Office Of
The Secretary Of The Interior

March 17, 1980

NOTE TO JEFF FARROW

Attached is the Interior Solicitor's opinion regarding Congressional participation on the Northern Marianas Commission. Please share it with your people, perhaps they will come to the same conclusion. Alexis Jackson is available to discuss this further.

Thank you.

Wallace O. Green

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR

MAR 14 1980

MEMORANDUM

TO: Acting Assistant Secretary, Territorial and International Affairs

FROM: Deputy Solicitor

SUBJECT: Commission on the Application of Federal Laws to the Commonwealth of the Northern Mariana Islands

This responds to your recent request for guidance on the question of whether the President, acting under authority of §504 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands 1/, may properly name a member of the Congress as one of seven members of a Commission on Federal Laws to report to the Congress on the applicability of Federal Laws to the Northern Mariana Islands.

For reasons discussed below, I am of the opinion that the appointment would be legally permissible. However, I must caution you that the law is not entirely clear in this area, and the President may desire to have the views of the Attorney General before such an appointment is made. 2/

Section 504 of the Covenant provides in pertinent part that:

> The President will appoint a Commission on Federal Laws to survey the laws of the United States and to

---

1/ P.L. 94-241, March 24, 1976, 48 U.S.C. 1681, note.

2/ See Senate Report No. 563, 67th Congress 2d Session, March 16, 1922. The Committee on the Judiciary determined that Senator Reed Smoot and Representative Theodore E. Burton were ineligible for membership on the World War Foreign Debt Commission created under P.L. 67-139 ". . . to consist of five members, one of whom shall be the Secretary of the Treasury who shall serve as chairman, and four of whom shall be appointed by the President, by and with the advice and consent of the Senate." The Attorney General, in an opinion to the President, advised that in his judgment the appointment of Senator Smoot and Representative Burton did not offend Article I, Section 6, of the Constitution. Report 43-46.

Article I, Section 6, of the Constitution. Report 43-46.

> make recommendations to the United States Congress as to which laws of the United States not applicable to the Northern Mariana Islands should be made applicable and to what extent and in what manner, and which applicable laws should be made inapplicable and to what extent and in what manner. The Commission will consist of seven persons (at least four of whom will be citizens of the Trust Territory of the Pacific Islands who are and have been for at least five years domiciled continuously in the Northern Mariana Islands at the time of their appointments) who will be representative of the federal, local, private and public interests in the applicability of laws of the United States to the Northern Mariana Islands. The Commission will make its final report and recommendations to the Congress . . . and . . . will make such interim reports and recommendations to the Congress as it considers appropriate . . . . (Emphasis added). 3/

The Act, P.L. 94-241, which enacts the Covenant as law, and its history are silent as to whether a Member of the Congress may be appointed by the President as a member of the Commission. Therefore, we turn to the Constitution and other authorities for guidance.

The method of appointment provided in §504 is clearly derived from the following portion of Article II, Section 2, clause 2 of the Constitution:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper,

---

3/ The Congress established similar Commissions which reported on the application of Federal Laws to Guam and the Virgin Islands respectively. Each was silent as to appointment of a Member of Congress as a member. Apparently, none was appointed to either Commission. See H. Doc. No. 212, 82d Cong., 1st Sess. (1951), Guam; Committee Print No. 7, Report of the Commission on the Application of Federal Laws to the Virgin Islands, 84th Cong., 2d Sess. (1956).

> in the President alone, in the Courts of Law, or in the Heads of Departments. 4/

In view of the language in §504, our concern here is with an appointment by the President alone. The question then becomes, does the appointment of a Member of Congress to the Commission by the President render the appointee an officer of the United States regardless of his functions and the provisions of §504. The answer must be considered in the light of Article I, Section 6, clause 2 which prohibits an appointment of a Member of Congress "to any civil Office under the Authority of the United States, which shall have been created" during the term for which he was elected and prohibits a "Person holding any Office under the United States" from membership in Congress during his continuance in office. On this point, the Attorney General in 42 Op. A.G. 165, 168 (1962) stated:

> . . . Presidents have on many occasions appointed Members of Congress, with or without the advice and consent of the Senate, as commissioners to negotiate treaties and other international agreements or to represent the United States at meetings of international organizations. 5/ The appointments with the concurrence of the Senate can be reconciled with the prohibitions of Article I, Section 6, clause 2 only on the theory that, although made in accordance with the method prescribed by Article II, Section 2, clause 2 for the appointments of "Officers of the United States," they, nevertheless, do not place Members of Congress within that classification. 6/

In footnote 5 to the above the Attorney General cites:

> Corwin, The President, Office and Powers (1957 ed.), p. 71. For a statute expressly recognizing the Presidential practice of appointing a Member of Congress as a representative of the United States at an international meeting, see section 2 of the Act of July 30, 2946, c. 700, 60 Stat. 712, 22 U.S.C. 287n, which is concerned with UNESCO.

