Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION	
001. memo	To Special Representative for Guam Commonwealth from Teresa W. Roseborough. Subject: Mutual consent provisions in the Guam Commonwealth legislation (12 pages)	07/28/1994	P5	638
002. statement	re: Comments on DOJ memorandum regarding mutual consent provision in the Guam Commonwealth legislation (53 pages)	08/26/1994	P5	639
003. letter	To I. Michael Heyman from Walter Dellinger. Subject: Proposed language from Department of Justice on Guam Commonwealth legislation (4 pages)	06/29/1994	P5	640

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bill Marshall
OA/Box Number: 20350

FOLDER TITLE:

Guam - Commonwealth Act 1996 [2]

Jamie Metrailer
2006-0193-F
jm587

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.
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]
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]

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

July 28, 1994

MEMORANDUM FOR
THE SPECIAL REPRESENTATIVE
FOR GUAM COMMONWEALTH

From: Teresa Wynn Roseborough
Deputy Assistant Attorney General

Re: Mutual Consent Provisions in
The Guam Commonwealth Legislation

The Guam Commonwealth Bill, H.R. 1521, 103d Cong., 1st Sess. (1993) contains two sections requiring the mutual consent of the Government of the United States and the Government of Guam. Section 103 provides that the Commonwealth Act could be amended only with mutual consent of the two governments. Section 202 provides that no Federal laws, rules, and regulations passed after the enactment of the Commonwealth Act would apply to Guam without the mutual consent of the two governments. The Representatives of Guam insist that these two sections are crucial for the autonomy and economy of Guam. The former views of this Office on the validity or efficacy of mutual consent requirements included in legislation governing the relationship between the federal government and non-state areas, i.e. areas under the sovereignty of the United States that are not States,[1] have

[1] Territories that have developed from the stage of a classical territory to that of a Commonwealth with a constitution of their own adoption and an elective governor, resent being called Territories and claim that that legal term and its implications are not applicable to them. We therefore shall refer to all Territories and Commonwealths as non-state areas under the sovereignty of the United States or briefly as non-state areas.

not been consistent.[2] We therefore have carefully reexamined this issue. Our conclusion is that these clauses raise serious constitutional issues and are legally unenforceable.[3]

In our view, it is important that the text of the Guam Commonwealth Act not create any illusory expectations that might to mislead the electorate of Guam about the consequences of the legislation. We must therefore oppose the inclusion in the Commonwealth Act of any provisions, such as mutual consent clauses, that are legally unenforceable, unless their unenforceability (or precatory nature) is clearly stated in the document itself.

I.

The Power of Congress to Govern the Non-State Areas under the Sovereignty of the United States is Plenary within Constitutional Limitations

All territory under the sovereignty of the United States falls into two groups: the States and the areas that are not States. The latter, whether called territories, possessions, or commonwealths, are governed by and under the authority of Congress. As to those areas, Congress exercises the combined powers of the federal and of a state government. These basic considerations were set out in the leading case of National Bank v. County of Yankton, 101 U.S. 129, 132-33 (1880). There the Court held:

---

[2] To our knowledge the first consideration of the validity of mutual consent clauses occurred in 1959 in connection with proposals to amend the Puerto Rico Federal Relations Act. At that time the Department took the position that the answer to this question was doubtful but that such clauses should not be opposed on the ground that they go beyond the constitutional power of Congress. In 1963 the Department of Justice opined that such clauses were legally effective because Congress could create vested rights in the status of a territory that could not be revoked unilaterally. The Department adhered to this position in 1973 in connection with then pending Micronesians status negotiations in a memorandum approved by then Assistant Attorney General Rehnquist. On the basis of this advice, a mutual consent clause was inserted in Section 105 of the Covenant with the Northern Mariana Islands. The Department continued to support the validity of mutual consent clauses in connection with the First 1989 Task Force Report on the Guam Commonwealth Bill. The Department revisited this issue in the early 1990's in connection with the Puerto Rico Status Referendum Bill in light of Bowen v. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986), and concluded that there could not be an enforceable vested right in a political status; hence that mutual consent clauses were ineffective because they would not bind a subsequent Congress. We took the same position in the Second Guam Task Force Report issued during the last days of the Bush Administration in January 1993.

[3] Mutual consent clauses are not a novel phenomenon; indeed they antedate the Constitution. Section 14 of the Northwest Ordinance contained six "articles of compact, between the original States and the people and States in the said territory, and [shall] forever remain unalterable, unless by common consent." These articles were incorporated either expressly or by reference into many early territorial organic acts. Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 442 (1872). The copious litigation under these "unalterable articles" focussed largely on the question whether the territories' obligations under them were superseded by the Constitution, or when the territory became a State, as the result of the equal footing doctrine. We have, however, not found any cases dealing with the question whether the Congress had the power to modify any duty imposed on the United States by those articles.

It is certainly now too late to doubt the power of Congress to govern the Territories. There have been some differences of opinion as to the particular clause of the Constitution from which the power is derived, but that it exists has always been conceded.[4]

* * *

All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States, except such as have been expressly or by implication reserved in the prohibitions of the Constitution.

Yankton was anticipated in Chief Justice Marshall's seminal opinion in American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 542-43, 546 (1828). The Chief Justice explained:

In the mean time [i.e. the interval between acquisition and statehood], Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress "to make all needful rules and regulations, respecting the territory, or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-

---

[4] Some derived that power from the authority of the United States to acquire territory, others from the mere fact of sovereignty, others from the Territory Clause of the Constitution of the United States (Art. IV, Sec. 3, Cl. 2) pursuant to which Congress has "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States". See e.g. American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 542 (1828); Mormon Church v. United States, 136 U.S. 1, 42-44 (1890); Downes v. Bidwell, 182 U.S. 244, 290 (1901).

At present, the Territory Clause of the Constitution is generally considered to be the source of the power of Congress to govern the non-state areas. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 673-674 (1945); Examining Board v. Flores de Otero, 426 U.S. 572, 586 (1976); Harris v. Rosario, 446 U.S. 651 (1980); see also Wabol v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabol, ____ U.S. ____, 113 S.Ct. 675 (1992). (Footnote supplied.)

government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United States.

* * *

"In legislating for them [the Territories], Congress exercises the combined powers of the general, and of a state government."

Id. at 542-43, 546.

The power of Congress to govern the non-state areas is plenary like every other legislative power of Congress but it is nevertheless subject to the applicable provisions of the Constitution. As Chief Justice Marshall stated in Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 196 (1824), with respect to the Commerce Power:

> This power [the Commerce Power], like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. (Emphasis added.)

This limitation on the plenary legislative power of Congress is self-evident. It necessarily follows from the supremacy of the Constitution. See e.g., Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 276 (1981). That the power of Congress under the Territory Clause is subject to constitutional limitations has been recognized in County of Yankton, 101 U.S. at 133; Downes v. Bidwell, 182 U.S. 244, 290-91 (1901); District of Columbia v. Thompson Co., 346 U.S. 100, 109 (1953).

Finally, the power of Congress over the non-state areas persists "so long as they remain in a territorial condition." Shively v. Bowlby, 152 U.S. 1, 48 (1894). See also, Hooven & Allison Co. v. Evatt, 324 U.S. 652, 675 (1945) (recognizing that during the intermediary period between the establishment of the Commonwealth of the Philippine Islands and the final withdrawal of United States sovereignty from those islands "Congress retains plenary power over the territorial government").

The plenary Congressional authority over a non-state area thus lasts as long as the area retains that status. It terminates when the area loses that status either by virtue of its admission as a State, or by the termination of the sovereignty of the United States over the area by the grant of independence, or by its surrender to the sovereignty of another country.

II.

The Revocable Nature of Congressional Legislation Relating to the Government of Non-State Areas

While Congress has the power to govern the non-state areas it need not exercise that power itself. Congress can delegate to the inhabitants of non-state areas full powers of self-government and an autonomy similar to that of States and has done so since the beginning of the Republic. Such delegation, however, must be "consistent with the supremacy and supervision of National authority". Clinton v. Englebrecht, 80 U.S. (13 Wall.) 434, 441 (1872); Puerto Rico v. Shell Co., 302 U.S. 253, 260, 261-62 (1937). The requirement that the delegation of governmental authority to the non-state areas be subject to federal supremacy and federal supervision means that such delegation is necessarily subject to the right of Congress to revise, alter, or revoke the authority granted. District of Columbia v. Thompson Co., 346 U.S. 100, 106, 109 (1953).[5] See also, United States v. Sharpnack, 355 U.S. 286, 296 (1958), Harris v. Boreham, 233 F.2d 110, 113 (3rd Cir. 1956), Firemen's Insurance Co. v. Washington, 483 F.2d 1323, 1327 (D.C. Cir. 1973). The power of Congress to delegate governmental powers to non-state areas thus is contingent on the retention by Congress of its power to revise, alter, and revoke that legislation.[6] Congress therefore cannot subject the amendment or repeal of such legislation to the consent of the non-state area.

This consideration also disposes of the argument that the power of Congress under the Territory Clause to give up its sovereignty over a non-state area includes the power to make a partial disposition of that authority, hence that Congress could give up its power to amend or repeal statutes relating to the governance of non-state areas. But, as shown above, the retention of the power to amend or repeal legislation delegating governmental powers to a non-state area is an integral element of the delegation power. Congress therefore has no

[5] Thompson dealt with the District of Columbia's government which is provided for by Art. I, Sec. 8, Cl. 17 of the Constitution, rather than with the non-state areas as to whom the Congressional power is derived from the Territory Clause. The Court, however, held that in this area the rules relating to the Congressional power to govern the District of Columbia and the non-state areas are identical. Indeed, the Court relied on cases dealing with non-state areas, e.g., Hornbuckle v. Toombs, 85 U.S. (18 Wall.) 648, 655 (1874), and Christianson v. King County, 239 U.S. 365 (1915), where it held that Congress can delegate its legislative authority under Art. I, Sec. 8, Cl. 17 of the Constitution to the District, subject to the power of Congress at any time to revise, alter, or revoke that authority.

[6] Congress has exercised this power with respect to the District of Columbia. The Act of February 21, 1871, 16 Stat. 419 gave the District of Columbia virtual territorial status, with a a governor appointed by the President, a legislative assembly that included an elected house of delegates, and a delegate in Congress. The 1871 Act was repealed by the Act of June 20, 1874, 18 Stat. 116, which abrogated among others the provisions for the legislative assembly and a delegate in Congress, and established a government by a Commission appointed by the President.

authority to enact legislation under the Territory Clause that would limit the unfettered exercise of its power to amend or repeal.

The same result flows from the consideration that all non-state areas are subject to the authority of Congress, which, as shown above, is plenary. This basic rule does not permit the creation of non-state areas that are only partially subject to Congressional authority. The plenary power of Congress over a non-state area persists as long as the area remains in that condition and terminates only when the area becomes a State or ceases to be under United States sovereignty. There is no intermediary status as far as the Congressional power is concerned.

The two mutual consent clauses contained in the proposed Commonwealth Act therefore are subject to Congressional modification and repeal.

III.

<u>The rule that legislation delegating governmental powers to a non-state area must be subject to amendment and repeal is but a manifestation of the general rule that one Congress cannot bind a subsequent Congress, except where it creates vested rights enforceable under the Due Process Clause of the Fifth Amendment.</u>

The rule that Congress cannot surrender its power to amend or repeal legislation relating to the government of non-state areas is but a specific application of the maxim that one Congress cannot bind a subsequent Congress and the case law developed under it.

The rationale underlying that principle is the consideration that if one Congress could prevent the subsequent amendment or repeal of legislation enacted by it, such legislation would be frozen permanently and would acquire virtually constitutional status. Justice Brennan expressed this thought in his dissenting opinion in <u>United States Trust Co.</u> v. <u>New Jersey</u>, 431 U.S. 1, 45 (1977), a case involving the Impairment of the Obligation of Contracts Clause of the Constitution (Art. I, Sec 10, Cl. 1):

> One of the fundamental premises of our popular democracy is that each generation of representatives can and will remain responsive to the needs and desires of those whom they represent. Crucial to this end is the assurance that new legislators will not automatically be bound by the policies and undertakings of earlier days.... The Framers fully recognized that nothing would so jeopardize the legitimacy of a system of government that relies upon the ebbs and flows of politics to "clean out the rascals" than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts.

Nonetheless, the maxim that one Congress cannot bind future Congress, like every legal rule, has its limits. As early as 1810, Chief Justice Marshall explained in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810):

> The principle asserted is that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.
>
> The correctness of this principle, so far as respects general legislation, can never be controverted. But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.
>
> When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest (sic) those rights.

The powers of one legislature to repeal or amend the acts of the preceding one are limited in the case of States by the Obligation of Contracts Clause (Art. I, Sec. 10, Cl. 1) of the Constitution and the Due Process Clause of the Fourteenth Amendment, and in the case of Congressional legislation by the Due Process Clause of the Fifth Amendment. This principle was recognized in the Sinking-Fund Cases, 98 U.S. 700, 718-19 (1879):

> The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. (emphasis supplied.)

See also Bowen v. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 54-56 (1986).

IV

The Due Process Clause does not Preclude Congress from Amending or Repealing the two Mutual Consent Clauses

The question therefore is whether the Due Process Clause of the Fifth Amendment precludes a subsequent Congress from repealing legislation for the governance of non-state areas enacted by an earlier Congress under the Territory Clause. This question must be answered in the negative.

The Due Process Clause of the Fifth Amendment provides:

> No person shall . . . be deprived of life, liberty, or property without due process of law. (emphasis supplied.)

This Clause is inapplicable to the repeal or amendment of the two mutual consent clauses here involved for two reasons. First, a non-state area is not a "person" within the meaning of the Fifth Amendment, and, second, such repeal or amendment would not deprive the non-state area of a property right within the meaning of the Fifth Amendment.

A.

A non-state area is not a person in the meaning of the Due Process Clause of the Fifth Amendment.

In South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966), the Court held that a State is not a person within the meaning of the Due Process Clause of the Fifth Amendment. See also, Alabama v. EPA, 871 F.2d 1548, 1554 (11th Cir.), cert. denied, 493 U.S. 991 (1989) ("The State of Alabama is not included among the entities protected by the due process clause of the fifth amendment"); and State of Oklahoma v. Federal Energy Regulatory Comm., 494 F.Supp. 636, 661 (W.D. Okl. 1980), aff'd, 661 F.2d 832 (10th Cir. 1981), cert. denied, sub. nom. Texas v. Federal Energy Regulatory Comm., 457 U.S. 1105 (1982).

Similarly it has been held that creatures or instrumentalities of a State, such as cities or water improvement districts, are not persons within the meaning of the Due Process Clause of the Fifth Amendment. City of Sault Ste. Marie, Mich. v. Andrus, 532 F. Supp. 157, 167 (D.D.C. 1980); El Paso, County Water Improvement District v. IBWC/US, 701 F. Supp. 121, 123-24 (W.D. Tex 1988).

The non-state areas, concededly, are not States or instrumentalities of States, and we have not found any case holding directly that they are not persons within the meaning of the Due Process Clause of the Fifth Amendment. They are, however, governmental bodies, and the rationale of South Carolina v. Katzenbach, 383 U.S. at 301, appears to be that such bodies are not protected by the Due Process Clause of the Fifth Amendment. Moreover, it is well established that the political subdivisions of a State are not considered persons protected as against the State by the provisions of the Fourteenth Amendment. See, e.g., Newark v. New Jersey, 262 U.S. 192, 196 (1923); Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933); South Macomb Disposal Authority v. Township of Washington, 790 F.2d 500, 505, 507 (6th Cir. 1986) and the authorities there cited. The relationship of the non-state areas to the Federal Government has been analogized to that of a city or county to a State. As stated, supra, the Court held in National Bank v. County of Yankton, 101 U.S. 129, 133 (1880):

> The territories are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective States ...

More recently, the Court explained that a non-state area is entirely the creation of Congress and compared the relationship between the Nation and a non-state area to that between a State and a city. United States v. Wheeler, 435 U.S. 313, 321 (1978). It follows that, since States are not persons within the meaning of the Fifth Amendment and since the political subdivisions of States are not persons within the meaning of the Fourteenth Amendment, the non-state areas are not persons within the meaning of the Due Process Clause of the Fifth Amendment.

