

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	re: Appointment of a Special Representative for purposes of political status consultations with Guam (Annotations) (1 page)	03/16/1993	P5
001b. memo	To President Clinton from Secretary of the Interior. Subject: Appointment of a Special Representative for purposes of political status consultations with Guam (2 pages)	03/15/1993	P5
001c. briefing paper	re: Guam Commonwealth bill and Special Representative (4 pages)	03/15/1993	P5 6299 Dup
001d. resume	DOB (Partial) (1 page)	03/15/1993	P6/b(6)
002a. memo	To President Clinton from Secretary of the Interior. Subject: Appointment of a Special Representative for purposes of political status consultations with Guam (2 pages)	03/15/1993	P5
002b. briefing paper	re: Guam Commonwealth bill and Special Representative (4 pages)	03/15/1993	P5 6299
002c. resume	DOB (Partial) (1 page)	03/15/1993	P6/b(6)
003a. memo	To President Clinton from Secretary of the Interior. Subject: Appointment of a Special Representative for purposes of political status consultations with Guam (2 pages)	03/15/1993	P5
003b. briefing paper	re: Guam Commonwealth bill and Special Representative (4 pages)	03/15/1993	P5 6299 Dup
003c. resume	DOB (Partial) (1 page)	03/15/1993	P6/b(6)

COLLECTION:

Clinton Presidential Records
WHORM Subject File-General
FG001-02
OA/Box Number: 21801

FOLDER TITLE:

007422SS

Jamie Metrailler
2006-0193-F
jm89

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

EXHIBIT A

BACKGROUND ON GUAM COMMONWEALTH

Guam currently is an unincorporated territory of the United States. In 1982, the people of Guam voted overwhelmingly (73 percent) for a Commonwealth status with the United States. Guam leaders generally defined that status at the time "as a closer relationship to the United States." Statehood received the second highest number of votes (27 percent). In response to the territory's desire for Commonwealth, the Guam Commission on Self-Determination drafted a proposed bill for submission to the U.S. Congress to implement that status. Against the recommendations of Congressional leaders, Guam included in the draft bill several provisions which U.S. leaders had stated they could not support. The bill was formally introduced in Congress in 1988 and reintroduced in 1989 and 1991.

A Federal Task Force, representing 23 Federal departments and agencies, has been engaged in discussions with the Guam Commission on the draft bill for the past five years. Congressional leaders asked that Federal interagency group "to narrow the gap" between the bill's provisions and what the Federal Government could realistically be expected to support. Congressional leaders share many of the concerns and objections expressed by the Task Force in two reports on the legislation which were sent to the Congress in 1989 and 1993.

Those reports supported the concept of a Commonwealth status for Guam and endorsed a number of provisions in the bill. The Task Force and Guam officials had reached compromise agreements on revised versions of many provisions. However, the previous Federal Task Force objected to key provisions, some on the basis that they are unconstitutional or inconsistent with U.S. sovereignty. Moreover, the Office of Management and Budget, under the previous Administration, directed the Task Force to withhold comment in the 1993 report on topics already agreed to by Federal and Guam officials.

MAJOR ISSUES IN GUAM COMMONWEALTH BILL

The major provisions in the proposed bill that must be examined are as follows:

Section 102(f) - Chamorro Land Trust: Guam's desire for a Land Trust that would be for the sole benefit of the Chamorro people was supported by the first report but opposed by the second. A review might regain the original position.

Section 102(g) - Residency for Voting: Guam desires language that would require up to three years residency to qualify for voting. The Task Force believes that durational residency clauses, as opposed to bona fide residence requirements, raise serious

constitutional questions. A review might produce a compromise.

Section 103 - Mutual Consent on the Commonwealth Act: Guam's desire that there be no amendment to any part of the Act without Guam's consent presents a major concern. Some accommodation - mutual consent on a few fundamental provisions, as enunciated in the 1989 Report, - may be possible through a further review.

Section 202 - Mutual Consent on Federal Laws: Guam's desire for mutual consent (a veto) on Federal laws and regulations made applicable to Guam under Commonwealth is inconsistent with U.S. sovereignty, law, and policy. A "fast-track" review process to address this problem may be possible. The first Task Force report supported such a mechanism, but OMB directed the Task Force not to comment on this topic in the 1993 report.

Section 203 - Joint Consultative Group: The first Task Force report supported such a group as a mechanism for conducting regular discussions with Guam under Commonwealth on problems in on-going relations. OMB directed the Task Force to withhold comment on this subject in the 1993 report.

Section 702 - Immigration: Guam desires a Guest Worker program to provide alien laborers, but wants to prevent them from acquiring naturalization rights and citizenship on Guam in order to ensure that the local population will not be politically overwhelmed by new immigrants. A Task Force agreement with Guam to address this was blocked by the Labor Department in the 1993 report, which withheld comment on the topic. A review might regain the original position.

Section 1102 - Federal Programs and Supplemental Security Income (SSI): The Task Force opposed these issues but pointed out that the only valid reason why SSI could not be extended to Guam was the new "Pay-As-You-Go" requirement of the Budget Reconciliation Act. OMB directed the Task Force to withhold comment on this section in the 1993 report.

Other outstanding issues are probably not resolvable and should not be opened to renegotiation because they involve the integrity of U.S. sovereignty and the application of provisions of the U.S. Constitution and other Federal laws to Guam. These include:

Section 101(b) - Full Self-Government: Guam's concept of "full self-government" is equivalent to an internal sovereignty inconsistent with U.S. sovereignty and law. Guam's concept envisions the local government having complete and exclusive authority for all matters that could be handled by the local government, i.e., everything except foreign affairs and defense. Local self-government in the United States must conform with the Constitution and applicable Federal law. Therefore, local self-government is limited, not full.

Section 102(a) - Chamorro Only Vote on Self-Determination: The

indigenous Chamorro people of Guam account for approximately 43 percent of the island's 133,000 population. A Chamorro-only self-determination vote denies other non-Chamorro U.S. citizens on Guam fundamental constitutional protections.

Section 303 - International Activities: Guam's desire for carte blanche authority for Guam to enter treaties in its own name with sovereign states and join international groups is inconsistent with U.S. sovereignty and foreign affairs.

Section 1001 - Exclusive Economic Zone (EEZ): Guam's desire for ownership of the U.S. Exclusive Economic Zone around the island is inconsistent with U.S. sovereignty and law.

FUNCTION AND ROLE OF A SPECIAL REPRESENTATIVE OF THE PRESIDENT

The Guam Commission on Self-Determination, in a February 8, 1993 meeting with me, expressed great disappointment with the recent Task Force report and asked for my support of a Presidential appointee to lead a Federal team in another round of talks with the Guam Commission. Guam Governor Joseph F. Ada, who is Chairman of the Commission, believes this appointment will provide the Federal team with the higher policy-level influence necessary to define a position more responsive to Guam's objectives. I understand the Governor also has written to the President requesting such an appointment and has met with White House officials to reiterate the request. Given the complexity of the coordination process within the Executive Branch and the uniqueness of the insular territories in our Federal system, I believe a Presidential appointment would help to restore the confidence of Guam leaders in the discussions and expedite the development of this Administration's position on the bill and the forwarding of those views to the Congress.

In making the appointment, the role and function of the President's Special representative need to be clearly explained to Guam leaders and the public. At the outset, it should be made clear to Guam that the Presidential appointment in no way implies an endorsement of the Guam Commonwealth Bill as drafted. Parameters for the consultation process need to be set. These parameters should include limiting the number of issues to be examined and setting a timeframe in which to complete the consultations and report to Congress. Because these discussions already have taken five years, and the process on Guam is more than a decade old, it is important that the new round of talks be completed expeditiously and that a report be sent to Congress. Six months to a year should be the Special Representative's target timeframe.

The President's Special Representative should consult regularly with and work closely with the Assistant Secretary of the Office of Territorial and International Affairs and with representatives of other federal agencies and departments. The Special Representative also should regularly consult with Congressional committees regarding topics and issues discussed. Congressional

representatives should be invited to attend negotiating sessions.

In addition to completing the primary task of reviewing and commenting on the proposed bill, the President's Representative should also have the authority to discuss with Guam and Congressional leaders the possibility of another referendum on Guam with Free Association and Commonwealth on the ballot. Members of the Guam Commission and Guam indigenous rights group leaders have stated to Federal officials and the public that they prefer Free Association. Moreover, numerous Executive Branch and Congressional reviewers of the Guam bill have stated that many of the key concepts of the bill are closer to Free Association or independence than to a commonwealth under United States sovereignty. It should be noted that the overwhelming majority of Guam residents appear to support a political status that retains U.S. citizenship. If another referendum is pursued, Federal parameters for each status option should be clearly outlined and a public education campaign conducted so that voters clearly understand the differences between the status options.

The expeditious appointment of a Special Representative of the President for these discussions with Guam will clearly demonstrate this Administration's commitment to improving Federal relations with the insular areas.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. memo	To Steven M. Mertens from Jeffrey L. Farrow. Subject: Guam illegal entries (1 page)	04/14/1999	P5 6300
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Irene Bueno
OA/Box Number: 17173

FOLDER TITLE:

MISC - GUAM

Jamie Mettrailer
2006-0193-F
jm590

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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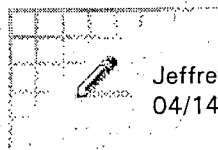
C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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Jeffrey L. Farrow
04/14/99 04:53:15 PM

Record Type: Record

To: Steven M. Mertens/OMB/EOP
cc: Irene Bueno/OPD/EOP
Subject: Re: Guam illegal entries

Interior opposes the Northern Marianas location because it would be taking advantage of the INA not applying to those islands when the President has strongly pushed for it to. (Interior is responsible for overall policy concerning Guam and the Marianas.) Our using the Marianas that way could be an argument for Tom DeLay in his effort to block the Administration (George Miller/Danny Akaka) bill.

I think higher levels at DoJ may also share this concern -- the foreign worker situation in the Marianas is a problem that has attracted national/international media, union, human rights groups attention. (20/20 may run a 2nd piece on it this week or next.) I have discussed this with Scott Busby in the context of the boat heading to Guam. That may be an isolated case that can be directed to the Marianas but want to talk about it tonight on the 7 pm call. There are some other islands associated with the US in the region that would be less problematic from this perspective but may not be a solution for this boat because of their distance.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	To Andrew Fois from Randolph D. Moss. Subject: Department of Interior report on S. 210 (2 pages)	08/12/1997	P5 6301
001b. note	re: ENRD comments to Interior letter to Don Young on S. 210 (2 pages)	08/14/1997	P5 6302
002. memo	To Sylvia Mathews through Mickey Ibarra from Fred Du Val. Subject: Guam (3 pages)	07/22/1997	P5

COLLECTION:

Clinton Presidential Records
Intergovernmental Affairs
Jeffrey Farrow
OA/Box Number: 24088

FOLDER TITLE:

Guam - Various V

Jamie Mettrailer
2006-0193-F
jm593

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

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COPY

Memorandum

6301

**Subject**

Department of Interior Report on S. 210

Date

August 12, 1997

To

Andrew Foiss
Assistant Attorney General
Office of Legislative Affairs

From

Randolph D. Moss *RD*
Deputy Ass't Attorney General
Office of Legal Counsel

The Office of Legal Counsel has only one comment regarding the Department of Interior Report on S. 210. In providing for the transfer of excess real property to Guam, section 4 of the bill distinguishes between the transfer of land for public purposes and the transfer of land for all other purposes. Land that is transferred for a public purpose is provided by the United States without further consideration, while land transferred for other purposes is to be sold at fair market value. The Office of Legal Counsel suggests clarifying this distinction.

Section 4(c)(5) of the bill defines "public purpose" by reference to, among other things, "public benefit uses provided under the Guam Excess Lands Act," Pub. L. No. 103-339, 108 Stat. 3116. Section 3(c) of the Guam Excess Lands Act, in turn, authorizes the Government of Guam to enact "legislation which establishes a detailed plan for public benefit uses (including, but not limited to, housing, schools, hospitals, child care centers, parks and recreation, conservation, economic development, public health and public safety.)" In implementing this provision, however, the Government of Guam concluded that the best "public benefit use" for the land was to return it to former "private" owners. See Guam Pub. L. No. 22-145 (a copy of which is attached).

The manner in which Guam implemented the Guam Excess Lands Act creates some ambiguity regarding the meaning of section 4(c)(5) of S. 210. On the one hand, S. 210 seems plainly to require compensation at fair market value for land transferred to private owners. On the other hand, it might be argued that the reference to the Guam Excess Lands Act suggests that land transferred to Guam for a "public" purpose might appropriately be retransferred to "private" individuals. Although we believe that, in the end, such a construction cannot withstand scrutiny, we suggest clarifying that the reference to the Guam Excess Lands Act is not intended to bring transfers to "private" individuals within the meaning of "public benefit." Such a clarification might be accomplished by simply providing that the "public benefits" incorporated by reference to the Guam Excess Lands Act include only those expressly

enumerated in that Act.

08/14/97 11:45 0202 314 0303 ULC 010
6302
ENRD Comments to Interior Letter to Don Young on S.210

As a general matter, we think that it would be useful to continue pursuing discussions with House Resources Committee staff on the Guam-related issues raised in the letter. We regard to the letter, we have the following specific suggestions.

1. We suggest that on page 3, the 2d full paragraph (starting "Guam is a small island . . .") be **entirely deleted**. We don't think that this portion of the letter is necessary. If it is retained, it should be clarified that the overlay refuge is part of the acreage administered by the military, and it would accordingly be appropriate to use the proper GSA terminology. The paragraph, if retained, would then read:

Guam is a small island . . . is owned by the United States and ~~managed~~ **administered** by a military department. In addition to the military, the United States Fish and Wildlife Service ~~administers a wildlife refuge of~~ **is a major Federal land manager on Guam. It manages a 23,274-acre wildlife refuge, of which about 22,502 acres is an overlay on lands managed by the military. about 770 acres at Ritidian Point (400 acres of which are submerged) are managed by the Service for the Federal Government. In addition, the Fish and Wildlife Service has responsibility for an overlay refuge of 22,500 acres on lands administered by the military.**

2. All of the 4th full paragraph (starting "The Congress and the Administration . . .") should be deleted and only the last sentence (starting "While the Administration agrees generally with . . .") retained in the following modified form to clarify that the proposed changes must be made prior to administration approval:

While the Administration agrees generally with the approach embodied in section 4 of S. 210, the Administration **strongly believes requires** that the following corrections ~~must~~ be made to properly implement this approach.

- 1) ~~We recommend deleting~~ **Delete** . . .

3. The second full paragraph on page 4 should be modified as follows to clarify that the proposal only deals with the overlay

lands:

The Administration proposal . . . located within the overlay component of Guam National Wildlife Refuge.

4. The first paragraph on page 5 should be modified as follows to clarify that the proposal only deals with the overlay land:

(4) The term "~~Overlay Component of the~~ Guam National Wildlife Refuge" . . . on page 74 ~~and as submerged lands in figure 7 on page 78~~ of the "final Environmental Assessment for the Proposed Guam National Wildlife Refuge, Territory of Guam, July 1993." ~~to the extent that the Federal Government holds title to such lands.~~

5. Fourth full paragraph on page 5 should be modified to reflect the fact that the District Court has ruled on these issues. However, since the court has been asked to reconsider its decision and the ruling is therefore not final at this time, it would be premature to emphasize this. Therefore, the passage should most appropriately read:

Besides being unnecessary, . . . ~~In that case, which is fully briefed and argued and currently under advisement, the United States has consistently argued that there is no legal basis for Guam's claim to the land. A statement by Congress raising, unnecessarily, some question about the present state of title to some of the lands at issue in this case has the potential for prejudicing the defense of the title to this land.~~

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001. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
002a. memo	To Harold Ickes and Marcia Hale from Jeff Farrow. Subject: Guam and Puerto Rico (1 page)	08/16/1996	P5
002b. memo	To Marcia Hale from John Garamendi. Subject: Guam Issues (1 page)	08/15/1996	P5
003. memo	To Marcia Hale from John Garamendi. Subject: Guam Issues (1 page)	08/15/1996	P5
004. briefing paper	re: Guam mutual consent provision agreement and Puerto Rico (4 pages)	11/03/1994	P5
005a. memo	To Marcia Hale from Jeff Farrow. Subject: Points regarding the Guam Commonwealth bill proposal (1 page)	08/19/1994	P5
005b. briefing paper	re: Points regarding the Guam Commonwealth bill proposal (2 pages)	08/19/1994	P5 6303
006. list	Phone No. (Partial) (1 page)	12/16/1996	P6/b(6)

COLLECTION:

Clinton Presidential Records
Intergovernmental Affairs
Marcia Hale
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FOLDER TITLE:

Guam

Jamie Mettrailer
2006-0193-F
jml14

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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COPY

Points Regarding the Guam Commonwealth Bill Proposal

Puerto Rico's commonwealth vs. statehood debate has to be considered in the handling of Guam's commonwealth proposals.

Many of the same issues are involved. The fundamental one is the nature of a commonwealth: Both Puerto Rico and Guam have petitioned for a relationship under which they do not have to accept the application of some Federal decisions. Their lack of power in the Federal process argues for limiting Federal powers...but doing so involves constitutional questions.

Asserting that this power can be provided Guam because it has no prospect of statehood but not Puerto Rico because it does is unfair and would suggest Puerto Rico has to and will become a state -- propositions which would create substantial controversy.

Among other major proposals in both the Puerto Rico and Guam commonwealth efforts are: extension of S.S.I. (which would only cost a few million dollars a year in Guam but some \$900 million a year in Puerto Rico) and exemption from the requirement to use U.S. flag shipping (a mainstay of the U.S. maritime industry.)

Puerto Rico commonwealthers are watching Guam. An observer went to the Pacific for a Guam bill hearing. Interior's recent willingness to discuss letting Guam determine the application of some Federal policies made headlines in Puerto Rico.

Many of the issues are also common factors in relations with the three other U.S. insular areas. In fact, Guam was encouraged to include the proposals noted above because of their treatment in the Northern Marianas Commonwealth Covenant.

The bottom line is that none of the insular areas other than Guam will accept the notion that Guam's situation makes "special application of federal laws easier to limit to just that island." And, contrary to the case of Guam, the political implications regarding Puerto Rico (with 3.6 million people on the island and 2.7 million in the States) are significant. Policies that seem unfair to Puerto Rico could backfire in 1996 and in Congress.

IGA should coordinate this with all policy councils/Legislative Affairs. Other agencies should be on the Working Group.

Guam commonwealth is primarily a domestic governmental relations matter involving a range of domestic and economic policy concerns as well as the security interests noted in the memo.

IGA has been designated to lead an interagency effort on Puerto Rico that will include all three policy councils and Legislative Affairs. IGA also handles relations with Guam and other islands. Because of the diversity of the issues and the need to coordinate

insular relations. IGA should lead coordination of this effort with other EOP offices and with other insular relations efforts.

In view of Guam's proposals, Treasury, H.H.S., Justice/I.N.S. and Legal Counsel, Commerce, Transportation, and Labor should be on the Working Group in addition to the recommended agencies.

While the memo proposes approving a Guam commonwealth structure before deciding the handling of other insular relations matters, IGA already has a responsibility for those matters. The only questions regard setting up coordinating mechanisms for areas other than Puerto Rico and coordinating the various efforts. Because of the interrelationship of the issues and interests, these insular structures should be decided upon simultaneously.

The issues and instructions should be clearer.

The key issues should be identified to Panetta. In addition to giving Guam the power to determine the application of some Federal policies, S.S.I., and exemption from shipping laws, they include: special rights for the indigenous minority of the population; Customs requirements; local assumption of Federal functions; control of the U.S. economic zone off Guam; income taxes; immigration; judicial appeals; and Federal land ownership.

The negotiating instructions should address all of Guam's key proposals and be cleared by all agencies of jurisdiction in the context of those proposals and of congressional positions.

Key Members of Congress should be consulted on the issues.

Congressional committees have expressed general support for the effort. But Congress has specific constitutional and treaty authority for insular status matters and some Members have strongly held views on the issues. Senate Chairman Johnston has already warned us not to raise Guam's expectations and staff have suggested recent positions on Puerto Rico provide precedents. The President's commitment was to work with Congress as well as Guam.

The timetable should permit consultation with Guam's new leaders.

The memo calls for recommendations by the end of the year (when the Republican Governor leaves office and his lawyers hope his successor has continued their retainer.) Guam's new officials should have an opportunity to review the agreement; they will have to support it in Congress. The Democratic Legislature Speaker and leading candidate for governor have reservations about the commonwealth process...although not the proposals.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Memo from Bill Clinton to Guam delegation re: campaign (1 page)	07/15/1992	Personal Misfile
002. briefing paper	re: Points regarding the Guam Commonwealth bill proposal (2 pages)	08/19/1994	P5 6303 Dup
003. memo	To Leon Panetta from Anthony Lake, Marcia Hale, Carol Rasco, and Susan Brophy. Subject: Inter-agency working group on Guam (2 pages)	08/24/1994	P5 6304
004a. briefing paper	re: Specific comments on the memorandum for Leon Panetta (2 pages)	n.d.	P5 6305
004b. briefing paper	re: Specific comments on the memorandum for Leon Panetta (2 pages)	n.d.	P5 6305 Dup
005. briefing paper	re: Specific comments on the memorandum for Leon Panetta (3 pages)	n.d.	P5 6306
006. briefing paper	re: Guam mutual consent agreement and Puerto Rico (4 pages)	11/03/1994	P5
007. memo	Phone No.'s (Partial) (1 page)	11/08/1994	P6/b(6)
008. memo	To Leon Panetta through Marcia Hale from Jeffrey Farrow. Subject: Guam mutual consent agreement results (1 page)	11/07/1994	P5
009. memo	To Marcia Hale from Jeff Farrow. Subject: Washington Post article (1 page)	11/16/1994	P5

COLLECTION:

Clinton Presidential Records
Intergovernmental Affairs
Cecily Williams
OA/Box Number: 9901

FOLDER TITLE:

Guam

Jamie Mettrailer
2006-0193-F
jml19

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

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COPY

THE WHITE HOUSE

WASHINGTON

6304

MEMORANDUM FOR LEON PANETTA

FROM: ANTHONY LAKE
MARCIA HALE
CAROL RASCO
SUSAN BROPHY

SUBJECT: Inter-Agency Working Group on Guam

Secretary Babbitt, with the concurrence of the President, appointed I. Michael Heyman in November 1993 as Special Representative for Guam to negotiate a change in the political status of Guam.

Secretary Babbitt has now asked Tony Lake to convene an inter-agency working group under the auspices of the NSC to provide a high level forum to resolve issues that may arise in his discussions with representatives of Guam. Since the main American interest in Guam is the preservation of our base rights, we agree that the NSC structure is the right mechanism for inter-agency coordination. The NSC staff has briefed relevant congressional committees which are supportive of this effort, as are concerned federal agencies.

