

December 22, 1976

MEMORANDUM TO THE FILES

Subject: Meeting With Executive Branch Officials Concerning the Northern Marianas Constitution

Howard P. Willens, Deanne C. Siemer, A. Mark Weisburd, James R. Leonard, Edward Pangelinan, and Paul S. Koffsky met with officials of the executive branch of the federal government on December 17, 1976, to discuss the recently adopted Constitution of the Commonwealth of the Northern Mariana Islands. Representing the executive branch were James Berg, Office of Territorial Affairs, Department of the Interior; Brewster Chapman, Department of the Interior; Herman Marcuse, Office of Legal Counsel, Department of Justice; and James Scott, Department of the Interior. The meeting was conducted in the office of the Director of Territorial Affairs in the Department of the Interior. Mr. Berg called the meeting to order at 10:00 a.m.

Mr. Willens described the purposes of the meeting as an opportunity for the representatives of the executive branch to pose questions concerning the Constitution and for the lawyers from Wilmer, Cutler & Pickering, Mr. Leonard, and Mr. Pangelinan to persuade those officials that the executive branch should act favorably on the document. Mr. Chapman observed that the Constitution was an "admirable job." He cautioned, however, that "official" scrutiny of

the Constitution will occur only after it is approved by the Northern Marianas people. Before that time, he said, the United States government can give only unofficial consideration to whether it should approve the Constitution. Mr. Willens noted his agreement with Mr. Chapman's position.

Mr. Marcuse stated that he only had a few questions with respect to the document. He said that it "makes sense and is well thought-through." He said that he was "disarmed" by the Convention's acceptance of many of the suggestions that he offered in his response to the November 14, 1976, draft. Mr. Marcuse first asked whether article VI contains a provision for local legislatures. Mr. Willens replied that the article includes no such provision. He advised the meeting that the delegates had decided on political grounds to eliminate municipal legislative bodies in the new government. Mr. Willens observed that the Constitution permits local laws to be enacted by the representatives and senators of the senatorial district affected by those laws.

Second, Mr. Marcuse inquired as to the scope of article XI, section 1. That section provides, in relevant part, that public lands in the Northern Mariana Islands "belong collectively to the people of the Commonwealth who are of Northern Marianas descent." Ms. Siemer responded that the theory of the Covenant and of article XI is that

the public lands originally belonged to persons of Marianas descent. Ms. Siemer said that under the Constitution no particular individual has a right to public land. Indeed, as the Analysis of the Constitution reveals, the Convention did not intend that the proceeds of the sale or lease of public lands be segregated as between residents of the Northern Mariana Islands who are of Marianas descent and those who are not of that descent.

Mr. Marcuse's third question concerned article XI, section 5. He inquired whether the word "policies" means "powers". Ms. Siemer answered in the negative: "policies" means "guidelines" in the context of the Constitution. This section, she explained, is an attempt to state what the by-laws of the Marianas Public Land Corporation would have included had by-laws been adopted. Section 3 of article XI sets forth the powers of the Corporation.

In response to a question put by Mr. Berg, Ms. Siemer observed that the present Northern Mariana Islands Legislature has the power to pass legislation to prevent future legislatures from acting with respect to public lands. Ms. Siemer said that one of the purposes of article XI is to attempt to ensure that its provisions will take effect as planned regardless of the activities of the present legislature. Ms. Siemer noted that she saw little risk of this type of preclusive legislative action. Mr.

Willens and Mr. Pangelinan agreed with Ms. Siemer's assessment. Mr. Willens added that the provisions of article XI track the pertinent Secretarial Orders.

Mr. Marcuse's fourth question involved article XI, section 4(d). He asked whether a corporation law currently obtains in the Northern Mariana Islands. Ms. Siemer replied that the Trust Territory corporation law now governs in the Northern Marianas. Under the Constitution, that law will automatically continue in force as a Commonwealth statute unless it is repealed. Mr. Marcuse disclosed that this question had been asked him by the Lands Division of the Department of Justice.

Mr. Chapman asked whether the forfeiture provisions of article XII, section 6, are not drastic. Ms. Siemer answered that the legislature will have the power to return forfeited lands to their former owners. For example, in the case of a corporation's technical failure to comply with the requirements of article XII, the legislature could provide that, upon the corporation's again complying with those requirements, the forfeited lands would be returned to it. Mr. Chapman reiterated that this provision is troubling to him. To illustrate his problems with the provision, he described a hypothetical situation in which a Northern Mariana Islands citizen leases land to a corporation. That corporation subsequently defaults on the constitutional

requirements for the ownership of land, so its leasehold escheats to the Commonwealth. Mr. Willens and Ms. Siemer rejoined that, in such a case, the Commonwealth government would obtain only the interest of the lessee and would be required to pay rent to the landowner in order to continue to enjoy that interest. In addition, Mr. Willens observed, the corporation would be able to prevent entirely the sanction of forfeiture by monitoring its own activities.