B.

Legislation relating to the governance of non-state areas does not create any rights or status protected by the Due Process Clause against repeal or amendment by subsequent legislation.

As explained earlier, a subsequent Congress cannot amend or repeal earlier legislation if such repeal or amendment would violate the Due Process Clause of the Fifth Amendment, i.e., if such amending or repealing legislation would deprive a person of property without due process of law. It has been shown in the preceding part of this memorandum, that a non-state area is not a person with the meaning of the Due Process Clause. Here it will be shown that mutual consent provisions in legislation, such as the ones envisaged in the Guam Commonwealth Act, would not create property rights within the meaning of that Clause.

Legislation concerning the governance of a non-state area, whether called organic act, federal relations act, or commonwealth act, that does not contain a mutual consent clause is clearly subject to amendment or repeal by subsequent legislation. A non-state area does not acquire a vested interest in a particular stage of self government that subsequent legislation could not diminish or abrogate. While such legislation has not been frequent, it has occurred in connection with the District of Columbia. See District of Columbia v. Thompson Co., 346 U.S. 100, 104-05 (1953); supra n.6. Hence, in the absence of a mutual consent clause, legislation concerning the government of a non-state area is subject to amendment or repeal by subsequent legislation.

This leads to the question whether the addition of a mutual consent clause, i.e. of a provision that the legislation shall not be modified or repealed without the consent of the Government of the United States and the Government of the non-state area, has the effect of creating in the non-state areas a specific status amounting to a property right within the meaning of the Due Process Clause. It is our conclusion that this question must be answered in the negative because (1) sovereign governmental powers cannot be contracted away, and (2) because a specific political relationship does not constitute "property" within the meaning of the Fifth Amendment.

1. As a body politic the Government of the United States has the general capacity to enter into contracts. United States v. Tingey, 30 U.S. (5 Pet.) 115, 128 (1831). This power, however, is generally limited to those types of contracts in which private persons or corporations can engage. By contrast [sovereign] "governmental powers cannot be contracted away," North American Coml. Co. v. United States, 171 U.S. 110, 137 (1898). More recently the Supreme Court held in connection with legislation arising under the Contract Clause (Art. I, Sec. 10, Cl. 1) of the Constitution that "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977).[7] In a similar context Mr. Justice Holmes stated:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).[8]

Agreements or compacts to the effect that the Congress may not amend legislation relating to the government of a non-state area without the consent of the latter, or that federal legislation shall not apply to Guam unless consented to by the Government of Guam would unquestionably purport to surrender essential powers of the federal government. They are

---

[7] Cases arising under the Contract Clause holding that a State cannot contract away a sovereign power are also applicable to the contracts made by the federal government because the Contract Clause imposes more rigorous restrictions on the States than the Fifth Amendment imposes on the federal government. Pension Benefit Guaranty Corp. v. R.A. Gray Co., 467 U.S. 717, 733 (1984); National Railroad Passenger Corp. v. A.T. & S.F. R., 470 U.S. 451, 472-73 n.25 (1985). Hence, when state legislation does not violate the Contract Clause, analogous federal legislation is all the more permissible under the Due Process Clause of the Fifth Amendment.

[8] Cited with approval with respect to federal legislation in Norman v. B. & O.R., 294 U.S. 240, 308 (1935).

therefore not binding on the United States and cannot confer a property interest protected by the Fifth Amendment.[9]

More generally, the Supreme Court held in Bowen v. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986), that the contractual property rights protected by the Due Process Clause of the Fifth Amendment are the traditional private contractual rights, such as those arising from bonds or insurance contracts, but not arrangements that are part of a regulatory program such as a State's privilege to withdraw its participation in the Social Security system with respect to its employees. Specifically, the Court stated:

> But the "contractual right" at issue in this case bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. The termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in § 418 itself. The provision constituted neither a debt of the United States, see Perry v. United States, supra, nor an obligation of the United States to provide benefits under a contract for which the obligee paid a monetary premium, see Lynch v. United States, supra. The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory program over which Congress retained authority to amend in the exercise of its power to provide for the general welfare.

Agreements that the Guam Commonwealth Act may not be amended without the consent of the Government of Guam, or that future federal statutes and regulations shall not apply to Guam without the consent of the Government of Guam clearly do not constitute conventional private contracts: they are elements of a regulatory system.

In the past the Department of Justice at times has concluded that a non-State area may have a vested interest in a specific status which would be immune from unilateral Congressional amendment or repeal.[10] We cannot continue to adhere to that position in

---

[9] Cases such as Lynch v. United States, 292 U.S. 571 (1934), and Perry v. United States, 294 U.S. 330 (1935), are not contrary to this conclusion. Both cases involved commercial agreements (Lynch: insurance; Perry: Government bonds) In Lynch the Court held that Congress could not amend the contract merely to save money "unless, indeed the action falls within the federal police police power or some other paramount power." 292 U.S. at 579. Perry involved bonds issued by the United States under the authority of Art. I, Sec. 8, Cl. 2 of the Constitution, to borrow money on the credit of the United States. The Court held that Congress did not have the power to destroy the credit of the United States or to render it illusory by unilaterally abrogating one of the pivotal terms of the bonds to save money. While the Court held that the United States had broken the agreement, it nevertheless held that plaintiff could not recover because, as the result of regulations validly issued by the United States, he had not suffered any monetary damages.

[10] Cf. n.2.

view of the rulings of the Supreme Court that legislation concerning the governance of a non-state area is necessarily subject to Congressional amendment and repeal; that governmental bodies are not persons within the meaning of the Due Process Clause; that governmental powers cannot be contracted away, and especially the exposition in the recent Bowen case, that the property rights protected by the Due Process Clause are those arising from private law or commercial contracts and not those arising from governmental relations.[11]

Sections 103 and 202 therefore do not create vested property rights protected by the Due Process Clause of the Fifth Amendment.[12] Congress thus retains the power to amend the Guam Commonwealth Act unilaterally or to provide that its legislation shall apply to Guam without the consent of the government of the Commonwealth. The inclusion of such provisions, therefore, in the Commonwealth Act would be misleading. Honesty and fair dealing forbid the inclusion of such illusory and deceptive provisions in the Guam Commonwealth Act.[13]

Finally, the Department of Justice has indicated that it would honor past commitments with respect to the mutual consent issue, such as Section 105 of the Covenant with the Northern Mariana Islands, in spite of its reevaluation of this problem. The question whether the 1989 Task force proposal to amend Section 103 of the Guam Commonwealth Act so as to limit the mutual consent requirement to Sections 101, 103, 201, and 301 constitutes such prior commitment appears to have been rendered moot by the rejection of that proposal by the Guam Commission.

---

[11] It is significant that the circumstances in which Congress can effectively agree not to repeal or amend legislation were discussed in the context of commercial contracts. Bowen, 477 U.S. at 52.

[12] Bowen, it is true, dealt with legislation that expressly reserved the right of Congress to amend, while the proposed Guam Commonwealth Act would expressly preclude the right of Congress to amend without the consent of the Government of Guam. The underlying agreements, however, are not of a private contractual nature, and, hence, are not property within the meaning of the Due Process Clause. We cannot perceive how they can be converted into "property" by the addition of a provision that Congress foregoes the right of amendment.

[13] The conclusion that Section 202 of the Guam Commonwealth Act (inapplicability of future federal legislation to Guam without the consent of Guam) would not bind a future Congress obviates the need to examine the constitutionality of Section 202. In Currin v. Wallace, 306 U.S. 1, 15-16 (1939), and United States v. Rock Royal Co-op. 307 U.S. 533, 577-78 (1939), the Court upheld legislation that made the effectiveness of regulations dependent on the approval of tobacco farmers or milk producers affected by them. The Court held that this approval was a legitimate condition for making the legislation applicable. Similarly, it could be argued that the approval of federal legislation by the Government of Guam is a legitimate condition for making that legislation applicable to Guam. Since, as stated above, a future Congress would not be bound by Section 202, we need not decide the question whether the requirement of approval by the Government of Guam for every future federal statute and regulation is excessive and inconsistent with the federal sovereignty over Guam.

August 26, 1994

COMMENTS ON DOJ MEMORANDUM REGARDING MUTUAL CONSENT PROVISION IN THE GUAM COMMONWEALTH LEGISLATION

We have had an opportunity to review the July 28, 1994 memorandum initialed by Deputy Assistant Attorney General Roseborough and addressed to the Special Representative for Guam Commonwealth (hereinafter the "Memorandum"). That Memorandum purports to reverse a thirty-year Justice Department policy supporting the constitutionality and enforceability of mutual consent clauses in legislation providing for internal self-government in the territories.[1] According to the Memorandum, mutual consent clauses are unenforceable because (1) rulings of the Supreme Court require that the "governance of a non-state

[1] The Department of Justice expressly has approved and gone on record supporting Congressional passage of mutual consent clauses in at least two U.S. statutes implementing political status agreements with one U.S. territory, and the Freely Associated States, and apparently continues to support the constitutionality and enforceability of these provisions. Memorandum at 12 ("Finally, the Department has indicated that it would honor past commitments with respect to the mutual consent issue"). But an Act of Congress either is constitutional and enforceable or it is not. If the Department of Justice means what it has stated in the Memorandum, this will have profound legal and political implications with respect to the state of law and governmental relations for the insular jurisdictions to which the existing federal mutual consent statutes apply, as well as one new insular jurisdiction for which yet another mutual consent law is to take effect within a matter of weeks. Appendix A is a description of the legal and political nature of the existing mutual consent precedents and some of the possible effects if the Department of Justice does not reconsider the views recommended in the Memorandum of July 28.

area is necessarily subject to Congressional amendment and repeal"; (2) "governmental bodies are not persons within the meaning of the Due Process Clause"; and (3) "governmental powers cannot be contracted away" relying on the recent decision in Bowen v. Public Agencies Opposed to Social Sec. 477 U.S. 41 (1986) (popularly referred to as the "POSSE" decision) supposedly because the Court held that the only "property rights protected by the Due Process Clause are those arising from private law or commercial contracts and not those arising from government relations". Memorandum at 12.

The POSSE Decision Does Not Bar A Mutual Consent Clause - If Congress Has Stated Its Intention in Unmistakable Terms.

Not one of the reasons given for rejecting a mutual consent clause in the Guam Commonwealth legislation can be justified relying on the POSSE decision or any other decision discussed in the Memorandum.[2] The Memorandum is misleading and disturbingly inaccurate. It quotes parts of judicial decisions out of context, relies on decisions which have nothing whatsoever to do with whether Congress has the power to bind itself when entering into a political status arrangement with a territory, misstates holdings in cases cited, mistakes dicta for holdings in others

[2] Interestingly while the Memorandum asserts that its position must change as a result of POSSE, the next most recent decision relied upon is United States Trust Co. v. New Jersey, 431 U.S. 1, decided in 1977. Virtually all of the other key cases were decided in the 19th Century and early 20th Century, none of which would justify the change. If the POSSE decision has been wrongly interpreted in the Memorandum, then no justification exists for the changed position.

and relies upon a web of circular reasoning which quite simply does not justify the Department's changed position.

Perhaps of most concern is that the Memorandum reaches an absolute conclusion concerning Congress' authority to enter into a binding mutual consent arrangement with a territory, even though this question has never been put directly before the Supreme Court or any other court. This is all the more disturbing because the only court which has ever even approached the question apparently assumed that Congress could indeed bind itself, notwithstanding its plenary power under the Territorial Clause. See, e.g., U.S. Ex Rel. Richards v. De Leon Guerrero, 4 F.3d 749, 754 (9th Cir. 1993). This case is not even mentioned in the Memorandum.[3] More importantly, both the Supreme Court and D.C. Circuit Court of Appeals have indicated in dicta that Congress can limit the ability of future Congresses to change laws which grant vested rights if Congress expresses its intention in "unmistakable terms". See, e.g. POSSE, 477 U.S. at 52; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 148 (1982);

---

[3] Our standards for legal advocacy properly allow attorneys to present the facts and law in the light most favorable to the proposition being espoused. Generally accepted ethical standards, however, obligate an attorney to undertake a reasonable inquiry and to ensure that the arguments put forward are accurate and fairly reflect existing law, even if asserting a nonfrivolous proposition that the law should change. In our view the Memorandum was not prepared in a manner consistent standards of advocacy required in proposing such an important change in policy, and it should not have been presented for approval by departmental management as an official position without further deliberation between all concerned agencies and even comment by the insular areas affected.

Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Transohio"). Incredibly, this "unmistakable terms" doctrine (which served as the basis for the holding in POSSE) is also not addressed.

A section-by-section analysis of the Memorandum is attached as Appendix B. This analysis demonstrates that no certain precedent exists for the proposed change in policy. To summarize the contents of this analysis: (1) none of the cases cited for the proposition that Congress must retain the right to alter, amend or repeal territorial legislation dealt with the question placed before the Department by the mutual consent proposal; (2) the issue of the Commonwealth of Guam not being a person for purposes of the Due Process Clause is a red herring because the proposal being discussed by Guam and the Administration contemplates an agreement between the Congress and the people of Guam based in part on the Commonwealth Of The Northern Mariana Islands and Freely Associated States political status precedents; and (3) the holding in the POSSE decision provides utterly no support for the proposition set forth in the Memorandum.

Perhaps no part of the Memorandum is as disturbing as is the analysis of the Supreme Court's decision in POSSE which is put forward as requiring the Department's change of its thirty-year position on the constitutionality and enforceability of mutual consent clauses. The Memorandum claims the change is required because the Supreme Court held in POSSE "that the [only] contractual property rights protected by the Due Process Clause of the Fifth Amendment are the traditional private contractual rights, such as those arising from bonds or insurance contracts, but not arrangements that are part of a regulatory program...." Memorandum at 11.

The POSSE decision, however, did not turn on the subject matter of the contract in question, and the Court's reference to the bond and insurance cases had no direct bearing on the Court's holding. Those cases were cited in POSSE for the limited purpose of contrasting contracts where Congress clearly evidenced its intent to bind itself from the facts in the POSSE case where "Congress expressly reserved to itself '[t]he right to alter, amend, or repeal any provision of' the Act which authorized the contracts at issue. 477 U.S. at 42. The Court relied upon this contrast because its holding in POSSE was that the Congress could amend the legislation in question, even if that amendment interfered with contractual rights, because it had not unmistakably indicated its intent to bind itself -- the standard the Court has established for determining whether Congress has imposed limits on the exercise of its sovereign powers.

The actual holding in POSSE --that Congress had not surrendered its sovereign power to alter Social Security laws -- has been thoroughly analyzed by the D.C. Court of Appeals in Transohio. The Transohio decision demonstrates conclusively that the Memorandum's analysis of the holding in POSSE is so fundamentally wrong that one wonders how it could be relied upon by the nation's Department of Justice to justify a proposed reversal in such an important area of Administration policy. In that decision, the D.C. Circuit makes clear that "[t]he Supreme Court reached [its] conclusion by analyzing the governing statute, the Social Security Act" and focused on the fact critical to its decision -- "[t]he Social Security Act contained an express reservation of Congress' power to amend the law...", 967 F.2d at 621, not by establishing the *per se* "private rights" test asserted in the Memorandum.

According to the D.C. Circuit

> The "principles form[ing] the backdrop" of the Supreme Court's analysis of the Social Security Act in POSSE were those comprising the unmistakability doctrine--the doctrine that "'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.

Id. at 622 (emphasis added).

The D.C. Circuit also discussed the history of the unmistakability doctrine.

> "The 'unmistakability' doctrine is a special rule of contract interpretation that applies to contracts with the government. The doctrine dates back to the early 19th century, when Chief Justice Marshall provided its justification. The government, Chief Justice Marshall wrote for the Court in a case concerning the government's taxing power, may enter binding contracts when it finds "a consideration sufficiently valuable to induce a partial release" of its sovereign powers.

Id. at 618.