Attached at Tab A is a proposed NSC memorandum establishing the IWG on Guam and providing terms of reference. That document has been informally cleared by the agencies that would participate in the working group.

There is a broader question of how the White House should be organized to deal with insular territories issues in general and how that should relate to Puerto Rico and to areas in the Pacific which have recently entered into new relations with the United States. In order to help us think about those issues we asked Interior to prepare a memorandum on insular territories and State to do a memo on the recently independent territories. (The two texts are attached at Tab B.) We will present a recommendation to you shortly on how we think we should proceed on the broader question, but we are agreed that it makes sense to move forward now with the inter-agency effort on the status of Guam.

RECOMMENDATION

That you approve the process outlined above.

Approve _____ Disapprove _____

Attachments

Tab A Memorandum for Mr. Itoh with Negotiating Instructions

Tab B Incoming Memorandums dated March 30, 1994 and April 28, 1994

SPECIFIC COMMENTS ON THE MEMORANDUM FOR LEON PANETTA

1st paragraph

The purpose of the negotiations are to develop a position on the bill to make the territory of Guam the Commonwealth of Guam. Whether this would change Guam into a different political status is an unresolved question with major implications.

"Commonwealth" is a name that has no specific legal meaning. Several States are commonwealths. Most Federal authorities consider the two existing insular commonwealths to be territories in a constitutional sense. Statehood, independence, and free association are clear non-territorial status options. Commonwealth, in an insular context, generally refers to a mutually-determined status arrangement, distinct from a relationship solely determined by the Federal Government.

Guam wants its commonwealth to be a different status (but some say what it actually wants is closer to free association.) Its primary goal is for its consent to be required for Federal policies to be applied, limiting Federal powers because of the island's lack of power in the Federal system.

This involves a major constitutional issue that has been one of the fundamental aspects of the status debates in Puerto Rico and other insular areas. It should be recognized before a decision on how to proceed is made. (Indeed, Guam thinks it is being considered here...although the memo doesn't clearly address it.)

2nd paragraph

"The main American interest in Guam" is not "our base rights." Guamanians are U.S. Citizens; their welfare is a main interest. Also, the term "base rights" is not applicable in U.S. islands (where the Federal Government owns land) in the way it is in other countries (where it leases through bilateral agreements.)

The main purpose of status legislation for a U.S. insular area should be to improve its place within the U.S. political family. This is in contrast to a primary purpose of the recent status talks conducted under NSC auspices with the non-U.S. Pacific territory administered on behalf of the U.N. They had base rights and fulfilling a commitment to the U.N. as their main purposes.

Given that Federal welfare, shipping, customs, immigration, labor, and tax laws as well as constitutional requirements and basic Federal-insular government relations are major Guam commonwealth issues, and given the implications for the Puerto Rico and other Federal-insular relationships, the proposed structure for inter-agency coordination should be revised.

IGA has a lead responsibility on insular relations matters. The DPC and NEC have substantive jurisdiction over many of the major issues (and other lesser ones.) Also, Congress has specific constitutional and treaty responsibilities for the territories and some Members are keenly interested in the subject.

The statement that the relevant congressional committees are supportive of the effort should be qualified. The lead committees are supportive of the effort but have qualms about some of the proposals. Other committees may also need to be consulted later in coordination with the lead committees.

3rd paragraph

The "terms of reference" (or "negotiating instructions") should be cleared in the context of Guam's specific proposals by all key EOP offices and agencies of jurisdiction. They should also be discussed with key Members of Congress before being finalized.

Additionally, the key issues should be more clearly identified in the memo. In addition to those mentioned above, they include: rights for the indigenous minority that would not be available to other U.S. Citizens there; judicial appeals; the local assumption of Federal functions; transferring military facilities; etc.

4th paragraph

The broader question of how the White House should be organized to deal with other territories issues is distinct but should be resolved before a decision is made on this structure.

Fortunately, it should not take too long. House Chairmen George Miller and de Lugo have already raised it with Panetta and Marcia. There have been discussions for months that have also involved Senate Chairman Johnston.

How both of these structures should relate to the structure for handling Puerto Rico's commonwealth proposals and issues is critical. The Puerto Rico matters have significant national substantive and political implications. Further, they are not as separable from the identical proposals relating to Guam as has been advised. IGA is leading an Inter-Agency Working Group on Puerto Rico that has already been announced.

On the other hand, how these structures should relate to the three non-U.S. Pacific insular areas which have or are entering into special relationships with the U.S. is really a minor matter. There should be coordination with the existing Interagency Group on Freely Associated State Affairs but major changes do not need to be made.

SPECIFIC COMMENTS ON THE MEMORANDUM FOR LEON PANETTA

1st Graph

Mike Heyman is understood to have been appointed to negotiate making the territory of Guam the Commonwealth of Guam...rather than to negotiate changing Guam's political status. Whether commonwealth would change Guam into a different political status is an unresolved question with major implications.

"Commonwealth" is a name that has no specific legal meaning. Several States are commonwealths. Insular areas considered by most Federal authorities to be territories in a constitutional sense are called commonwealths. The preponderance of opinion is that statehood, independence, and free association are the non-territorial status options. Commonwealth, in an insular context, generally refers to a mutually-determined status arrangement, distinct from a relationship solely determined by the Federal Government.

It is clear that Guam wants its commonwealth to be a different status. (Some say what it wants is closer to what is generally considered to be free association than what is generally considered to be commonwealth.) The island's key goal is for its consent to be required for the application of any future or specified Federal policies (limiting Federal powers because of the island's lack of power in the Federal system.)

This involves a major constitutional issue that has been one of the fundamental aspects of the status debates in Puerto Rico and other insular areas. It should be recognized before a decision on how to proceed is made. (Indeed, Interior, has suggested that is the purpose of this memo.)

2nd Graph

It is offensive, inaccurate, and misleading to say that "the main American interest in Guam is the preservation of our base rights."

Guamanians are U.S. Citizens; their welfare is a main interest. Also, the term "base rights" is not applicable in U.S. territories in the way it is in foreign countries.

The main purpose of status legislation for a U.S. insular area should be to improve its place within the U.S. political family. This is in contrast to a primary purpose of the status negotiations conducted under NSC auspices (and, during Republican administrations, by, among others, Guam's current lawyers) with non-U.S. insular areas. They had base rights as a main purpose.

Given that Federal immigration, labor, welfare, shipping,

customs, and tax laws as well as constitutional requirements and basic Federal-insular government relations are major Guam commonwealth issues, and given the implications for the Puerto Rico and other Federal-insular relationships, the structure for inter-agency coordination should be revised.

IGA has a lead responsibility within the White House on insular relations matters. The DPC and NEC have substantive jurisdiction over many of the issues. Also, Congress has specific constitutional and treaty responsibilities for the territories and some Members are keenly interested in the subject.

The statement that the relevant congressional committees are supportive of the effort should be qualified. The lead committees are generally supportive of the effort but have qualms about some of the proposals. Other committees may also need to be consulted later in coordination with the lead committees.

3rd Graph

The "terms of reference" (or negotiating instructions) should be cleared in the context of Guam's specific proposals (bill) by all the EOP offices noted above as well as by other agencies and should be discussed with key congressional leaders before being finalized.

The key issues should be more clearly addressed and noted. In addition to those mentioned above, they include: rights for the indigenous minority that would not be available to other U.S. Citizens there; judicial appeals; the local assumption of Federal functions; transferring military facilities; etc.

4th Graph

The broader question of how the White House should be organized to deal with the other territories issues (including American Samoa, Northern Marianas, and Virgin Islands issues as well as other Guam issues) is distinct but should be resolved before a decision is made on the structure for Guam. It should not take too long to resolve, though. House Chairmen George Miller and de Lugo are dissatisfied with the current staffing arrangement and have already raised it with Panetta and Marcia. There have been discussions for months also involving Senate Chairman Johnston.

How the structures for handling territories issues and Guam's commonwealth proposals relates to the structure for handling Puerto Rico's commonwealth proposals and issues is critical. The Puerto Rico matters have significant national substantive and political implications and are not as separable from the

identical proposals relating to Guam as the Interior Department has advised the NSC. Marcia and I are about to organize an Inter-Agency Working Group on Puerto Rico that has already been announced.

On the other hand, how these structures should relate to the three non-U.S. Pacific insular areas which have or are entering into special relationships with the U.S. is really a minor matter. There should be coordination with the existing interagency Group on Freely Associated State Affairs but major changes do not need to be made.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To Robert Suettinger from John Garamendi. Subject: Guam Commonwealth Negotiations. (2 pages)	03/13/1996	P5 6307
002. memo	To Leon Panetta and Sandra Kristoff from John Garamendi. Subject: Situation in Guam. (2 pages)	10/18/1996	P5 6308

COLLECTION:

Clinton Presidential Records
National Security Council
Asian Affairs
OA/Box Number: 1046

FOLDER TITLE:

Guam, 1996

Van Zbinden
2006-0193-F
vz1174

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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RR. Document will be reviewed upon request.

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United States Department of the Interior

OFFICE OF THE DEPUTY SECRETARY

Washington, D.C. 20240

RV copy

6307

h/c
Guam

March 13, 1996

TO: Robert Suettinger
Director, Asian Affairs

FROM: John Garamendi *John Garamendi*
Deputy Secretary

SUBJECT: **Guam Commonwealth Negotiations**

Summary: A successful negotiation is possible if the Administration is willing to accept that Guam is unique and should have special status and laws. However, the negotiations with U.S. Government departments have not been proceeding well because of polarized views on several issues. Agencies have been reluctant to move when it requires exemption or variation to existing Federal laws and regulations or allowing for self-governing status for Guamanian jurisdictions. At the same time, the agencies are trying to be responsive and we will be meeting with them individually during the next two weeks in an attempt to break up some of the log jams. Our most recent meeting with the Governor and some members of the Guam Commission was very promising. End Summary

On February 23, I chaired a meeting of all Federal agencies having an interest in our negotiations on Guam's Commonwealth status. I made it clear that we (myself and Mark Mulvey who has been detailed from State to assist me) were going to actively engage the agencies, and the latter have responded accordingly by providing us with updated position papers based on the most recent Guamanian positions (attached). As you can discern from the four position papers, the Guamanian demands focus on self-determination in general and pose a dilemma for the Federal agencies entrusted to maintain the uniformity of U.S. laws and regulations. The essence of some of the agencies' arguments is one of principle and they see no basis for granting exemptions.

There is room for movement on both sides. At a March 1 meeting with the Governor and his staff, the Guamanians were open to suggestion on how best to articulate their need for change. I also sense the Governor sincerely wants to close on these negotiations and is no longer taking a position of "all or nothing". During the next two weeks, Mark Mulvey will meet with

the agencies individually to bring the two sides closer together -- something I believe is achievable within the next few months. In response to Guam's request to control the immigration process. State suggests that to create a separate process for Guam is an unwelcome burden and expense at a time of massive downsizing. This type of excuse is unacceptable. We have an obligation to the people of Guam to negotiate in good faith. Twelve years of similar excuses have left the Guamanians with little, if any, trust with respect to the agencies.

Our goal should be to provide Guam with maximum democracy within the American family consistent with long term strategic objectives. We must therefore take into consideration all the aspects of Guam's uniqueness. I also am managing these negotiations in the context of US national interests -- and in this light we have to be flexible and creative enough to grant exemptions to Guam in meeting these interests. I plan to produce an agreement for Congressional approval this year, and I expect the Federal agencies to be forthcoming and helpful in this process.

Attachment



United States Department of the Interior

OFFICE OF THE DEPUTY SECRETARY

Washington, D.C. 20240

October 18, 1996

MEMORANDUM

TO: Leon Panetta
Chief of Staff
The White House

✓ Sandra Kristoff
Director, Asian Affairs
National Security Council

FROM: John Garamendi
Deputy Secretary
Department of the Interior

SUBJECT: **Situation in Guam**

The President should stop in Guam when he travels to the APEC meeting. I am informed that Governor Gutierrez is under significant pressure to obtain White House agreement for the President to stop on the island on the way to or from the upcoming APEC meeting in Manila. The Governor and other Guam leaders consider a Presidential stop of utmost importance to continued good relations with Guam. Not only would a Presidential stop reaffirm the importance of Guam to the United States, but it would also go far in defusing the negative public perceptions of the events previously outlined above. Conversely, if the President does not stop in Guam, it may be considered the proverbial "straw that broke the camel's back." I am informed, among other things, that this may result in Guam's immediate termination of the Commonwealth negotiations and local political fall-out on continued U.S. military presence in the island.

As the Administration's Special Representative for Guam Commonwealth, I have been attempting to bring closure to these political status negotiations since the beginning of this year. My goal has been and remains to reach an agreement which would accomplish Guam's desire for maximum self-government under continued U.S. sovereignty, while addressing the concerns of various Federal agencies whose programs might be impacted by a new status for Guam. While prospects for a speedy resolution of these talks seemed bright early on, these prospects dimmed considerably during the summer and early fall when Federal agencies retreated to harder line positions.

Nowhere has this reversal been more glaring than with the agencies' position on the issue of Federal excess land in Guam. The Department of Defense, the General Services Administration, the Fish & Wildlife Service and the Department of Justice all strongly opposed Guam's modest proposal to be given the "right of first refusal" to obtain lands that Federal agencies no longer needed in Guam. As you may be aware, Delegate Underwood's bill on this issue died in the waning days of Congress despite last minute attempts to reach an accommodation with interested Federal agencies.

From the Guamanian perspective, the failure of the excess lands bill has been intertwined with a series of events which are considered affronts to Guam's dignity -- e.g., stalled progress in the Guam Commonwealth negotiations, the lack of a presidential directive on Federal, a perception that the Fish & Wildlife Service desires to obtain large tracts of the island as critical habitat or wildlife refuge, a recent report denying Federal responsibility to appropriate funds to offset the impact of Micronesian immigration to Guam and a recent Navy decision to relocate a \$35-million-a-year Diego Garcia shuttle mission from Guam to Japan. As a result of these events, Governor Gutierrez, Delegate Underwood and other Guam leaders have significantly stepped up their public criticism of U.S. policies toward the island. In short, an atmosphere of tension, distrust and hostility is growing in Guam against the United States. See attached articles.

This deterioration of U.S.-Guam relations cannot but have a detrimental effect on our long-term strategic interests in the Asia-Pacific region. It is ironic that this increase in tensions with Guam is occurring at precisely the same time that the U.S. has used its Air Force base in Guam to launch bomber attacks against Iraq, that the U.S. is now using Guam as a staging area for thousands of Kurds evacuated from Turkey and Iraq, and that there are currently discussions to transfer some Marine units to Guam from Okinawa due to the unpopularity of U.S. presence there. Many of Guam's leaders are seriously beginning to question whether it is in the island's best interest to continue cooperating with the United States.

I raise these issues for your consideration because I think the President should be made aware of them. As soon as the elections are over and before the President leaves for APEC, I suggest that we get together to discuss our next steps in addressing Commonwealth and other Guam issues. At some point before the end of the year, it will probably be necessary for the White House to get more directly involved in these matters. In the meantime, my staff and I will continue to monitor the situation in Guam closely.

Attachments:

1. An American Colony
2. Land Bill Hits New Snag, Clinton, Defense Oppose Guam Land Return Act.
3. Gutierrez Returns Federal Check
4. Humans Are Also Endangered Species
5. 2000 Refugees, Kurds Flee Saddam, Arrive In Guam
6. Underwood's War Of Words Over Supply Ship Continues

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	To Morton Halperin from Danny Aranza. Subject: Special Representative on Guam Commonwealth. (2 pages)	02/14/1995	P5
002. memo	For T. Alexander Aleinikoff from Janice Podolny and Craig Raynsford. Subject: Commonwealth Negotiations with Guam. (4 pages)	11/30/1994	P5 6309

COLLECTION:

Clinton Presidential Records
National Security Council
Democracy, Human Rights, and Humanitarian Affairs (Morton Halperin)
OA/Box Number: 492

FOLDER TITLE:

Guam #2 [1]

Van Zbinden
2006-0193-F
vz1182

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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COPY

**DRAFT**

Subject

Commonwealth Negotiations with Guam

Date

NOV 30 1994

To

T. Alexander Aleinikoff
General Counsel

From

Janice Podolny
Craig RaynsfordAssociate General
Counsel

The issue of immigration control has arisen in discussions concerning the Guam Commonwealth Bill. The Representatives from Guam want to restrict permanent immigration, while at the same time establishing a temporary worker program to promote economic development.

The Guamanians argue that the ever-increasing migration of East Asian immigrants has rendered the indigenous population a minority. Consequently, they have requested that complete control over immigration policy and administration be turned over to the newly created Commonwealth. As a compromise, the last Federal Task Force to consider this issue suggested amendments to the Immigration and Nationality Act that would limit immigration to the island without relinquishing Federal control.

These recommended amendments would limit immigration to: (a) spouses and children of both United States Citizens and permanent resident aliens in the United States Armed Forces stationed in Guam; (b) spouses and children of United States citizens permanently residing on Guam; and (c) spouses and unmarried children of permanent resident aliens residing on Guam for two years from the date of enactment. Once this two-year grace period expires, permanent resident aliens on Guam, other than members of the Armed Forces, would no longer be permitted to petition on behalf of their relatives. Additionally, Guam would no longer be considered part of the United States in calculating the length of a permanent resident alien's physical presence for naturalization purposes, thus making Guam less attractive to prospective immigrants.

Issues Presented.

1. Does this proposal violate the constitutionally guaranteed right to equal protection?

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2. Is there a viable alternative to the restrictions proposed by the Federal Task Force?

Summary Conclusions.

1. The Task Force proposal is not unconstitutional as a denial of equal protection. The constitutionality of legislative pronouncements distinguishing between aliens and United States citizens is based on whether the laws in question have a rational basis. Since the Task Force proposal is rationally related to a legitimate federal interest, i.e., preserving the ethnic identity of Guam's indigenous population, the Chamorros, it most likely would withstand constitutional challenges on equal protection grounds.

2. One alternative to the Task Force proposal is the creation of a special visa preference system for Guam.

Discussion.

1. Constitutionality.

The scope of judicial inquiry into immigration legislation is extremely limited. The Supreme Court "has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Fiallo v. Bell, 430 U.S. 787, 792 (1977), quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909). "Congress regularly makes [immigration] rules that would be unacceptable if applied to citizens'." Fiallo at 792, quoting Matthews v. Diaz, 426 U.S. 67, 80 (1976). In Fiallo, appellants argued that they were denied equal protection by the provisions in the Immigration and Nationality Act of 1952, which distinguished between the preferential immigration status granted to an illegitimate child and his natural mother but not to such a child and his natural father. The Court held that this distinction was a policy question within Congress' exclusive province, and that Congress' determination of whether preference status should be granted to illegitimate children and their natural fathers is a legislative decision subject to limited judicial review.

So long as a rational basis exists for a legislative distinction between aliens and citizens, the law will survive constitutional challenge on equal protection grounds. "[T]he role of the courts in analyzing an equal protection challenge to a federal immigration statute is limited to determining whether the statute at issue is rationally related to the achievement of a legitimate federal interest." Blackwell v. Thornburgh, 745 F.Supp. 1529, 1539 (C.D. Cal. 1989). See also, Smith v. Immigration and Naturalization Service, 684 F.Supp. 1113, 1116 (D. Mass. 1988). Since the Task Force proposal has an arguably

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rational basis--to protect the ethnicity of Guam's indigenous population, the Chamorros¹-- it is likely it would withstand constitutional muster.

2. Alternative to Federal Task Force Proposal.

One alternative to the Task Force proposal would be the creation of a separate special visa preference program for Guam. Modeled after the existing preference system for the entire United States, such a program would preserve present immigration policy while addressing the concerns of the Guamanian people by placing numerical limitations on the issuance of visas for immigrants destined to Guam. Assuming that this limitation furthered a legitimate government interest, i.e. to protect the ethnic identity of the Chamorro people, such a program should withstand a constitutional challenge on equal protection grounds, as the scope of judicial inquiry would be very narrow.

Clearly, such an admissions program would only relate to persons entering Guam from outside the United States. These limitations would not affect persons legally admitted to other parts of the United States from traveling to Guam. Aside from the constitutional problems inherent in trying to prevent such migration, it would be difficult to police the movement of aliens from other parts of the United States to Guam.

The definitions, documentation requirements, and procedures used in the program would those set forth in the Immigration and Nationality Act, although these categories could be adjusted to better meet Guam's needs.

Placing numerical limitations on each of the categories in this manner would discourage immigration to Guam and respect Guamanian interests in self-determination. Furthermore, this alternative proposal would permit the regulation of immigration to Guam in a manner consistent with the existing preference system.

We anticipate the following objections to this proposed "mini-preference" system:

1. Since people can move from the mainland to Guam, this system would not totally restrict non-Chamorro immigration to Guam.

Response: This is true under the current system as well. Moreover, it is a circuitous and unattractive alternative for one

¹This might be challenged as an impermissible race-based distinction. However, it is consistent with the range of statutes dealing with the territories and analogous to federal efforts regarding protection, study and self-determination of Indian tribes.

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individual to move to the continental United States with the intention of ultimately residing in Guam.

2. The creation of these special immigration limitations for Guam may draw criticism from persons in other areas heavily affected by legal and illegal immigration, such as California and Florida.

Response: The territories are different from individual states, and special arrangements have historically been made with respect to their immigration policies. For example, the Northern Mariana Islands have nearly total control of their own immigration, while Puerto Rico has virtually no control.

3. If a mini-preference system is created, and the priority dates are more favorable than the normal worldwide quota system, this will provide an incentive to immigrate through the Guam preference system.

Response: This mini-preference system could be integrated into the present worldwide system, providing for a separate numerical limitation for Guam, limited by "receiving" destination, i.e. Guam. There would not be an incentive to immigrate through the Guam system if aliens issued immigrant visas under the Guam preference system were restricted in where they could reside. In other words, all aliens immigrating under the Guam preference system would have their visas stamped "restricted--only valid in Guam". Likewise, all persons immigrating under the normal (non-Guam) system would have their immigrant visas stamped "valid except in Guam". This raises the issue of whether there is a constitutional right to travel on the part of lawful permanent resident aliens, and whether the federal government could lawfully try to limit such travel.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	To Michael Hayman from Walter Dellinger. Subject: Guam Commonwealth Act. (2 pages)	06/29/1994	P5
001b. memo	Proposed Alternatives for Mutual Consent Provisions. (2 pages)	06/29/1994	P5
002a. letter	Duplicate of 001a. (2 pages)	06/29/1994	P5
002b. memo	Duplicate of 001b. (2 pages)	06/29/1994	P5
003a. letter	Duplicate of 001a. (2 pages)	06/29/1994	P5
003b. memo	Duplicate of 001b. (2 pages)	06/29/1994	P5
004. memo	For Secretary Babbitt from Mike Heyman. Subject: Guam Commonwealth. [partial] (4 pages)	06/30/1994	P5 6310
005. memo	Duplicate of 004. (4 pages)	06/30/1994	P5 6310 Dup
006. note	To Morton Halperin from Mike Heyman. (1 page)	06/16/1994	P5
007a. letter	To Morton Halperin from Mike Heyman. (1 page)	06/02/1994	P5 6311
007b. memo	Guam's Negotiations. (5 pages)	06/02/1994	P5 6312

COLLECTION:

Clinton Presidential Records
National Security Council
Democracy, Human Rights, and Humanitarian Affairs (Morton Halperin)
OA/Box Number: 492

FOLDER TITLE:

Guam #2 [5]

Van Zbinden
2006-0193-F
vzl183

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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COPY

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Mutual Consent to Changes in a Commonwealth Act

Of the four symbolic issues, the one most amenable to our positive response is a requirement in the eventual Commonwealth Act that changes in the Act require the consent of both the Congress and Guam.

