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THE WHITE HOUSE

WASHINGTON

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

February 13, 1976

The Honorable Dick Clark
United States Senate
404 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Clark:

I have been asked by your staff to respond to the substance of a letter addressed to the Members of the Senate by the American Civil Liberties Union on February 2, 1976. The ACLU asserts that the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (H.J.Res. 549, as amended) would "deny the citizens of the Northern Marianas basic rights of citizenship guaranteed by the Constitution", "extend to the people of the Northern Marianas, privileges not extended to other United States citizens", and "institutionalize second-class citizenship". It is also asserted that the United States has denied the people of the Northern Marianas the option to choose independence and that we have failed to respect the principles contained in United Nations General Assembly Resolutions 1514(XV) and 1541(XV). Finally, the ACLU states that the Senate should not vote on the Covenant until more is known about the "real United States interests--especially the military interests--in annexing the Mariana Islands, and until the terms of this particular Covenant have been studied in greater detail".

These are serious charges and I must emphatically state that they are totally at variance with the facts as documented in full in the attached memorandum. Indeed it was hard for me to understand how they could be made since they are so at odds with the clear text of the Covenant as well as its purposes explained by the testimony before four Congressional Committees and the supporting documents printed in the House Hearings and S.Rept. 94-433.

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For example the letter of ACLU charges that the Covenant would deny to the people of the Northern Mariana Islands the constitutional rights to indictment by grand jury and to trial by a jury of one's peers. Actually, Section 501(a) of the Covenant does not affect at all the rights to indictment and trial by jury in criminal prosecutions under federal law. In criminal cases under local law the people of the Northern Mariana Islands will have the right to decide whether they want prosecution by indictment, as have the people of the States and the territories, and whether or not they desire trial by jury, an option available under existing law to the people of Guam and the Virgin Islands.

Again, the letter complains that the Covenant would deny to the people of the Northern Mariana Islands their constitutional right to vote for the President of the United States. The opposite is correct. The Covenant does not deprive the people of the Northern Mariana Islands of a right but takes into consideration the constitutional requirement that only residents of the several states and the District of Columbia may vote for President. If the Constitution allowed the residents of the territories to vote for President, the Covenant, of course, would not withhold that right from the people of the Northern Mariana Islands.

The claim that the Covenant will be superior to the Constitution is based on a similar misapprehension. There is no question that the Covenant as a law of the United States will be subject to the supremacy of the U.S. Constitution.

As shown in detail in the attached memorandum the Covenant meticulously protects the basic rights of citizenship of the citizens of the Northern Mariana Islands and there is no basis for a claim that they would be second-class citizens. It is also shown that our dealings with the Northern Mariana Islands fully respect our responsibilities to the United Nations and to the rest of the Trust Territory. Indeed, the Congress of Micronesia passed a joint resolution on February 12, 1976 calling on the United States Senate to take early and favorable action on the Northern Marianas Covenant.

The Covenant has been studied and approved by three Committees of the Senate. The appropriate Executive agencies have testified before these Committees as to United States interests and obligations in the islands. All aspects of the American interest as it relates to the Northern Marianas, including the national security aspect, have been discussed in full in Committee hearings. The Covenant has been under consideration by the Congress since July, 1975 and was the subject of consultations during more than two years of negotiations. It is a rare piece

of legislation that is considered by three Senate Committees and I find it difficult to understand the suggestion that further delay is required. Delay in approval would deprive the people of the Northern Mariana Islands of their right of self-determination and of the very constitutional benefits which the ACLU purports to protect so eagerly.

Sincerely yours,

F. Haydn Williams

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

Enc: As indicated

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FHW:kkc

February 13, 1976 03/d

MEMORANDUM

Subj: Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America

The American Civil Liberties Union asserts in its letter of February 2, 1976 that the Marianas Covenant (H.J.Res. 549, as amended) would deny the basic rights of citizenship to the people of the Northern Mariana Islands. The very opposite is the case. Rather than relying solely on the decisions of the Supreme Court which establish that provisions of the Constitution which protect fundamental rights apply to the territory of their own force, Section 501(a) of the Covenant specifically enumerates those provisions of the Constitution and provides that they will be applicable to the Northern Mariana Islands. Section 501(a) is analogous but even more specific than 48 U.S.C. 1421(b)(u) and 1561 which apply to Guam and the Virgin Islands respectively.