Both the POSSE and Transohio cases dealt with the application of the "unmistakable terms" test to a determination of whether Congress has limited its right to exercise its regulatory jurisdiction. This test has nothing whatsoever to do with a standard based on "traditional private contractual rights" which the Memorandum would have us believe is the standard. If it were the test, the Supreme Court and D.C. Court of Appeals could easily have disposed of the contracts in POSSE and Transohio by adopting the test advocated in the Memorandum with a simple finding that alleged contractual rights associated with the regulatory programs at issue in the cases are not traditional private contractual rights. They did not, of course, because the Supreme Court applies the "unmistakable terms" test which requires an analysis of Congress' intent, not the *per se* standard proposed in the Memorandum. See, e.g., 477 U.S. at 54.

We find it inconceivable that the Department would decide to reverse a thirty-year old policy based on a decision which has been universally interpreted as suggesting exactly the opposite of what the Memorandum asserts is the holding -- that Congress can limit the exercise of its regulatory authority if it makes clear its intent to do so.[4] Instead of dealing accurately with

---

[4] The import of the POSSE decision has been recognized even by its critics. An article in the Columbia Law Review by David Toscano entitled "Forbearance Agreements: Invalid Contracts for the Surrender of Sovereignty" analyzed the POSSE decision in great detail. It concluded that "[t]he power to waive sovereignty was recognized" in POSSE. 92 Col. L. Rev. 426, 451. It goes on "[i]n POSSE, the Court relied entirely on Merrion v. Jicarilla Apache Tribe for the proposition that the federal government can surrender sovereign power. Jicarilla in turn relied upon cases involving primarily the taxation powers of state governments... Instead of endorsing the rule applying to

the Court's actual analysis, the Memorandum at page 11 relies upon a quote, claimed to set forth the holding, which is taken completely out of context and has nothing whatsoever to do with the holding.

The quote, taken from 477 U.S. 55, fails to include the entirety of the paragraph, the remaining text from which puts back into context the relationship of the bond and insurance cases to the basis of the decision. The following quote picks up the rest of this language beginning with the last sentence of the quote from page 11 of the Memorandum. This language makes absolutely clear that what the Court focused on was the fact that instead of Congress having stated in unequivocal terms its intention to limit the exercise of its regulatory authority, it explicitly retained it.

> Rather, the provision simply was part of a regulatory program over which Congress <u>retained</u> authority to amend in the exercise of its power to provide for the general welfare. <u>Under these circumstances,</u> we conclude that the termination provision ... did not rise to the level of "property." The provision simply cannot be viewed as conferring <u>any sort of "vested right"</u> in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute <u>containing the language of reservation</u>.

477 U.S. at 55 (emphasis added).

---

the police powers -- such powers cannot be surrendered -- it adopted the rule applying to taxation powers -- such powers can only be surrendered if done so unmistakably. This move should not be followed automatically: if the Court wants to enforce contracts that surrender the federal government's regulatory authority, it should do so on the basis of policy arguments, not on the basis of POSSE." <u>Id</u>. at 460.

<u>Congress Can Utilize Its Plenary Authority to Limit Its Future Power -- The Greater Includes the Lesser</u>.

In part, the Memorandum goes astray in its interpretation of Congress' plenary authority over the territories. According to the Memorandum, Congress' plenary authority is infinite in time or at least until one of three things happen: (1) Guam becomes a State; (2) Guam achieves independence; or (3) the United States transfers its sovereignty over Guam to another country. Memorandum at 4.

Thus, the Memorandum seems to suggest that Congress is estopped from exercising its authority with respect to Guam if that exercise of authority results in some form of meaningful consent to the form of government under which the Guamanian people live. But Congress is not the prisoner of its plenary authority over the territories -- it is the master. The fact that Congress has plenary authority does not mean that Congress cannot exercise this authority to limit its rights in the future in the context of a political status change. Plenary authority means that Congress can take whatever action it decides is in the best interest of the U.S. and the territories, including a decision that it can limit its own exercise of future authority, if its intentions are stated in unmistakable terms. To assert otherwise stands the meaning of plenary on its head. Plenary means full power. It does not mean full power, except when Congress attempts to exercise it.

Under the Territorial Clause, Congress has the power to dispose of a territory or to make all needful rules and regulations. The broad power of Congress under the territorial clause is grounded in the need for the federal government to be able to govern and/or dispose of territory which is not part of a state. In this context, it is clear that if Congress has the power to dispose of a territory in its entirety, it also has the power to dispose of some of its control by exercising its power to make all needful rules and regulations. It is an elementary principle of statutory interpretation that the "greater includes the less". See, Late Corp. of the Church of Jesus Christ of Later-Day Saints v. Romney, 136 U.S. 1, 45 (1889).

The issue of Congress being able to restrict its authority over territory of the United States has been long decided. While at first blush it may seem counter-intuitive, Congressional authority over the people of the territories and their political rights emanates from Congress' authority over Guam as property brought within Congress' control by the Territorial Clause. In Edward v. Carter, the Court clarified Congress' power under the property clause, stating:

> Thus, it appears that in referring to Congress' power "without limitation", the Court was holding that Congress' authority under Article IV §3 cl. 2 embraces any disposition of property of the United States chosen by Congress.

580 F.2d 1055, 1061 n. 18 (1978) (citations omitted) (emphasis added).

Further definition was provided in U.S. v. Gratiot, 39 U.S. 526 (1840) where the Court considered Congress' power to impact a lease of federal lands through legislation. The Court's approach to the question is quite interesting and seems to analogize the power over land with the power over territorial governments.

First, it finds that the mines in question lie within territory of the United States are, therefore, its property.

Second, it recites the Territorial Clause and concludes that the term territory refers is a descriptive word referring to one kind of property.

Third, the Court concludes that "Congress has the same power over [the mine] as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest". Id. at 537.

Fourth, the Court then references cases involving Congress' authority over the territories, including Florida, including the right of Congress "to make all needful rules and regulations respecting the territory or property of the United States". Id. at 538.

Finally, the Court concludes "[i]f such are the powers of Congress over the lands belonging to the United States, the words 'dispose of,' cannot receive the construction contended for at the bar; that they vest in Congress the power only to sell, and not to lease such lands". Id.

The Court's concept which forms the basis of these opinions is that the greater includes the lesser. The Court reached its decision building on Congress' authority over the territories. If Congress has the power to dispose of territories or to make all needful rules and regulations, it must then also have the power to limit its political control over the people of the territory just like it has the right to limit its authority over territory by leasing it.

The Result of the Department's Opinion is to Leaves the People of Guam with a Hobson's Choice -- Remain in a Perpetual State of Colonialism or Seek Independence.

The result of this reversal in position would have extraordinarily serious policy implications for United States security interests in Guam and the Pacific Region, not to mention the United States' moral leadership on the issue of granting democracy to non-self-governing people around the world. The Memorandum begins by defining Guam as a "non-state area, a catchy pseudonym for what Guam really is -- a territory, and U.S. citizen population, which the U.N. officially classifies as not yet having been decolonized, and which has no realistic prospect of achieving statehood -- the traditional path by which U.S. territories ceased being colonies and became self-governing in our constitutional system.

Fortunately, the Territorial Clause gives Congress the constitutional power to address this problem. In the Insular Cases the Supreme Court recognized that Congress must have flexibility to adapt federal law and policy for island territories which remain "unincorporated" for an extended period of time, and which remain subject to federal power without being integrated into the system of constitutional federalism --

leaving the U.S. citizens concerned without equal legal and political rights when compared to citizens resident in the states.

The moral imperative of ending Guam's neo-colonial status is fundamental to the Administration's decision to pursue a mutual consent provision. Mutual consent brings to the people of Guam democracy by giving them a direct role in their own internal self-government which would not otherwise be available.[5]

By rejecting absolutely any possibility that the Supreme Court may uphold a mutual consent clause in a political status arrangement, the Department of Justice is putting this Administration in the untenable position of saying to the U.S. citizens of Guam that they cannot have meaningful self-government within the framework of the U.S. Constitution. We do not think this is a position which this Administration ought to be taking, especially when the Supreme Court has not spoken directly to the

---

[5] The American-citizen residents of Guam do not have the same rights to participate in the representative democracy enjoyed by the citizens of the several States. Without voting representation in Congress or a vote in national elections, there is no means by which they meaningfully can consent to the laws and form of government under which they live. This colonial status was awkward even in its first fifty years, but has become intolerable since the U.N. Charter was adopted and the era of decolonization began. Guam is not seeking decolonization outside the U.S. system, and it would be perverse to suggest that decolonization is not available to U.S. citizens within the U.S. political system. Thus, the question facing the Administration is whether a nation founded on the principle of consent of the governed can adapt its law and policy to end denial of this basic right and establish an appropriate alternative means of consent for loyal citizens in the territories.

question and the most that can be said about the precedent is that arguments exist on both sides of the question.

The effect of the Department's changed position is to leave the people in a perpetual state of colonialism or force them into independence. The Clinton Administration has been the first to state with candor and honesty on the record what all those who have dealt with Guam have known for years -- Statehood is not an option for Guam. It is simply too small and remote. Similarly, given Guam's strategic importance to the United States, it is inconceivable that sovereignty would be voluntarily transferred to another sovereign power, nor do we believe that the people of Guam would accept it. The clear implication of the Department's position, therefore, is that the American citizen residents of Guam, if they desire to possess a truly democratic government, will have no choice but to seek independence from the United States.

The notion that independence is the only political status outcome through which the injustice of Guam's colonial past can be remedied is not only counter to the robust common sense with which Americans have implemented their Constitution, it is a dangerous, fatalistic and cold-hearted idea that will have a chilling effect on the spirits of the Guamanian people.

Leaving independence as the only alternative also raises serious national security policy questions. Policy coordination for Guam Commonwealth negotiations is exercised by the National Security Council because Guam is an important military and strategic location for the United States. A decision has been made by the White House that an agreement should be reached with the people of Guam which achieves two fundamental goals. First, the people of Guam should be permitted to achieve meaningful internal self-government free from unnecessary interference. Second, United States long-term security interests must be protected. Offering the people of Guam the opportunity to achieve meaningful participation in a democracy only by forcing them to seek independence is inconsistent with the second of these goals. We do not believe that this Hobson's Choice ought to be forced upon the United States or people of Guam based on conclusions of anyone other than the Supreme Court.

This is a policy issue which is best left to the courts, if a challenge ever arises. In this regard, the Department's concern that no one should be misled concerning the certain viability of a mutual consent provision is consistent with our position. We have consistently taken the position in the negotiations that no one can be sure how the issue will be decided. The best we can do is to meet the requirements the Supreme Court has set out as being necessary for Congress to bind itself (a statement in "unmistakable terms") and state forthrightly in the political education process that we cannot be sure of the outcome until the Supreme Court has acted. It is well established, however, that when the intent of Congress with respect to the precise question at issue is clear, the courts must give it effect. See, Chevron, U.S.A. v. NRDC, 467 U.S.

837, 842-43 (1984). It is equally clear that the courts give great deference to Congress when it is exercising its Territorial Clause authority. See, Wabol v. Villacrusis, 958 F.2d at 460, citing Torres v. Puerto Rico, 442 U.S.465, 460-70. In fact, we know of no decision of the Supreme Court reversing any action by the Congress taken with regard to the governance of a territory when the Congress has acted pursuant to its Territorial Clause authority.

Attachments

APPENDIX A

U.S. Practice With Respect to Mutual Consent Arrangements for Insular Areas Not Incorporated into the U.S. Constitutional Process for Democratic Self-Government But In Which the U.S. Retains and Exercises Sovereignty and/or Significant Powers of Government:

BACKGROUND:

Under a succession of treaties with other nations and international organizations including the U.N., in this century the U.S. has acquired and exercised actual sovereignty and/or the full powers and jurisdiction of government over insular areas (islands) which have not been incorporated as territories or states to which the U.S. Constitution applies in full. Thus, these areas are not fully self-governing and have no power to give consent to U.S. laws made applicable to them.

As each of these territories has moved toward greater self-government the U.S. has agreed to various political, legal and budgetary measures which accommodate U.S. interests in retaining certain powers of government, while at the same time redeeming in some greater degree the principle that free people must be enabled to give some meaningful form of consent to the laws and form of government under which they live.

In the case of U.S. territories over which the U.S. exercises full sovereignty, but which have not been incorporated fully into the system of federalism, measures aimed at enhanced self-government have attempted to address the fact that the U.S. citizens concerned do not have voting representation in Congress, enfranchisement in national elections or general legal or political equality with their fellow citizens in the states.

For example, in the case of the Commonwealth of the Northern Mariana Islands (CNMI), as discussed below, the Executive Branch of the federal government and Congress entered a "Covenant," or agreement with the people of the territory, under which the U.S. exercises sovereignty, but which defines a political relationship the central elements of which are not subject to modification without mutual consent of the people of the territory and the federal government.

This mutual consent arrangement constitutes a substitute set of political rights intended to give the people of the CNMI a greater measure of democratic self-government by granting them a political power of consent to federal law not granted to U.S. citizens in the states, who instead are able to give their consent to federal law through representation in Congress and voting in national elections. This type of mutual consent arrangement has been promulgated by Congress pursuant to the Territorial Clause of the Constitution (Article IV, Section 3, Clause 2), which empowers Congress to provide for areas not yet fully within the constitutional system but subject to U.S. federal law and sovereign powers.

For insular areas over which the U.S. exercised powers of government but not sovereignty under agreements with the U.N., the federal government promulgated mutual consent provisions through a combined statutory and treaty-making process. Under these arrangements the U.S. retains plenary authority over broad areas of government power in the concerned insular areas, i.e., full defense authority, while the separate citizenship, sovereignty and national independence of those insular areas have been recognized. This arrangement is known as "free association."

The compact agreements establishing the free association relationships between the U.S. and certain insular areas have been approved by the U.S. Congress in the form of joint resolutions passed by both houses and signed by the President. Like the CNMI covenant and the proposed Guam Commonwealth Act, the U.S. federal statute approving the free association compact was intended to create a unique and mutually agreed political status for insular areas not incorporated into the U.S., but with special close political, legal and security ties to this nation.

The fact that Guam and the CNMI are unincorporated territories, while the freely associated states under the compacts are sovereign, does not change the legal or constitutional analysis. These acts of Congress which bind the federal government and limit the exercise of constitutional powers either are constitutional and enforceable or they are not.

There is no valid constitutional distinction between the mutual consent provisions in the free association compact and the CNMI covenant or proposed Guam Commonwealth Act simply because the power of Congress which is being limited involves foreign policy and national defense powers arising from Article I or Article II of the Constitution, or if the subject matter gives rise to Article IV territorial powers.

The general concept that Congress can alter, amend or repeal the laws of purely domestic application has its parallel with respect to laws and treaties which create obligations between the U.S. and other nations. Specifically, an element of sovereignty is the power to abrogate treaties, and in the U.S. constitutional system the President and Congress have the power to make treaties and terminate treaties. Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979). As discussed below, in addition to formal renunciation of a treaty by the President, Congress can terminate or prevent performance of treaties requiring appropriations simply decline to appropriate funding to meet international obligations. This has the effect of superseding the prior act of the Congress ratifying the treaty.

Thus, the question before us is whether Congress can limit its power to amend, alter or repeal a prior act so that commitments intended to be binding are set aside, and that question is relevant to any act of Congress which purports to make such binding commitments, including the statute making the free association compacts U.S. law.

We believe the test under POSSE for answering that question turns on whether Congress makes its intent to do so unmistakably clear. If the position set forth in DOJ Memorandum stands and the Department of Justice reverses prior legal policy by adopting the view that binding commitments such as the mutual consent provisions in the CNMI covenant, the free association compacts and the proposed Guam Commonwealth Act are unenforceable and unconstitutional, then the effect of that could reach far beyond the Guam mutual consent proposal.

For example, the mutual consent provisions relating to the political and legal relationships created by the free association compacts are linked to unprecedented multi-year funding authorizations that bind successive Congresses to enact appropriate laws providing funding for specified grants to the governments of the free associated insular areas. These provisions are enforceable in the federal courts, and give the free associated state governments concerned access to domestic U.S. legal remedies that foreign governments do not have under conventional U.S. laws and treaties.