A provision of this sort was included in the covenant establishing the Commonwealth of the Northern Marianas:

Section 105

' . . . In order to respect the right of self government guaranteed by this Covenant, the United States agrees to limit the exercise of that authority [to pass laws applicable to the Northern Mariana Islands] so that the fundamental provisions of this covenant, articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.'

The Department of Justice is taking the position that a similar provision in the Commonwealth Act for Guam would be unconstitutional. This was stated directly in a letter of May 12, 1994, from Walter Dellinger to Michael Heyman. The operative paragraphs are:

'The most difficult problem presented by your proposal is whether it is possible to immunize the

autonomy that is to be granted to Guam from future congressional intrusion, in other words, whether the mutual consent provision that would preclude Congress from unilaterally amending the Commonwealth Act is constitutional. After serious consideration we have regretfully come to the conclusion that a mutual consent clause could not bar a subsequent Congress from amending the Commonwealth Act without the consent of the Government of Guam.

This letter obviously is not the proper place for an extended legal discussion. We shall therefore give you in a nutshell the reasons that cause us to reach the above result. Under the Constitution the areas under the sovereignty of the United States fall into two groups: States and areas that are not States. The latter are 'necessarily governed by or under the authority of Congress.' National Bank v. County of Yankton, 101 U.S. 129, 133 (1880). This Congressional authority is plenary and based on the Territory Clause of the Constitution. Art. IV, Sec. 3 Cl. 2. The Constitution does not admit of any third category i.e. a non-state area that is not governed by the Territory Clause. Legislation enacted under that clause, like all other legislation, is subject to the power of amendment or repeal by subsequent Congresses². Specifically, it has been held that while Congress need not itself exercise its power to legislate for the Territories and may delegate that power to them, that delegation is 'of course' subject to the right of Congress to revise, alter, or revoke. District of Columbia v. Thompson Co., 346 U.S. 400, 406 (1953); United States v. Sharpnack, 355 U.S. 286, 296 (1958).

It follows that mutual consent clauses are either directly unconstitutional or ineffectual, because they cannot preclude a subsequent Congress from amending or repealing the legislation supposed to be protected by that Clause. The inclusion of such clauses in the proposed agreement would be deceptive because it would create an illusory expectation in the Guamanians. For that reason, the Department of Justice must object to them. Analogous consideration would apply to any attempts in the Commonwealth Act to limit the power of Congress to enact legislation applicable to Guam.'

²The only exception to that rule is the situation where one Congress creates vested rights of a private or commercial nature. See Bowen v. Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52, 55 (1986).

I responded to these observations in my letter to Dellinger of May 16, 1994. I revised the Negotiating Instructions so as to leave the issue open and indicated surprise given Justice's assent in the case of CNMI. I also suggested that further discussion was necessary.

I find quite persuasive to the contrary the CNMI precedent. The CNMI covenant contains a mutual consent provision which was treated as valid in the recent case of U.S. Ex. Rel. Richards v. DeLeon Guerrero, 4 F.3d 749 (9th Cir. 1993). In that case, CNMI resisted a subpoena issued by the Inspector General of the Department of the Interior for various tax records relevant to an audit of the Commonwealth's Department of Finance. CNMI argued that the audit violated CNMI's right of self-government as provided in section 103 of the Covenant and protected by the provision in Section 105 quoted above requiring mutual consent. The court did not question the applicability or the constitutional validity of the mutual consent provision. It rejected the argument that provision was nugatory and that Congress could always act under the Territorial Clause. Rather, it stated:

'Even if the Territorial Clause provides the constitutional basis for Congress' legislative authority in the Commonwealth, it is solely by the Covenant that we measure the limits of Congress' legislative power.' 4 F.3d at 754.

This quotation seems a straightforward holding that Congress has the authority under the Territorial Clause to limit its future exercise of authority quite to the contrary of the statement in the Dellinger letter of May 12th.

(Perhaps there is some argument lurking that distinguishes the validity of a mutual consent requirement in a covenant that transforms a trust territory to a commonwealth under U.S. sovereignty (CNMI) and one contained in a covenant that transforms a territory under U.S. sovereignty to commonwealth under U.S. sovereignty (Guam). If so, it would remind me of ancient property laws distinguishing, for instance, between springing and shifting executory interests -- rules without any present day policy justifications.)

Guam's lawyers have a number of other arguments supporting their contention that Congress, under the Territorial Clause, can "bind" a future Congress (see attached memorandum of August 3, 1993.) I find most interesting the proposition that if Congress has the power under the Territorial Clause to dispose of all U.S. interests in property, and thus bind future Congresses, it

would seem axiomatic that it could dispose of less than all U.S. interests in a final way. In the case of the Philippines, for instance, a complete divestment occurred. In the case of Guam, it is argued, a partial divestment is possible."

Mort and I made our oral presentation to Justice a week ago. Today we were given acceptable language by Justice on mutual consent to changes in the Commonwealth Act, which I believe gives us the needed flexibility to negotiate a deal with Guam. This is a real breakthrough.

3. In light of the foregoing, I suggest that you address the Commonwealth matter in accordance with the following outline:
 - A. As I have said, I want to bring closure to the negotiation on Commonwealth as soon as feasible.
 - B. As I have also said, I want an act which creates a partnership between Guam and the U.S. Government which recognizes that the primary interest of the U.S. is assuring the continuation of U.S. rights to maintain military bases while providing Guam heightened opportunities for self-government.
 - C. I have faith in Mike Heyman's ability to negotiate to these ends. I share his frustration that progress has been slower than we anticipated.
 - D. This has been due primarily to the complexity of addressing subject matters within the jurisdiction of a host of other Federal Agencies.
 - E. Mike informed me on Friday, however, that the Department of Justice has finally accepted our approach to the thorny issue of whether future changes in an acceptable Commonwealth Act could require mutual consent by both Congress and the Guam legislature. He believes that the approach provides the needed flexibility to make likely an agreement on this issue in our negotiations with Guam.
 - F. This is an important milestone, in my view, and should increase the momentum towards the successful negotiation we all desire.
4. If you need any additional information, Danny Aranza, who is with you, is very knowledgeable.

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United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

JUN - 2 1994

6311

Dr. Morton Halperin
Special Assistant to the President
for Democracy
National Security Council
Old Executive Office Building, Room 393
17th St. and Pennsylvania Avenue, NW
Washington, D.C. 20506

Dear Mort:

I address the primary mutual consent controversy in the enclosed memorandum. It, together with the Israel memorandum of August 3, 1993, is sufficient, in my view, to use as a basis for discussion with OLC in which we seek to talk them out of the position taken in their May 12th letter. I believe the issue is one of policy, not law. They have steadfastly refused to address the former. Their argument on the latter is not based on cases; in fact they omit reference to the only case of relevance (Guerrero).

I would like to have this issue resolved in June. If we prevail we will give momentum to our effort to treat Guam as a partner, and we will give Bruce Babbitt and Governor Ada a principle to celebrate when Bruce visits Guam on July 5 and 6. (If we fail, we are in real trouble.)

You wanted to read some cases. I enclose my marked up copy of Guerrero. Tell Danny Aranza what others you would like, and he will respond rapidly.

I will be in California until June 8th. I would appreciate it if by then you could have gotten our Negotiating Instructions okayed and thought out a way to precipitate a decision discussion on the mutual consent matter. Possible?

Sincerely,

I. Michael Heyman
Counselor to the Secretary

Enclosures

Guam's NegotiationsBackground

Guam's demands in its Commonwealth Act fulfill two "needs." One is symbolic -- a recognition by the United States that Guam and its people are ethnically and culturally distinct, mature, worthy of respect, and no longer "colonial subjects." The second is more pragmatic -- adjustments largely to reflect Guam's distance from the mainland, potentialities for economic success, shortages of land, and initial port of entry for a stream of Asian immigrants to the United States.

We probably will do decently with the pragmatic subjects, although the initial reaction of career folk in a number of agencies is a bit discouraging.

I am not optimistic about the symbolic matters. There are four of concern: land, self-determination, required mutual consent to changes in applicable Federal law, and required mutual consent to changes in the Commonwealth covenant. If we do not show flexibility on any of the symbolic issues, we will lose credibility, respect and connection with a good number of Guamanians, especially those of Chamorro identity. Moreover, we will help legitimize the independence movement, especially among the young. It is often said that a large majority of Guamanians are pro-United States. This is true. But the percentage of friends diminishes with the age of the respondent. Those who will run Guam 10 and 20 years from now owe no allegiance to Uncle Sam. If we are to maintain our substantial military presence and

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Attachment

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	To Morton Halperin from Michael Heyman. (1 page)	05/16/1994	P5 6313
001b. memo	Proposed Negotiating Instructions. (2 pages)	05/16/1994	P5 6314
002. letter	To Walter Dellinger from Michael Heyman. (3 pages)	04/22/1994	P5 6315
003. draft	Letter to Walter Dellinger from Michael Heyman. (5 pages)	04/20/1994	P5 6315 Dup
004. letter	To Michael Heyman from Walter Dellinger. (3 pages)	04/12/1994	P5 6316
005. list	Proposed Negotiating Instructions. (2 pages)	04/1994	P5 6314 Dup

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FOLDER TITLE:

Guam #2 [6]

Van Zbinden
2006-0193-F
vz1184

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United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

MAY 16 1994



Walter Dellinger
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530

Dear Walter:

Thank you for your letter of May 19, 1994, regarding the proposed negotiating instructions for the Guam Commonwealth negotiations.

The thrust of your letter concerns the constitutionality of a mutual consent clause, and thus the extent of autonomy that can be afforded to Guam. You conclude that such a clause would be unconstitutional and suggest revisions to the negotiating instructions to reflect that conclusion.

The issues raised in your letter go to the heart of the political relationship to be established between the United States and Guam. It is therefore critical that we discuss these issues thoroughly before foreclosing any options. As you may know, in both the CNMI Covenant and in earlier Guam Commonwealth negotiations, the United States took the position that at least certain fundamental provisions of the political relationship could be subject to mutual consent -- an approach that is at odds with the position taken in your letter. Accordingly, before adopting an approach that would foreclose flexibility, further discussion of these issues is necessary.

In the meanwhile, in order not to delay further the negotiating instructions, I propose that the instructions be revised to the extent necessary to leave the issues that you have raised open for further discussion. The instructions can then be issued with the understanding that the outstanding issues will be resolved definitively in the near future. I have enclosed a revised version of the instructions that I believe accomplishes this end, and that I would like to proceed with at this time.

I look forward to working with you to resolve the outstanding issues.

Sincerely,

Nike

I. Michael Heyman
Special Representative for
Guam Commonwealth

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PROPOSED NEGOTIATING INSTRUCTIONS
GUAM COMMONWEALTH

1. The United States shall enter into a political relationship with Guam in which Guam shall be an internally self-governing Commonwealth under the sovereignty of the United States, as reflected in the Commonwealth Act.
2. The Commonwealth Act shall allow Guam the maximum amount of governmental autonomy that is constitutionally permissible, consistent with the primary interests of the United States as reflected in these negotiating instructions. The Act shall also provide mechanisms which will allow Guam the greatest constitutionally permissible input regarding any future amendments to the Commonwealth Act.
3. The Commonwealth Act and the Guam Constitution shall guarantee due process and equal protection of the law to all persons to whom the Due Process and Equal Protection Clauses of the United States Constitution apply.
4. The Guam Constitution shall:
 - a. recognize, and be consistent with, the sovereignty of the United States, as reflected in the Commonwealth Act, and the supremacy of those provisions of the Constitution, treaties and laws of the United States that are applicable to Guam pursuant to the Commonwealth Act;
 - b. provide for a republican form of government;
 - c. provide for three branches of government; and
 - d. contain a bill of rights.
5. The Commonwealth Act shall contain a process by which the United States can ensure that the Guam Constitution complies with the applicable requirements of the Commonwealth Act.
6. Recognizing that statehood does not appear to be a viable option for Guam, and that Guam is geographically distant, culturally distinct and economically oriented toward Asia, the Commonwealth Act shall provide mechanisms to ensure that: (a) the application of federal laws and regulations to Guam take into account Guam's unique location and local conditions; and (b) Guam has the opportunity to provide input into future decisions regarding the application of federal laws and regulations to Guam.
7. The Commonwealth Act shall: (a) secure indefinite military base rights consistent with the short and long-range national security interests of the United States; (b) safeguard decisionmaking authority and operating rights of the United States in national security matters; and (c) provide for

appropriate avenues for participation by and consultation with Guam consistent with the national security interests of the United States.

8. The Commonwealth Act shall: (a) safeguard the authority of the United States in matters of foreign affairs that affect Guam; and (b) provide appropriate avenues for participation by and consultation with Guam consistent with the foreign affairs interests of the United States.
9. The Commonwealth Act shall be consistent with applicable provisions of the United States Constitution and other applicable law.

2
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United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

6315

APR 22 1994

Walter Dellinger
Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
Washington, D.C. 20530

Dear Walter:

Thank you for your letter of April 12, 1994, regarding the proposed Negotiating Instructions for the Guam Commonwealth talks. I find your suggestions quite useful, but I do want to emphasize that the Proposed Instructions embrace language of direction, not precise language expected to be contained in a finally acceptable covenant. The directions urged, which have favorably been treated in the White House, are (1) to provide Guam as much autonomy as feasible while protecting important Federal interests, and (2) to bring this negotiation to a conclusion as rapidly as possible.

The direction to provide Guam a good measure of autonomy is premised on a number of factors.

First, Guam is without any meaningful participation in United States elective politics -- Guamanians do not vote for President and have no vote in Congress -- and it is highly unlikely that political integration can ever be obtained through Statehood. Second, Guam is still listed by the United Nations as one of twelve non-self-governing places in the world -- i.e., as a colony. Third, Guam is literally in another world -- it is geographically remote from the rest of the United States (seven hours from Hawaii and three hours from Tokyo), culturally distinct, has a small island environment, and its economy is oriented toward Asia. Finally, Guam serves as an important military base for both the Navy and the Air Force, particularly since the withdrawal of United States forces from the Philippines, and continued availability of Guam sites for these purposes are our highest priority.

In my view, these factors counsel in favor of granting as much autonomy as possible to Guam in exchange for the assurance of indefinite military base rights on the island for the United States. In pursuing this objective, we should be as creative and flexible as reasonably possible, consistent, of course, with the dictates of the United States Constitution and applicable law. Such an approach would be in accord with our democratic

tradition; would recognize the uniqueness of Guam's circumstances; and would safeguard what is, unquestionably, the United States' primary interest in Guam.

With this in mind, I would like to address the two major issues contained in your letter to me.

I.

The first issue concerns whether, and if so to what extent, Guam has the right to be free from Federal laws or interventions with regard to particular subject matters of local concern. Your letter essentially urges that Guam should have no guarantee against future Federal interventions. You fear that the language in Proposed Instructions 1 and 4 (by coupling the words "sovereignty of the United States" with "as reflected in the Commonwealth Act") will limit Federal authority to defense and foreign affairs. You have a similar worry that the emphasis of Proposed Instruction 2 ("allow Guam as much governmental autonomy as possible, consistent with the primary interest of the United States as reflected in these negotiating instructions" implies a like limitation.

I can understand your worry. I agree that the interests of the United States to be protected embrace more than foreign affairs, defense, and due process equal protection, although as I indicated, I believe that defense is the primary one. My problem with your comments, however, are that they go too far at this stage in seeking to protect the right of the United States to intervene in Guam in the future with respect to any matter it chooses. If that is the result I see no change in status ensuing from a Commonwealth Agreement.

What I will be questing for in these regards is a status analogous to a municipality in a Home Rules State, such as California, where a limited number of subject matters are purely local, many are purely state, and the balance require a determination, whether the State interest justifies the intervention into the local arena. I trust that this was the undertaking when negotiating the CNMI. Your letter indicates dissatisfaction with that process (that "pitfalls" and uncertainties were created leading to litigation). I too like certainty, but it is often very hard to achieve if the statutory result is not to be one-sided. You cite the DeLeon Guerrero case negatively. I rather like the way the court phrased the ultimate question:

"... we think it appropriate to balance the Federal interest to be served by the legislation at issue against the degree of intrusion into the internal affairs of the CNMI." 4F.3d 749, 755.

II.

Your second point involves the breadth of due process and equal protection guarantees and a worry that Proposed Negotiating Instruction #3 is too narrow. Please be assured that the Instruction is not meant to be precise and that your notations on the sweep of both the 5th and 14th Amendments are welcomed and will certainly be followed. To address that problem I suggest the following modification to Proposed Negotiating Instruction No. 3:

The Commonwealth Act and the Guam Constitution shall guarantee due process and equal protection of the law to all persons to whom the Due Process and Equal Protection Clauses of the United States Constitution apply.

Again, I thank you for your observations. I hope that this letter clarifies the meanings I attribute to the Proposed Instructions and gives you comfort that my views are within reasonable parameters. Morton Halperin at the White House concurs in my responses. The Office of Legal Counsel, of course, clearly will be involved in drafting and discussions as the negotiation proceeds.

May I treat my redrafting of Proposed Instruction #3 and the "Legislative history" regarding Proposed Instructions #1 and #4 contained in this letter as a sufficient response to your observation so that I can report that the Department of Justice is on board? A response at your earliest convenience would be much appreciated.

A final note: I have inherited a few legal problems at Interior where lawyers still in the Solicitor's Office took defensible positions during the last Administration with which we disagree. It is understandably very hard for them to rework their prior analyses. I hope that this will not be the case here and that you will assure that I will be given sufficient room to seek to attain the Administration's objectives. If you think that it would be useful for us to chat about this now, I stand ready to visit you at your earliest convenience.

Sincerely,



I. Michael Heyman
Special Representative for
Guam Commonwealth



U. S. Department of Justice

Office of Legal Counsel

6316

Office of the
Assistant Attorney General

Washington, D.C. 20530

April 12, 1994

Michael Heyman
Counselor to the Secretary
Room 5129
U.S. Department of Interior
Washington, D.C. 20240

Dear Mike:

As you requested, OLC has reviewed the Proposed Negotiation Instructions for the Guam Commonwealth talks. While we do not presume to rewrite them, we submit the following suggestions which are mostly designed to avoid the pitfalls we encountered in connection with the Commonwealth of the Northern Mariana Islands. Cf. U.S. ex rel. Richards v. De Leon Guerrero, 4 F.3d 749, 754-55 (9th Cir. 1993).¹

We should avoid any language that could support claims by the Guamanians that the relations between the United States and Guam are governed solely by the terms of the Commonwealth Act or that Guam has full legislative authority over all internal matters, and hence that the authority of the United States with respect to Guam is limited to foreign affairs and defense. Similarly, it should be made clear in the text of the Commonwealth Act that the Territory Clause of the U.S. Constitution (art. IV, § 3, cl. 2) applies to Guam (in the Northern Mariana Covenant that reference appears only, but unambiguously, in the negotiating history). We therefore suggest a formula such as that the Commonwealth of Guam shall have the maximum amount of local self-government compatible with the sovereignty of the United States over Guam and the Constitution and laws of the United States.

For the same reason it should be made absolutely clear that the United States has full and undivided sovereignty over Guam. We therefore counsel against the clauses in Proposed Instruction #1 and in Proposed Instruction #4(a) that use the term "the sovereignty of the United States as reflected in the Commonwealth Act." This could lead to the assertion that the Commonwealth Act limits the scope of the sovereignty of the United States over Guam.

¹ For your information, I am attaching a draft report on Covenant interpretation that is indicative of the type of arguments to which the United States may expose itself unless extreme care is taken in the formulation of these provisions.

We would avoid the formula contained in Proposed Negotiating Instruction #2 to "allow Guam as much governmental authority as possible consistent with the primary interest of United States, as reflected in these negotiating instructions". This clause permits the inference that the authority retained by the United States is limited to foreign relations and defense.

Similar problems arise from the Supremacy Clause contained in Proposed Negotiating Instruction #4(a) providing for "the supremacy of those provisions of the Constitution, treaties and laws of the United States that are applicable to Guam pursuant to the Commonwealth Act." The Commonwealth Act cannot limit the application of the Constitution of the United States in Guam. Moreover, if any existing federal legislation now applicable to Guam should terminate under the Commonwealth Act, the repeal should be express. We should avoid litigation and uncertainties resulting from claims that federal statutes are repealed by implication because they are inconsistent with the Commonwealth Act in particular because they are inconsistent with the Commonwealth Act's grant of the right to internal self-government. Whether the proposed Supremacy Clause should have the effect of limiting the applicability of future legislation to Guam is clearly related to the mutual consent issue and would have to be discussed in future instructions dealing with that subject.

The third Proposal Negotiating Instruction would provide that the Commonwealth Act and the Guam Constitution shall guarantee due process and equal protection of the law for all permanent residents and citizens of the United States in Guam, apparently to the exclusion of non-residents and illegal aliens. However, the Due Process Clause of the Fifth Amendment and its Equal Protection element apply to "any person"; the Due Process Clause of the Fifteenth Amendment applies to "any person"; and "the Equal Protection Clause of the Fourteenth Amendment applies to "any person within its jurisdiction." These clauses therefore apply to every person geographically located in Guam, including illegal aliens. Plyler v. Doe, 457 U.S. 202, 210-16 (1982). The Supreme Court has held with respect to Puerto Rico that Due Process and Equal Protection are fundamental provisions of the Constitution that apply of their own force to the unincorporated territories, although the Court did not find it necessary to determine whether those Constitutional guaranties were provided under the Fifth or the Fourteenth Amendment. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7-8 (1982) and the authorities there cited.

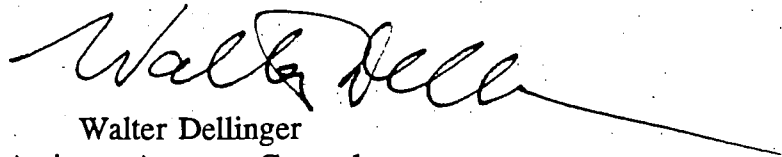
Moreover, the Fifth Amendment and the second sentence of the first section of the Fourteenth Amendment, containing the Due Process and Equal Protection Clauses, have been specifically introduced to Guam by the Act of September 11, 1968, Pub. L. No. 90-497, 82 Stat. 842, 847, 48 U.S.C. § 1421 b(u).