The following is a discussion of each of the specific constitutional rights which it is alleged the Covenant would deny the people of the Northern Mariana Islands:

1. Indictment by grand jury and trial by jury of one's peers. The Covenant does not affect at all the right to indictment by a grand jury and trial by jury in prosecutions under federal law. In prosecutions under local law the people of the Northern Mariana Islands have the power to determine whether and when they want the benefit of those common law institutions. Similar provisions apply to Guam (48 U.S.C. 1424(b)), and the Virgin Islands (48 U.S.C. 1561, 1616). With respect to Puerto Rico the Supreme Court held in Balzar v. Puerto Rico, 258 U.S. 298, 310-311 (1922), that the Constitution did not require the forcing of the jury system on a community with definitely formed customs and political conceptions not providing for juries, until the community desired it. To give the people of the Northern Mariana Islands the option to determine whether and when they want to adopt the grand jury and jury systems for prosecutions under local law constitutes and expression of respect for the traditional institutions of a people about to join the United States and not a badge of second-class citizenship.

2. The One-Man One-Vote principle established in Reynolds v. Sims. It is claimed that Section 203 of the Covenant which provides for equal representation for each of the chartered

municipalities in one House of a bicameral legislature violates the One-Man One-Vote principle of Reynolds v. Sims, 377 U.S. 533 (1964). That decision, however, does not establish an absolute principle. It recognizes that exceptions from it are permissible--as in the case of the United States Senate--where they are required for the formation of, or the accession to, a union, or in the case of political subdivisions which are not merely artificially created by a state as convenient agencies for the exercise of political powers, but which have had a separate and independent historic and geographic existence. (See Reynolds v. Sims, at 574-575.) This is exactly the background of Section 203. The municipalities of Tinian and Rota refused to approve the Covenant with the United States and to join the Commonwealth of the Northern Mariana Islands unless they were protected from being out-voted by the far more populous municipality of Saipan. Saipan, Tinian and Rota are three separate island communities with divergent histories, traditions, and problems; indeed Rota is closer to Guam than it is to the other two communities. The Court's reservations in Reynolds v. Sims thus are applicable here.

3. Voting in Presidential Elections. It is claimed that the constitutional right to vote for the President of the United States is denied to the residents of the Northern Mariana Islands. The fact is that the Constitution permits only residents of States and of the District of Columbia to vote for President. (Article II, section 1, clause 2 of the Constitution and the Twelfth and Twenty-third Amendments.) The residents of Guam, the Virgin Islands, and Puerto Rico are equally unable to vote for President, and so were the residents of all other territories before they became admitted to Statehood. Moreover, the disability to vote for President is territorial, not personal. Thus, if a resident of the Northern Mariana Islands who is a citizen of the United States establishes his residence in a State he will be able to participate in the Presidential elections there.

4. Inapplicability of the Fifth Section of the Fourteenth Amendment (Enforcement Clause) to the Northern Mariana Islands. This argument is based on a misunderstanding. The enforcement clause has not been listed in Section 501(a) of the Covenant for the sole reason that Section 501(a) is designed only to make certain that the basic rights of U.S. citizenship apply to the Northern Mariana Islands. The enforcement clause does not in itself constitute a basic right of citizenship but rather a power of Congress to legislate. As such it is included among the legislative powers of Congress provided for in Section 105. Further, the negotiating history states that "the authority of the United States under this section (105) will be exercised

through, among other provisions of the United States Constitution, Article IV, Section 3, Clause 2," (S.Rept. 94-433, p.404.) That clause grants to the Congress the power "to dispose of and make all needful regulations respecting the territory and other property belonging to the United States". Since that power is plenary, Congress does not even require the enforcement clause in order to enforce the provisions of the Fourteenth Amendment in the Northern Mariana Islands.

Another group of charges against the Covenant goes in the opposite direction, viz, that the people of the Northern Mariana Islands are given special privileges which are denied to the rest of the U.S. citizens. These contentions are equally based on misconceptions.

1. The Covenant will be supreme to the Constitution. Section 101 of the Covenant unambiguously states that the Northern Mariana Islands will be "under the sovereignty of the United States of America". Section 102 states that the supreme law of the Northern Mariana Islands will be the Covenant and "those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands". And since the Covenant is a law of the United States it is subject to the supremacy of the Constitution of the United States. (Article VI, section 2 of the Constitution.)

2. Future constitutional amendments will apply to the Northern Mariana Islands only if it is their desire. Section 501(a) provides that amendments of the Constitution which do not apply of their own force within the Northern Mariana Islands will be applicable within the Northern Mariana Islands only with the approval of the Government of the Northern Mariana Islands and the Government of the United States. The underlined clause is of course, crucial in this context. The mutual consent provision becomes applicable only to those amendments which do not apply to the Northern Mariana Islands of their own force. An amendment will apply to the Northern Mariana Islands of its own force either if it protects fundamental rights, or because it textually applies to the Northern Mariana Islands. Hence, only if an amendment does not fall into either category, will the U.S. and the Northern Mariana Islands have the power to determine whether it should be made applicable to the Northern Mariana Islands. Most of those amendments will presumably have no bearing on the Northern Mariana Islands.