Mr. Willens explained that the Convention decided against providing for the reversion of land to the owner of a leaseland in the event of the lessee's default because the delegates were concerned that the possibility of such reversion would provide the opportunity for fraud. Ms. Siemer observed that should a default occur the defaulting corporation would receive no payment from the Commonwealth government.

Once again, Mr. Chapman stated his misgivings, noting that the word "forfeit" is "unpopular." He said that the meaning of the word may provoke questions. Ms. Siemer rejoined that the meaning was explained in the Analysis.

Mr. Marcuse's fifth question dealt with the middle paragraph on page 155 of the Analysis. Mr. Marcuse stated that, contrary to the assertion of that paragraph, the United States government maintains that the interest

of the Northern Mariana Islands in submerged lands will be measured by what Guam, not a state, receives. Mr. Willens replied that the Constitution does not directly address this question. The Analysis, he said, serves only as the Convention's statement of its intention in adopting the Constitution, not as an exposition of present law. The Convention recognized that United States law will determine the new Commonwealth's rights in submerged lands. Ms. Siemer added this recognition is explicit in the Analysis' discussion of section 1 of article XII. She said that the acceptance of this proposition constitutes agreement with the Department of Justice's position that United States law governs in this area. Ms. Siemer emphasized that the Analysis merely reasserts the Convention's view that the Commonwealth will have the same rights as those of a state.

Mr. Chapman stated that section 703 [sic] of the Covenant provides that the Submerged Lands Act is applicable to the Commonwealth. Mr. Willens disagreed, asserting that no provision of the Covenant makes that Act applicable to the Covenant.

Mr. Chapman stated that a major policy concern of the United States government is to avoid giving to the territories greater power than that received by the states. Mr. Willens assured Mr. Chapman that the people of the Northern Mariana Islands want only the authority of a state.

Mr. Berg requested an explanation of section 1 of article XII. Mr. Willens replied that the Covenant requires restrictions on the alienation of permanent and long-term interests in land for the first twenty-five years following the effective date of the Constitution and permits such restrictions thereafter. Mr. Willens said that the Convention decided that these restrictions are so fundamental that, following the expiration of the twenty-five year period, changes should be permitted only by constitutional amendment. Ms. Siemer added that the Convention has provided alternative and liberal means by which the Constitution may be amended.

Mr. Willens stated that the Constitution was drafted so as to minimize legal problems. Ms. Siemer stated that the committee reports and discussions on the floor of the Convention with respect to restrictions on land alienation and constitutional amendment disclose the delegates' thorough discussion of the problems pertaining to land alienation.

Mr. Chapman inquired whether article XII, section 2, contains an exception for the acquisition of land by a child through inheritance. Ms. Siemer answered that the section contains no such exception. Mr. Willens observed that only a child born to parents of 25% and less than 25% Marianas descent, respectively, would be adversely affected by this provision. Ms. Siemer explained that the delegates'

concern to prevent fraud motivated them not to exclude transfers to spouses, except by inheritance, or to children from the scope of article XII. In addition, the Convention desired to simplify the regulations concerning restrictions on land alienation, Ms. Siemer said. Mr. Chapman said he was still concerned by article XII, since opportunities for fraud remain. Ms. Siemer stated that the delegates' concerns, not those of the legal consultants, were being reported to the meeting. She reiterated that the restrictions on land alienation are not rigid, especially in light of the flexibility of constitutional amendment. Mr. Chapman stated that the absence of such an exception does not constitute a fatal objection to the Constitution.

Mr. Berg observed that the provision regarding statutes of limitations, which had been section 3 of article XIII in the November 14, 1976, draft had been modified and moved to the Schedule on Transitional Matters as section 7 in the Constitution as adopted by the Convention. Mr. Willens said that because the study mandated by the modified provision would be a "one-shot" operation, it seemed more appropriate to include the section in the Schedule rather than in the body of the Constitution. Mr. Chapman said that he disfavors any "promise" of reopening land claims. Mr. Willens replied that this matter was within the discretion of the Convention, because the resolution

of the question does not turn on legal judgment. Mr. Willens maintained that section 7 of the Schedule is in full compliance with the Covenant and with the Constitution, laws and treaties of the United States. Mr. Willens also said that the attention of the Convention was directed to transactions between private persons in the Northern Mariana Islands, not to the Micronesian War Claims Act. Mr. Willens observed that as a matter of judgment he agrees with Mr. Chapman's position with respect to the reopening of land claims. Mr. Willens noted that the younger leaders of the Convention displayed a "surprising support" for leaving undisturbed statutes of limitations now barring land claims. Mr. Chapman asserted that in no event may the land claims of the United States government already settled under a statute of limitations be reexamined.