If the Third Proposed Instructions is designed to limit the scope of the Due Process and Equal Protection Clauses to permanent residents and citizens of the United States in Guam to the exclusion of temporary workers and aliens, it would raise serious constitutional problems. It has been held that once a constitutional provision has become applicable to an

area, it cannot be withdrawn by legislation. Downes v. Bidwell, 182 U.S. 244, 261, 270, 271 (1901); Rassmussen v. United States, 197 U.S. 516 (1905), especially the concurring opinions of Harlan, J. and specifically Brown, J. at 536. This is particularly true with respect to provisions of the Constitution that are applicable to an area of their own force.

Please let us know if we can be of further assistance.

Sincerely,

A handwritten signature in cursive script, appearing to read "Walter Dellinger", with a long horizontal line extending from the end of the signature.

Walter Dellinger
Assistant Attorney General

Attachment

cc: Morton Halperin
National Security Council

Wilma Lewis
Associate Solicitor
General Law
Department of Interior

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. form	I-590. [partial] (2 pages)	c. 09/1999	P6/b(6)
001b. form	I-590. [partial] (2 pages)	c. 09/1999	P6/b(6)
002. email	To Fred Duval from Jeffery Farrow. Subject: Scott Busby. (1 page)	04/09/1998	P5
003. email	Duplicate of 002. (1 page)	04/09/1998	P5
004. memo	For John Podesta from Samuel Berger and Mickey Ibarra. Subject: Deterring Chinese Illegal Immigration to Guam. Record ID: 9903101. (2 pages)	07/30/1999	P5 6317
005a. memo	For John Podesta from Samuel Berger. Subject: Deterring Chinese Illegal Immigration to Guam. Record ID: 9903101. (2 pages)	04/24/1999	P5 6318
005b. draft	Memo for John Podesta from Samuel Berger and Mickey Ibarra. Subject: Deterring Chinese Illegal Immigration to Guam. Record ID: 9903101. (1 page)	04/24/1999	P5 6317 Dup

COLLECTION:

Clinton Presidential Records
National Security Council
Multilateral and Humanitarian Affairs (Scott Busby)
OA/Box Number: 2251

FOLDER TITLE:

Guam [1]

Van Zbinden
2006-0193-F
vz553

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
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COPY

THE WHITE HOUSE

WASHINGTON

July 30, 1999

INFORMATION

MEMORANDUM FOR JOHN PODESTA

FROM:

SAMUEL R. BERGER *SJR*
MICKEY IBARRA *Mib*

SUBJECT: Deterring Chinese Illegal Migration to Guam

This is an update on the issue of irregular Chinese boat migration.

In April, to stem the growing numbers of illegal Chinese migrants seeking to reach Guam, we increased our interdiction efforts and decided to take interdicted Chinese to the territory of the Commonwealth of the Northern Mariana Islands (CNMI) for further processing. As you may recall, the Immigration and Nationality Act (INA) does not apply on CNMI, thus making it easier for us to process migrants expeditiously (while continuing to take care that genuine refugees are not returned to China).

Our decisions in those cases have yielded success; there have been no interdictions or arrivals of Chinese migrants in the Guam area since May 29. Of the 537 migrants we interdicted in April and May, 392 were repatriated to China. Ninety-seven were found to have credible asylum claims and are undergoing further processing in the continental United States or Guam. The remainder are either defendants or witnesses in alien smuggling prosecutions that are being brought in connection with these incidents.

Three issues remain. First, there are still 432 Chinese migrants detained on Guam, and the adjudication process available to them under the Immigration and Nationality Act (INA) will take at least six months for most of the cases. As the 432 detainees exceed available detention capacity on the island, we have constructed temporary housing for about 300 migrants in tents at Guam's correctional facility. With the recent arrival of typhoon season, this situation is of growing

concern, and we are working with the Government of Guam to develop permanent structures where these migrants and other future illegal immigrants may be held.

Second, we owe the Government of Guam approximately \$4 million and CNMI approximately \$1 million for the assistance they have provided to date in the implementation of our deterrence strategy. Although there were no funds available in existing budgets to reimburse these governments immediately, the Administration has proposed an amendment to our FY 2000 budget for the Department of Justice that would make such a reimbursement possible. It would also provide prospective funding of \$19.4 million for the continued detention on Guam of Chinese migrants or other illegal aliens.

Third, we must establish a long-term policy towards the processing of Chinese migrants whom we interdict in the vicinity of Guam. The Executive Order which permitted the Department of Justice to detain and process Chinese migrants on CNMI will expire at the end of the calendar year and, while renewal is an option, there are downsides. In particular, the CNMI authorities have sought to exploit our use of the territory in these cases to bolster their arguments against our efforts to extend the INA there. The NSC, in collaboration with the Office of Intergovernmental Affairs, will be convening an interagency meeting to develop options that are consistent with the President's proposal to extend federal immigration law to the CNMI.

To: BUBBY

3101
SCHWARTZ

6318

ERIC -

Possible to
update John
on status?

Q

THE WHITE HOUSE
WASHINGTON

April 24, 1999

INFORMATION

MEMORANDUM FOR JOHN PODESTA

FROM:

SAMUEL BERGER

SUBJECT:

Deterring Chinese Illegal Migration to Guam

John - per your
question at Staff
meeting. Sam

The Coast Guard interdicted a boat carrying approximately 175 Chinese illegal migrants west of Guam last night. This is the third such boat in the past week. One boat holding 147 Chinese was taken by Coast Guard to the Northern Marianas Islands late last week. Another with 108 Chinese landed directly in Guam at the same time. Guam now has close to 600 Chinese illegal migrants on its soil, roughly 100 more than its detention capacity. Coast Guard believes more may be on the way.

The root of the problem is that we have had difficulty in expeditiously repatriating Chinese migrants from Guam. U.S. immigration laws apply on Guam, and these make it virtually impossible to process quickly Chinese migrants who apply for asylum. Justice is seeking to address this problem by investing greater adjudication resources, but this will not cure the problem entirely.

Consequently, we have sought to bring the people aboard the two vessels we have interdicted to the Northern Marianas Islands, where our asylum procedures do not apply. We believe that migrants can be processed there within a two to three-week period. Those Chinese who appear to have credible asylum claims will be brought to Guam for further processing; the rest will be repatriated. Justice is also seeking to identify for prosecution those migrants involved in the smuggling rings.

We also intend to demarche the Government of China in the next few days to see whether it can do more to target alien smuggling rings in China and deter these migrant vessels from departing China.

Let's get on with this.
LH

3101

HAS

concern, and we are working with the Government of Guam to develop permanent structures where these migrants and other future illegal immigrants may be held.

Second, we owe the Government of Guam approximately \$4 million and CNMI approximately \$1 million for the assistance they have provided to date in the implementation of our deterrence strategy. Although there were no funds available in existing budgets to reimburse these governments immediately, the Administration ~~plans to~~ proposed an amendment to our FY 2000 budget for the Department of Justice that would make such a reimbursement possible. It would also provide prospective funding for the continued detention on Guam of Chinese migrants or other illegal aliens. *Make of \$9.4 million*

ok
of \$19.4 million
Third, we must establish a long-term policy towards the processing of Chinese migrants whom we interdict in the vicinity of Guam. The Executive Order which permitted the Department of Justice to detain and process Chinese migrants on CNMI will expire at the end of the calendar year and, while renewal is an option, there are downsides. In particular, the CNMI authorities have sought to exploit our use of the territory in these cases to bolster their arguments against our efforts to extend the INA there. The NSC, in collaboration with the Office of Intergovernmental Affairs, will be convening an interagency meeting to develop options that are consistent with the President's proposal to extend federal immigration law to the CNMI.

Date: 7-20-99

NSC Log # 3101

To: MR. IBARRA

Please sign / initial for concurrence or approve the attached document and return to NSC West Wing Desk (in Situation Room) or call 6-9425 for pick up.

Thank you.

see page two
Please revision
Whitely
NSC West Wing Desk
(B)

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	Summary of Conclusions for Meeting of the NSC Deputies Committee. Subject: Summary of Conclusions for DC Meeting on Migrant-Burden Sharing. (2 pages)	08/26/1999	P1/b(1)
001b. list	Deputies Committee Meeting, August 26, 1999, Attendees [partial] [CIA Act] (1 page)	08/26/1999	P3/b(3)
001c. draft	Summary of Conclusions for Meeting of the NSC Deputies Committee. Subject: Summary of Conclusions for DC Meeting on Migrant-Burden Sharing. (1 page)	08/26/1999	P1/b(1)
001d. draft	Summary of Conclusions for Meeting of the NSC Deputies Committee. Subject: Summary of Conclusions for DC Meeting on Migrant-Burden Sharing. (2 pages)	08/26/1999	P1/b(1)
001e. draft	Summary of Conclusions for Meeting of the NSC Deputies Committee. Subject: Summary of Conclusions for DC Meeting on Migrant-Burden Sharing. (2 pages)	08/26/1999	P1/b(1)
002. memo	From William Treanor to James Baker. Subject: Authority to Implement Burden-Sharing Plan for Migrant Operations at Guantanamo and Other Overseas Facilities (8 pages)	04/02/1999	P1/b(1)
003a. form	Routing Sheet. Annotated. (1 page)	04/24/1999	P5
003b. draft	For John Podesta from Samuel Berger. Subject: Deterring Chinese Illegal Migration to Guam. Record ID: 9903101. (1 page)	04/24/1999	P5 6318 Dup
003c. draft	Duplicate of 003b. (1 page)	04/24/1999	P5 6318 Dup

COLLECTION:

Clinton Presidential Records
National Security Council
Multilateral and Humanitarian Affairs (Scott Busby)
OA/Box Number: 2251

FOLDER TITLE:

Guam [2]

Van Zbinden
2006-0193-F
vz523

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003d. draft	Duplicate of 003b. (1 page)	04/24/1999	P5 6319
004. demarche	Chinese Migrant Smuggling to Guam. (4 pages)	04/23/1999	P1/b(1)
005. draft	Mémo for John Podesta from Samuel Berger. Subject Deterring Chinese Illegal Migration to Guam. (1 page)	04/23/1999	P5 6319 Dup

COLLECTION:

Clinton Presidential Records
National Security Council
Multilateral and Humanitarian Affairs (Scott Busby)
OA/Box Number: 2251

FOLDER TITLE:

Guam [2]

Van Zbinden

2006-0193-F

vz523

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

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C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

6319

THE WHITE HOUSE

WASHINGTON

INFORMATION

MEMORANDUM FOR JOHN PODESTA

FROM: SAMUEL R. BERGER

SUBJECT: Deterring Chinese Illegal Migration to Guam

The Coast Guard interdicted a boat carrying approximately 175 Chinese illegal migrants west of Guam last night. This is the third such boat in the past week. One boat holding 147 Chinese was taken by Coast Guard to the Northern Marianas Islands late last week. Another with 108 Chinese landed directly in Guam at the same time. Guam now has close to 600 Chinese illegal migrants on its soil, roughly 100 more than its detention capacity. Coast Guard believes more may be on the way.

The root of the problem is that we have had difficulty in expeditiously repatriating Chinese migrants from Guam. ^① ~~This is partly because the Department of Justice has not invested extensive resources into the adjudication of immigration cases on Guam. Justice is now addressing that deficiency. More importantly, U.S. immigration laws apply on Guam, and these make it virtually impossible to process quickly Chinese migrants who apply for asylum. Justice is seeking to address this problem by investing greater adjudication resources, but this will not cure the problem entirely.~~ *Justice has just added resources to*

Consequently, we have sought to bring the people aboard the two vessels we have interdicted to the Northern Marianas Islands, where our asylum procedures do not apply. We believe that migrants can be processed there within a two to three-week period. Those Chinese who appear to have credible asylum claims will be brought to Guam for further processing; the rest will be repatriated. Justice is also seeking to identify for prosecution those migrants involved in the smuggling rings.

We also intend to demarche the Government of China *in the next few days* as soon as possible to see whether it can do more to target alien smuggling rings in China and deter these migrant vessels from departing China.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. report	Guam Commonwealth bill. Section by section analysis (52 pages)	n.d.	P5 6320
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COLLECTION:

Clinton Presidential Records
Presidential Personnel
Liz Montoya
OA/Box Number: 9658

FOLDER TITLE:

Guam Commonwealth [2]

Jamie Mettrailer
2006-0193-F
jm600

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
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GUAM COMMONWEALTH BILL
SECTION-BY-SECTION ANALYSIS

Preamble

Summary of Original Provision. The preamble describes the motives of "the people of the United States" in embracing the establishment of the Commonwealth, making reference to the Treaty of Paris, the UN Charter, and the principle of self-determination. It also describes the motives of "the people of Guam," who seek greater self-government "in concert" with the U.S.

Status. UNCERTAIN. The preamble has not been discussed by Guam's representatives (hereinafter CSD) with the Federal Interagency Task Force (hereinafter Task Force or Feds), but both the 1989 and 1993 Task Force Reports have expressed misgivings about some of the language.

Guam Position. The Preamble articulates the Guamanians' aspirations for greater self-government within a continuing and improved union with the U.S. Underlying the right of self-determination for the Chamorro people is the fundamental principle that governments derive their just powers only from the consent of the governed. This principle is echoed in statements in the Treaty of Paris and the United Nations Charter that direct the U.S. to take into account the civil rights, political status and aspirations of the people of Guam.

Federal Position. Federal misgivings arise because: (1) the reference to "the right of self-determination ... of the Chamorro people" might appear to endorse the Chamorro-only vote (about which there is disagreement in connection with section 102(a)); and (2) the reference to Guam acting "in concert" with the United States implies that they are equal parties, and that the Commonwealth Act is akin to a bilateral treaty. As an alternative, The 1993 Task Force Report suggests language that was used in the Northern Mariana Islands Covenant: the "establishment of a self-governing Commonwealth of Guam within the American political system."

TITLE I - POLITICAL RELATIONSHIP

Section 101(a) - Creation of Commonwealth Government

Summary of Original Provision. Creates the Commonwealth of Guam and identifies the supreme laws of the island.

Status. AGREEMENT, as modified by language that clarifies that Guam will remain "under the sovereignty of the United States" (See Attachment 1).

Section 101(b) - Self-Government and Guam Constitution

Summary of Original Provision. Guam shall have "full" self-government and its Constitution shall be consistent with the sovereignty of the U.S., provide for a republican form of government, provide for 3 branches of government, and contain a bill of rights.

Status. DISAGREEMENT on: (i) the adjective "full" to describe "self-government"; and (ii) the need to have Congressional approval of the Constitution. (See Attachment 1).

Guam Position. CSD objects to Congressional approval of the Guam Constitution essentially because it is perceived as demeaning. Further, Guam insists that it must have "full" self-government and its new proposal for subsection (d) (which refers to Guam's "inherent powers") would serve to ensure that result. During the discussions, the CSD's intent appeared to focus on carving out a sphere of federal non-interference over matters purely "internal" to Guam. The negotiations were unable to reach mutually acceptable definitions of "full" or "internal."

Federal Position. Both the 1989 and 1993 Task Force Reports make clear, the need for Congressional approval of the Commonwealth Constitution, based on prior precedent (discussed in detail in the reports), and the need to insure Guam's compliance with the elements required to be included in the Constitution pursuant to Section 101(b). As to the modifier "full" for self-government, the Task Force objects because the term creates ambiguity, particularly when other modifiers of the term elsewhere in the legislation differ. The Task Force objection is based, principally, on the Northern Mariana experience, which suggests that the term "full" could be used in later litigation to diminish the authority of the United States.

Section 101(c) Commonwealth Power to Sue and Be Sued

Summary of Original Provision. The Government of the Commonwealth shall have the power to sue in its own name and be sued for breach of contract and tort.

Status. AGREEMENT as modified by the addition of legislative consent to be sued as "evidenced by enacted law." (See Attachment 1)

Section 101(d) Public Education System/Inherent Powers

Summary of Original Provision. Refers to the Commonwealth's power to establish, maintain and operate a public educational system.

Status. AGREEMENT to delete the original subsection dealing with creation of a public educational system as unnecessary. DISAGREEMENT as to the CSD's proposed new subsection (d), dealing with the "non-waiver" of the "inherent powers of the Commonwealth of Guam."

Guam Position. The CSD's rationale for this new language was to support its view that the Guam Commonwealth Government would be created with "full" self-government. Although it has disclaimed it, Guam may also desire to express a concept akin to the Tenth Amendment of the U.S. Constitution -- i.e. powers not expressly delegated to the Federal Government are expressly reserved to the respective States, or to the people. For Task Force criticism of application of 10th Amendment to Guam, see 1989 Report, pp. 21-24.

Federal Position. The CSD's proposed (d) is objectionable for the same reasons stated in regard to subsection (b) above: uncertainty as to its meaning, and its likely use to assert unintended and expanded authority of the new Commonwealth.

Comment. It is likely that Congress would insist upon approval of the Guam Constitution, as it always has in similar contexts. Further, Justice would probably insist on deleting both "full" and the new subsection (d) to avoid mischief-making litigation.

Section 102. Chamorro Self-Determination and U.S. Citizenship.

Subsection 102(a) - Chamorro Self-Determination.

Summary of Original Provision. Congress recognizes the inalienable right of self-determination by indigenous Chamorros, who are defined as those born on Guam before

August 1, 1950, and their descendants. The act of self-determination shall be provided in Guam's Constitution.

Status. DISAGREEMENT (See Attachment 2).

Guam Position. The Chamorros, as a culturally unique people, possess the inalienable moral and human right to exercise self-determination. They have been deprived of this right from the time Spain colonized Guam in the 16th century. Guam and her people have been oppressed and kept in a subservient, colonial status by Spain, Japan and, most currently, the United States. Under the broad, plenary power given to Congress to govern the U.S. territories, Congress has authority to provide a Chamorro-only vote under the Territorial Clause.

Federal Position. Both the 1989 and 1993 Task Force Reports state unequivocally that this restriction on voting to permit a Chamorro-only vote would be unconstitutional under the Fifteenth Amendment. The 1989 report also states that it would violate the Fourteenth Amendment. See generally the 1993 report, pp. 12-14; the 1989 report, pp. 8-12. The 1989 report also discusses alternative processes that would recognize the Chamorros' special status in Guam, but it was concluded that these alternatives would be constitutionally objectionable as well. In response to the Territorial Clause arguments, the Task Force responded in 1993 (p. 14) by contending that Congress must exercise its Territories Clause power in subordination to other applicable provisions of the Constitution and that the 14th and 15th Amendments do apply to Guam.

Comment. From the Chamorro perspective, this is the single most important provision in the entire Commonwealth proposal, without which the initiative would be meaningless. The Task Force's position on this issue was largely dictated by the Justice Department. Although Chamorro self-determination has not been defined, it is generally understood as a vote to decide the ultimate political status of Guam in which only the Chamorro people participate.

Section 102(b). Voting to Ratify Commonwealth.

Summary of Original Provision. The subsection provides that "notwithstanding the provisions of" section 102(a), no qualified voter will be deprived of the right to participate in a local referendum to ratify the Commonwealth Act.

Status. UNCERTAIN, BUT PROBABLE AGREEMENT.

The Task Force opposed this subsection because its reference to section 102(a) implies an endorsement of the Chamorro-only vote. Although the matter has not been discussed, the CSD may no longer require this subsection because it has advanced a new provision (in Title XII) which sets forth the procedure for ratifying the Commonwealth.

Section 102(c) Federal Programs For Chamorros

Summary of Original Provision. Requires new Federally-funded programs and authorizes the Commonwealth to promote programs targeted toward the enhancement of economic, social and educational opportunities for Chamorros and to protect their language and culture.

Status. SUBSTANTIAL AGREEMENT as modified (see Attachment 3). DISAGREEMENT by the Task Force on two points.

Federal Position. The Feds believe, first, that the responsibility imposed upon the United States should not be mandatory; and secondly, that the 1991 language which would have the Congress authorizing Guam to adopt Chamorro programs is of dubious constitutionality based on the Supreme Court's conclusion in City of Richmond that the Fourteenth Amendment confers remedial powers on the Federal Government that are withheld from the States and other governmental bodies. See generally the 1989 report, pp. 12-13; the 1993 report, pp. 15-16.

Section 102(d) Continued Eligibility Under Existing Programs

Summary of Original Provision. Provides that new programs under (c) will not affect eligibility of all minorities under existing programs.

Status. AGREEMENT (See Attachment 3).

Section 102(e) No Impairment of U.S. Citizenship Rights

Summary of Original Provision. Confirms that the Act and the Constitution of Guam do not impair U.S. citizenship or the rights of legally admitted permanent residents.

Status. AGREEMENT that the subsection can be eliminated as unnecessary (See Attachment 4).

Section 102(f) Chamorro Land Trust

Summary of Original Provision. Requires the Government of Guam to establish a Chamorro Land Trust for the benefit of

indigenous Chamorros, comprised of lands returned to Guam by the U.S. Authorizes return or lease of lands to original owners.

Status. DISAGREEMENT. (This is one of the provisions "reneged" on by the Bush Administration).

Guam Position. This is a rehabilitative provision for the Chamorro people, whose lands were taken from them by the Spanish and later by the United States after World War II.

Federal Position. In its 1989 report, the Feds supported this subsection, noting that to pass constitutional muster the language must be carefully drafted. There followed CSD-Task Force agreement on language (see Attachment 32 to the 1993 report), which differs only slightly from subsection (f) in the bill. But following the Metro Broadcasting decision of the Supreme Court, the Justice Department changed its position and the 1993 report therefore opposes the subsection as being race-based. (See 1993 Report, pp. 16-19.)

Comment. The Guam Legislature passed a Chamorro Land Trust law several years ago. Until recently, the Governor had not implemented it due to concerns about whether the law violated Guam's Organic Act. However, in the face of growing criticism from the indigneous rights community and in light of a local court decision upholding validity of the law, the Governor recently implemented the law by appointing a Chamorro Land Trust Commission. The early activities of the Commission have been controversial locally, in part due to "original landowners" arguing for the return of their lands and conflict within the Chamorro community regarding priorities for homesteading. It is not clear if the CSD will elect to include Section 102(f) in future discussions.

Section 102(g) Residency Requirements

Summary of Original Provision. Provides that the Commonwealth Constitution shall establish reasonable residency requirements for voting and elective office.

Status. DISAGREEMENT. The subsection was the subject of modified language, which included a durational element (not to exceed three years) and also brought eligibility for public assistance within its scope. (See Attachment 5).

Guam Position. The CSD argued that durational elements were necessary in order to counteract the adverse effect of "transient" elements of the population (e.g. military servicemen) skewing local election results.