To illustrate the point, as a general rule if Congress refuses to fund U.S. performance of a treaty, it is extremely unlikely that without an explicit statutory basis for jurisdiction the federal courts would be inclined to reach beyond the political question doctrine and interfere in the foreign policy domain of the political branches by entertaining an action by a foreign government seeking a court order to compel payment of funding for U.S. obligations under a treaty abrogated by the President or Congress. Yet, under the free association compacts, that is exactly what Congress has explicitly authorized and directed the federal courts to do. See, Section 236, P.L. 99-239, discussed below.

Similarly, in Section 101(d)(2)(B) of P.C. 99-239, the statute approving the compacts, Congress required that amendments to the compact and certain related agreements made pursuant to the applicable mutual consent provisions would require congressional approval. Thus, Congress by statute explicitly agreed to the mutual consent provisions in the agreements identified in Section 101(d)(2)(B) and established a role for Congress in the procedure for U.S. consent to an amendment.

Thus, just as the mutual consent provisions of the CNMI agreement limit the exercise of Article IV territorial clause powers by

Congress, the mutual consent and related funding provisions of the free association compacts limit the exercise of Article I and Article II foreign policy and defense powers by the President and Congress. These unprecedented arrangements are intended to enable the U.S. to sustain its authority over areas in which it has significant national interests, but in which the people do not enjoy the full rights and benefits of incorporation into the U.S. federal political and legal system.

To understand the gravity of the problems that will be created if the Department of Justice persists in what we believe is a misinterpretation of the POSSE decision, it is important to examine the existing mutual consent precedents very closely.

EXISTING MUTUAL CONSENT PRECEDENTS:

The first of the existing mutual consent precedents is found at Section 105 in the Covenant to Establish the Commonwealth of the Northern Mariana Islands, U.S. Public Law 94-241, 90 Stat. 263 (1976), *reprinted at* 48 U.S.C. 1681, note. The additional important insular area mutual consent precedents are given the force and effect of U.S. law pursuant to the agreements referred to in Section 101(d)(2)(B) of the U.S. statute approving the Compact of Free Association between the U.S., the Republic of the Marshall Islands (RMI) and the Federated States of Micronesia (FSM), U.S. Public Law 99-239, 99 Stat. 1770, 48 U.S.C. 1681, note. The CNMI, FSM and RMI mutual consent provisions became effective under Presidential Proclamation No. 5564 of October 3, 1986, Federal Register Vol. 51, Number 216, November 7, 1986.

As already stated, the RMI and FSM compacts also bind successive Congresses through a pledge of the full faith and credit of the U.S. for economic assistance grants which are central elements of the political relationship defined in the compact as an agreement between the U.S. and the peoples of the RMI and FSM exercising their sovereignty by approving the agreement in a plebiscite. See, Preamble and Section 236, Compact of Free Association, P.L. 99-239.

These multi-year funding obligations are not "subject to appropriation by Congress," the typical treaty formulation, but are enforceable in the U.S. courts, which are expressly granted jurisdiction to enforce the payment obligations in the compact. Thus, Congress has restricted its ability to alter, amend or repeal those statutory obligations of its own making.

THE CASE OF PALAU:

A fourth mutual consent precedent is scheduled to enter into force on October 1, 1994 under the terms of a Compact of Free Association between the U.S. and Palau.

The Palau compact implementation agreement is terminable unilaterally by Palau or the U.S., but once the Compact enters into force, under Section 453(a) of U.S. Public Law 99-658, 100 Stat. 3700, 48 U.S.C. 1681, note, the Palau compact mutual consent provision and all the related rights and obligations under the agreement will be binding upon both Palau and the United States. If the DOJ Memorandum of July 28 is applied to the Palauan compact mutual consent provision there may be reasons not to go forward with implementation.

The U.S. currently is under no legal obligation to implement the Palau Compact, and even though the Palauans have approved the Compact the government of that insular area has no rights under the agreement until it enters into force by mutual agreement, and Palau has no right to an arrangement with the U.S. which is enforceable or unconstitutional -- even if that arrangement achieves important U.S. goals such as granting Palau self-government and ending the U.N. trusteeship under which the U.S. has the ultimate powers of government in Palau.

Thus, implementing the Compact for Palau is not a case of honoring a previous commitment on mutual consent, but of creating a new one. If mutual consent clauses binding Congress are unenforceable and unconstitutional, the U.S. should unilaterally terminate the implementation agreement as provided for in Article II, Section 4 of that agreement, and seek to renegotiate an arrangement with Palau consistent with the Department's position in the Memorandum.

It would be bad faith to implement the Palau Compact knowing that a key provision is unenforceable and unconstitutional under U.S. law. Under the Vienna Convention on the Law of Treaties, to do so could give rise to international legal issues affecting enforceability of the compact. For the DOJ Memorandum of July 28 puts Palau on notice that the mutual consent agreement contained in Section 453(a) is viewed by the U.S. legal authorities as unenforceable.

Yet, the Section 453(a) mutual consent arrangement with Palau -- which gives the U.S. "strategic denial" rights (i.e., exclusion of third country military forces) in perpetuity -- is the single most significant provision which justified to Congress the huge economic grants contained in the funding sections of the Palau compact. As in the case of the FSM and RMI, those funding grants are backed by the full faith and credit of the U.S. and enforceable in the federal courts.

If the Palau compact takes effect and the mutual consent provision in Section 453(a) is unenforceable, it would appear that the massive U.S. funding obligations under Title Two of the compact for Palau would survive under the terms of Section 452(a), even if the U.S. followed the procedure under Section 442 to terminate the free association relationship due to loss of the defense rights which were to extend beyond the initial period of the compact.

Perpetual strategic denial is what the U.S. would be able to retain under continuation of the U.N. trusteeship, and so strategic denial that lasts beyond the agreed period of free association under the compact is what Congress demanded in order to justify over $450 million in grants to a community of 14,000. If the Department of Justice wants the Administration to give away what Congress approved in P.L. 99-658 just to win a debate over mutual consent for Guam, shouldn't Congress be informed?

Thus, the decision of the Department of Justice to change its position on mutual consent does not impact on Guam alone. The most immediate impact may be on Palau. Of course, the Department of Justice may not have the authority or ability simply to choose to honor what must be viewed under its theory as an unconstitutional and inchoate mutual consent commitment between the U.S. and Palau. Indeed, the notion that individuals in the federal government have that degree of discretion in fundamental matters such as this itself raises constitutional issues.

But, again, even if the Department of Justice is as generous with respect to honoring a mutual consent commitment to Palau as it appears ready to be, a question may arise as to whether the U.S. will be able to enforce its rights or meet its obligations under the Palau mutual consent provision. On the face of things Section 453(a) and the related provisions of Section 311 seem to be a benefit to the U.S. which it simply can enjoy by deciding to honor it.

That view may be folly. If the same litigious parties in the U.S. or Palau who have mounted legal challenges to the military provisions of the compact tirelessly for the last fifteen years establish jurisdiction to challenge the validity of the Section 453(a) mutual consent provision in our own courts, and prevail with the aid of the DOJ Memorandum, it appears that U.S. taxpayers could end up paying Palau for defense authority tied to a mutual consent provision in Section 453(a) rendered null and void.

Having been seized with what Palau and the U.S. prudentially must view presumptively as a serious substantive legal infirmity in a provision that is fundamental to the purpose of the agreement prior to its entry into force, will the parties be able to rely upon and enforce the reciprocal and interdependent rights and obligations set forth in the agreement? If not, are the U.S. funding obligations linked to the defense authority and mutual consent provisions severable so that the U.S. would be able to extricate itself from the full faith and credit payment requirements if the defense rights proved unenforceable?

The answer to both those questions arguably would be in the negative.

We raise these issues not because we believe that the Palau mutual consent provisions are either unenforceable or unconstitutional. Rather, we use them to show the basic problem inherent in the Justice Department's approach. When the CNMI covenant and the compacts were negotiated, Justice supported the mutual consent clauses. Nothing has changed since then. Only the POSSE case has caused a rethinking of this support and POSSE merely explains the test that must be employed to determine whether Congress bound itself validly to a limitation on the exercise of its power. It did not establish a *per se* rule to the contrary.

To avoid the perverse result that could come about by applying the position set forth in the Memorandum to Palau's mutual consent compact, the DOJ Memorandum of July 28 should be withdrawn immediately. That would allow the Palau compact to be implemented and enable the parties to the Guam commonwealth negotiations can move forward with the process of defining an acceptable mutual consent relationship as endorsed by Secretary Babbitt during his trip to Guam.

APPENDIX B

SECTION-BY-SECTION ANALYSIS OF THE MEMORANDUM FOR THE SPECIAL REPRESENTATIVE FOR GUAM COMMONWEALTH DATED JULY 28, 1994 RE: MUTUAL CONSENT PROVISIONS IN THE GUAM COMMONWEALTH LEGISLATION FROM THE DEPUTY ASSISTANT ATTORNEY GENERAL

Introductory Paragraphs - pp 1-2.

The Department's Memorandum correctly recognizes that the inclusion of mutual consent clauses in the Commonwealth legislation is crucial to the people of Guam, referencing as the reasons autonomy and economics. While economic development is clearly a consideration, the reference to autonomy is misleading. It is true Guam seeks control over its internal affairs. But autonomy is less the goal than democracy. The American-citizen residents of Guam do not have the same rights to participate in the representative democracy enjoyed by the citizens of the several States. If the citizens of the Guam maintain their residence there, they elect voting members of neither the House nor the Senate, nor can they vote in presidential elections. They are effectively excluded from the most fundamental aspect of our democratic system -- the right of U.S. citizens to give some form of meaningful consent to the laws and form of government under which they live.

The circumstances of the people of Guam today are the direct consequence of almost 100 years of American rule, a period during which the U.S. has exercised sovereignty over Guam without incorporating it into the U.S. system of constitutional federalism. No level of economic development can sustain perpetual second-class citizenship. A process must be created which will lead to resolution of Guam's status as a non-self-governing area under the U.N. Charter. Until Guam is decolonized it will be a living contradiction of U.S. moral opposition to colonialism.

Thus, the fundamental question which the people of Guam and, indeed, which this Administration must ask today is similar to that question asked by the leaders of the American revolution -- can a nation, founded on the principle that government acts only with the consent of its people continue to deny basic rights of self-government to some of its citizens solely because they live in a territory?[1]

The DOJ Memorandum recognizes that for the past thirty years, the Department has supported the constitutionality and enforceability of mutual consent clauses.[2] Appendix A

---

[1] In footnote 1, the Memorandum chooses to define Guam as a "non-state area", a catchy pseudonym for what Guam really is -- a colony of the United States. This is why people in the territories object to their territorial status. As a territory they are precluded from the democratic system. The Guam Commission on Self-Determination, however, does not claim that the legal implications of being a territory do not apply to them. It is because they recognize that being a territory leaves them out of the democratic process that they seek mutual consent.

[2] Unfortunately, the Department has refused to provide us with any of the prior opinions supporting mutual consent clauses.

09/15/94, 11:59am
20029980

accompanying this document reviews the legal and political nature of relevant prior mutual consent precedents, as well as the pending entry into force of another mutual consent arrangement. We do not understand how the mutual consent provisions in these other acts of Congress will be "honored" by the Department while a similar provision proposed for Guam is unenforceable. Memorandum at 12. See Appendix A.

Neither the relevant provisions of the Constitution nor applicable cases support different standards for the kind of mutual consent arrangements involved in these insular political status relationships. Nor can it be argued that an Act of Congress in connection with the CNMI covenant or Compacts of Free Association is any different or more binding on Congress than an Act adopting the Guam Commonwealth would be. An Act of Congress is either constitutional and enforceable or it is not. If the Department intends to support the mutual consent provisions in these other Acts and does not intend to interfere with implementation of the Palau Compact, it must apply the same policy to Guam. To quote the Memorandum at p. 2 -- "[i]n our view, it is important that the text of the...Act not create any illusory expectations that might to (sic) mislead the electorate...about the consequences of the legislation".

In the end, note 2 makes clear that the foundation for the proposed change in position on mutual consent clauses is the Supreme Court's decision in Bowen v. Agencies Opposed to Soc.

09/15/94, 11:59am
20029980

Sec. Entrapment, 477 U.S. 41 (1986) (popularly referred to as "*POSSE*"). As discussed in great detail infra, *POSSE* does not bar Congress from limiting its right to exercise sovereign power by entering into a binding contract, nor does it establish a *per se* test that Congress can only bind itself when entering into contracts dealing with traditional private rights. In fact, *POSSE* dealt with the exercise of a regulatory right, and turned, not on the nature of the contractual right at issue, but on a determination of whether Congress had expressed an intention to bind itself in "unmistakable terms".

The following section-by-section analysis demonstrates that none of the cases cited in the Memorandum leads to a certain conclusion that the Supreme Court would restrict Congress' ability to enter into a political status arrangement with Guam based on mutual consent.

Section I. - "The Power of Congress to Govern the Non-State Areas under the Sovereignty of the United States is Plenary with Constitutional Limitations -- pp 2-4.

The DOJ Memorandum would lead us to believe that the Supreme Court has already decided that Congress cannot limit its exercise of authority over the territories because its authority is plenary. In this regard, the Memorandum seems to argue that this plenary authority is infinite and must remain unencumbered in perpetuity -- or at least until the U.S. alters Guam's status..

Memorandum at 4.

Thus, the Memorandum argues that Congress actually is estopped from exercising its authority with respect to Guam if that exercise of authority results in some form of meaningful consent to the form of government under which the Guamanian people live. But Congress is the master, not the prisoner of its plenary authority over the territories. If Congress has plenary authority, it follows that Congress can exercise this authority to limit the types of measures it will take pursuant to that authority if that is in the best interests of the U.S. and the territory. To assert otherwise stands the meaning of plenary on its head. Plenary means full power. It does not mean full power, except when Congress attempts to exercise it.

Under the Territorial Clause, Congress has the power to dispose of a territory or to make all needful rules and regulations. If Congress has the power to dispose of a territory in its entirety, it also has the power to dispose of some of its control by exercising its power to make all needful rules and regulations. It is an elementary principle of statutory interpretation that the "greater includes the less". See, Morman Church v. U.S, 136 U.S. 1, 45 (1889).[3] Similarly, in Collins

[3] While a distinction obviously exists between the Government's rights to abrogate property rights and the issue of its authority to exercise political power in the territories, the Supreme Court's frequent statements that the Government can bind itself do not appear to be limited to commercial-type contracts. The Court has, for instance, upheld limitations on federal political powers in areas ceded to the federal government by the

09/15/94, 11:59am
20029980

v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), the Court upheld an agreement between California and the Federal Government which reserved certain rights to California when it ceded Yosemite Park. The Court concluded that the Federal Government and the states could enter into agreements concerning jurisdiction over property within their borders, and the courts should "recognize and respect" the agreements. 304 U.S. at 527-30.[4] For instance, the Supreme Court has approved of the Government's right to lease mineral rights. See United States v. Gratiot, 39 U.S. (14 Pet.) 526, 536 (1840)("it lies in the discretion of Congress, acting in the public interest to determine how much of the property it shall dispose."). In Ashwander v. T.V.A., 297 U.S. 288 (1936), the Court approved a contract for the sale of electricity, rejecting an argument that the Government lacked constitutional authority to dispose partially of its property by contract and relying on Congress'

---

states pursuant to the Territorial Clause. In Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885), the Court upheld an agreement between the Federal Government and Kansas dividing taxing authority.

[4] The Court stated:

> Though the jurisdiction and authority of the general government are essentially different from those of a State, they are not those of a different country; and the two, the State and the general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution.