In reviewing the Constitution, Mr. Chapman said that his function will be to advise the executive branch what could be considered a defect, not just what is already regarded as a defect by the United States Supreme Court.

Ms. Siemer observed that nothing in section 7 of the Schedule confers on the Northern Mariana Islands legislature a power not already bestowed by grant in article II of plenary legislative power. Indeed, section 7 prescribes policy limitations on the legislature's exercise of its power in this area. Mr. Willens stated that this provision

does nothing more than mandate a study and impose limitations if, after the study is completed, relief from a statute of limitations is afforded by the legislature. Section 7 expressly provides that the only relief available will be "priority with respect to the distribution of public lands." The section further provides that relief "shall not affect a right in property that vested under the repealed statute of limitations." Mr. Marcuse observed that it is better for this provision to be included than to be excluded from the Constitution. Ms. Siemer said that, in any event, the legislature has but a small area of discretion in dealing with a statute of limitations with respect to land in light of the fact that priority in the distribution of public lands is the sole relief possible.

Mr. Chapman said that section 7 affects only transactions barred by a statute of limitations, not those resolved by adjudication. Mr. Willens voiced his agreement with this interpretation.

Mr. Berg inquired as to the meaning of article XI, section 6(d), and the explanatory material at page 173 of the Analysis. Mr. Willens replied that this provision and section 803(e) of the Covenant, when read with the Technical Agreement, permit only the income, not the principal, of the rental fee received by the Commonwealth for the property at Tanapag Harbor to be used for the maintenance of a memorial park and for other uses approved.

by the United States government. Mr. Marcuse agreed with this construction.

Mr. Chapman asked whether the full-time judges assigned to Rota and Tinian under article IV of the Constitution may sit in Saipan. Mr. Willens replied in the affirmative. Mr. Willens added that, in general, one must compare the size of the constitutional government to that of the Trust Territory government in assessing whether the constitutional government is inefficiently large.

Mr. Berg posed two general questions regarding the interplay between the executive and legislative branches of the government established by the Constitution. First, he asked whether the legislature would be a decentralized institution. Mr. Willens answered that he does not view the legislature as acting in a decentralized way. The Constitution merely provides two means by which Commonwealth laws for individual senatorial districts may be enacted by the legislature. In sum, the Constitution creates only one legislature with alternative methods of dealing with local problems. Mr. Willens said that he hopes that the option of local legislation enacted by the representatives and senators from a senatorial district will never or rarely be used. Rather, he said that he hopes the whole legislature will respect a senatorial district's view of the best way to solve its local problems. Mr. Willens noted that Rota and Tinian want to retain their present level of control over local

services. He observed that the Department of the Interior has persuaded the people of the outer islands that at present they significantly affect local services. In response to a question asked by Mr. Chapman, Mr. Willens said that the governor will have the power to veto local laws. Mr. Chapman replied that the Constitution affords an "ingenious solution" to the problem of local legislation by avoiding the continuation of municipal legislative bodies.

Second, Mr. Berg asked whether the executive branch could be characterized as a centralized organ until and if the Commonwealth government alters the structure of that branch. Mr. Willens agreed with that characterization.

Mr. Willens advised the participants in the meeting that he, Ms. Siemer, and Mr. Koffsky would welcome questions concerning the Constitution in the coming months. Mr. Chapman said that he is "not trying to sandbag anybody." Mr. Pangelinan responded that he hopes Mr. Chapman will continue to be "generous" with his comments. Mr. Willens observed that if formal congressional review of the Constitution occurs, the position of the executive branch will be very important in that review.

Mr. Chapman said that the provisions with respect to restrictions on land alienation are the most controversial part of the Constitution. Mr. Willens said that he believes

that the United States government may only reject the Northern Marianas Constitution if it violates the Covenant or the Constitution, laws or treaties of the United States.

Mr. Willens asked the participants in the meeting to consider how to inform the Northern Marianas people as to the contents of the Constitution. No consensus emerged from the brief discussion that followed.

Mr. Chapman said that the executive branch's role in reviewing the Constitution would remain "passive" until the Constitution is approved by the Northern Marianas people. He said that the Office of Management and Budget will serve as the coordinating agency for that review. Mr. Willens asked who will serve as the action officer for each department and agency of the executive branch involved in reviewing the Constitution. Mr. Willens expressed interest in contacting those officers sometime in January so as to answer any questions that they may have concerning the Constitution. Mr. Chapman responded that no action officers had been designated as of yet. He said, however, that he expected ^{Mr. Susaki} Wes Asaki of the Interior Unit of the Office of Management and Budget and the General Counsel's Office of OMB to play important roles. Mr. Chapman also said that, within the Department of Defense, the Joint Chiefs of Staff and the International Security Affairs Bureau will be influential.

The meeting concluded at 11:45 a.m.

Paul S. Koffsky

cc: Mr. Willens
Ms. Siemer
Mr. Lapin
Mr. Weisburd