Federal Position. The Feds could have agreed with the original subsection (g), but felt constrained to disagree with the 1991 revision because it permits a durational requirement, which is constitutionally unacceptable, and it refers also to public assistance recipients, using language that is uncertain in its application. The Feds suggested alternative language in the Second Task Force Report which focused on "bona fide" residency rather than durational requirements. (See 1993 Report, p. 21)

Section 103. Mutual Consent

Summary of Original Provision. Provides that the United States will not modify the Guam Commonwealth Act unless it has the consent of the Government of the Commonwealth of Guam. (There is also a "mutual consent" principle in Section 202).

Status. DISAGREEMENT. (See Attachment 5).

Guam Position. Mutual consent is one of the two foundations of the Commonwealth Act (Chamorro self-determination being the other). Mutual consent is crucial for at least three reasons. First, since the hallmark of a colonial relationship is the lack of consent and lack of participation by the governed, mutual consent constitutes a step towards the "decolonization of Guam" by the U.S. Second, in the absence of formal institutional participation by Guam in the federal policy-making process (it does not have Senators or voting Representatives in Congress, it cannot cast electoral votes for President), the principle of mutual consent provides Guam with meaningful input in federal decisions that affect Guam. Finally, mutual consent is an important way to provide a sense of permanence to the structure of the Commonwealth relationship that is negotiated between Guam and the U.S.

Federal Position. This is one of the major subjects of disagreement between the CSD and the Feds. The Feds agreed in the 1989 report to require Guam's consent for the amendment of four sections of the Commonwealth Act--sections that go to the foundation of the Commonwealth--just as was done in 1976 in connection with the Commonwealth of the Northern Marianas. The Justice Department agreed to perpetuate this position in 1991-1992, but only if Guam would agree to it. When Guam did not agree to such a compromise, Justice had the Feds say in the 1993 report that no compromise was possible; that the Northern Marianas were unique (as a former UN trusteeship) and thus no precedent; and that no Congress can bind a successor. Ergo, the 1993 report opposed section 103 and offered no compromise.

Comment. Guam continues, apparently, to insist on mutual consent to all provisions--even though there are some subjects (the courts being an obvious example), where the United States needs unfettered legislative authority. It is possible, and perhaps even likely, that the Justice Department can be prevailed upon to return to its 1989 position. (The 1989 report contained cases supporting the propriety of the United States making a binding commitment to Guam, at pp. 17-18.) It is also possible that sections beyond the four to which we earlier agreed could be made the subject of mutual consent. There is much room for discussion here. But the United States cannot agree to mutual consent on all provisions of the Commonwealth Act.

TITLE II - APPLICABILITY OF FEDERAL LAW

Section 201. Applicability of the United States Constitution.

Summary of Original Provision. In addition to particular provisions of the U.S. Constitution that already apply to Guam, Section 201 provides for the application to the Commonwealth of additional Constitutional provisions: Article IV, section 2, clause 2; Article IV, section 4; the Tenth Amendment; and the first sentence of the Fourteenth Amendment. (See 1989 Report, pp. 19-24 for discussion of provisions).

Status. SUBSTANTIAL AGREEMENT on a modified list of provisions, with the Feds dissenting on two points. (See Attachment 7).

Federal Position. As modified in Attachment 7, section 201 contains a bracketed phrase to which the Feds object--that certain provisions of the U.S. Constitution shall apply "except as otherwise provided by Congress in this Act." The Feds say it creates confusion, because there are no exceptions expressly provided for in the Act; the CSD says it needs the language, to give it full authority under various sections of the Act. In addition, after the Feds had agreed to the remainder of the language of Attachment 7, they decided that they wanted also to include express reference to the Territorial Clause--so as to avoid the controversies over that point that had arisen in the Northern Marianas. The CSD would not agree to the addition. The U.S. position is elaborated upon at pp. 28-29 of the 1993 report.

Section 202. Effect of Federal Law (Mutual Consent)

Summary of Original Provision. The section provides that no Federal law, rule, or regulation will apply to Guam unless Guam consents.

Status. DISAGREEMENT. (See Attachment 8).

Guam Position. This is the second form of the "mutual consent" principle. The reasons raised by the CSD in support of this section are similar to those advanced for the Mutual Consent provision of Section 103 -- i.e. step towards decolonizing Guam and giving Guam greater participation in the federal process. From a practical perspective, this provision is also intended to protect Guam from Federal laws, rules and regulations whose application to Guam is perceived to be inappropriate

in light of the island's unique geographic, economic, social, environmental and physical conditions.

Federal Position. No section created such consternation among Federal agencies as did this section--with dozens of agencies reporting nightmares along the lines of: Congress passes a law providing benefits; Guam consents to its application to Guam; Congress amends the law to reduce the benefits; Guam refuses to consent. There were many variations of this example, leading to the clear prospect that two sets of laws and two of regulations would exist, with one of each applicable to Guam and the other applicable to the rest of the United States. The Task Force also maintains that this provision is inconsistent with the sovereignty of the U.S and would undermine Congressional authority under the Territorial Clause of the Constitution.

Comment. As alternatives to Section 202, the Feds offered: (a) a fast-track review process for Federal laws that the Governor recommends should not apply to Guam because of the island's unique circumstances (See Attachment 9); (b) a special appeals process regarding the application of federal regulations to Guam (See Attachment 10), and (c) a general legislative proposal providing State-like treatment for Guam, unless Guam is expressly named in the law as a recipient of different treatment (See 1993 Report, p. 31).

On fast-track - Although this alternative was proposed by the Feds, the 1993 Report stated that this program is still under review by the Administration.

On regulations appeals - DISAGREEMENT.

On State-like treatment - NOT YET DISCUSSED WITH CSD

Obviously the United States cannot agree to section 202 as introduced. The CSD has not shown any willingness to compromise on this subject. It is not clear that the CSD understands how remarkably generous the fast-track proposal is. OMB in January 1993 grew nervous about endorsing the process again, as it had done in 1989 (see p. 30 of the 1993 report) but there is some hope that OMB could be persuaded to do so if again approached. Further, because both the regulatory appeal provision and the State-like treatment provision confer benefits on Guam (see pp. 30-31), it ought not to be hard to persuade the CSD to accept them.

Section 203. Joint Commission.

Summary of Original Provision: Four Guam and three federal officials would form a commission, funded by the U.S., to conduct regular consultations and negotiations with U.S. on all matters affecting the relationship between Guam and the U.S.; to recommend modification of federal laws; and (via last sentence of Sec. 1002) to declare federal property excess.

Current Status: NO COMMENT. The 1993 report withheld comment on this section, saying it was still under review. First and Second Task Forces disagreed with the bill's version, and recommended instead a Guam-only commission to replace the Joint Commission proposal, most of which was agreed to by U.S. and Guam.

Guam Position: Originally argued that Guam would need a Joint Commission, with delegated federal powers, to be the sole vehicle for handling Executive Branch relations with the new Commonwealth and for settling major issues such as excess land, Jones Act, etc. Present federal mechanisms are unable to effectively address Guam's needs.

Federal Position: A Joint Commission, the majority of whose members the Governor of Guam would have appointed, would have been authorized to make decisions on matters reserved to federal officers, including determination of excess federal property under sections 1002 and 1003(c), and coastwise laws under section 901(c). These raised constitutional problems for Justice. It would have eliminated DOI or any successor federal entity as the lead agency in the Federal Government on matters affecting Guam. Additionally, the authority of the Secretary of the Interior under the Guam Organic Act (Title 48, U.S.C. 1421a) would have been repealed by section 1203(b).

The Joint Commission's authority for access to federal documents was too broad and its expenses were unrestricted, while the U.S. would have borne all of the Commission's costs. Federal powers to be assumed by Joint Commission should remain with appropriate federal agencies mandated by law to carry them out.

Comment: The revised version (see Attachment #11), most provisions of which had been agreed upon, creates a Guam-members only commission, with study, review, and recommendation powers, under the authority of the

Government of Guam. It eliminates many of the problems federal officials saw. Areas of minor disagreement in the revised version are bracketed.

Section 204. Delegation of Authority.

Summary of Original Provision: Congress would authorize the President or his designee to delegate to Governor of Guam total or partial performance of functions now vested in administrative agencies in the Federal Government.

Status: AGREEMENT. Both the Task Force and the Guam CSD have recommended (see Attachment 13) that Section 204 be amended and the revised version of the provision, which gets around federal concerns, be adopted by Congress.

Guam Position: The enforcement of federal statutes 9,000 miles away from the seat of the Federal Government presents serious problems, especially in the case of federal agencies whose activities on Guam do not warrant the maintenance of a field office there. If Guam is going to have to carry out some of these responsibilities, it needs specific authority.

Federal Position: Justice argued that under the Appointments Clause of the Constitution (Article II, Section 2, Clause 2) Federal statutes may be enforced only by officers of the United States, i.e., persons who have been appointed by the President, with the advice and consent of the Senate, or in the case of inferior officers, if authorized by Congress, the President alone, the courts of law, or the heads of departments. Buckley v. Valeo, 424 U.S. 1, 119-141 (1976).

The Governor of Guam is not appointed in conformity with the Appointments Clause, and Congress therefore cannot authorize the President to delegate to the Governor of Guam the power to execute the Federal laws. The Appointments Clause, however, can be met, if Congress authorizes the President or the heads of Departments to appoint the Governor of Guam or officers of the Government of Guam as officers of the United States charged with the enforcement of the pertinent Federal laws on Guam.

TITLE III - FOREIGN AFFAIRS AND DEFENSE

Section 301. U.S. Authority for Foreign Affairs and Defense.

Summary of Original Provision. The U.S. would have responsibility and authority for foreign affairs and defense that affect the Commonwealth of Guam.

Current Status: GENERAL AGREEMENT. (See Attachment #14). U.S. Constitution grants this authority to the United States and the bill would make this clear. Disagreement over precise extent of U.S. authority.

Guam Position. Under other provisions of the draft bill, the U.S. would "share" its authority with Guam, allowing the Commonwealth to enter treaties with sovereign states and to join international organizations. Moreover, U.S. defense powers would be limited under Commonwealth, for example by section 302, and, therefore, not complete.

Federal Position. Federal officials to date have generally resisted the sharing of, or the restrictions on, Federal authority that Guam seeks in this section. The Federal argument is that these are incompatible with the Federal government's constitutional authority over foreign affairs. Moreover, the CNMI Commonwealth Covenant states the U.S. has "complete authority" for these functions. If the word is omitted in Guam's provision, which is otherwise the same as the CNMI's, the implication could arise that a lessening or limitation of U.S. defense and foreign affairs authority was intended. This should be avoided by the addition of the word "complete" before "responsibility" in the first line of the revised provision. This word is bracketed to indicate Guam's disagreement with its use.

Comment. This is the obverse of the section 101 argument over "full self-government" (which Guam wants) versus "maximum amount of self-government consistent with the laws of the United States" (which federal officials want). It is a reflection of the larger undecided question of where the line will be drawn in a commonwealth relationship between Guam's powers and authorities and those of the federal government.

Section 302. Consultation with Guam.

Summary of Original Provision. Subsection (a): The U.S. will consult with Guam before signing treaties or

agreements which affect Guam; (b) no military security zones or foreign military personnel on the island without Guam's approval (except in case of war) and no new U.S. bases without consultation with Guam; (c) no increases/decreases in DOD activities without consultation with Guam.

Current Status. AGREEMENT in principle on (a); DISAGREEMENT with (b); AGREEMENT in principle with (c). The general agreements on elements of this provision are in the form of a series of principles (see Attachment #16) that would underlie a revised international affairs and defense consultation provision. These are intended to guide the drafters of legislative language. No specific legislative language has been agreed to.

Guam Position. U.S. international agreements as well as global and regional defense activities often affect Guam significantly and occasionally adversely. The Commonwealth needs to be consulted by U.S. policy-makers and Guam's opinion seriously considered in the decision-making process before these pacts and actions are made. On some crucial issues - security zones, foreign personnel - Guam needs to have the power to disapprove, if necessary.

Federal Position. State and Defense maintain they usually consult with Guam officials, consistent with national security interests, before taking actions that could impact the island. But some consultations and certainly the approval requirements which Guam seeks would seriously hamper the U.S. ability to respond to international crises. The U.S. cannot agree to the "security zone" and "foreign personnel" provisions requiring Guam's approval, but is willing to agree to required consultation, consistent with national security, with Guam on these issues. If the U.S. is to assume responsibility to defend Guam as part of the U.S., then it must have the same rights and powers that it has elsewhere in the U.S.

Comment. Guam and federal officials attempted to get around the bill's language by working out a series of principles that could be agreed on and later fleshed out with legislative language. If these principles still meet Guam and U.S. acceptance, they could be expanded and form the basis of a new agreement on principles.

Section 303. U.S. Consular and Trade Offices:

Summary of Original Provision: (a)(1) The U.S. will help Guam set up offices in U.S. and abroad; (a)(2) U.S. will help Guam become a member of or participant in regional

and other international organizations (including South Pacific Forum and Asian Development Bank). Guam shall be free to accept financial and technical assistance from these organizations, enter agreements with members of these groups and other sovereign states, relating to trade and tax questions; (b) U.S. will obtain from foreign countries favorable treatment for exports from Guam.

Current Status. AGREEMENT on (a)(1); DISAGREEMENT with major parts of (a)(2); AGREEMENT with (b).

Guam Position. (a)(1): If Guam controls immigration, it will need to set up counselor offices abroad to help visitors obtain visas, alien worker permits, etc. To continue the promotion of tourism and investment in Guam, additional trade and tourism promotion offices also will be needed abroad.

(a)(2): Because of the increasing economic and cultural ties between it and the Asia-Pacific region, Guam needs to join regional organizations in its own name, participate in their aid programs in its own right, and negotiate tax and trade agreements with sovereign states. The U.S. should share its authority with Guam in these areas to enable the island to develop an international identity and to benefit from these regional associations.

(b): The U.S. can also help Guam's economic development by urging the international community to provide favorable treatment for Guam exports.

Federal Position. (a)(1): Consular offices would not be needed if the Federal Government can reach a compromise agreement on the immigration provision. U.S. is ready to assist Guam to set up offices abroad to promote tourism, economic, and cultural interests. These target areas should be specified in provision.

U.S. also sought qualifier "as appropriate" because it will not be able to provide assistance in those foreign states which the U.S. does not recognize and with which the U.S. does not maintain friendly relations. Qualifier will also clarify that the U.S. will not be expected to provide financial assistance to Guam for the establishment of these offices.

To signify their general agreement (see Attachment #17) Guam and Federal officials signed an agreement on this section³203(a)(1). Guam wanted the words "shall" and "as appropriate" bracketed because they had not fully accepted the U.S. position. ✓

(a)(2): While the U.S. will continue to assist Guam in joining regional organizations for which Guam is qualified, the U.S. cannot force organizations whose rules limit membership to sovereign states to accept Guam. The rules of the South Pacific Forum and Asian Development Bank - of which Guam wishes to be a member - currently restrict membership to nations that are responsible for their foreign affairs. The U.S. supports Guam's participation in appropriate international groups, and will consider requests on a case-by-case basis.

The federal position recognizes that Guam can enter certain types of international agreements of a non-governmental, commercial, or cultural character. But a grant of independent authority to Guam to conclude tax and trade treaties with sovereign states is incompatible with the Constitutional authority of the federal government, and could create confusion as to the U.S. guaranteeing that its constituent parts comply with U.S. treaty obligations. The U.S. will consider negotiating the tax and trade agreements Guam seeks with other sovereign states. Guam would participate as part of the U.S. delegation.

(b): The U.S. has agreed to help Guam gain favorable treatment for its exports from foreign states under various trade preference programs, but Guam preferred not to sign any agreement on this issue because of the impasse over the other international activities issues in this section.

Comment. The State Department has steadfastly resisted an outright grant of authority for international activities and offers a case-by-case approach for Guam's membership in international organizations and the negotiation of treaties.

Section 304. Nuclear, Chemical, and Other Toxic Wastes.

Summary of Original Provision. (a) U.S. shall not use Guam land or surrounding water for storage or dumping of nuclear waste; (b) U.S. shall make safe for human habitation all DOD chemical waste dump sites on Guam and shall not store hazardous chemicals on Guam or in its surrounding waters; (c) U.S. shall compensate, as the District Court of Guam decides, anyone injured by nuclear, chemical, or other hazardous material stored, used, or disposed of by U.S. agencies on Guam or in its waters.

Current Status. DISAGREEMENT. Federal and Guam officials

have drafted separate legislative language to address the goals of this provision. See Attachment #35, which contains the limited language federal officials could support as well as the more expansive language proposed by the Guam CSD.

Guam's Position. Due to the large number of defense installations on Guam and the historic use of Guam bases in World War II and the Cold War, the people of Guam have more reason to prevent the federal government from dumping or improperly using toxic waste than most other U.S. communities. And Guam has more reason to provide legal means for cleaning up past dump sites and compensating those who may have suffered injuries from U.S. use, storage or dumping of nuclear and other toxic wastes. Therefore, Guam needs language in the bill that would create a special case, comprehensive legal regime to protect the people and rectify past practices.

Federal Position. The U.S. maintains that the objectives of this section of Guam's bill are largely achievable through the application of existing U.S. statutory and regulatory requirements as well as international agreements the U.S. has concluded.

Federal officials objected to the language of the original provision because it was ambiguous, contradictory, unspecific, and generally did not conform to existing statutory language. The Guam CSD substantially revised its language and clarified its terms. But its second draft, according to Federal officials, adopted an approach that was overly specific, overly encompassing and confusing. The multiplicity of references to Federal agencies and departments, and citations to some but not all applicable Federal laws created further ambiguity and confusion.

It has been the Federal view that Guam's attempt to create a special legal regime to deal with toxic wastes different from those regimes that apply across the nation is a major problem. It creates, for example, a different standard of liability for injuries arising on Guam from Federal actions than exists for the rest of the nation. Justice argued, for example, that there was no sound justification for providing a significantly different tort liability regime for citizens of Guam than for the citizens of any state or territory of the U.S.

Comment. Despite the disagreements over specific language, Federal officials agree in substance with principles underlying all three provisions, but disagree

with Guam's language and overly specific approach.

TITLE IV - COURTS

Section 401. Judicial Relationship of Guam to the U.S.

Summary of Original Provision. Judicial relations between Guam courts and U.S. courts with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters and proceedings shall be governed by U.S. laws establishing the relationship between Federal courts and State courts.

Current Status. AGREEMENT. (See Attachment #18 for agreed to language on the courts.) Section 401 for the most part tracks the language of Guam's Organic Act (48 U.S.C. 1424-2) on this matter with one major difference - a requirement that for the first 15 years following the establishment of an appellate court of Guam, the U.S. Court of Appeals for the Ninth Circuit shall have jurisdiction to review by writ of certiorari all final decisions of the highest court of Guam from which a decision could be had. The Ninth Circuit review would be in lieu of review by the U.S. Supreme Court.

Guam's Position. Guam maintains a 15-year period is unnecessary and far too long. It has offered a mechanism for shortening the period upon reexamination of the competence of the appellate court of Guam, but seeks no more than a five-year period.

Federal Position. Justice argues that during the formative years of the new appellate court and while it established its institutional traditions, all decisions of that court should be reviewable by a court of appeals which is familiar with the local conditions rather than on a discretionary basis by the Supreme Court. However, there are mechanisms for shortening the period. Moreover, Justice officials were willing to further limit the proviso to cases involving a Federal question and to provide that appellate review would be as of right and not on writ of certiorari. Guam was not willing to agree, so this provision in the draft language is bracketed.

Section 402. Jurisdiction of the District Court.

Summary of Original Provision. Guam's District Court shall have the jurisdiction of a district court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28, United States Code, and that of a bankruptcy court of the United States.

Current Status. AGREEMENT with one bracketed clause. The language of this section generally tracks the Guam Organic Act's language and therefore is acceptable to Justice. The parties agreed to drop subsection (a), which "continued" the District Court, as unnecessary and agreed to add the words "and have such other jurisdiction as may be expressly provided by this Act." But DISAGREEMENT remains over the federal proposal to add the words "and any additional special jurisdiction given it [District Court] by Congress."

Guam Position. Guam opposes the addition of this special jurisdiction clause, arguing that it might be construed as authorizing the enactment of federal legislation applicable only to Guam that would detract from the jurisdiction of the local courts of Guam. Guam suggested modifying the clause with the words "provided that any additional exclusive jurisdiction applies generally to all District Courts of the United States, unless otherwise agreed."

Federal Position. Justice would not accept that qualifier, arguing it would render the Federal proposal useless, because it is by definition addressed to problems limited to Guam. The reason for the Federal proposal, Justice argued, is that it might become necessary or desirable, again to confer on the Guam District Court jurisdiction over claims against the U.S. that arise exclusively on Guam, for example, claims stemming from federal land acquisition on Guam after World War II.

Section 403. Applicable District Court Rules.

Summary of Original Provision. Federal rules of practice and procedure are applicable to the Guam District Court.

Current Status. AGREEMENT. The bill language parallels language in the Guam Organic Act and is acceptable to Justice. See Attachment #18 for agreed language.

Section 404. District Court Judge, U.S. Attorney, Marshal.

Summary of Original Provision. The President shall appoint a judge for District Court of Guam for a 10-year term, as well as the U.S. Attorney and U.S. Marshal.

Current Status. AGREEMENT. Parallels language in Guam Organic Act and is acceptable to Justice, with minor updating of references. See Attachment #18 for language.

Section 405. Judicial Transition. (Formerly Section 1203(c)).

Summary of Original Provision. Sets the date on which the Guam Appellate Court assumes appellate jurisdiction of the District Court of Guam. This would repeal the judicial provisions - sections 22 through 24 - of the Guam Organic Act either on the effective date of the Constitution of Guam, if the Appellate Court authorized by section 22A is operating, or 90 days after the operation of the Appellate Court is certified by the Governor of Guam to the Chief Judge of the U.S. Court of Appeals of the Federal Circuit.

Current Status. AGREEMENT with bracketed language. By mutual agreement, this provision was moved from Title X (it was formerly part of section 1203(c) of the draft Act) to this section because it deals with the relations of the Guam courts to Federal courts. Areas of disagreement deal with the process of certification and are indicated by brackets in the agreed to language. See Attachments #18 and 38. Justice officials believed the certification should be jointly by the Governor and the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit.

Section 406. Rules of Decision Act. (Formerly Section 1201(b)).

Summary of Original Provision. Provided that U.S. courts, when ruling upon the laws of the Commonwealth, will give the same deference to the laws of the Commonwealth as they give to the laws of the several States.

Current Status. AGREEMENT with bracketed language. This section deals with the Rules of Decision Act which provides generally that the laws of the several States shall be regarded as rules of decision in civil actions in U.S. courts. There have been differing opinions on the issue by Federal courts. (See 1993 Report, pages 52 and 53.) Agreed language is Attachment #19.

Guam's Position. Because of differing rulings on this issue by U.S. courts, the provision needs to be specifically set out by law to guide future U.S. court decisions regarding the choice of law when ruling on the laws of the Commonwealth.