Fort Leavenworth, 114 U.S. at 541.

authority under the Territorial Clause. Id, at 330-36.[5]

None of the cases cited in the Memorandum are to the contrary. Each of them sets forth the general proposition that in regard to the territories, the Congress is supreme. In part, the earlier cases were required to make this point because the Territorial Clause was included to make clear that it was the Federal Government and not the States that would exercise control over the Territories. See, e.g., A. Leibowitz, Defining Statute (1989) at 10-11; See also, District of Columbia v. Thompson Co., 346 U.S. 100, 109 (1953). But, none of the cases cited in this

[5] The Congress also has authority to dispose of property under the Territorial Clause. This power includes both the absolute right to dispose of property in its entirety or to dispose of part of the governments rights in property:

> Of course, a significant difference may exist between the disposition of property and the disposition of sovereign authority. Nevertheless, the conclusion that Congress can partially dispose of matters over which it has the power of total disposition has considerable logical appeal. If Congress could totally dispose of its power over the Philippines by granting them independence, it seems logical that it could also partially dispose of its powers by granting them something less than complete independence. Whether Congress could later change its mind as to the partial disposition is not clear, but some kinds of dispositions are by nature final. For example, if Congress disposes of its powers over territory by admitting it as a state, that would seem a final disposition of its territorial powers; Congress cannot change later the status of a state. Similarly, when Congress granted independence to the Philippines, it disposed of its territorial power over them for all time.

Inventive Statesmanship vs. The Territorial Clause: The Constitutionality of Agreements Limiting Territorial Powers, 60 Va. L. Rev. 1041, 1060-61 (1974).

section address directly the question of whether Congress could exercise its plenary authority by restricting its ability to act in the future.

The Memorandum bases its assertions about Congress' plenary authority on Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824). That case, of course, is the seminal decision establishing Congress' power under the Commerce Clause. It has nothing whatsoever to do with the Congress' Territorial Clause authority. It is apparently cited to establish the proposition that in some express areas Congress' power "acknowledges no limitations, other than are prescribed in the Constitution". We think it should be obvious that the Department's proposed changed opinion on mutual consent is entirely inconsistent with this principle. Rather than recognizing the scope of Congress' powers, the Department is claiming that a limitation exists on Congress' power -- that Congress is imprisoned by its plenary power and cannot exercise it to limit itself. In fact, several of the other cases cited in the Memorandum to support the breadth of Congress' power are inconsistent with this limitation.

The very first case cited in the section is National Bank v. County of Yankton, 101 U.S. 129 (1880). The Memorandum utilizes a quote to establish that Congress is supreme in the territories. But this quote has nothing whatsoever to do with whether Congress can act to limit its authority. Unfortunately, what has been left out from the quote are the next two sentences which bear directly on the issue presented by the mutual consent clause and the analysis the Supreme Court adopted in *POSSE* whether Congress has limited its right to exercise sovereign power. The Court apparently addressing the issue that Congress had not expressly reserved the right to amend acts of a territory stated:

> In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it necessary. Such power is an incident of sovereignty, and continues until granted away.

101 U.S. at 133 (emphasis added).

Clearly, the implication of this decision is that while Congress has full power it has the right to grant it away.[6]

While the next case cited, Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264, 276 (1981), like Gibbons v. Ogden, does not deal with the Territorial Clause, it does describe accurately the standard the Court applies when determining whether Congress has acted within the scope of its power. This is the same test the Court would apply if it were presented with the question of whether Congress had acted appropriately in agreeing to a mutual consent clause.

> The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the

6 Similarly, American Insurance Co. v. Canter, 26 U.S. 511 (1828) and Downes v. Bidwell, 182 U.S. 244 (1901), cited in the memorandum to establish the extent of Congress' power, do not address the issue of whether Congress can act to limit its authority.

09/15/94, 11:59am
20029980

> Commerce Clause is relatively narrow. The court <u>must defer</u> to a congressional finding...if there is any rational basis for such a finding...This established, <u>the only remaining question</u> for judicial inquiry is whether "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution."...The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme.

452 U.S. at 276 (emphasis added).

This test recognizes the great deference the Court gives to an exercise of power by Congress. If Congress were to conclude that a mutual consent clause is within its power and that such a clause is necessary to achieve Congress' purpose of granting greater self-government to Guam, can anyone say with certainty that the Court will not believe that a sufficient rational basis exists. If it does, not even the Memorandum asserts that anything in the Constitution specifically bars a mutual consent clause.

It is well established that when the intent of Congress with respect to the precise question at issue is clear, the courts must give it effect. <u>See</u>, <u>Chevron, U.S.A. v. NRDC</u>, 467 U.S. 837, 842-43 (1984). It is equally clear that the courts give great deference to Congress when it exercises its Territorial Clause authority. <u>See</u>, <u>Wabol v. Villacrusis</u>, 958 F.2d 145, 1460 (9th Cir. 1992) ("The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to

09/15/94, 11:59am
20029980

accommodate the unique social and cultural conditions and values of the particular territory. More over, we must be cautious in restricting Congress' power in this area."), citing Torres v. Puerto Rico, 442 U.S.465, 460-70 (emphasis added). In fact, we know of no decision of the Supreme Court reversing any action by the Congress taken with regard to the governance of a territory when the Congress has acted pursuant to its Territorial Clause authority.

None of the rest of the cases cited for the proposition that Congress' power continues indefinitely address the question of whether Congress can limit its ability to act in regard to the territories without their consent. Shively v. Bowlby, 152 U.S. 1 (1894) can be cited only for the proposition that it is the Federal Government and not the states which exercises control over the territory of the United States. It did not address in any way whether the Congress can limit its authority to act over this territory. Similarly, Hooven & Allison Co. vl Evatt., 324 U.S. 652 (1945), can be cited only for the self-evident proposition that Congress retained its authority until the Philippines achieved independence. The question of whether Congress could have agreed with the Philippines that certain Congressional powers would not be exercised during the transition was not addressed.

Congressional authority over the people of the territories and their political rights is derived from Congress' authority

09/15/94, 11:59am
20029980

over Guam as property brought within Congress' control by the Territorial Clause. In Edward v. Carter, the Court clarified Congress' power under the property clause, stating:

> Thus, it appears that in referring to Congress' power "without limitation", the Court was holding that Congress' authority under Article IV §3 cl. 2 embraces any disposition of property of the United States chosen by Congress.

580 F.2d 1055, 1061 n. 18 (1978) (citations omitted) (emphasis added).

Further definition was provided in U.S. v. Gratiot, 39 U.S. 526 (1840) where the Court considered Congress' power to impact a lease of federal lands through legislation. The Court's approach to the question is quite interesting and seems to analogize the power over land with the power over territorial governments.

First, it finds that the mines in question lie with territory of the United States are, therefore, its property. Second, it recites the Territorial Clause and concludes that the term territory refers is a descriptive word referring to one kind of property. Third, the Court concludes that "Congress has the same power over [the mine] as over any other property belonging to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest". Id. at 537. Fourth, the Court then references cases involving Congress' authority over the territories, including Florida, including the right of Congress "to make all needful rules and regulations respecting the territory or property of the United States". Id. at 538. Finally, the Court concludes "[i]f such are the powers of Congress over the lands belonging to the United States, the words "dispose of," cannot receive the construction contended for at the bar; that they vest in Congress the power only to sell, and not to lease such lands". Id.

The Court's concept which forms the basis of these opinions is that the greater includes the lesser. The Court reached its decision building on Congress' authority over the territories. If Congress has the power to dispose of territories or to make all needful rules and regulations, it must then also have the power to limit its political control over the people of the territory just like it has the right to limit its authority over territory by leasing it.

Section II - "The Revocable Nature of Congressional Legislation Relating to the Government of Non-State Areas-- pp 5-6.

This section of the Memorandum offers nothing more than a restatement of the "principle" asserted in Section I -- that Congress' plenary authority does not include the right to limit the exercise of this authority in the future by way of a mutual consent clause. As with Section I, the cases relied upon in this section do not deal with the issue of Congress exercising its plenary authority in this way.

Clinton v. Englebrecht, 80 U.S. (13 Wall) 434 (1872) does not establish a rule that any delegations of authority to a territory "must be 'consistent with the supremacy and supervision of National authority'" as asserted in the Memorandum at p. 5. The case did not address whether Congress could irrevocably limit its right to alter a law because of a mutual consent clause, nor did it use the word "must". The quote is dicta and deals with how Congress had approached local government up to that time. The actual quote is as follows:

> The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress.

80 U.S. at 441 (emphasis added).

This quote establishes nothing more than the historical fact that Congress in its approach to self-government for the Territories had not agreed to limit its power in any way.

Similarly Puerto Rico v. Shell Co., 302 U.S. 260 (1937) adds nothing to the debate. The Court recites the quote set forth above from Clinton v. Englebrecht but uses it to affirm a broad grant of power to territorial legislatures, not to bar Congress from entering into an agreement not to exercise its authority. In fact, the holding in Puerto Rico was to affirm the validity of Puerto Rico's anti-trust law which had been challenged as conflicting with the Sherman Act.

District of Columbia v. Thompson Co., 346 U.S. 100 (1963) provides even less support for the Memorandum's assertions. As with the other cases, the Court was merely referring to the same precedent regarding the general authority of Congress to alter its legislation relating to a territory, but, here again, this discussion was not in the context of an expression by Congress of an intent to limit itself.[7] More importantly, the laws in question contained specific reservations permitting Congress to make such amendments. 346 U.S. at 195.

What is missing from this section, is a discussion of two important decisions more closely on point. The first is Currin v. Wallace, 396 U.S. 1 (1938) which is mentioned in footnote 13 of the Memorandum but summarily dismissed as being inconsistent with the Department's new theory that Congress cannot bind itself. This is a decision which we suggest is more appropriately left to the Supreme Court. Currin is significant because the Supreme Court approved an Act of Congress implementation of which required the approval of those affected by it, the essence of the Guam mutual consent clause. The Act,

---

[7] The memorandum attempts to bolster the Department's theory that Congress must retain the authority to revise, alter or revoke any authority it grants to the territories by citing United States v. Sharpnack, 355 U.S. 286 (1958); Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956); Firemen's Insurance Co. v. Washington, 483 F.2d 1323 (D.C. Cir. 1973); Hornbuckle v. Toombs, 85 U.S. 648 (1874) and Christianson v. King County, 239 U.S. 365 (1915). The cases cited, similar to D.C. v. Thompson, 346 U.S. 100 (1953) do not discuss an express intent by Congress to limit the exercise of its authority, rather they are limited to situations whereby Congress clearly reserved the exercise of its authority to revise, alter or revoke through enacted legislation.

passed pursuant to the Commerce Clause which the Memorandum asserts gives Congress the same plenary power as the Territorial Clause, was challenged as an unconstitutional delegation of authority. The Court disagreed finding that rather than a delegation of legislative authority, the Congress "has merely placed a restriction upon its own regulation by withholding its operation...`unless two-thirds of the [voters] voting favor it. Similar conditions are frequently found in police regulations." 306 U.S. at 15. The Court went on:

> Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required favorable vote upon the referendum is one of these conditions..."Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions...it may leave the determination of such time to...a popular vote of the residents of a district to be effected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the legislature on the expression of the voters of a certain district."

306 U.S. at 16 (citing Hampton & Co. v. United States, 276 U.S., 394, 407 (19??).

If the Court agrees Congress has the authority to make implementation of its legislation subject to ratification by the affected voters, it is inconceivable that the Court would find that Congress could not agree to limit its ability to change that same law without the consent of those same voters, if Congress has expressed its intention unmistakably.

The most troublesome oversight in this section of the Memorandum, however, is the failure to discuss the Ninth Circuit's decision in United States v. De Leon Guerrero, 4 F.3d 749 (9th Cir. 1993), cert. denied, ?? U.S. ?? (199?). De Leon Guerrero is the only decision of which we are aware that deals with the applicability of a mutual consent provision in territorial legislation. The case arose under the Covenant for the Commonwealth of the Northern Mariana Islands. The Covenant was ratified by an Act of the Congress. 48 U.S.C. § 1681b. The case involved an ongoing debate about whether the Commonwealth's right of local self-government as defined in the Covenant under Section 103 substantially limits Congress' legislative powers over the Commonwealth under Section 105". 4 F.3d at 752. The specific issue was whether the audit provisions of the Inspector General Act of 1978 "conflicts with the self-government provisions of the Covenant". 4 F.3d at 753.

In order to reach the question, the court first had to deal with arguments put forward by the Department of Justice which are identical to those in the Memorandum. Arguing on behalf of the Inspector General, the Department asserted that Congress had the right to pass the Act under the Territorial Clause arguing "that because the CNMI is governed through Congress' power under the

Territorial Clause, Congress has plenary legislative authority over the CNMI". 4 F.3d at 754.[8] The court found this argument "unpersuasive". According to the Ninth Circuit

> 'the authority of the United States towards the CNMI arises solely under the Covenant.' The Covenant has created a `unique' relationship between the United States and the CNMI, and <u>its provisions alone</u> define the boundaries of those relations...The applicability of the Territorial Clause to the CNMI, however, is not dispositive of this dispute. 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 authority.

4 F.3d at 754.

Ultimately, the Ninth Circuit approved application of the law not because Congress had plenary authority under the Territorial Clause but because the Covenant specifically gave Congress the right to enact legislation applicable to the Commonwealth. The only limit on this right is a mutual consent provision stating that a few limited sections of the Commonwealth Act could not be modified without the mutual consent of the

[8] The court referred to <u>Simms v. Simms</u>, 175 U.S. 162, 168 (1899) a case which explained that under the Territorial Clause, Congress "has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative over all subjects upon which the legislature of a state might legislate within the state". This is the same principle upon which the Justice Department again relies.

Commonwealth. Covenant Section 105.[9] The Court found that this mutual consent provision as drafted did not bar the Congress from passing laws affecting the Commonwealth where the U.S. had a sufficiently significant interest to justify it.

The holding in De Leon Guerrero contradicts directly the conclusion paragraph to this section. This paragraph reasserts that the "non-state areas are subject to the authority of Congress, which, as shown above, is plenary...[and] persists [until] the area becomes a State or ceases to be under United States sovereignty". Memorandum at 6. Rather, that decision makes clear that Congress' authority, after a political status change agreed to between Congress and the people of the territory, is defined solely by the terms of that agreement.

Section III -- The Rule that Legislation Delegating Governmental Powers to a Non-State Area Must Be Subject to Amendment and Repeal Is but A Manifestation of the General Rule That One Congress Cannot Bind A Subsequent Congress, Except Where It Creates Vested Rights Enforceable Under the Due Process Clause of the Fifth Amendment -- pp 6-7.

This entire subsection is premised on a fallacy. There is no rule expressed in any decision of any court that governmental powers to a non-state area must be subject to amendment and repeal. As described above, the most that can be said is that there is dicta in a series of cases, not addressing the issue of

---

[9]. Without explanation and despite the inconsistency with its newly proposed position, this is one of the mutual consent provisions which the Memorandum states the Department will continue to support. Memorandum at 12.

whether Congress can bind itself, that Congress' actions in the territories are subject to later amendment or repeal. What is accurate in the section is that these statements are nothing more than "a specific application of the maxim that one Congress cannot bind another...." Memorandum at 6.

The analysis does not end here, however, because it is simply not true that one Congress cannot bind another, as the Memorandum recognizes but then attempts to explain away. As described above, the most that can be said is that there is dicta in a series of cases, which do not address the issue of whether Congress can bind itself. They stand only for the proposition that when express statutory language exists or when language is not provided and it is clear Congress originally had the power, then in those situations Congress <u>retains</u> its authority and its actions in the territories may be subject to later amendment or repeal. In the end, the section misrepresents as conclusive and inflexible "the maxim that one Congress cannot bind another." First, the law must create vested rights as Justice Marshall explained in <u>Fletcher v. Peck</u>, 19 U.S. (6 Cranch) 87, 135 (1810) ("When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest (sic) those rights.")[10] This, too, the Memorandum

---

[10] Although the Department in its memorandum focus' on the dissenting opinion in <u>U.S. Trust Co. v. New Jersey</u>, 431 U.S. 1 (1977) the actual holding was that impairment of contract by the State was in violation of the Contract clause and neither necessary nor reasonable in light of the circumstances. Although

439

recognizes but goes on to utilize a quote from the Sinking Fund Cases as part of its effort to build a case that only contractual rights of a private nature are protected from change.[11]

The analysis provided is incomplete. The test actually established by the Supreme Court to determine whether Congress has bound itself turns not on the nature of the contract (private right vs public) but on whether Congress has expressed its intention to protect the vested right in "unmistakable terms". The "unmistakable terms" doctrine is not even addressed in the Memorandum. Infra at p. 25.

Section IV -- The Due Process Clause Does Not Preclude Congress from Amending or Repealing the Two Mutual Consent Clauses - p. 8.