3. Violation of the Uniform Rule of Naturalization clause (Article I, section 8, clause 4 of the Constitution). This criticism is based on a misunderstanding of a highly technical interim provision of the Covenant (Section 506) which may never become effective. The American Civil Liberties Union charges that this section permits immediate relatives of citizens of the Northern

Mariana Islands to avoid naturalization procedures established by the Immigration and Nationality Act. The brief answer to this assertion is that the section does just the opposite. It permits their naturalization pursuant to the procedures of the Immigration and Nationality Act which otherwise would not be applicable to them.

The background of Section 506 is as follows: Pursuant to Sections 301 and 1003(c), most residents of the Northern Mariana Islands will become citizens of the U.S. upon the termination of the Trusteeship. Section 503(a), however, provides that the Immigration and Nationality laws of the United States shall become applicable to the Northern Mariana Islands only in the manner and to the extent that Congress extends them to the Northern Mariana Islands after the termination of the Trusteeship. The reason for that provision is connected with the problems which unrestricted immigration may impose upon small island communities. Congress is aware of those problems. (See, e.g., Alien Labor Program in Guam, Hearing before the Special Study Subcommittee of the Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess., pp. 19-25.) It may well be that these problems will have been solved by the time of the termination of the Trusteeship Agreement and that the Immigration and Nationality Act containing adequate protective provisions can be introduced to the Northern Mariana Islands immediately thereafter. Section 506 provides for a limited applicability of that Act in the interim period. Thus, it would provide that the children born abroad to U.S. citizens residing in the Northern Mariana Islands would become citizens of the United States and that immediate relatives of permanent residents of the Northern Mariana Islands who immigrated into the Northern Mariana Islands could become naturalized U.S. citizens in accordance with the requirements of the U.S. immigration and naturalization laws although they will not generally apply to the Northern Mariana Islands.

4. Restrictions on the Purchase of Land. Section 805 of the Covenant limits the acquisition of permanent or long-term interests in land to persons of Northern Mariana Islands descent for a period of at least 25 years. This provision has precedent in Congressional actions and similar provisions have been upheld by the Supreme Court. It was inserted in the Covenant on the basis of consultation with the House Interior Committee and has 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 aggressive, more sophisticated and economically stronger outside individuals and groups. Without this protection there is a likelihood that the people of the Northern Mariana Islands would soon become landless, as have other island peoples. The only thing which is

novel about this provision is that it seeks to prevent an evil, bound to occur, before it is too late.

The Hawaiian Homes Commission Act of 1920, 42 Stat. 180, was enacted by Congress for the protection of the native Hawaiians while Hawaii was still a territory and section 4 of the Hawaii Statehood Act contains a provision in the nature of a compact to the effect that the Hawaiian Homes Commission Act shall become part of the Constitution of the State of Hawaii subject to amendment and repeal only with the consent of the United States. Guam has recently adopted legislation analogous to the Hawaiian Homes Commission Act. Legislation similar to the limitation on the acquisition of title to land in the Northern Marianas was upheld by the Supreme Court in Board of Commissioners v. Seber, 318 U.S. 705, 715-718 (1943). The Court pointed out at that time that the legislation was required to protect American Indians from the selfishness of others.

Other charges of a more general nature are also contained in the letter:

1. Second-class Citizenship. The ACLU statement that the Covenant would "institutionalize second-class citizenship" is without merit. The Constitution and laws of the United States do not provide for or allow "classes" of citizenship. The Covenant is consistent with the Constitution and existing law. Citizenship would be extended without prejudice or discrimination to eligible residents of the Northern Marianas who wish it.

2. Tax Provisions. The ACLU takes issue with the tax provisions of the Covenant on the ground that their local territorial tax law is not enacted by them but identical with the Federal Income Tax (Section 601). Various tax alternatives were discussed during the negotiations of the Covenant and the one included in the Covenant was chosen mainly for practical and technical reasons, such as the simplified treatment of exemptions and deductions where the taxpayer has income derived from other U.S. jurisdictions, or if members of his family live elsewhere in the United States, or to take a simple but frequent example, where a resident of the Northern Mariana Islands works part of a year on Guam and has tax withholding on Guam and the Northern Mariana Islands. Without a provision such as Section 601, these simple everyday situations present complex problems. Economic unity is not feasible without uniformity of the tax laws. Analogous provisions exist with respect to Guam and the Virgin Islands. (48 U.S.C. 1421i, 1397.)

In recognition of the principle that there shall be no taxation without representation the Northern Mariana Islands will not be subject to the Federal Income Tax as such. On the other hand the imposition of a local territorial income tax identical with the federal income tax prevents them from becoming tax havens.