Federal Position. Justice agrees with Guam that this is a necessary provision, but disagrees with the bracketed language ("as it has been interpreted through the day prior to the effective date of this Act") arguing if the Rules of Decision Act applies to Guam, it should apply in the same way in which it applies to the States and that its applicability should not be frozen as of a specific time.

TITLE V - TRADE

Section 501. Guam-United States Free Trade Area.

Summary of Original Provision: Guam would remain outside the U.S. customs territory, and have unrestricted entry of products to the U.S. market under a free trade area agreement. Products of Guam will be defined as those having 30 percent "value added" on Guam, as certified by the Governor of Guam.

Current Status: SUBSTANTIAL AGREEMENT on a compromise version with some bracketed language. The previous Administrations would not accept the bill's version, arguing, among other points, that the proposed "free trade area" could allow Guam to become a virtually unrestricted "pass through" for foreign products in violation of U.S. quota rules and regulations. (1993 Report, pp. 54,55). See Attachment #20 for agreed to language.

Guam Position: Guam said its bottom line interest was that potential export investors in Guam have increased "certainty" that U.S. customs treatment of their products would not change once a company set up operations to ship goods to the U.S. under the General Note 3(a)(iv) program. Guam did not want the rules to change, as they had in the past with watch and textile assembly plants, thus driving those companies out of business.

Federal Position: The Second Task Force (with USTR) developed an alternative proposal (Attachment #20) that would provide for reciprocal free trade between Guam the U.S. customs territory with the certainty Guam sought. The rules of origin for Guam products would be the same as the rules of origin contained in the North American Free Trade Agreement. This alternative was generally agreed to by Guam and the U.S., but some areas of disagreement remain.

TITLE VI - TAXATION

Section 601. Mirror Image Tax.

Summary of Original Provision. The bill would permit Guam to enact a local income tax to replace the income tax provisions of the Internal Revenue Code (IRC) of 1986 which serves as a "mirror image" income tax on Guam.

Current Status: Agreement with principle, but no mutually accepted language. Federal officials agree with the major principle - that Guam should develop its own local income tax to replace the IRC". The 1986 Tax Reform Act provided for the development of local territorial codes to replace the IRC "mirror codes". But federal negotiators have disagreed with Guam on the details of implementing the federal requirements necessary by law for local codes to replace IRC "mirror codes".

Under the authority of the 1986 Tax Reform Act, the Guam Tax Code Commission has been negotiating with the U.S. Treasury Department for the past several years to develop Guam's own code. Hence, language for legislation that would supplant this title is being developed through separate negotiations among the Guam CSD, Guam Tax Code Commission, and the U.S. Treasury Department.

Guam Position: Guam Commission agrees in general with the separate negotiations approach, but also wanted to negotiate under the commonwealth framework several principles to which any future tax agreement between the U.S. and Guam would have to adhere. Guam's interest is in developing a local tax that is better suited to its needs, maximizes revenue to the local government, avoids double taxation, etc. Guam's proposed principles are contained in Attachment #44.

Guam argues the goal of commonwealth discussions is to change U.S. laws with respect to Guam, and that the commonwealth negotiation framework, therefore, is the mechanism to set out the principles which should guide Treasury in working with Guam.

Federal Position: The U.S. has supported the intent of this title, i.e., having local codes supplant the IRC, if the federal requirements detailed in the 1986 Tax Reform Act were met. In particular, they require that the local tax generate the same amount of revenue as would have been raised under the current mirror code system, and that no provision in the new code may discriminate against any U.S. person or any resident of any other U.S. jurisdiction. Some of

these requirements remain at issue between Guam and the U.S. tax negotiators.

The second Task Force disagreed with Guam's proposal to negotiate several principles in the commonwealth context that would guide the separate negotiations between Guam and Federal tax officials. In part the disagreement stemmed from the view that Treasury has the statutory authority to conduct these negotiations and in part from Federal officials' belief that some of Guam's proposed principles conflict with the requirements for local codes set out in the 1986 Tax Reform Act. Therefore, the 1993 Report offered no official recommendation on this section.

Comment: This section is complicated by the fact that Treasury officials by law have the lead on tax negotiations with the territories, have not welcomed other federal officials' attempts to "guide" their work, and have objected to Federal agreement to "principles" which conflict with 1986 Tax Reform Act requirements or with which Treasury does not agree being imposed on their on-going discussions with Guam.

Note: The following additional elements of a new Guam tax code, contained in the draft Act, need to be negotiated and worked out under the terms, conditions, and concerns expressed above.

SECTION 602. ENFORCEMENT INSTITUTIONS: Provides for criminal penalties for violation of Guam tax code and further provides that Guam shall have a lien, like the U.S. has, with respect to local income tax.

SECTION 603. REBATE OF TAXES: Guam can provide for the rebate or reduction of taxes collected by it as an incentive to bringing new industries to the island to stimulate economic development.

SECTION 604. GUAM INCOME TAX AUTHORITY: Guam has full authority to set nature and amount of taxes to be collected from persons within its jurisdiction, from whatever source derived.

SECTION 605. TAX EXEMPTION FOR GUAM BONDS: Guam bonds will be exempt from taxation by the U.S. or by any State or territory, including the District of Columbia.

TITLE VII - IMMIGRATION

Section 701. Guam Immigration Authority.

Summary of Original Provision. In order to limit the number of immigrants to Guam, Congress grants the Commonwealth of Guam the authority to control entry of all aliens into the island. Federal immigration law will apply for a 2-year transition period after Commonwealth is enacted. Thereafter, locally-enacted immigration laws will apply. Among other things, local authority over immigration shall not impair the free movement of U.S. citizens between Guam and the U.S., shall not include naturalization of aliens for U.S. citizenship, and shall not make Guam a port of entry into the U.S. for permanent resident aliens (for purposes of calculating duration of physical presence in U.S. prior to naturalization).

Current Status. DISAGREEMENT (this is one of the provisions "reneged" on by the Bush Administration in the Second Task Force Report).

Guam Position. Initially, CSD argued for sole control of immigration by the Commonwealth government, citing two grievances: (i) U.S. immigration policies which resulted in massive in-migration of permanent resident aliens to Guam without the input or consent of Guam leaders; (ii) unduly restrictive U.S. policies that constrained the availability of temporary alien workers to satisfy the labor demands of Guam's burgeoning tourism-based economy. Subsequently, the CSD agreed to the Task Force's proposals to retain U.S. authority over immigration and amend selected immigration laws to address Guam's concerns (See Attachments 22 and 23). When the Second Task Force Report failed to incorporate these agreements, Guam accused the U.S. of reneging on the prior negotiations.

Federal Position. The Task Force has never agreed to giving Guam authority over immigration. Federal control of immigration was particularly important for Defense, which cited national security concerns, and for Congress and the Department of Labor, which cited problems arising from the CNMI's control of immigration. In particular, Labor's concern focused primarily on the relaxed temporary worker provisions -- it argued that relaxing such standards would lead to a situation on Guam similar to that in the CNMI, where: (a) there were wide-spread and egregious violations of health, safety and minimum wage laws; and (b) the great demand for a cheap and easily exploitable labor force resulted in the number of temporary alien laborers outnumbering the local

permanent population. Due to Labor's objections, OMB directed the Second Task Force to omit comment on this entire section in its report.

Comment. There should be more flexibility to deal with these issues. Not only are there new appointees in the Department of Labor who might be more sympathetic to Guam's needs, but the labor situation in the CNMI has improved significantly in recent months -- e.g. working and living conditions in textile factories have improved; workers are being paid their agreed-upon wages in a timely manner; and the CNMI Government is in the process of enacting minimum wage and labor reform laws. Further, Congressman George Miller, chairman of the House Natural Resources Committee having jurisdiction over insular issues and the most vociferous critic of CNMI labor abuses in Congress, will be leading a congressional delegation on a tour of Guam, CNMI, American Samoa and Palau in early January, 1994. If the delegation finds that significant improvements have been made in the CNMI, this may release political pressure on the Department of Labor to oppose the relaxation of temporary alien worker provisions for Guam Commonwealth.

If Labor is persuaded to change its position, the Clinton Administration could adopt the Second Task Force's last signed agreement with the CSD (which already has the support of Justice via INS). The essence of the agreement is two-fold:

Breaking the "Chain" of Permanent Immigration. The CSD wanted to stop the ability of permanent alien residents on Guam to file petitions for their relatives. The U.S. wanted to make sure that the rights of U.S. citizens and members of the U.S. Armed Forces to petition for relatives were not diminished. This was accomplished by retaining the right of U.S. citizens and members of the U.S. Armed Services to bring spouses and children to Guam. However, permanent resident aliens residing on Guam were given a two-year period from the date the Commonwealth Act is made effective within which to petition for spouses and unmarried children. After this two-year grace period, the "immigration chain would be broken" and permanent resident aliens on Guam would no longer be permitted to petition for relatives. Related provisions of the Immigration and Naturalization Act were conformed similarly to make Guam less attractive to immigrants. For example, the U.S. District Court's jurisdiction to naturalize aliens was restricted to aliens who fell within the permitted categories of Section 701. Also, Guam would no longer be considered part of the U.S. for purposes of calculating the duration of a permanent resident

alien's physical presence for naturalization, thereby making Guam less attractive to prospective immigrants. (See Attachments 22 and 23).

Expanding Temporary Alien Worker Program. As a result of Guam's burgeoning economy, the CSD wanted the ability to bring temporary alien laborers to work in Guam's hotel, restaurant and tourism-related industries. Unfortunately, current INS laws permit temporary alien laborers only in temporary positions (e.g. agricultural and construction jobs). They are not permitted in permanent positions (restaurant and hotel positions fall within this category). The Task Force and CSD had agreed to broaden Section 101(a)(15)(H) of the INA (8 USC Section 1101(H)) to eliminate the distinction between "temporary" and "permanent" positions by adding a new section which allows alien workers to be admitted to Guam "if unemployed persons capable of performing such services or labor cannot be found in Guam." (See Attachments 22 and 23).

Section 702. Guam-Only Visa.

Summary of Original Provision. Section would authorize U.S. consular officials to issue non-immigrant visas for travel only to Guam to encourage foreign investment and tourism.

Status. UNDER REVIEW by CSD.

Guam Position. Purpose of this section is to encourage tourists and investors, especially those from the Asia-Pacific region, to come to Guam. The tourist-development aspect of this provision has already been satisfied, in large part, by the separate passage of the "Guam Visa Waiver" program (Section 2, P.L. 98-454 codified at 8 U.S.C. 1182(l)). The investor-development aspect, however, still needs to be strengthened.

Federal Position. The Guam Visa Waiver Program satisfies the entire intent of this proposal. It waives the visa requirement for visitors from selected countries coming solely to Guam for a period not exceeding 15 days for business or pleasure. Countries that have qualified for this program include: Australia, Brunei, Darussalm, Burma, Indonesia, Japan, Malaysia, Nauru, New Zealand, Papua New Guinea, the Republic of Korea, Singapore, the Solomon Islands, the United Kingdom, Vanuatu and Western Samoa. As of August 1993, Taiwan has been

added to the list of countries qualifying for visa waiver into Guam only.

Nevertheless, in order to accommodate further the CSD's request regarding the encouragement of foreign investment in Guam, the Task Force has proffered a new provision that would allow foreign investors to come to Guam to direct and develop businesses in which they have invested a substantial amount of capital. As of the publication of the Second Task Force Report, the CSD had not yet responded to the proposal.

Comment. It has become apparent that Guam wants more than the waiver of temporary visas from selected countries for 15-day visits to Guam. It also wants to provide longer-term non-immigrant visas for foreign investors who come to Guam to develop and direct an operation in which they have invested a substantial amount of capital and which would benefit the economy of Guam. Guam appears to want something that is a cross between the existing non-immigrant "treaty-investor E-2" program (8 U.S.C. 1101(a)(15)(E)(ii)) and the newly-enacted immigrant investor provisions (8 U.S.C. 1153(b)(5)). Because the Task Force has previously offered a proposal on this issue, this concept should be acceptable to the Federal Government. Future negotiations should focus on the content of the provision -- e.g. permissible length of the visa; dollar amount necessary to qualify as "substantial investment"; number of jobs required to be created by the venture; and role of Government of Guam vis-a-vis the U.S. Attorney General/INS in setting the conditions of the program.

Section 703 Preservation of Authority

Summary of Original Provision. None. This is a new provision proffered by the CSD during the negotiations with the Second Task Force. (See Attachment 23). The proffered provision attempts to retain the Government of Guam's power to enact immigration and nationality laws should a future Congress modify or repeal Section 701.

Status. UNDER REVIEW by Task Force.

Guam Position. CSD wants this provision as a fall-back provision to ensure that the Guam Commonwealth Government would have authority to enact its own immigration and nationality laws should a future Congress repeal Section 701.

Federal Position. To the extent that this provision is an attempt to bind the actions of future Congresses, the Federal concerns would be similar to

those raised with the "mutual consent" provisions.
See Section 103 (Mutual Consent) and Section 202
(Effect of Federal Law).

Comment. There is probably room for movement here,
similar to that described for the mutual consent
provisions.

TITLE 8 - LABOR

Section 801. Federal Employment.

Summary of Original Provision. Provides a preference in Federal employment in Guam to residents of Guam possessing requisite standards of age, health, character, education, knowledge and experience.

Status. AGREEMENT as modified (See Attachment 24).

Guam Position. The CSD argued that there was discrimination against local residents in the filling of U.S. civil service positions on Guam and that a preference for locals was required to provide a better balance.

Federal Position. Notwithstanding allegations about discrimination against locals, the Task Force maintained that there existed a de facto preference for local hires in Guam for federal civil service positions. Nevertheless, the Task Force believed that a statutorily mandated preference was appropriate for two reasons: (a) it would confer a benefit on U.S. citizens and nationals who are residents of Guam; and (b) it would be conducive to fiscal economy by saving on relocation costs of off-island hires.

Comment. In relevant part, the agreement (Attachment 24) provides the following refinements: (a) that the preference applies only to new Federal employees hired in Guam (not transfers of existing federal employees from off-island); (b) that the term "qualifications" was substituted for "age" and other standards because of Federal prohibition on age discrimination; (c) that Federal anti-discrimination laws in employment continue to apply in Guam; and (d) that the preference for veterans and spouses of military personnel continues to apply and takes priority over the preference to residents of Guam provided for in the section. In addition the agreement adds a paragraph providing a remedy in Federal court for persons claiming to be aggrieved.

Section 802. Guam Labor Laws.

Summary of Original Provision. Authorizes the Guam Commonwealth Government to enact and enforce labor laws to replace existing Federal labor laws. All applicable Federal laws which regulate employment on Guam will remain in effect until replaced by local laws.

Status. AGREEMENT as modified (See Attachment 26).

Guam Position. Because of the island's proximity to Asian and Pacific labor markets, there is a need for flexibility in designing competitive yet responsible employment laws.

Federal Position. The original language gives rise to great uncertainty as to what constitutes "U.S. laws applicable to employment on Guam" and to what extent such laws are replaced or superseded by locally-enacted Guam labor laws. In light of the CNMI's labor abuses, the Task Force was also concerned that Guam's control of labor laws was intended to provide for less stringent employment standards in order to make Guam a more attractive/competitive labor market for foreign investment.

Comment. The Second Task Force and CSD agreed upon substitute language (Attachment 26). Attachment 26 allows the Government of Guam to assume responsibility for enacting and enforcing employment laws in Guam if they meet certain conditions. Guam must submit its proposed legislation or regulation to the Secretary of Labor. Upon consultation with any other Federal agency that may be affected, the Secretary of Labor may approve the legislation or regulation provided that it includes standards and enforcement mechanisms as stringent as the Federal laws and regulations which it supplants or provided that the Secretary finds that the Guam legislation or regulation is required by compelling conditions in Guam. In addition, the Secretary of Labor must find that Guam has provided an agency with sufficient funds, legal authority and staff to enforce the local law. The Secretary of Labor is given 180 days to approve or to disapprove a proposed Guam statute or regulation. Upon approval, the corresponding Federal law or regulation that would otherwise apply is superseded.

TITLE IX - TRANSPORTATION AND TELECOMMUNICATIONS

Section 901. Maritime Shipping (Jones Act).

Summary of Original Provision. This section would allow (1) the use of certain foreign-built vessels in Guam's waters and in the EEZ surrounding Guam; (2) a limited exemption for Guam from the Jones Act for shipping fish; (3) a periodic review of Federal coastwise laws in order to determine the desirability of continuing their application to Guam.

Status. DEFERRED at the CSD's request, pending the resolution of outstanding litigation brought by Guam against certain shipping companies.

Guam Position. Guam relies almost exclusively on the shipping industry to provide the bulk of its food supplies, equipment, building material and other necessities. U.S. cabotage or coastwise shipping laws, such as the Jones Act, adversely impact Guam's economy and are largely responsible for the high cost of living on Guam. Among other things, such laws have encouraged a shipping monopoly among certain sea carriers and have allowed them to price-gouge the Guam market. Containers of materials from the West Coast to Guam, for example, are priced significantly higher than containers of the same materials from the West Coast to Japan or Taiwan. At the same time, such laws prevent Guam from taking advantage of much less expensive shipments from the closer Asian markets.

Federal Position. The Department of Transportation's Federal Maritime Commission has been stringently opposed any relaxation of U.S. cabotage laws in regard to Guam. The primary argument is that exempting Guam would set a slippery precedent which would encourage coastal States to seek similar exemptions, thereby undermining U.S. cabotage laws.

Comment. The recent agreement on GATT (General Agreement on Tariffs and Trade), which lowers a broad array of trade barriers worldwide, may cause the independent repeal of the Jones Act and other U.S. cabotage laws.

Section 902(a). Airlines.

Summary of Original Provision. Authorizes the Governor of Guam to sponsor any qualified air carrier to serve Guam. Exempts Guam from all bilateral treaties between the U.S. and foreign countries with regard to scheduling, technical specifications of aircraft and charter passenger flights to or from Guam that originate in foreign countries.

Status. DISAGREEMENT. See Attachment 45 (CSD Proposal); Attachment 45 (Joint Proposal); Attachment 55 (Task Force Proposal).

Guam Position. Guam has a growing economy based largely on tourism, which is enhanced by its central "hub" location in relation to Asia-Pacific Rim countries. Under existing procedures, air carrier service to and from Guam have been determined pursuant to bilateral treaties between the U.S. and foreign countries. Guam is permitted neither to observe nor participate in negotiations of such treaties, which have substantial impact on Guam's economy. Issues such as routes, carriers and scheduling are often decided without regard to the unique needs and requirements of Guam. Section 902 is generally intended to encourage increased air flights between Guam and foreign countries and allow those decisions to be made by Guam rather than the U.S.

Federal Position. The Task Force generally agrees with increasing Guam's role in the process of determining air service that directly impacts the island. The Task Force, however, objects, to the proposed elimination of DOT's role regarding the approval of foreign carriers on grounds that questions of safety, economic fairness, and consistency with current aviation agreements of the United States will be slighted in the absence of DOT procedural review. DOT also believes that Guam should be required to take affirmative steps to intervene in proceedings in which it is interested rather than receive the status of an automatic party. The Task Force opposes the CSD request for party status in international aviation negotiations on grounds that the Assistant Secretary--Territorial and International Affairs participates in the negotiations and represents Gov Guam's interests.

Section 902(b). Essential Air Service.

Summary of Original Provision. Continues Guam as an "eligible point" for essential air service.

Status. AGREEMENT as modified (See Attachment 27).

Section 902(c). Domestic Air Routes.

Summary of Original Provision. Requires domestic air carriers to obtain the concurrence of the Governor of Guam on applications for new, additional, or changed routes to Guam.

Status. DISAGREEMENT.

Guam Position. Guam should have increased input and participation in decisions regarding air service to the island.

Federal Position. The Federal Task Force opposes this provision on grounds that DOT is statutorily responsible for this matter. DOT maintains that Federal regulation is necessary for assessments of convenience, public safety, and national security. In addition, the Task Force opposes this provision because, as a practical matter, Guam does exercise a degree of control over the service provided by carriers through its control of the airport.

Section 903. Telecommunications.

Summary of Original Provision. Defines Guam as a "domestic" point for purposes of setting telecommunication rates by the Federal Communications Commission.

Status. DISAGREEMENT.

Guam Position. Guam intended the original language to force the FCC to treat Guam as a domestic point. It was hoped that this would lower the costs of telecommunications between Guam and the U.S. After the 1989 Task Force Report, the CSD withdrew the original bill language on grounds that its initial proposal was not in the best interests of Guam (see Comment below).

In 1992, the CSD presented a revised proposal (see Attachment 46) which exempted Guam from FCC jurisdiction and gave Guam authority over virtually all matters pertaining to interstate and

foreign communications services in Guam with the FCC restricted to an advisory role. The CSD argued that Guam's unusual telecommunications situation, with its historic role as a connecting point for international communications, justified this treatment.

Federal Position. The Task Force expressed sympathy with some of Guam's concerns about pricing policy but opposed the CSD proposal. The Task Force suggested deleting section 903 from the bill entirely on grounds that current law gave the FCC sufficient flexibility to deal during the administrative process with the special considerations governing telecommunications issues in Guam. Since Guam is currently pursuing a separate solution to this issue through an administrative process with the FCC, the Task Force declined to sign the CSD's new proposed language. (See 1993 Report, pp. 70-73)

Comment. Long distance telephone calls between Guam and the U.S. are treated as international calls and are therefore considerably more expensive than domestic long distance calls. This price differential prompted the original language of Section 903. In analyzing this provision, however, the 1989 Task Force Report concluded that the application of domestic rate-making formulas to non-contiguous areas would probably result in local intra-island calls becoming more expensive. The local telephone company, the Guam Telephone Authority (GTA), discovered a heavy subsidization of local calls by long distance calls -- although island telephone traffic consisted of 90% local calls and 10% long distance calls, 60% of its revenue came from long distance calls and only 40% came from local calls. Guam was prompted to withdraw the original language when it estimated that application of the FCC's domestic tariff formulas to Guam would result in increasing the costs of local calls from \$12 per month to \$32 per month.

TITLE X - LAND, NATURAL RESOURCES AND UTILITIES

Section 1001(a) Eminent Domain Power By Guam.

Summary of Original Provision. Commonwealth Government shall have power of eminent domain over all property within Commonwealth consistent with Guam Constitution.

Status. AGREEMENT (as modified by Attachment 28).

Guam Position. As a duly constituted government, the Commonwealth of Guam should have the power of eminent domain within the island.

Federal Position. Agreed to Guam position, but noted that an affirmative statement of this power is unnecessary in Commonwealth Bill and may be more appropriate in the Guam Constitution. Nevertheless, for sovereignty reasons, the Task Force argued that Guam's eminent domain power should not extend to federal landholdings in Guam. The CSD agreed and language to this effect was signed by both parties. (See Attachment 28).