The Memorandum presents two bases for its conclusion that the Due Process Clause does not bar a repeal of a mutual consent

---

the Contract clause applies to States and not the federal government, the "United States are as much bound by their contracts as are individuals." Sinking-Fund Casess, 98 U.S. 700, 719 (1879). The Court in Barcellos and Wolfsen v. Westlands Water District, 899 F.2d 814, 821 (9th Cir. 1990) quoting Lynch v. United States, 292 U.S. 571, 579 (1934), stated "the Supreme Court held that "[r]ights against the United States arising out of a contract with it" are property rights protected from deprevation or impairment by the 5th Amendment." See also Madera Irr. Dist. v. Hancock, 985 F.2d 1397, 1401 (9th Cir. 1993). Moreover the Court,.in U.S. Trust Co. noted that "a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." 431 U.S. at 17, fn 14 (1977).

[11] What is not disclosed about the Sinking Fund Cases is that the "statutes in question expressly reserved Congress' authority to repeal, alter, or amend them, and Congress exercised that power..." POSSE, 477 U.S. at 53.

clause. First it points out that a territory is not a person within the meaning of the Due Process Clause. This is a red herring. Secondly, it asserts that a repeal would not deprive a territory of property within the meaning of the Fifth Amendment. This is not the test the Supreme Court has established. It is not the nature of the vested right that controls. Rather, the test involves a combination of a vested right coupled with an "unmistakable" commitment by the Congress not to interfere with the right.

Subsection IV, B -- "A Non-State Area Is Not A Person in the Meaning of the Due Process Clause of the Fifth Amendment." pp.8-9.

We do not need to debate the merits of the legal arguments presented in this subsection because this is a non-existent issue. The mutual consent clause being discussed between the President's designated negotiator and representatives of the Guam Commission on Self-Determination runs between the Government of the United States and the People of Guam, not the political entity of the Commonwealth of Guam as the Memorandum assumes. The People of Guam clearly qualify as persons under the Due Process Clause.

We have attached the current configuration of the proposal for your review. The reference to the People of Guam is appropriate because elsewhere in the Act we intend to require that after adoption by Congress the People of Guam hold a plebiscite to approve what Congress has enacted before it becomes applicable to Guam. In this regard, we also intend to change the nature of the Guam Commonwealth Act. Rather than an Act of Congress approved by the people before implementation, it will become a Covenant between the United States and the people of Guam. This Covenant will create vested and binding rights protecting both the interests of the United States and of the People of Guam.

Subsection IV, B -- Legislation Relating to the Government of Non-State Areas Does Not Create Any Rights Or Status Protected By the Due Process Clause Against Repeal Or Amendment By Subsequent Legislation. - pp. 9-12.

While recognizing that the Government may enter into contracts, the Memorandum asserts that only contracts similar to those entered into by private individuals are enforceable, and "governmental powers cannot be contracted away", citing North American Coml. Co. v. United States, 171 U.S. 110, 137 (1898).[12] To bolster its position, the Memorandum relies on the POSSE

12. The comment by the Court relied upon by the Memorandum is dicta. It came in a case involving Congress' right to alter the terms of a lease through regulation. The decision did not turn on the rule that sovereign regulatory authority could not be waived. It turned on the fact that an express reservation of authority had been included in the contract. As the Court noted, this was a lease "expressly subjected from the beginning, to whatever regulations of the business the United States might make". 171 U.S. at 137.

decision.[13]

The POSSE decision, however, did not turn on the subject matter of the contract in question. The actual foundation of the Court's holding was that if Congress was to surrender any of its sovereign power in a contract, it must do so in "unmistakable terms". The "unmistakable terms" analysis would not be necessary if the Court did not assume that Congress could indeed surrender sovereign powers, even in the realm of traditional regulatory authority as was presented in the POSSE case. This is exactly the opposite of what the Memorandum asserts.

Indeed, the Court's reference to the bond and insurance cases had no direct bearing on the Court's holding. The cases were cited for the limited purpose of contrasting circumstances where Congress clearly evidenced its intent to bind itself from the facts in the POSSE case where "Congress expressly reserved to itself "[t]he right to alter, amend, or repeal any provision of"

---

[13] The Memorandum lacks examples that give support to the Memorandum's theory that Congress does not have the ability to limit the exercise of its authority under the plenary power of the Territorial Clause. Rather, the cases cited involve situations whereby the Congress through legislation, or the lack of legislation, retained its authority. For example, the memorandum indicates Hudson Water Co. v. McCarter, 209 U.S. 349 (1908) has a much broader interpretation than the actual case decision provides for. In fact, Hudson concerns an action involving a water rights contract between the State and an individual where the State did not include provisions limiting its powers, therefore allowing subsequent legislation by the State and a resulting ineffective contract. It is not about the State's incapability to limit its power by contract, rather it's about the authority of a State to retain its power when not granted away.

the Act which lead to the contracts at issue. 477 U.S. at 42. The Court relied upon this contrast because its holding in POSSE was that the Congress could amend the legislation in question, even if that amendment interfered with contractual rights, because it had not unmistakably indicated its intent to bind itself -- the standard the Court has established for determining whether Congress has waived its sovereign power.

The actual holding in POSSE -- that Congress had not surrendered its sovereign power to alter Social Security laws -- has been thoroughly analyzed by the D.C. Court of Appeals in Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 621 (D.C. Dir. 1992). The Transohio decision demonstrates conclusively that the Memorandum's analysis of the holding in POSSE is so flawed that one wonders how it could be used to justify a proposed reversal in such an important area of Administration policy. In that decision, the D.C. Circuit makes clear that "[t]he Supreme Court reached [its] conclusion by analyzing the governing statute, the Social Security Act" and focused on the fact critical to its decision -- "[t]he Social Security Act contained an express reservation of Congress' power to amend the law...", 967 F.2d at 621, not by establishing the *per se* "private rights" test asserted in the Memorandum.

According to the D.C. Circuit

> The "principles form[ing] the backdrop" of the Supreme Court's analysis of the Social Security Act in POSSE were those comprising the unmistakability doctrine--the doctrine

> that " 'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' " Id. at 622 (emphasis added).[14]

The D.C. Circuit also discussed the history of the unmistakability doctrine.

> "The "unmistakability" doctrine is a special rule of contract interpretation that applies to contracts with the government. The doctrine dates back to the early 19th century, when Chief Justice Marshall provided its justification. The government, Chief Justice Marshall wrote for the Court in a case concerning the government's taxing power, may enter binding contracts when it finds "a consideration sufficiently valuable to induce a partial release" of its sovereign powers.

Id. at 618.

Both the POSSE and Transohio cases dealt with the application of the "unmistakable terms" test to a determination of whether Congress has limited its right to exercise its

---

[14]. If the Court had actually established a *per se* rule which depended on the nature of the contract, then why did the Court continue after stating the unmistakable terms principle and the general rule that "contractual arrangement, including those to which a sovereign itself is party, remain subject to subsequent legislation by the sovereign" state that "[t]hese principles form the backdrop against we must consider the District Court's decision effectively to forbid Congress to amend a provision of the Social Security Act". 477 U.S. at 52. By use of the "must consider" terminology, the Court made clear what the test is. It would have been much more direct and ultimately clearer simply to have ruled that the contract between the Social Security Administration and the State of California was not a traditional private contract. It did not, of course, because that is not the test the Supreme Court ever applies. The test is whether Congress has stated its intentions in unmistakable terms.

regulatory jurisdiction. This test has nothing whatsoever to do with a standard based on "traditional private contractual rights" which the Memorandum would have us believe is the standard. If it were the test, the Supreme Court and D.C. Court of Appeals could easily have disposed of the contracts in POSSE and Transohio by adopting the "traditional private contractual rights" test advocated in the Memorandum with a simple finding that alleged contractual rights associated with the regulatory programs at issue in the cases are not traditional private contractual rights. They did not, of course, because the Supreme Court applies the "unmistakable terms" test which requires an analysis of Congress' intent, not the *per se* standard proposed in the Memorandum. See, e.g., 477 U.S. at 54.

We find it inconceivable that the Department would decide to reverse a thirty-year old policy based on a decision which has been universally interpreted as suggesting exactly the opposite of what the Memorandum asserts is the holding -- that Congress can contract away sovereign rights to exercise its regulatory authority when its says so unmistakably.[15] Instead of dealing

[15]. The POSSE decision has even been criticized because it appears to open the door wider than some commentators believe advisable. In an article by David Toscano entitled "Forbearance Agreements: Invalid Contracts for the Surrender of Sovereignty analyzed the POSSE decision in great detail. It concluded that "[t]he power to waive sovereignty was recognized" in POSSE. 92 Colum. L. Rev. 426, 451. It goes on "[i]n POSSE, the Court relied entirely on Merrion v. Jicarilla Apache Tribe for the proposition that the federal government can surrender sovereign power. Jicarilla in turn relied upon cases involving primarily the taxation powers of state governments... Instead of endorsing

accurately with the Court's actual analysis, the Memorandum at page 11 relies upon a quote, claimed to set forth the holding, which is taken completely out of context and has nothing whatsoever to do with the holding.

The quote, taken from 477 U.S. 55, fails to include the entirety of the paragraph, the remaining text from which puts back into context the relationship of the bond and insurance cases to the basis of the decision. The following quote picks up the rest of this language beginning with the last sentence of the quote from page 11 of the Memorandum. This language makes absolutely clear that what the Court focused on was the fact that instead of Congress have stated in unequivocal terms its intention to limit the exercise of its regulatory authority, it explicitly retained it. After stating that the contract claimed by the State of California "bears little resemblance to rights held to constitute 'property' and citing to the insurance and bond cases as examples, the Court went on to explain their relevance.

> Rather, the provision simply was part of a regulatory program over which Congress <u>retained</u> authority to amend in the exercise

---

the rule applying to the police powers -- such powers cannot be surrendered -- it adopted the rule applying to taxation powers -- such powers can only be surrendered if done so unmistakably. This move should not be followed automatically: if the Court wants to enforce contracts that surrender the federal government's regulatory authority, it should do so on the basis of policy arguments, not on the basis of <u>POSSE</u>." <u>Id</u>. at 460. Obviously the author did not like the test used by the Court. Nevertheless his criticism makes clear what the test is.

09/15/94, 11:59am
20029980

> of its power to provide for the general welfare. Under these circumstances, we conclude that the termination provision ... did not rise to the level of "property." The provision simply cannot be viewed as conferring any sort of "vested right" in the face of precedent concerning the effect of Congress' reserved power on agreements entered into under a statute containing the language of reservation.

477 U.S. at 55 (emphasis added).

Indeed, the Memorandum is unable to cite any cases holding that Congress is barred from contracting away its right to adopt legislation, because the "Court has never held that the United States cannot surrender regulatory powers through contract..." 92 Colum. L. Rev at 458. But the Court has approved Congress making effectiveness of its legislation subject to approval by the voters who are impacted by the legislation, see, Currin v. Wallace, 306 U.S. at 15-16. It defies the rational of the POSSE decision to argue that the Court would approve Congress adopting legislation making effected-voters approval a requirement and then pass subsequent legislation authorizing it to ignore the vote of approval, if it has stated in unmistakable terms that it would not take such action.

After spending eleven and one-half pages arguing that mutual consent clauses are unenforceable and unconstitutional, the Memorandum comes to an astounding conclusion. It states that the "Department of Justice...would honor past commitments with respect to the mutual consent issue", including Section 105 of

09/15/94, 11:59am
20029980

the Covenant with the Northern Marianas Islands. But the Department cannot have it both ways. An Act of Congress is either constitutional and enforceable or it is not. If a mutual consent provision for Guam is unenforceable, then the Department must reach the same conclusion for all other mutual consent provisions. This includes the mutual consent provisions in the Compact of Free Association with Palau' scheduled to go into effect on October 1, 1994. The Department's Memorandum offers no solid basis for such a significant reversal in policy. All of the cases upon which it relies, except POSSE, were available to it when its earlier positions supporting mutual consent were made. POSSE does not change any rule with regard to Congress binding itself. It merely lays out clearly a test adopted in 1981 in Merrian v. Jecarilla Apache Tribe, 455 U.S. 130, which in turn carried forward a principle which the D.C. Circuit states "dates back to the early 19th century." 967 F.2d at 618.

U. S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

June 29, 1994

I. Michael Heyman
Special Representative for Guam Commonwealth
United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Dear Mike:

Enclosed are a few examples of the type of language you might be able to use in your negotiations with Guam concerning a commonwealth act. These provisions reflect the sincerity of the intentions of the United States with respect to self-governance in Guam, without making unconstitutional assertions of invulnerability to future congressional encroachment. We hope that you will find these suggestions helpful. If not, please let me know and we will continue to work with you in crafting solutions.

I hope that you took away from our meeting an appreciation of the basis for my analysis of the mutual consent question. At bottom, there are few constitutional limitations on the ability of one Congress to repeal the enactments of a prior Congress. Those few limitations do not appear to me to apply in the context of the proposed mutual consent provision.

I have considered Morton's view that under the Territories Clause Congress can achieve by direct statutory enactment what could be achieved by a grant of independence followed by a treaty. While this argument has some appeal in light of the limited case law on the scope of Congress' power under the Territories Clause, I am ultimately not persuaded by it. The example I used in our meeting illustrates why. If a future Congress attempts to impose its will on an independent Guam in a manner not authorized by treaty, the answer to why it cannot do so is simply that Guam is outside the sovereignty of the United States. That answer is not available so long as Guam remains within United States sovereignty.

Nor would we want the case to be otherwise. So long as it is within the sovereignty of the United States, the obligation to insure the citizens of Guam a free and democratic government is ours. We cannot and should not give up the tools that would be necessary to fulfill that obligation.

I hope that your negotiations with Guam are successful. Again, if I can be of further assistance, please let me know.

Sincerely,

Walter Dellinger

Walter Dellinger
Assistant Attorney General

cc: Morton Halperin

Proposed Alternatives For Mutual Consent Provision

There are two "mutual consent" provisions in the Guam Commonwealth Bill, H.R. 1521: section 103 (mutual consent to modify organic act) and section 202 (mutual consent to future applications of Federal law). The focus of concern is section 103, which the Department of Justice considers to be unconstitutional as presently drafted. We suggest the following three alternatives, each of which is designed to satisfy the constitutional standard while allowing flexibility in negotiating with Guam's representatives.

Current section 103 of H.R. 1521

SEC. 103. MUTUAL CONSENT.

In order to respect the self-government granted to the Commonwealth of Guam under this Act, the United States agrees to limit the exercise of its authority so that the provisions of this Act may be modified only with the mutual consent of the Government of the United States and the Government of the Commonwealth of Guam.

Proposed alternative drafts of section 103

SEC. 103. MUTUAL CONSENT.

The United States solemnly undertakes to respect the self-government granted to the Commonwealth of Guam under this Act. In giving this undertaking, it is the intention of Congress to limit the exercise of its authority so that the provisions of this Act may be modified only with the consent of the Government of the Commonwealth of Guam.

SEC. 103. MUTUAL CONSENT.

The United States solemnly undertakes to respect the self-government granted to the Commonwealth of Guam under this Act. In giving this undertaking, it is the intention of Congress to limit the exercise of its legislative authority so that the fundamental provisions of this Act relating to the self-government of Guam, namely sections 101, 103, 201, and 301 may be modified only with the mutual consent of the Government of the United States and the Government of the Commonwealth of Guam.

SEC. 103. MUTUAL CONSENT.

The United States solemnly undertakes to respect the self-government granted to the Commonwealth of Guam under this Act. In giving this undertaking, Congress affirms its intention not to modify the terms of this Act without the consent of the Commonwealth of Guam.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5 6041

COLLECTION:

Clinton Presidential Records
Counsel's Office
Bill Marshall
OA/Box Number: 20350

FOLDER TITLE:

Guam - Memos for the President

Jamie Metrailer
2006-0193-F
jm588

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.
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]
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]

- special provisions in federal law to address Guam's immigration concerns.