The ACLU is also critical of a statement made by the Marianas Political Status Commission in their section by section analysis of the bill to the effect that "the U.S. income tax is progressive and only people with very large incomes pay significant taxes". (See House Hearings at 646 (not p.427).) The ACLU considers this statement "sufficiently absurd to make us skeptical of other representations made during the status negotiations and thereafter to the people of the Northern Mariana Islands". The context of this statement, of course, shows that it refers to the income levels now prevailing in the Northern Mariana Islands, and the corresponding passage in the section by section analysis of the Senate Interior Committee makes this point clear beyond peradventure. (S.Rept. 94-433, p.80.)

3. U.N. Obligations. Approval of the Covenant by the Congress will enable the United States to meet its obligations under the United Nations Charter and the Trusteeship Agreement. Article 76 of the Charter describes one of the basic objectives of the trusteeship system as the promotion of "development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement". In Article 6 of the Trusteeship Agreement the United States undertook to promote the political development of the Trust Territory toward self-government or independence in accordance with local circumstances and the wishes of the peoples concerned.

The people and leaders of the Northern Mariana Islands have consistently expressed their desire for political union with the United States since 1950 and this fact is reflected in the reports of every United Nations Visiting Mission to visit the Trust Territory. As early as 1969 the Political Status Commission of the Congress of Micronesia stated that it had no objection in principle to a separate political status for the Northern Mariana Islands if it were desired by the local people and did not jeopardize the interests of the Trust Territory as a whole. In testimony before the Senate Foreign Relations Committee on November 5, 1975, Congress of Micronesia spokesmen responded to a direct question from Senator Pell as to whether they would support or oppose passage of the Covenant by saying they would support its approval. On February 12, 1976, the Congress of Micronesia passed a joint resolution asking the United States Senate to take early and favorable action on the Northern Marianas Covenant.

The people of the Northern Mariana Islands have indicated no desire for independence from the United States and the Covenant was negotiated on the basis of an initiative from the Northern Marianas to seek United States Territorial status. The voters of the Northern Marianas approved the Covenant in a United Nations ovserved plebiscite on June 17, 1975. The question put to the

voters at that time was whether they approved the Covenant or whether they rejected it. The wording of the ballot was designed to make it clear to the voters that if they rejected the Covenant they would "remain as a District of the Trust Territory with the right to participate with the other districts in the determination of an alternative future political status".

U.N. General Assembly resolutions are advisory and without binding effect. Additionally, Article 83 of the U.N. Charter states that "All functions of the United Nations relating to strategic areas ... shall be exercised by the Security Council". The U.S. Trust Territory has been declared by the U.N. to be a strategic area. Despite the fact that the United States is under no legal obligation to comply with the terms of General Assembly Resolutions 1514 and 1541 in reaching agreement with the peoples of the trust territory on future political status arrangements, it should be noted that the Covenant does not conflict with criteria established in these resolutions. The United States has not sought to "disrupt the national unity and the territorial integrity" (1514) of the Trust Territory, rather it, along with the Congress of Micronesia and the United Nations Trusteeship Council, has accepted the fact that the political aspirations of the people of the Northern Marianas are not compatible with those of the leaders of the rest of the Trust Territory. The United States shares the belief stated in Resolution 1514 that "all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development".

As for the assertion that Covenant approval would conflict with the criterion of Resolution 1541 that the "people of both territories (in this case, the United States and the Northern Marianas) should have equal rights and freedoms without distinction or discrimination", the fact is that, by its own terms, this Resolution does not apply to trust territories. Further, the people of the Northern Marianas will have the option of becoming American citizens, fully equal before the law with all other American citizens. As pointed out above, the Supreme Court has determined that fundamental rights and freedoms extend equally to all Americans. These rights would be extended to the Northern Marianas simultaneously with the extension of American sovereignty to the islands, whatever the specific language of the Covenant.

The American Civil Liberties Union counsels that in the light of the "gross injustices" inflicted on the people of Bikini, Kwajalein, Eniwetok and other islands, the Senate should consider carefully allowing the people of the Northern Mariana Islands to become step-children in the American family. This admonition

totally misreads the purpose and effect of the Covenant. Under the latter the people of the Northern Mariana Islands would become full-fledged U.S. citizens, entitled to all the rights of citizenship. Moreover, the provisions of the Covenant are specifically designed to give them the very protection which the inhabitants of Bikini and Eniwetok lacked for twenty-five years. The power of the United States to acquire or seize land is carefully circumscribed. The power of eminent domain may be exercised only after voluntary means to acquire land have failed, and then only in the same manner and to the same extent as in a State of the Union. (Section 806.)

Further delay in the consideration of the Covenant would impinge on the right of self-determination of the people of the Northern Mariana Islands. It would extend the period during which they are denied the benefits of the Constitution of the United States, continue as to them the basically arbitrary Trusteeship Government, and their involuntary association with the Congress of Micronesia.