Section 1001(b) Control over Exclusive Economic Zone (EEZ).

Summary of Original Provision. Confers on Commonwealth Government jurisdiction over all resources in the 200-mile EEZ, including rights to determine the conditions and terms of pollution control, marine scientific research, management, exploration and exploitation.

Status. DISAGREEMENT.

Guam Position. Because of oil spills, toxic waste disposal and nuclear waste dumping in the ocean, Guam seeks to maximize its ability to prevent pollution within the EEZ. Guam also seeks maximum economic benefits that may accrue from whatever marine and mineral resources exist in the zone. During discussions between the CSD and the Second Task Force, Guam often cited its historical and cultural ties to the surrounding waters, its distance from the United States and its need to develop a diverse economic base as reasons to assert control over its EEZ.

Latest Guam Proposal. Guam shall have jurisdiction over all living and nonliving resources within the EEZ, including the licensing of exploration and

exploitation of such resources and the control of pollution. Separate provisions transfer the current authority of Commerce (over living resources), Interior (over nonliving resources) and the EPA (over environmental regulation) to the Commonwealth Government. Each transfer of authority includes: (a) the transfer of federal fees generated by the management and licensing of the particular activity; and (b) the development of Guam's own management, conservation and legal regime for the covered activity so long as such regime is consistent with federal law and international obligations. (See Attachment 48, CSD Proposal, unsigned).

Federal Position. Although the Task Force agreed with the principle that Guam should benefit economically from the exploitation of the EEZ, it had serious concerns about giving Guam the ability to enact, administer and enforce its own laws within the EEZ. Citing numerous federal laws and regulations as well as international treaties and agreements that apply on a uniform basis to all domestic EEZ's, the Task Force argued that the provision would create insurmountable problems of coordination, enforcement and regulation by federal agencies currently charged with management of the EEZ. The Task Force also was concerned that the confusion stemming from inconsistencies between Guam laws and federal/international provisions would weaken the present regulatory structure. Finally, the Task Force was concerned that there was no mechanism to ensure that Guam laws would be at least as stringent as existing federal/international laws.

Latest Federal Proposal. The Task Force offered Guam a working partnership in the fisheries management of the EEZ and the cover over of all federally collected revenues derived from the exploitation of fisheries in the EEZ. Guam would be allowed to develop its own EEZ management and conservation regime, consistent with federal law, "in cooperation with, and through the auspices and structure of, the Western Pacific Regional Fishery Management Council." Federal jurisdiction is expressly asserted over the U.S. EEZ surrounding Guam. (See Attachment 56, Task Force Proposal, unsigned).

Comment. There was no agreement on this section, with Guam arguing for comprehensive authority within the EEZ and the Task Force willing to give authority only with respect to fisheries and the transfer of fisheries fees. There may be room for compromise if each side can set aside concepts of "sovereignty" (which seem to underlie each side's position and form the basis of conceptual

disagreement) and focus instead on each side's specific economic and regulatory interests.

Sections 1001(c) and (d) Federal Eminent Domain Power

Summary of Original Provision. Section 1001(c) states that during times of peace, the only way the Federal Government can acquire land on Guam is by voluntary means through negotiation with landowners. Acquisitions would occur only after authorized by Congress and if appropriated funds are available. Section 1001(d) states that during times of war, federal eminent domain power can be exercised, but only in compliance with the applicable provisions of U.S. and Guam Constitutions and laws.

Status. DISAGREEMENT. Although there was a signed agreement regarding Section 1001(c), which deleted reference to "voluntary means" (see attachment 29), the two sides are at opposite poles regarding the scope of federal eminent domain power. Guam argued that such power should only be exercised in times of war and that at all other times only voluntary means can be used. (See Attachment 30). The Task Force tried to accommodate Guam's sensitivity by proposing that federal land acquisitions will be done by voluntary means unless it becomes impracticable, in which case the U.S. would use its eminent domain powers, whether or not there is a declaration of war. (See Attachment 31).

Guam's Position. This is a a very sensitive issue for Guam. It derives much of its force from the Chamorros' collective memory of massive military land takings on Guam immediately after World War II and the perception that such takings were, if not illegal, then at least morally unjust -- e.g. fair market value was not offered for the property; Navy officials "took advantage" of the Chamorro people's patriotism and sense of gratitude after the war; Chamorro landowners did not have the benefit of legal representation; the courts hearing condemnation cases were staffed by U.S. Naval personnel; the military's unfulfilled promise to give land back to the original owners once its mission was accomplished (which is an especially sore point now, given the military's diminished need for Guam lands and the unused nature of federal lands on the island).

Federal Position. Driven primarily by Defense, the Task Force strongly believed that federal eminent domain power on Guam should not be unduly restricted. First, limiting the use of federal eminent domain powers only to times of war would severely hamper the military's ability to quickly provide for the

national defense, especially since the United States has not officially declared war since 1941. Second, the U.S. as a sovereign nation, has the inherent right and therefore the ability, to condemn property during peace time, albeit as a last resort.

Comment. This will be difficult to resolve. On one hand, the federal interest in retaining eminent domain powers in war or peace appears directly related to fundamental interests it has in Guam -- i.e. national security and continued sovereignty. On the other hand, Guam's interest in limiting such powers is directly related to one of the driving forces behind Guam's quest for greater self-determination -- i.e. absolute federal control and ownership of large portions of Guam and lingering perceptions that military condemnation of such lands were unfair at the outset.

Section 1001(e), (f) and 1002. Return of Excess Federal Land.

Summary of Original Provision. Section 1001(e) exempts Guam from the application of any Federal regulations pertaining to the transfer of excess lands and authorizes the transfer of future excess lands to Guam without conditions, limitations or reversion clauses. Section 1001(f) lifts all restrictions imposed on excess lands previously transferred to Guam. Section 1002 mandates that all federal lands on Guam "not necessary for direct and continuous operational, logistical, or security use" shall be transferred as excess real property to the Commonwealth Government. Such lands would be transferred at no cost to Guam, or at the fair market value of such lands when originally acquired by the Federal Government. Final determination as to what Federal lands are excess shall be made by the Joint Commission (a body consisting of Federal and Guam representatives, the majority of whom represent Guam interests -- see Section 203).

Status. DISAGREEMENT.

Guam Position. The CSD believes that excess federal lands ought to be returned to Guam as quickly, as unconditionally and as cost-free as possible. It also believes that the military unfairly condemned one-third of Guam after World War II and that it promised that the land would be returned when no longer needed. The CSD argues that much of this land is underutilized or unused by the military. This is land that Guam, because of its small size and growing economy and population, desperately needs for a variety of public purposes. Additionally, the Guam Government is chafing under conditions and restrictions imposed on the use of excess lands previously returned by the Federal Government. In

particular, Guam has problems with restrictions imposed on 927 acres of land returned for port purposes that required that 70% of the proceeds from the sale or lease of such lands be reimbursed to the Federal Government.

Guam's last proposal (see Attachment 47) is essentially similar to the original Section 1002, except that: (a) decisions on whether Federal lands are "excess" shall be made pursuant to consultations between a Joint Consultative Group (composed wholly of Guam members) and the Federal agency holding title to such lands; and (b) the issue of whether and to what extent Federal land use restrictions/conditions are lifted will be referred to a Joint Consultative Group for recommendations; and (c) the Government of Guam is expressly authorized to return such lands to a Chamorro land trust and/or the original Chamorro land owners.

Federal Position. The Task Force's concerns with these provisions can be summarized as follows: (a) they place decision-making on what constitutes lands excess to Federal needs in the control of a Commission controlled by Guam interests; (b) Guam's proposal makes no allowance for the Department of Defense's long-term or contingency uses of such lands for national security purposes; (c) vesting such authority in a Guam-controlled commission violates the Appointments Clause of the Constitution (local officials making Federal decisions); and (d) elimination of use restrictions undermines legitimate national security, public safety and economic concerns.

The Task Force's last proposal (see Attachment 57) is similar to one recommended in the First Task Force Report -- i.e. the U.S. will periodically review its land needs in Guam and will release property determined excess pursuant to existing statutes, with the proviso that it will take into account Guam's recommendations and strive to eliminate as many restrictions as possible from the conveyance documents.

Comment. The return of excess Federal land remains a major factor behind Guam's quest for greater self-determination. The long-standing unresolved land issues between Guam and the U.S. are sources of the current tension in Federal-territorial relations. Several events will occur in the upcoming months which, depending upon their outcome, may lead to a successful resolution of land issues or greatly exacerbate the frustrations of both sides. In no particular order, these are as follows: (a) whether

Congressman Underwood's excess lands bill (H.R. 2144), which will return to Guam 3,200 acres of federal lands declared excess in 1977, will be passed in the upcoming session of Congress; (b) the public perceptions and substantive results of the so-called Guam Land Conference scheduled for mid-January 1994 in Guam and the follow-up meetings contemplated in Washington and California; (c) the outcome of the Fish and Wildlife Service's final decision by March 1994 on the designation of Critical Habitat versus a Wildlife Refuge Overlay; (d) the result of the Department of Defense's "Guam Land Use Plan '94", which seeks by March 1994 to identify additional military lands no longer needed for military purposes; (e) whether the Governor's office and the Fish and Wildlife Service can agree on the creation of access easements through and/or the transfer of title to Ritidian Point; and (f) the resolution by the National Park Service of private and public land-inholdings within the boundaries of the 2,000 acre War In the Pacific National Historical Park in Guam.

Section 1003. Access to Federal Property.

Summary of Original Provision. The Joint Commission is given authorization to determine which recreational and historic sites on Federal property should be open to the public. Also, Commission shall determine what roadway easements over Federal property should be available to the public in cases where such easements are the only practicable means to reach recreational or historic areas.

Status. AGREEMENT on principle of public access to and use of recreational and historical sites and roadway easements on Federal property, "so long as the security of military installations and operational military requirements are not compromised." (See Attachment 33).

DISAGREEMENT on Joint Commission's authority to decide specific instances of public use and access to Federal property.

Guam Position. CSD argues that there are numerous recreational, historical and private sites that are landlocked by Federally-owned property. Instances include the private beach properties of the Artero and Castro families adjacent to Ritidian Point on the northern tip of Guam. CSD also argued against what it perceives to be unduly burdensome requirements imposed by the military on the public to obtain access to such site -- e.g. armed security guards at Potts Junction (leading to a roadway through the Air Force base to Ritidian Point and which has since been unmanned) and requirements to show identification and obtain permits from base commanders. From Guam's perspective, the military has no right to withhold

essentially unfettered public access to these areas so long as military security requirements are not compromised.

Federal Position. The Task Force opposed vesting exclusive authority in a Joint Commission controlled by Guam representatives to make decisions regarding access to Federal property because: (a) there was no mechanism to prevent the Commission from ignoring a base commander's stated needs for military security, safety and operational requirements; and (b) determination of public easements and access on Federal property can only be exercised by U.S. officials appointed pursuant to the Appointments Clause of the Constitution.

Comment. Access to and through Federally-owned land remains one of the most contentious issues on Guam. Last year, prompted by actions of local Chamorro indigenous rights groups, local protestors marched against the guard post at Potts Junction. Furthermore, the issue of providing access through Ritidian Point for adjacent private property owners remains one of Governor Ada's top priorities. The Department of the Interior, through the Fish and Wildlife Service (which received title to Ritidian Point from the military earlier this year over the strident objections of Guam leaders), is currently negotiating access with Governor Ada's Washington D.C. office.

Section 1004. Transfer of Federal Utilities to Guam.

Summary of Original Provision. Within 90 days of the passage of the Commonwealth Act, all right, title and interest to Federally-owned utilities would be transferred to the Commonwealth Government, except those parts of the systems used solely for Federal purposes.

Status. AGREEMENT (as modified by Attachment 34). Essentially, the transfer of Federal water, power and sewer utilities would be made subject to the terms of separate agreements being negotiated between the U.S. and Guam. Exceptions from transfer include portions of utilities which are located within federal property and systems necessary for mission-critical military purposes. Once the utilities are transferred, the utility rates charged by Guam to the U.S. must be cost-based and applied on a non-discriminatory basis.

Guam Position. There have been long and difficult negotiations between the U.S. and Guam over public utilities which were originally the sole responsibility of the Defense Department after World War II. Consequently, large parts of the island's

power and water utilities remained under military control despite the development of a parallel set of utilities under civilian management and control. The provision recognizes advances in Guam's technological and managerial abilities to provide island-wide utility services and the growing belief that the most cost-efficient means to operate utilities is to merge the military and civilian systems into a single grid. Furthermore, Guam's growing civilian population would benefit from the excess electrical generation and transmission capacity of the military power facilities.

Federal Position. The primary Federal interest in utility service on Guam is providing stable, reliable and cost-efficient services to support the naval and air force installations on the island. In light of advances in the civilian technological and managerial capabilities in utilities, the military is receptive to transferring their utility systems to Guam, with the exception noted.

Comment. Transfer of the power utility has already been accomplished by signing of a Customer Supplier Agreement by the U.S. Navy and the Guam Power Authority in June, 1992. The Task Force continues to recommend inclusion of the revised Section 1004 to deal with future utility transfer issues.

Section 1005. Hazardous Waste.

Comment. Original bill ended with Section 1004. The CSD and Task Force discussed moving the subject matter of the original Section 304 (Hazardous Waste) to Article XI as a new Section 1005. For discussion, see Section 304.

TITLE XI - UNITED STATES FINANCIAL ASSISTANCE

Section 1101 - Return of Taxes and Fees.

Summary of Original Provision. Provides for the continuation of Federal income tax transfer or cover-over policy and law for Guam under Commonwealth. Under section 31 of the Organic Act of Guam, as amended (48 USC 1421h), the Internal Revenue Code is used on Guam but the revenue goes to Guam, not the Federal Treasury. Guam receives in excess of \$300 million annually under this law. Under section 30 of that Act, there are paid into the Treasury of Guam various Federal revenues derived from Guam, principally Federal income taxes derived from military personnel and Federal employees in Guam. Section 30 also covers the proceeds of other taxes and fees collected on Guam by the Federal Government, including quarantine, passport, immigration, and naturalization fees. Between \$35 and \$40 million has been transferred annually to Guam in section 30 funds over the past few years.

Current Status. AGREEMENT with minor revisions to original language. See Attachment #37 for agreed language.

Federal Position. This provision parallels the existing sections 30 and 31 of the Organic Act, with a few exceptions, and therefore is acceptable to the Federal Government. The additions to the Guam language mutually agreed to were:

1) section 30 now provides that all of the taxes and fees turned over to the Treasury of Guam under the section shall be "held in account for the Government of Guam [and shall be expended for the benefit and Government of Guam] in accordance with the annual budgets." Those bracketed words are now in the agreed language.

2) The last two sentences of section 30, as amended in 1978, provide an advance payment for Guam of the funds. If the two sentences of section 30 are omitted Guam would experience, upon enactment of the Commonwealth Bill, a transition year in which none of the specified Federal revenues would be paid to Guam. Federal and Guam officials therefore agreed on the restoration of the two sentences from section 30 to prevent such a revenue loss to Guam.

Section 1102. Equal Finance for Guam Citizens with States.

Summary of Original Provision. Accords Guam State-like treatment for purposes of Federal programs; would extend

the Supplemental Security Income (SSI) program to Guam; and would require that the formula for allocating program funds to Guam be the same as the States.

Status. DISAGREEMENT.

Guam Position. Even though the residents of Guam are U.S. citizens, the U.S. sometimes neglects to extend the benefits of certain federal programs to Guam, or, when it does provide benefits, it allocates benefits pursuant to formulas that are not as favorable as those applicable to the several States. Although certain situations may be inadvertent, these exemplify discriminatory treatment of Guam and demonstrate that the residents of Guam are "second-class" U.S. citizens.

Federal Position. The function of section 1102 is probably essentially to extend to Guam the SSI program. The issue is one that HHS has studied at some length, usually concluding that because Puerto Rico would inevitably follow Guam, extension would be prohibitively expensive. HHS has lately softened, but OMB was not persuaded in January 1993 that extension was appropriate, based on a complex formula that never has been made public.

The other functions of section 1102 need not be performed. Guam now receives Federal programs under all Federal laws other than some portions of the Social Security Act, and its formula is sometimes not State-like because it is not possible to apply State standards to a territory. (What is rural and what is urban, for instance, is difficult in the territorial context.) When Guam is subject to a special formula, it is at least as generous as the State formula, and often much more so.

(The reference to section 228 of the Social Security Act is now moot. All the beneficiaries of it are now, if alive, close to 100 years old.)

Comment. The Second Task Force Report stated that this provision was still under review by the Administration. HHS should continue to explore the SSI issue, with the hope that extension might be economically feasible. Otherwise the CSD needs to be provided with further information about the extent to which Guam is now well-treated under Federal programs.

Section 1103. Return of Exclusive Economic Zone Fees.

Summary of Original Provision. Provided that under

Commonwealth status, all licensing and other fees obtained by permitting foreign vessels to fish or other exploitation of the 200-mile Exclusive Economic Zone would be paid to the treasury of Guam.

Current Status. AGREEMENT with a caveat. The Federal counter-proposal to Guam on the EEZ control and development issue is dealt with in section 1001(b). Generally speaking, the Federal proposal offered to transfer all EEZ fees to Guam if Guam agrees to set up a fishery management regime under the auspices of the Western Pacific Regional Fisheries Management Council. (See prior discussion, Section 1001(b)).

Section 1104. Federal Payment.

Summary of Original Provision. Provides for an annual payment to Guam, based on the pattern of the Federal payment to the District of Columbia that is provided in the D. C. Home Rule Act of 1973. The Governor would develop annual expenditure and revenue estimates, identifying elements of cost and benefits to Guam resulting from U.S. defense presence on the island, and formulate with the Guam Legislature Guam's request with respect to the level of appropriation for the annual Federal payment. The request is to be submitted to the President for submission to the Congress.

Current Status. DISAGREEMENT. No compromise language. This section received limited consideration and discussion during previous talks - only two hours of formal discussion.

Guam Position. The large U.S. defense presence on Guam, combined with the amount of land held by the Federal Government (about one-third of the island), and U.S. control of the 200-mile Exclusive Economic Zone substantially reduce the available natural resource base Guam can use to stimulate economic development. The island's unusual role as one of the Nation's principal military bastions in the Far East, therefore, requires special financial assistance to compensate for the restrictions, limitations, and demands placed on the island.

Federal Position: Guam and the D.C. are not comparable. Guam receives substantial Federal fiscal benefits not available to States or D.C., and these would be continued under the draft Act. These include the territorial income tax in lieu of a federal tax, payable to the Government of Guam (for 1991, \$311 million), and section 30 taxes (\$36 million in 1991) which are Federal income taxes paid by military personnel and Federal employees in Guam,

by military personnel and Federal employees in Guam, and are transferred to the Guam Treasury. There are no comparable provisions for D.C. It would not be reasonable to provide the additional Federal fiscal assistance to Guam called for in this section.

Comment. The special Federal tax benefits Guam receives, the island's rapid economic development over the past several years, which tripled local government revenues, the end of the Cold War and continuing reduction in U.S. defense presence in Guam, as well as the increasing budgetary problems of the Federal Government have combined to significantly change the strategic, economic, and U.S. political context in which this proposal was initially developed in the early 1980s. This has tended to weaken Guam's case for additional assistance in Federal eyes, while lessening the Federal Government's political and economic ability to address this proposal.

Section 1105. Transition Assistance

Summary of Original Provision. Provides for three forms of transition assistance from the U.S. to Guam: (1) Federal financing of the costs of institutional change connected with Guam's assuming commonwealth status, with such costs to include costs of staff, contracts, and the referendum; (2) Assistance in meeting Guam's capital needs by means of Federal appropriations to implement a long-term capital improvement program; and (3) A federally-funded revolving fund to establish an Economic Development Fund, to "assist in the financing of the private sector needs of Guam...and to develop the economic resources needed to meet the responsibilities of local self-government".

Current Status. LIMITED AGREEMENT on (1). DISAGREEMENT on (2) and (3). See Attachment #59 for language on limited agreement.

Guam Position. The U.S. has provided assistance to the CNMI and Freely Associated States for status votes, constitutional conventions, and public education projects related to status and self-determination, and therefore the U.S., which has the responsibility to promote Guam's political development, should similarly assist Guam's status process and transition to greater self-government. Because the U.S. also has the responsibility to encourage the social and economic development of Guam, it should assist in building an infrastructure base adequate for development of the private sector and to strengthen the utility of Guam for U.S. national security purposes. The U.S. transfer of federal taxes to Guam is a Congressional choice and Guam should not be penalized for it.

Federal Position. The bill contains no ceilings on the amounts to be appropriated for these programs, and the Task Force received no estimates as to amounts contemplated. U.S. should assume some costs associated with "institutional change", as it did in the case of the Northern Marianas and the Freely Associated States. Federal funds in an amount ranging from \$150,000 to \$500,000 were made available to each of them to defray referendum/plebiscite costs.

U.S. ought not to defray the costs of the Guam CSD or those with whom it has contracted to assist it. U.S. has exercised no oversight with respect to such matters, and it would be extremely inappropriate for it to have done so. Guam should assume the costs arising from its decisions as to how that quest should be conducted, by whom, and at what cost.

The U.S. should support long-term capital improvement program (CIP) but not by the means provided for in section 1105(1)(B), (2), and (3), and should support a continued Federal role in promoting Guam's infrastructure development. Annual Interior Appropriations Acts have carried substantial appropriations for CIP in Guam, with the amount varying during the last ten years from \$4 million to over \$11 million annually in ad hoc appropriations. Also in the 1960's an island-wide plan for capital improvements was devised in connection with the Guam Rehabilitation Act (Public Law 88-170 (1963), as amended by Public Law 90-511 (1968)), for which the United States ultimately provided a total of \$75 million (in 1960's dollars).

Guam's economy is capable of sustaining its own infrastructure development, including long-term financing and repayment from revenues, both earmarked and general. Guam has not requested capital improvement funds from the Federal Government for the past two fiscal years, and spokesmen for Guam have testified to Congress that they believe Guam can provide such financing from its local resources and through private bond issues backed by local government revenue streams.

Guam's needs can be much better addressed through a planned program of borrowing on the capital markets. The Federal Government has assisted in such borrowings in the past, both directly through Federal loan guarantees, and indirectly through Guam's pledge of future cover over of "Section 30" receipts. Federal Government support for such infrastructure finance should continue.

Federal position recommended against legislation that would re-authorize a Guam Economic Development Fund, for reasons already outlined and other considerations. (See 1993 Report, pp. 91 and 92).

Section 1106. Guam Departure Tax.

Summary of Original Provision. None. This is a new provision which was added to Guam's Commonwealth proposal at the end of the 1993 discussions. It provides that Guam would be able to assess a head tax on passengers departing Guam on ocean and air carriers. It would exempt any person travelling on a U.S. passport. Revenues collected would go to Guam's General Fund for whatever use the Commonwealth Government determines.