Although Governor Gutierrez and Delegate Underwood had hoped for Administration endorsement of their Commonwealth proposals, and are disappointed with our conclusions, their primary request has been that the Administration finally take a clear and unambiguous position on the Bill, and be specific as to where we agree and disagree -- and why. A comprehensive Administration response has been long-awaited by Guam. Garamendi's testimony will satisfy this request. Nevertheless, you should be prepared for the Governor to attack us for "bad faith" and the possibility of his doing something publicly to underscore his disappointment. Based on our conversations with Guam officials so far, we are not sure that this will occur, but want you to be prepared for it.

We are considering ways to "soften the blow." On the substantive side, the testimony will positively highlight areas of agreement as well as commit to further work with Guam and Congress on the bill. We also are looking for ways to signal your continuing interest in our Guam citizens. This could be accomplished by any one or more of the following actions:

- Inviting the Governor to the China State Dinner Wednesday, October 29. (He will be in Washington.)

- Inviting the Governor to sit with the First Lady at the State of the Union address and recognizing Guam in the context of remarks that you make on the Race Initiative.

- Proposing long authorized -- but not provided -- appropriations to cover the cost of immigration to Guam that occurred because of the Micronesian Compacts, a federal policy that fueled Guam's desire for immigration control. ($5.5 million for four years is needed above funds already being identified.)

- Committing to a visit by you to Guam within the next year, if feasible in the context of a potential Asia trip.

A gesture of this type would need to be announced before the hearing in order to have the most impact.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. report	Draft Guam Commonwealth bill. Comments on selected new policy proposals (7 pages)	n.d.	P5 642

COLLECTION:

Clinton Presidential Records
Counsel's Office
Charles Ruff
OA/Box Number: 13213

FOLDER TITLE:

Guam

Jamie Metrailer
2006-0193-F
jm589

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.
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]
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]

DRAFT GUAM COMMONWEALTH BILL

COMMENTS ON SELECTED NEW POLICY PROPOSALS

Central Provisions

- **Agreement that no provision of the law may be changed without Guam's approval.**

This idea is the disputed heart of the Commonwealth concept in Puerto Rico as well as Guam. It is intended to limit Congress' Constitutional power to make policy regarding territories (in local as well as national matters) and override the principle that one Congress cannot relinquish the power of its successors (in territories unless statehood or sovereignty is granted).

While a commitment in this regard could be made as a matter of solemn policy, it probably cannot be legally binding (although the courts might well sidestep the question as "political").

The provision includes a qualifier that the agreement is made to the extent constitutionally permissible but it does not overcome the problems with the provision.

A) Justice agreed to it on the understanding that the limitation on Congress' Constitutional power would not be legally binding but Interior and Guam now want to assert that it is meant to be ... as the language suggests.

B) The qualifier would make the provision even more objectionable to Puerto Rico statehooders who would see it as enabling a concept that they believe to be unconstitutional to be approved and misleadingly suggest that an effective insulation from Federal territories governing power is possible.

Current law does not provide even a commitment for Puerto Rico but some Puerto Rico Commonwealth supporters claim that there is an obligation in this regard created by the mutual approval of the arrangement. The Northern Mariana Islands Commonwealth Covenant includes purportedly binding language but limits it to "fundamental" matters: local authority; U.S. citizenship; application of the Constitution; and limiting the right to own land to persons of local descent (upheld as being essential to the arrangement and justified by the islands' non-U.S. past).

House Chairman Young and Senate Committee staff suggest that the provision in the draft bill has no chance of passage. And even a policy commitment limited to key provisions would be hard for Puerto Rico statehooders to accept. It would be hard not to agree to such a commitment, though, in light of the Marianas precedent ... and since it can be done.

- Invitation for a status plebiscite excluding U.S. citizens not descended from residents as of 1898.

The potential opponents include citizens among the half of the population that would not qualify. Although A) many of them agree that the original Guamanians never exercised `self-determination' and B) the vote would not be binding, some would feel that they have an equal right to vote on the future status of their home island.

A provision such as this is likely to be cited as precedent by Puerto Rican independence and commonwealth advocates who controversially want status votes to 1) include residents of the U.S. descended from residents of the islands as of the date of acquisition (there are 2.7+ million) and 2) exclude citizens not descended from residents as of the date of acquisition.

<u>Interior/Other Agency Stalemate Provisions</u>

- **Commission with Interior as chair, Defense, Justice, the Governor, and the Delegate to Congress empowered to --**

    A) modify the application of any regulation to Guam and

    B) make recommendations on modifying laws which Congress would have to consider on an expedited basis.

Most agencies -- which would not be represented -- would, understandably, be opposed to being excluded from decision-making in matters within their jurisdiction. The House and Senate are unlikely to agree to have their agenda set by such a body.

The provision would give Interior and Defense, at least, unprecedented roles in policies of other agencies and in Guam. (Current law specifically excludes matters within other agencies' jurisdiction from Interior's mission regarding Guam.)

This proposal stems, in part, from a more modest proposal by Puerto Rico's commonwealthers for Federal review of laws and regs at the islands' request and from an advisory commission in the case of the Northern Marianas Commonwealth Covenant.

- **Authorization for Interior/Commerce to waive any law or regulation to benefit U.S.-Guam or U.S. through Guam trade.**

There are too many potential problems to contemplate because of the breadth of the proposal ... "<u>any</u> law".

- **Authorization to enter into agreements associated with the World Trade Organization and, possibly, other organizations.**

Puerto Rico commonwealth and independence supporters have proposed similar authority. Federal agencies contend that the U.S. must speak with one voice on international trade matters.

- **Expedited Customs processing of Guam products.**

Other areas/interests might be interested in a similar provision.

- **No automatic trade benefits for any other U.S. island area.**

This was included because current law provides that Northern Marianas products will be treated equally with products of Guam.

- **Control over immigration.**

The Northern Marianas Covenant did not extend U.S. immigration law to those formerly non-U.S. islands but gave the U.S. the right to do so. Justice and Labor oppose transferring authority to Guam because of the way that the Marianas has used its exemption. Rep. George Miller is concerned about this provision.

The Marianas sought exemption ostensibly to enact stricter limits on immigrants and, thereby, prevent itself from being overrun by aliens. But it has developed a system which so liberally admits temporary workers that a majority of the population are non-resident workers. These individuals have only limited rights and influence in the community. There has been national attention to spectacular cases of employer abuse of workers in the Marianas.

Some House Members have considered extending immigration control to the Marianas. Puerto Rico commonwealth supporters would want immigration authority. The Virgin Islands has also sought it.

- **Temporary workers' visa.**

There might be concern because of the Marianas experience and since the workers would be `temporary' for up to four years.

- **Authority to deny program benefits to aliens for five years.**

This would be inconsistent with the administration's stance policy on a current, nationally controversial issue.

- **Interior/Defense/Guam joint recommendations on transferring military land on Guam to the Commonwealth.**

Defense may be opposed since it now makes its own decisions on what land it needs. A process (excluding Interior) would be of significant interest in Puerto Rico because of the islands' dispute with the Navy over the Navy's need for land it owns.

- **Authorization for the Commonwealth to transfer land obtained from the Federal Government to private use.**

GSA, OMB, and Congress may be concerned about authorizing private gain from what is now a public resource.

- **Special environmental standards.**

EPA is opposed, fearing a precedent for region-specific policies. Rep. Miller is also concerned.

Targeted exemptions from Clean Air and Clean Water Act requirements have been enacted for Guam and other insular areas. Puerto Rico commonwealthers have sought a similar blanket policy using a similar rationale to the one used by Guam.

- **Priority for hazardous waste site clean-ups.**

Defense opposes since it is involved. Many other areas also want clean-ups funded.

<u>Other Interior Recommendations</u>

- **Authority to adopt "reasonable" voting requirements.**

This would be controversial if used as authorization for a longer residency than the courts have sanctioned -- as some Guam officials have wanted (and it would be superfluous if not). New residents would be concerned about being disenfranchised.

- **Authorization for delegating Federal agency functions to Commonwealth officials.**

This would raise concerns about the performance of statutory requirements and accountability in various sectors. Even the Republican Congress is unlikely to agree to blanket authority.

- **Guam taxation of U.S. and foreign income of residents.**

Treasury objects to this applying to Federal employees because of the precedent it would set for all Federal workers outside the U.S.

- **Approval to rebate taxes to individuals and on U.S. income.**

The Marianas Covenant includes authority to rebate taxes on Marianas income only. Treasury would object to rebating taxes on U.S. income. Laws have been enacted to discourage rebates to individuals (vs. companies) in the Marianas because the rebates have effectively negated Covenant taxation requirements.

- **Inclusion in tax treaties.**

Treasury would object to automatic inclusion since the island is foreign for tax purposes and would be able to enact laws at odds with U.S. tax code provisions.

- **Access to or through military property.**

Objectives have included commercial development of landlocked private property and use of military recreation areas.

- **Submerged lands between three and nine miles offshore.**

Puerto Rico has this due to a 1980 law justified by Spanish law. It has been an unfulfilled objective of some Gulf Coast States.

<u>Other Proposals Interior Wants to Pursue</u>

- **Congressional findings that Guam does not have equal participation in Federal policy making and has a compelling interest in protecting the island from inappropriate laws.**

This would be of equal application to and interest in other insular areas and be of concern to Puerto Rico statehooders.

- **Congress relinquishing its Constitutional power to govern in territories to the extent provided in the legislation.**

Would have tremendous appeal to Puerto Rico commonwealthers, be constitutionally questionable, and have no chance of enactment.

- Agreement to consult the Commonwealth to an appropriate extent before international negotiations which affect Guam.

State and Justice oppose as a limitation on the President's foreign policy power. Other insular areas also want this.

- **Requirement to consult the Commonwealth prior to significant changes in military presence.**

Defense opposes this as unworkable.

- **Authorization for the Commonwealth to receive assistance from foreign governments.**

State has opposed Northern Marianas proposals in this regard, wanting the U.S. to remain an aid donor rather than a recipient.

- **Authorization to enter into international agreements not inconsistent with U.S. policy and not binding on the U.S.**

State is opposed to the U.S. speaking with more than one voice on international matters.

- **Commonwealth replacement of Federal labor laws.**

Labor has strong concerns based on the Northern Marianas experience. Rep. Miller does as well.

- **Joint recommendations on whether the requirement to use U.S. vessels for U.S. shipping should continue to apply using the sole criteria of the island's economic interest.**

The U.S. vessels shipping requirement does not apply to the adjacent Northern Mariana Islands, American Samoa, or the Virgin Islands but does apply to Puerto Rico (which is adjacent to the V.I.). Considered by many islanders to be a major burden on consumer costs, it is as big an issue in Puerto Rico as Guam.

Reps. Gutierrez, Velazquez, and Serrano have sponsored a Puerto Rico exemption bill.

Transportation and U.S. merchant marine companies and unions are strongly opposed to exemption and would even more strongly oppose using a standard of the island's interests only.

- **Exemption from the requirement to use U.S.-built vessels in the waters near Guam.**

Transportation opposes this provision which would amend an exemption limited by vessel size. The limitation was insisted upon by the House Merchant Marine Committee. This might also be of interest in Puerto Rico.

- **Exclusive or concurrent authority to manage and obtain revenue from the U.S.'s Exclusive Economic Zone around Guam.**

Other insular areas and California have expressed interest in the EEZ. Justice objects to this provision.

- **SSI and any other Federal programs not now extended.**

This has been one of the primary objectives of Puerto Rico's commonwealthers. SSI has also been sought by the Virgin Islands and American Samoa. SSA views the cost of extending SSI to all of the areas as too great. The Administration has proposed greater -- but partial -- funding in Puerto Rico.

- **Joint recommendations on levels of program funding.**

Puerto Rico and other insular areas would want similar input.

- **Authorization for any funds necessary for infrastructure projects, technical programs, and cooperative ventures.**

Puerto Rico, the Virgin Islands, and the Northern Mariana Islands would want a similar authorization. One exists for American Samoa but the House authorizing committee has questioned it. OMB would probably oppose this provision for budgetary reasons.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. list	Personal (1 page)	n.d.	Personal Misfile
002. notes	re: Guam (Personal file) (3 pages)	n.d.	P5
003. memo	To President Clinton. Subject: Puerto Rico (1 page)	12/27/1997	P5 4096
004. memo	Phone No. (Partial) (1 page)	12/31/1996	P6/b(6)

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

FOLDER TITLE:
Guam - Various IV

Jamie Metrailer
2006-0193-F
jm109

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.
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]
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]

27 December 1997

MEMORANDUM TO THE PRESIDENT

CC LEON PANETTA
EVELYN LIEBERMAN
ERSKINE BOWLES
MARCIA HALE
JEFF FARROW
STEPHANIE STREETT
ANNE HAWLEY
DOUG SOSNIK

FROM [redacted]

RE Puerto Rico

Governor Rossello (who plays tennis on the championship level and jogs but who does not play golf) does not want you to make an artificial stop in Puerto Rico just for the sake of doing so. He also thinks that his meeting you in the Virgin Islands would be somewhat artificial.

Marcia Hale, Jeff Farrow and I advise that you make a well publicized telephone call to Governor Rossello either on 2 January (the day he is sworn in) or on 1 January.

Based on conversations with the Governor's staff, this would be preferable to your doing an airport stop in San Juan on the way back from the Virgin Islands. (If you were to decide to play golf in Puerto Rico, that of course would be welcomed by the Governor, as would your visiting the Governor at LaFortaleza (sp?) reputedly the oldest capital in the Americas, but there is certainly no need for you to do so.)

We will provide you with talking points in the event you decide to telephone Governor Rossello, which we strongly recommend that you do.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. letter	To President Clinton from Phil Caplan. Subject: Administration stance toward Guam (1 page)	10/27/1997	P5
~~001b. memo~~	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (Annotations) (5 pages)	10/27/1997	P5 4131
001c. letter	To President Clinton from Phil Caplan. Subject: Administration stance toward Guam (1 page)	10/27/1997	P5
~~001d. memo~~	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5
002a. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5
002b. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5
002c. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5 Dup
002d. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5
002e. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5
002f. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (1 page)	10/25/1997	P5

COLLECTION:
Clinton Presidential Records
WHORM Subject File-General
ST051-01
OA/Box Number: 14051

FOLDER TITLE:
239943SS

Jamie Metrailer
2006-0193-F
jm568

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.
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]
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]

THE PRESIDENT HAS SEEN
10-27-97

THE WHITE HOUSE

WASHINGTON

October 27, 1997

INFORMATION

'97 OCT 27 AM11:41

MEMORANDUM FOR THE PRESIDENT

FROM: Mickey Ibarra MI
Fred DuVal

SUBJECT: Response to Guam's 1987 Federal Policy Package

CC: Hon. John Garamendi, Erskine Bowles, Sylvia Mathews, Jeff Farrow, Sandy Berger, John Hilley, Frank Raines, Chuck Ruff, Janet Murguia, Lucia Wyman, Bill Marshall, Sandy Kristoff

---

I. SUMMARY

The House Resources Committee will hold a hearing Wednesday, October 29, on Guam's Commonwealth Bill ("Bill"). The Bill, which Guam voters endorsed in 1987, would essentially provide powers generally associated with national sovereignty and exemptions from constitutional and other requirements while continuing the island's U.S. status and providing increased federal benefits. As you directed, we asked OMB to conduct a full agency review of the Bill.

Interior Deputy Secretary John Garamendi, who serves as the Administration's Special Representative on the Bill, will testify. The purpose of the testimony is three-fold: First, it will clearly indicate that the Administration cannot support the Bill as proposed. (Guam has asked for a "clear answer.") Second, it will identify specific areas of agreement and disagreement. Third, it will highlight actions that can improve Guam's relationship with the United States.

The approach taken in the testimony was suggested by Deputy Secretary Garamendi and has been agreed to and developed by the appropriate White House and agency staff. While it will provide Governor Gutierrez (D) and Delegate Underwood (D) of Guam with the specific policy response that they have long requested, they are disappointed that it will not accept the Bill's controversial proposals in total.

II. DISCUSSION

The U.S. citizens of Guam chose "Commonwealth" as a status option in 1982. Guam's officials subsequently drafted the Bill for Congress to implement the choice. It went far beyond the laws that established the Puerto Rico and Northern Mariana Islands Commonwealths. In 1987, Guam's officials also obtained island voter approval of the Bill -- in spite of U.S. Congressional cautions that doing so prior to federal consideration would make it difficult for Guam's officials to later make the compromises that would be necessary for the Bill to obtain federal approval.