4/ The application of this provision is discussed in 42 Op. A.G. 165 (1962) as such concerned Presidential appointment of Directors of the Communications Satellite Corporation. The issue did not involve authority of the President to appoint a Member of Congress to a commission. However, the decision does touch upon this.

In footnote 6 the Attorney General cites:

> Corwin, The President, Office and Powers (1957 ed.), p. 71. For conflicting views on this point see H. Rept. 2205, 55th Cong., 3d Sess., and S. Rept. 563, 67th Cong., 2d Sess.; cf. act of July 30, 1946, n.5, supra.

Corwin, supra, at page 71, states in part that:

> . . . beginning with Washington, Presidents have, practically at discretion, dispatched "secret" agents on displomatic or semidisplomatic missions without nominating them to the Senate; while at other times, with or without the consent of the Senate, they have designated members of that body or of the House to represent the United States on international commissions and at diplomatic conferences; and this in face of Article I, Section 6, paragraph 2, of the Constitution, which reads:
>
> > No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.
>
> How are the above-mentioned practices, long since established usage under the Constitution, to be reconciled with these provisions: Only on the theory, apparently, that such diplomatic assignments are not "offices" in the sense of the Constitution, being summoned into existence only for specific temporary purposes and carrying with them, for Senators and Representatives, no extra compensation, whereas the constitutional term connotes "tenure, duration, emolument and duties."

Granted we are not dealing with an appointment to an international commission or diplomatic conference. However, as to whether appointees hold "offices", there are other instances, touched upon at length in House Report 2205 and Senate Report 563, referenced in the Attorney General's footnote 6, which are relevant. Noteworthy is the provision in the Act of July 7, 1898, a Joint Resolution [No. 51] to provide for annexing the Hawaiian Islands to the United States, which provides that:

* * *

> The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.
>
> Sec. 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate. 30 Stat. 751.

In its consideration of the above Act, the Committee on the Judiciary in its report pointed out that:

> . . . These commissioners are and are intended to be mere advisory agents of the Congress of the United States. Their investigations are confined to some particular matter or subject and they are not required to take an oath of office. They have no power to decide any question or bind the Government or do any act affecting the rights of a single individual
>
> * * *
>
> The acts performed are for the information of the Congress, and it alone. Their suggestions and recommendations have no force; they may or may not be adopted. To make their suggestions or recommendations operative bills or resolutions must be introduced embodying the provisions recommended, or their substance, and these must be enacted into law . . . H. Rept. No. 2205 (Part 1), 52.

The committee concluded that:

> In respect to the Hawaiian Commission the committee finds that those members of the House of Representatives appointed or designated as commissioners under public resolution No. 51--"Joint resolution providing for annexing the Hawaiian Islands to the United States,"--are not, nor are any of them officers under the United States within the meaning of the Constitution. H. Rept. No. 2205 (Part 1), 53, 54. 5/

5/ The committee came to a similar conclusion as to those members

The above argument, as well as that of the Attorney General in his March 8, 1922 letter to the President (S. Rept. No. 563, 43-46) in regard to the appointment of Senator Smoot and Representative Burton on the World War Foreign Debt Commission, which is similar to the matter before us, are supportive of the appointment of a Member of the Congress to the Commission on Federal Laws. The Commission will be advisory only to the Congress 6/, its members will not be considered "Officers of the United States" under Article 2, Section 2, clause 2, it will serve as a temporary body and have no enforcement authority - which would be an executive branch function to be performed by Presidential appointees as "Officers of the United States" under the Appointments Clause. Under the doctrine of separation of powers ". . . . the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; the judiciary cannot exercise either executive or legislative power . . . ." Springer v. Philippine Islands, 277 U.S. 189, 201, 202 (1928); Myers v. United States, 272 U.S. 52; Buckley v. Valeo, 424 U.S. 1, 138, 139 (1976).

Because of mutual concerns of the executive branch and the legislative branch in matters concerning the Northern Mariana Islands coordination between the two branches on a special commission to accomplish a special purpose, as here, with representation by members from the two branches appears constitutionally permissible under the above authorities. In our opinion the President may thus, within his discretion and in the exercise of his authority under §504, appoint a Member of Congress to the Commission on Federal Laws. However, because, as we have previously indicated, there are conflicting views surrounding such appointments (see 42 Op. A.G. 165, 168 (1962)) the President may desire to seek the advice of the Attorney General before a Member of Congress is appointed to the Commission.

Regardless of the preceding, amendatory legislation could resolve any doubt as to the propriety of the President appointing a Member of Congress to the Commission. This could be accomplished by an amendment to P.L. 94-241. The following would amend that statute to add the following Section 3:

5/ (Con't) of the House appointed or designated as commissioners on the Industrial Commission, Canadian Commission, Postal Commission and visitors to the Military Academy. H. Rept. No. 2205 (Part 1), 54.

6/ Because the Commission will be advisory to the Congress and not to the President or an agency or officer of the Federal Government, the Commission would not, in our opinion, come under the Federal Advisory Committee Act, 5 U.S.C., App. 1, et seq.