Current Status. DISAGREEMENT. No Compromise language. Guam's proposed language is Attachment #50.

Guam's Position. Guam needs the ability to assess local taxes and fees in order to rationally plan and develop its infrastructure and economy. Tourism is the island's largest private sector industry, drawing 800,000 visitors a year to the island's air and sea terminals. Guam under Commonwealth ought to have the flexibility to use this resource as a way to generate the necessary revenues to develop its infrastructure. This tax would not place a burden on U.S. travellers.

Federal Position. U.S. statutes prevent U.S. jurisdictions from imposing a head tax on passengers using an international airport. Guam also accepted FAA-administered airport development funds, pledging as one of the requirements not to use its international airport as a means for imposing any head tax for general revenue purposes. The U.S. is bound to this prohibition both by domestic policy considerations and international treaties. Guam, however, is permitted to levy a passenger facility charge at its international airport, provided the revenue is used for airport capital improvement.

TITLE XII - TECHNICAL AMENDMENTS AND INTERPRETATION

The provisions of Title XII of the original Commonwealth legislation were substantially revised by the CSD after the First Task Force report. The CSD's revised version of Title XII is Attachment 51 to the Second Task Force Report. The Task Force's version of Title XII is Attachment 60. As we have seen with other sections, although there are considerable areas of agreement, differences remain. There has been no formal agreement between the parties regarding Title XII.

The Second Task Force Report made a three-fold classification of the issues addressed by Title XII: (1) conceptual approaches to defining "Commonwealth"; (2) proposals on which Federal laws should remain in force under Commonwealth and which should be repealed; and (3) the ratification process for the Guam Constitution, including effective dates. In the following summary of where matters stand, we will follow the Second Task Force report by considering the revised language for Title XII proposed by the CSD and included in the Second Task Force report as Attachment 51.

Part A. Defining Commonwealth - CSD Proposal.

Summary of Provisions. Section 1201 states that neither the Commonwealth legislation nor Guam's adoption of a Constitution shall be interpreted as a final act of self-determination or as an act of incorporation of Guam into the United States. Section 1202 states that the Commonwealth legislation cannot be altered without Guam's consent and that the mutual consent provision shall be deemed to establish a Fifth Amendment property right in Guam enforceable in the Federal courts. Section 1203 consists of definitions relating to the boundaries of Guam and to the scope of its jurisdictional authority.

Status. DISAGREEMENT.

Guam Position. Commonwealth is intended to be an "interim" status, with Guam's ultimate political status to be determined by a Chamorro-only vote as provided in the Guam Constitution. Additionally, if it is true that one Congress cannot bind a subsequent Congress in regard to not revising the Commonwealth Act without mutual consent, then Guam has the right to demand just compensation for the deprivation of its right to consent to subsequent revisions.

Federal Position. The CSD language suggests that further acts of self-determination rest exclusively with Guam, a proposition that cannot exist pursuant to a Commonwealth relationship purportedly under

U.S. sovereignty. Further, there can be no Fifth Amendment property right in the mutual consent provision based on Bowen v. Agencies Opposed to So. Sec. Entrap., 477 U.S. 41, 55 (1986). Finally, the the definitional sections are objectionable largely because Guam appears to be attempting to assert title to the Exclusive Economic Zone (EEZ) -- the submerged lands more than three miles off-shore from Guam -- in direct contravention of continued U.S. sovereignty.

Part B. Federal Laws Continued or Repealed.

Summary of Provisions. These sections provide that Guam's internal laws will continue in effect upon establishment of the Commonwealth and that Federal laws not specifically repealed by the Commonwealth legislation will continue to apply to Guam.

Status. DISAGREEMENT.

Nature of Disagreement. On the whole, the disagreements involve the continuing extent of Federal supervisory authority over Guam with Guam trying to eliminate this authority and the Task Force trying to retain those portions necessary to protect Federal interests. For example, the Task Force, particularly DOI, wants to retain the current statutory provisions, 48 U.S.C. 1422d giving the Inspector General broad audit authority in Guam. To give another instance, DOI wants to retain 48 U.S.C. 1421a or add equivalent language to provide that DOI retains general administrative responsibility for the Federal government's relations with Guam.

Part C. Ratification of the Constitution and Effective Dates.

Summary of Provision. The Second Task Force Report considered a proposal which Guam put forward as a substitute for section 1204 in the bill regarding the procedures to be followed in Guam for ratifying the Commonwealth legislation (majority vote in a referendum) and in adopting a constitution.

Status. SUBSTANTIAL AGREEMENT except that the Task Force would require Congressional approval of the Guam Constitution before it becomes effective.

Guam Position. Congressional approval of a locally drafted Guam Constitution is inherently demeaning to

the principles of self-government and self-determination.

Federal Position. It has historically been the responsibility of the Federal Government to review and approve local constitutions. Congressional approval of the Guam Constitution is necessary in order to insure that the Guam Constitution was sufficiently protective of Federal constitutional guarantees of U.S. citizens and that the Guam Constitution complied with the requirements of Section 101(b).

Effective Dates. There is a major DISAGREEMENT between the CSD and the Task Force about the effective date of most of the Compact legislation. This disagreement is related to the issue discussed above regarding the continuing status of the Organic Act and other legislation applicable to Guam.

Guam Position. Guam believes that the Commonwealth legislation should become effective with the approval of the Commonwealth in the Guam referendum and following a Presidential Proclamation.

Federal Position. The Task Force maintains that the legislation cannot be implemented until Guam has shown its capacity for the enhanced status it seeks by adopting its constitution. As the Second Task Force report states: "[t]he absence of a constitution is inconsistent with the status of Commonwealth for United States insular areas."

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Donsia Stron to Carol Rasco, re: insular territories (1 page)	4/14/1994	P5
002. email	Melissa Green to Jake Siewert, re: latest draft of APEC memo (6 pages)	10/30/1998	P5 6321

COLLECTION:

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Whitney Ross
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wr599

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

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RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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6321

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa G. Green (CN=Melissa G. Green/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME: 30-OCT-1998 18:46:13.00

SUBJECT: latest draft of APEC memo

TO: Jake Siewert (CN=Jake Siewert/OU=OPD/O=EOP @ EOP [OPD])

READ: UNKNOWN

TEXT:

----- Forwarded by Melissa G. Green/OPD/EOP on 10/30/98
06:46 PM -----

Jake Siewert

10/30/98 01:16:25 PM

Record Type: Record

To: Jonathan A. Kaplan/OPD/EOP, Melissa G. Green/OPD/EOP

cc:

Subject: latest draft of APEC memo

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: SAMUEL BERGER
GENE SPERLING
STEPHANIE STREET

SUBJECT: Communications Plan for Your Trip to APEC, Japan and Korea

Purpose

That you approve the main messages and key events for your trip to Asia in November.

Background

As you travel to Asia for the APEC Summit and official visits to Japan and Korea, the international economic crisis remains front, back and center in the minds of the media and the concerns of the American public. This trip is an opportunity to show you continuing to galvanize the international response to the crisis in the region where it has hit hardest, following up on the initiatives you launched at the Council on Foreign Relations and the IMF/World Bank annual meeting.

Thus, at APEC, we can spotlight your efforts to forge consensus on the practical steps countries should take to overcome the financial crisis: adopt policies that spur domestic and therefore global growth, increase openness and transparency, strengthen the social safety net, and help pursue long term fixes to the international financial system (including mechanisms to tame the cycles of expansion and contraction that have shaken the world economy.) At the same time, by winning agreement on a \$1.5 trillion sectoral market opening package, you can show that the

region remains focused on opening rather than protecting its markets, which is good news for America and a good omen for the future.

From Malaysia, you can take your message of economic reform directly to the leaders and people of Japan and Korea. You will want to encourage the Japanese to fully assume the responsibilities of leadership -- going further, faster in implementing banking legislation, accelerating and increasing fiscal stimuli, pursuing market opening and deregulation. This will require finding a delicate balance between two approaches to motivating the Japanese: exerting pressure (which risks provoking resentment but which the Japanese admit may be required) and embracing Japan (which must be done with a deft touch if it is really going to promote change.) Japan, belatedly, has taken positive steps, but much more needs to be done to breath life into its economy. In Korea, you can show empathy for the economic pain its people have suffered and the sacrifices they have made, while praising the steps they are taking to get back on track. In both Japan and Korea, we have designed events that will allow you to speak around the leaders and directly to the people.

This trip also presents you with an important opportunity to remind the American people that our own future cannot be secure if Asia's is in doubt -- and that we must continue to play a central role in shaping that future economically, politically and strategically. When markets tremble in Hong Kong or Tokyo, they cause tremors all the way to Wall Street and to Main Street. Nearly 40,000 Americans still guard the Korean DMZ, the Cold War's last militarized fault line. Indonesia's ongoing political and economic transition reverberates throughout the region, promising but uncertain. India and Pakistan's nuclear tests have bucked the tide of history and threaten to spark a new arms race. And our relationship with China, home to almost one quarter of the earth's people, will help determine whether the 21st century is one of peace and prosperity for America -- or one of conflict and instability.

In your public events in Japan and Korea, and through your bilateral meetings at APEC with the leaders of Thailand and the Philippines, you can reinforce the message that our relationships with our treaty allies remain the cornerstone of stability in Asia. This is a useful pushback against the charge that our Asia policy has become too China-centric. You also will have an opportunity in Korea to highlight the progress of democracy in Asia, and to make the point that the best way out of the economic crisis is not less freedom but more. At the same time, you will meet in Malaysia with President Jiang, giving you an opportunity to show progress on our broad agenda with the Chinese.

III. Key Events

Saturday, November 14 - Sunday, November 15: Guam

White House Communications, Political Affairs and Speechwriting will provide you with a separate memo on your stop in Guam.

Monday, November 16: Kuala Lumpur, Malaysia

- ú Pool Spray and Bilateral Meeting with Primakov
- ú Pool Spray and Bilateral Meeting with Jiang
- ú Bilateral Meeting with Chuan
- ú Keynote Address to APEC Business Summit

Message

You will have a full business day in Malaysia before the APEC meetings begin, giving you an opportunity to meet bilaterally with key counterparts and to set the scene for the APEC leaders meeting with an evening speech to business leaders. Pool sprays before your meetings with Foreign Minister Primakov and President Jiang will show you engaged in advancing our interests with Russia (economic and political reform) and China (non-proliferation; regional security). In your speech to business leaders, you can highlight our twin objectives for the Summit: (i) to build support for the specific steps you have laid out to restore confidence, revive stalled economies and repair the international financial system for the long term; and (ii) to continue to make trade more free and fair by taking down tariffs and barriers throughout the Asia Pacific region.

This speech also will be your best opportunity to make clear that your presence in Kuala Lumpur is an endorsement of APEC, not the Mahatir administration. Indeed, the media is likely to personify in Mahatir and former Finance Minister Anwar the choice Asia allegedly faces -- the choice between turning away from the world economy or toward greater integration. You can point out that this is a false choice; integration is neither inherently good nor bad, but it is certainly a fact. Countries that try to turn back will find that the road has disappeared behind them. The only path to progress is forward, toward more openness and integration.

Tuesday, November 17: Kuala Lumpur, Malaysia

- ú Pool Spray and Bilateral Meetings To Be Determined
- ú Remarks to American Embassy Community
- ú APEC Meetings
- ú APEC Dinner

Message

The APEC meetings offer few opportunities to put you on camera. To counter this problem, we may move your bilateral meeting with Jiang or Primakov to Tuesday, and/or elevate a pull-aside with President Habibie of Indonesia into a bilat, complete with pool spray. Of course, Sandy and Gene, along with Madeleine, Bob Rubin and others will brief the press on the substance of the first day of APEC meetings, and we also can consider opening your embassy remarks to the press should events warrant.

Wednesday, November 18: Kuala Lumpur, Malaysia

- ú Leaders Retreat at Cyberview Lodge
- ú Reading of Declaration
- ú Depart for Japan

Message

Because the Leaders Retreat is closed to the press and President Mahatir is the sole speaker at the closing press conference, Sandy and Gene, together with Madeleine, Bob and others will brief the press on the Summit results. Again, if events warrant, we can put you on camera on short notice, prior to our departure for Japan.

Thursday, November 19: Tokyo, Japan

- ú Roundtable with Japanese Business Leaders

- ú Televised Town Hall Meeting
- ú Call on Emperor
- ú Pool Spray and Bilat with PM Obuchi
- ú Official Dinner

Message

One of your key objectives in Japan will be to bring your message of economic reform directly to the Japanese people -- going above, below and around the sclerotic bureaucracy. Your roundtable with Japanese business leaders and especially a televised town hall meeting offer you the opportunity to do just that. The Town Hall would show you interacting directly with a broad cross section of young Japanese leaders, speaking easily and openly to any subject (in sharp contrast to Japanese political leaders.) In your opening remarks, and in response to questions, you can make clear and compelling the steps we believe Japan must take to help lead Asia out of economic stagnation. But you will want to do so in a positive, affirming, forward looking way -- appealing to Japan's ability and responsibility to lead -- without hectoring, lecturing or heavy-handed criticism. At the same time, this forum and your pool spray with Obuchi will allow you to emphasize the centrality we attach to our relationship with Japan, which will help assuage feelings of neglect caused by the success of your trip to China.

Friday, November 20 -- Tokyo and Hakone, Japan

- ú Remarks to Embassy Community
- ú Boat ride and lunch in Hakone with Obuchi
- ú Science/Environment Event (tbd.)

Message

The Japanese were impressed and pleased that you offered to host Prime Minister Obuchi in Tarrytown during his trip to New York for the UNGA -- seeing in that special setting evidence of the importance we attach to Japan and your interest in building a warm personal relationship with the Prime Minister. Now, Obuchi wants to reciprocate by hosting you in Hakone, a picturesque and very popular vacation spot, with breathtaking views of Mt. Fuji.

Japan is our most important partner in global climate change research and a strong ally in efforts to protect the global environment. The U.S.-Japan Common Agenda -- now entering its fifth year -- provides a strong framework for cooperative efforts to address a broad range of global problems. You and Prime Minister Obuchi will each speak briefly to these topics against the striking backdrop of Mount Fuji. Coming one week after the close of the Buenos Aires conference, your remarks offer an opportunity to address climate change and the joint efforts of the United States and Japan to shape a clean energy future in Asia and around the world.

Saturday, November 21 -- Seoul, Korea

- ú Bilat with President Kim
- ú Joint Press Conference with President Kim
- ú Democracy Event (Tbd.)
- ú Official Dinner

Message

Korea is on the right path out of its economic crisis -- but there is still hard road ahead, some resistance to reform from large conglomerates and the lingering danger of a crisis in confidence. In your press conference statement, you will want to praise President Kim's strong leadership and encourage Korea to stay the course by continuing to stabilize and restructure its financial system, while bringing greater transparency, market discipline and independent oversight of anti-competitive practices to its economy. You also will want to show strong solidarity with President Kim on North Korea policy -- a clear-eyed mix of diplomacy (the Four Party Peace initiative and Kim's sunshine policy), strategic steps on non-proliferation (the Agreed Framework), and deterrence against North Korean aggression (defense cooperation).

President Kim stands tall as a symbol of democracy and reconciliation in Korea and throughout Asia. We are developing a democracy event that you would co-host, possibly announcing the establishment of a Democracy Training Institute at a major Korean university, organized with the assistance of American NGOs. This event would underscore a consistent theme in your discussions of Asia: that democracy and human rights are not American rights or developed world rights, but the birthrights of people everywhere, including in Asia. At the same time, it will help you advance the message that the best way out of the present economic crisis is not less freedom but more. By and large, democratic countries hit by the crisis like Korea and Thailand have fared better because the difficult solutions proposed by responsible, democratically-elected leaders have more legitimacy with their people. Over the long term, democracy is vital to economic growth, because in the 21st century the true wealth of nations will be based on creativity and the free flow of ideas.

Sunday, November 22 -- Seoul and Military Base tbd., Korea

- ú Attend Church
- ú Remarks to Embassy Community
- ú Remarks to U.S. & Korean Military Personnel
- ú Tour Military Base tbd., view exercises
- ú Lunch with troops

Message

The nearly 40,000 American troops who guard the DMZ are powerful evidence of our commitment to the security of South Korea -- and to the defense of freedom, 45 years after the Armistice was signed. Your remarks to American and Korean troops serving side-by-side will highlight that commitment, and spotlight our cooperation. As such, they will send a clear message to North Korea that our alliance with the South is unshakable and our resolve to defend freedom undiminished. At the same time, you can underscore our determination to maintain a high level of military readiness, especially among our front line and "first-to-fight" troops.

We are looking at two different bases for you to tour: (i) Osan Air Base, which includes chemical and biological warfare defense units, a combined air defense center and tactical fighter squadrons; and (ii) the Multipurpose Training Range, which would feature live-fire field training exercises with U.S. Army troops and their ROK counterparts.

RECOMMENDATION

That you approve the main messages and key events for your trip to APEC, Japan and Korea.

Approve _____

Disapprove _____

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Jeffrey Farrow to Fred Duval, re: Guam Compact Impact (1 page)	1/9/1998	P5
002. email	Jeffrey Farrow to Fred Duval, re: Lausell/Guam FEMA match (1 page)	2/6/1998	P5
003. email	Jeffrey Farrow to Fred Duval, re: Guam lead (1 page)	4/7/1998	P5
004. email	Jeffrey Farrow to Mickey Ibarra, re: Guam Stop Cover Note (1 page)	4/8/1998	P5
005. email	Jeffrey Farrow to Emory Mayfield, re: Weekly - Guam Bullet (1 page)	4/9/1998	P5
006. email	Jeffrey Farrow to Fred Duval, re: Guam Rep (2 pages)	4/28/1998	P5
007. email	Jeffrey Farrow to Fred Duval, re: President on Guam Stop (1 page)	4/30/1998	P5 6322
008. email	Jeffrey Farrow to Fred Duval, re: Guam (1 page)	5/6/1998	P5
009. email	Jeffrey Farrow to Emory Mayfield [partial] (1 page)	5/12/1998	P6/b(6)
010. email	Jeffrey Farrow to Fred Duval, re: Guam Proclamation (1 page)	5/12/1998	P5
011. email	Jeffrey Farrow to Janet Murguia, re: Guam Message (1 page)	6/3/1998	P5
012. email	Jeffrey Farrow to Mickey Ibarra, re: Guam Centennial Video (1 page)	6/16/1998	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Farrow: Guam])
OA/Box Number: 500000

FOLDER TITLE:

[11/17/1997 - 10/28/1998]

Whitney Ross

2006-0193-F

wr622

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(5) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(5) of the FOIA]
b(6) Release would disclose information compiled for law enforcement purposes [(b)(6) of the FOIA]
b(7) Release would disclose information concerning the regulation of financial institutions [(b)(7) of the FOIA]
b(8) Release would disclose geological or geophysical information concerning wells [(b)(8) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
013. email	Jeffrey Farrow to Jennifer Palmieri, re: Guam/State Dept. Nexus (1 page)	6/17/1998	P5
014. email	Jeffrey Farrow to Simeona Pasquil, re: Guam Stop Announcement (1 page)	8/4/1998	P5
015. email	Jeffrey Farrow to Mickey Ibarra, re: Guam (1 page)	8/5/1998	P5
016. email	Jeffrey Farrow to Fred Duval, re: Guam (1 page)	8/19/1998	P5 6323
017. email	Jeffrey Farrow to Fred Duval, re: Guam (1 page)	8/20/1998	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Farrow: Guam])
OA/Box Number: 500000

FOLDER TITLE:

[11/17/1997 - 10/28/1998]

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2006-0193-F
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- PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
- RR. Document will be reviewed upon request.

6322

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jeffrey L. Farrow (CN=Jeffrey L. Farrow/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 30-APR-1998 18:15:39.00

SUBJECT: President on Guam Stop

TO: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])

READ: UNKNOWN

TO: Mickey Ibarra (CN=Mickey Ibarra/OU=WHO/O=EOP @ EOP [WHO])

READ: UNKNOWN

CC: Emory L. Mayfield (CN=Emory L. Mayfield/OU=WHO/O=EOP @ EOP [WHO])

READ: UNKNOWN

CC: Suzanne Dale (CN=Suzanne Dale/OU=WHO/O=EOP @ EOP [WHO])

READ: UNKNOWN

TEXT:

There was a lot of discussion re a Guam visit in connection with the President's Congressional Asian-Pacific Caucus meeting.

Before the briefing, John Podesta reiterated it was likely on the India trip because of China trip time constraints and likely to be announceable before the China trip/Guam Centennial. That was consistent with my briefing material, which also suggested pledging a Centennial message if the President couldn't stop during the China trip.

During the briefing, the President said if time was a problem re going to China, he wanted to do it on the way back. ("We won't do most of what they want, the least we can do is show the flag" etc.) He was emphatic and we also discussed stopping in Samoa on the New Zealand trip next year and the difficulty of going to Puerto Rico. John ended by saying on the way back from China or on the India trip and "Jeff's happy." The President also agreed to doing a written or video message.

During the meeting, the President responded to Cong. Underwood by saying we would do something re the Centennial. When they got up, he told Underwood that he hoped to visit during one of the two trips.

Cong. Faleomavaega also suggested a Pacific islands (including foreign countries) summit, citing work ex-Gov. Waihee was doing at the East-West Center in Hawaii, a Bush summit, and a 40 vote caucus of Pacific and Caribbean islands at the UN. The President said it was a good idea.

6323

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jeffrey L. Farrow (CN=Jeffrey L. Farrow/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:19-AUG-1998 12:09:19.00

SUBJECT: Re: Guam

TO: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Mickey Ibarra (CN=Mickey Ibarra/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

When its convenient, I think we should go over Guam Commonwealth/Berry. It shouldn't take long.

Here are my basic points:

Garamendi negotiated. We took positions on almost all issues and submitted them to Congress. They are solid and served us well. They should not be renegotiated.

I have developed positions on the outstanding issues -- taxes and trade -- with all agencies concerned. They need to be communicated to Guam and then to Congress.

We need a point person to: communicate on taxes and trade; testify on all matters; and work with Congress on legislating.

This needs to be approached on an interagency basis. The recommended small territories interagency group would fulfill the need. If it is not established, an ad hoc group needs to be formed.

We probably won't need to do anything public before the election. (Congress could change this but I don't think it will.)

After the election, we should do what Garamendi recommended, I conceptually supported, and we did not do last Fall in deference to Gov. Gutierrez and Cong. Underwood: offer Guam its range of options. (We will not be able to satisfy Guam on the Commonwealth Bill. Guam has already called a vote next May on all options objectionably limiting the franchise to individuals of Chamorro descent and the UN Decolonization Committee supports a vote. Some of what Guam wants could be gotten under free association. I think the vote would be for the Commonwealth we'd support instead of free association but the distinction needs to be clear before Guam would settle.)

~~We have to keep the stop in mind.~~