The Bill is more akin to the Free Association Compacts reached with other non-U.S. Micronesian islands -- in which those areas are sovereign nations with special ties to the U.S. -- than it is to a Commonwealth model with U.S. citizenship. Controversial provisions include:

- requiring the island's consent for changes to the Bill once enacted and for new laws and regulations to apply ("Mutual Consent") as well as other limits on Federal Constitutional powers;
- a status choice limited to the plurality of the people descended from longtime inhabitants, excluding other U.S. citizens;
- a longer residency requirement for voting than the Supreme Court has permitted;
- authority to enter into international agreements and receive foreign aid;
- consultation before international negotiations that affect Guam;
- ? limitations on U.S. military activities;
- enabling the island to be a 'pass-through' for the entry of foreign goods into the U.S.;
- eliminating requirements for replacing I.R.C. tax rates as the insular income tax and authorizing Guam to reduce tax liability or rebate collections;
- ? immigration control;
- ? replacement of federal labor laws;
- ? a recommendation that Guam be exempt from having to use U.S. shipping that would be made based on the island's interests only;
- control of all resources within 200 miles of the island's coastline;
- waving restrictions on past and future transfers of land and Guam's determination of what military property should be transferred;
- equal funding with States in all federal programs; and

- an open-ended authorization for business development and infrastructure funds.

This Bill was reviewed by an Inter-Agency Task Force and found to be unsupportable as proposed early in the Bush Administration. They concluded that agency opposition most provisions was well-founded. In a 1989 hearing, the Resources Committee requested the Task Force to try to work out a supportable substitute bill with Guam. This effort produced a second report to Congress that reached many of the same conclusions.

You have pledged to work with Guam's officials and Congress for a bill that meets Federal requirements as well as addresses the island's aspirations. This Administration's efforts on the matter intensified under Deputy Secretary Garamendi. He undertook a rigorous effort to develop alternative provisions more acceptable to Guam's officials for Administration consideration. Some have become the basis for heightened expectations by Guam. But the Deputy Secretary, we, and key agencies have ultimately concluded -- and key Members of Congress largely agree -- that many provisions would require constitutional and policy changes that the Administration cannot accept.

Among the most controversial are:

- The Justice Department, Chairman Don Young (R-AK) and Ranking Democrat George Miller (D-CA) have strong concerns about the Mutual Consent proposal that would require the island's consent for any future changes in the many policies covered by the Bill once enacted. This poses constitutional and policy problems, and goes far beyond the bipartisan compromise on the House Puerto Rico Status Choice bill.

- Justice has constitutional objections to Guam's plan for a status vote limited to native Chamorros. A majority of the island's residents are not Chamorro.

- Many federal agencies oppose the proposal for a joint U.S.-Guam commission that would independently make final decisions on the application of federal agency regulations.

  Nothing

- Guam's proposal to transfer immigration control and replace labor laws would run counter to your proposal to apply federal law to the neighboring Northern Marianas, and it is opposed by the Justice and Labor Departments and Rep. Miller.

In addition to identifying areas of disagreement, Garamendi's testimony will indicate areas where agreement has been reached between agency and Guam positions as well as alternatives to Bill provisions that we can support. These include:

- a Mutual Consent policy of not unilaterally changing the fundamental relationship;

- a joint commission to advise on the application of federal policy; and

- special provisions in federal law to address Guam's immigration concerns.

Although Governor Gutierrez and Delegate Underwood had hoped for Administration endorsement of their Commonwealth proposals, and are disappointed with our conclusions, their primary request has been that the Administration finally take a clear and unambiguous position on the Bill, and be specific as to where we agree and disagree -- and why. A comprehensive Administration response has been long-awaited by Guam. Garamendi's testimony will satisfy this request. Nevertheless, you should be prepared for the Governor to attack us for "bad faith" and the possibility of his doing something publicly to underscore his disappointment. Based on our conversations with Guam officials so far, we are not sure that this will occur, but want you to be prepared for it.

We are considering ways to "soften the blow." On the substantive side, the testimony will positively highlight areas of agreement as well as commit to further work with Guam and Congress on the bill. We also are looking for ways to signal your continuing interest in our Guam citizens. A gesture of this type would need to be announced before the hearing in order to have the most impact.

- special provisions in federal law to address Guam's immigration concerns.

Although Governor Gutierrez and Delegate Underwood had hoped for Administration endorsement of their Commonwealth proposals, and are disappointed with our conclusions, their primary request has been that the Administration finally take a clear and unambiguous position on the Bill, and be specific as to where we agree and disagree -- and why. A comprehensive Administration response has been long-awaited by Guam. Garamendi's testimony will satisfy this request. Nevertheless, you should be prepared for the Governor to attack us for "bad faith" and the possibility of his doing something publicly to underscore his disappointment. Based on our conversations with Guam officials so far, we are not sure that this will occur, but want you to be prepared for it.

We are considering ways to "soften the blow." On the substantive side, the testimony will positively highlight areas of agreement as well as commit to further work with Guam and Congress on the bill. We also are looking for ways to signal your continuing interest in our Guam citizens. This could be accomplished by any one or more of the following actions:

- Inviting the Governor to the China State Dinner Wednesday, October 29. (He will be in Washington.)

- Inviting the Governor to sit with the First Lady at the State of the Union address and recognizing Guam in the context of remarks that you make on the Race Initiative.

- Proposing long authorized -- but not provided -- appropriations to cover the cost of immigration to Guam that occurred because of the Micronesian Compacts, a federal policy that fueled Guam's desire for immigration control. ($5.5 million for four years is needed above funds already being identified.)

- Committing to a visit by you to Guam within the next year, if feasible in the context of a potential Asia trip.

A gesture of this type would need to be announced before the hearing in order to have the most impact.

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 Dup
001c. briefing paper	re: Guam Commonwealth bill and Special Representative (4 pages)	03/15/1993	P5
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 Dup
002b. briefing paper	re: Guam Commonwealth bill and Special Representative (4 pages)	03/15/1993	P5
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 4132
003b. briefing paper	re: Guam Commonwealth bill and Special Representative (4 pages)	03/15/1993	P5
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 Metrailer
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]
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.
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]
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]

THE SECRETARY OF THE INTERIOR
WASHINGTON

March 15, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: SECRETARY OF THE INTERIOR

SUBJECT: APPOINTMENT OF A SPECIAL REPRESENTATIVE FOR PURPOSES OF POLITICAL STATUS CONSULTATIONS WITH GUAM

I. **ACTION-FORCING EVENT:** The U.S. territory of Guam is seeking enhanced political status as a U.S. Commonwealth. A Special Representative appointed by the President would be useful in facilitating progress on the political status discussions with the relevant Guam leaders. I have already conveyed my support for the appointment of a Special Representative to Governor Ada of Guam and to the Guam Commission on Self-Determination. Further, such an appointment can serve as a vehicle for ensuring the continued political support of the people of Guam. The appointment will send a much needed message to Guam and interested Congressional leaders that this Administration is committed to improving the Federal relationship with the island and to supporting greater self-government.

II. **BACKGROUND/ANALYSIS:** In 1988, the Delegate from the U.S. territory of Guam introduced a draft bill (H.R. 98) to change Guam's political status to a U.S. Commonwealth. The bill had been drafted in Guam and approved by popular referendum. In response to Congressional requests for the Administration's views on H.R. 98, a Federal Task Force was established to review the bill and to discuss compromise language with Guam leaders to minimize the differences between what Guam had proposed and what the Federal Government could reasonably support. The Task Force-Guam discussions have resolved many areas of dispute with respect to the proposed bill but the discussions have reached an impasse over several issues which raise major constitutional and policy questions. <u>See</u> exhibit A for the history on Guam's request for Commonwealth status and the major issues raised by the proposed legislation.

III. **RECOMMENDATION:** I strongly recommend that the White House appoint a Special Representative of the President who, in coordination with policy-level representatives of pertinent Federal departments and agencies, would be responsible for reviewing the draft Guam Commonwealth Bill, previous Federal Task Force Reports on the measure, and other relevant materials. The goal would be to develop an Administration position on the political status question and to make further recommendations to Congress on the Guam legislation. The function and role of the Special Representative are discussed in exhibit A, attached hereto.

Finally, I recommend the appointment of Michael Heyman as the Special Representative. He is currently the Selvin Professor of Law and Professor of City Planning for the University of California at Berkeley. Heyman has previously provided consulting services to several insular areas on governmental matters, and his legal background and managerial experience will be a tremendous asset in the discussions on Guam's political status. A copy of his resume is attached hereto as exhibit B.

IV. DECISION:

_____Approve _____Approve as amended _____Reject
_____No action

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To Erskine Bowles and Sylvia Mathews from Mickey Ibarra, Fred Du Val, and Jeffrey Farrow. Subject: Request for Guam (2 pages)	10/27/1997	P5
002. fax	Phone No.'s (Partial) (1 page)	10/25/1997	P6/b(6)
003. memo	To President Clinton through Mickey Ibarra and Fred Du Val from John Garamendi. Subject: Administration position on Guam Commonwealth (5 pages)	10/25/1997	P5 4133
004. draft	re: Jeff Farrow suggestions concerning Administration comments on Guam Commonwealth Draft Act, H.R. 100 (23 pages)	10/29/1997	P5

COLLECTION:

Clinton Presidential Records
Intergovernmental Affairs
Jeffrey Farrow
OA/Box Number: 24087

FOLDER TITLE:

Guam - Various II [1]

Jamie Metrailer
2006-0193-F
jm107

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.
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]
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]

October 25, 1997

INFORMATION

MEMORANDUM FOR THE PRESIDENT

THROUGH: Mickey Ibarra, Director, Intergovernmental Affairs
Fred Duval, Deputy Director, Intergovernmental Affairs

FROM: John Garamendi, Deputy Secretary of the Interior and
President's Special Representative for Guam Commonwealth

SUBJECT: Administration Position on Guam Commonwealth

CC: Erskine Bowles Lucia Wyman
Sylvia Mathews Bill Marshall
Sandra Kristoff Jeff Farrow

---

1. SUMMARY

The House Resources Committee will hold a hearing next Wednesday, October 29, on H.R. 100, the Guam Commonwealth Draft Act. The upcoming hearing will represent the first time that your Administration will present a position on the Commonwealth proposal -- the last Congressional hearings on this matter were held 8 years ago.

The original bill, which Guam voters approved in 1987 plebiscites, has been introduced in its original, unmodified form in every Congress since 1988. The original bill has been strongly opposed by Executive agencies from the beginning. While ostensibly creating a Guam Commonwealth "under U.S. sovereignty" and increasing Federal benefits through "state-like" treatment, the bill nevertheless would provide powers to the Commonwealth government normally associated with national sovereignty and autonomy.

As your Special Representative for Guam Commonwealth, I have been negotiating with Guam and with Federal agencies for the better part of two years and will be presenting the Administration's testimony on the bill. The Administration's position will emphasize three things: (a) we cannot support the original bill as drafted; (b) we nevertheless have made progress and can support certain proposals, which, if modified, would improve Guam's relationship with the United States; and (c) we offer a willingness to bring the Commonwealth issue to final resolution by working closely together with Guam and with Congress to build upon the progress made thus far to enact mutually acceptable legislation. This approach has the concurrence of all involved White House staff.

II. DISCUSSION

The original Guam Commonwealth package finds its doctrinal origins in Executive agreements (later codified) that the U. S. negotiated in the 1970's with the former Pacific Island trust territories -- the Covenant which created the U. S .-affiliated Commonwealth of the Northern Mariana Islands, and the Compact of Free Association which created the sovereign Federated States of Micronesia, Republic of the Marshall Islands and Republic of Palau. The latter three are distinguishable from Guam's Commonwealth proposal because they are sovereign nations, with special financial and base rights arrangements with the United States. The Northern Mariana Islands example is distinguishable because: (a) it was not a U.S. territory when the Covenant creating it was negotiated; and (b) the scope of self-government granted was significantly less than what Guam proposes.

The original Commonwealth Draft Act can be seen as hybrid legislation. On the one hand, it purports to create a commonwealth "under U, S. sovereignty," over which most of the U.S. Constitution and federal laws apply, and whose residents continue to be U.S. citizens. On the other hand, it contains provisions creating a commonwealth government with strong aspects of separate and autonomous sovereignty. For example, the original bill would:

- require Guam to consent before the United States could change any provision in the Act creating Commonwealth;
- require Guam to consent before the United States could apply new laws or regulations to Guam;
- authorize "Chamorro self-determination," which is envisioned as a vote by the indigenous people of Guam to determine the island's ultimate political status, exclusive of the participation of other U. S. citizens in Guam;
- give Guam authority to enter into international agreements and receive foreign aid and require the U.S. to consult with Guam prior to entering foreign negotiations which might affect the island;
- give Guam authority to develop and administer its own immigration, labor, and tax policies and to control all natural resources within 200 miles; and
- place limitations on U.S. military activities on Guam, and give Guam authority to determine what military lands should be transferred to local control.

The Bush Administration had reviewed the original Guam Commonwealth package and twice indicated its opposition to the original package based on widespread and deep agency concerns. A 1989 Task Force Report found most of the original provisions objectionable on constitutional policy and administrative grounds. Based on this first report, Congress held hearings in 1989 and requested the Task Force to work with Guam officials in order to bridge their differences and come up with a supportable substitute bill. This effort resulted in a 1993 Task Report, which recommended a number of alternative formulations to various provisions, but generally remained strongly opposed to fundamental Commonwealth concepts.

When you took office, you had pledged to work with Guam's leaders and Congress for a mutually agreeable compromise regarding Guam's Commonwealth proposal. Since 1994, the bulk of these negotiations have been undertaken by your Special Representatives for Guam Commonwealth -- I am the third and current one. When I took over these negotiations in January 1996, I attempted to look beyond the programmatic concerns of particular agencies in order to achieve mutually agreeable compromises that balanced Guam's legitimate aspirations for greater self-government, while protecting fundamental Federal interests in Guam. In January and February of this year, I made a series of preliminary proposals for White House consideration. Before these proposals could be fully vetted by White House staff and appropriate agencies and further refined through consultations with Congress, the Resources Committee unexpectedly called for hearings on short notice.

Notwithstanding the short period provided to prepare a formal Administration position, there is broad consensus among myself, White House staff, key agencies and Congressional members that many of the provisions that Guam has identified as "deal breaker issues" in the original bill raise constitutional and policy objections that cannot be overcome. Among the most objectionable include the following:

- Guam's insistence that the United States obtain its consent before making any changes to an enacted Commonwealth arrangement, or applying future Federal laws and regulations to Guam;

- Guam's requirement that the indigenous Chamorro people be granted the exclusive right to vote upon the ultimate political status of Guam;

- Guam's desire to have a Guam-controlled commission that would be authorized to make final decisions on the application or modification of Federal regulations to Guam; and

- Guam's proposal to have Federal jurisdiction over immigration and labor policies transferred to local control.

While our objections to these provisions are similar in nature to those stated by the previous Administration, my testimony will emphasize the positive progress made since 1988, especially in your Administration, and will highlight substitute policies on key issues which we can endorse, including:

- supporting a commitment, based on policy rather than on a legally binding obligation, not to unilaterally change the fundamental relationship between Guam and the U.S.;

- supporting the creation of a commission with significant input by Guam to review and provide advice on the appropriate application of Federal policies to the island;

- supporting a call for the Chamorro people to express their desire for Guam's ultimate political status in a non-binding manner and without the endorsement or under the auspices of either the Federal government or the Guam government; and

- supporting the amendment of appropriate provisions of the U.S. Immigration and Naturalization Act to accommodate Guam's desire to limit the rate of permanent immigration to the island and to provide additional flexibility for Guam's permanent labor needs.

Although Governor Gutierrez and Delegate Underwood had hoped for Administration endorsement on the key Commonwealth original concepts, their primary request has been for your Administration to take a clear and unambiguous position on the original bill. They have requested that we provide a comprehensive response as possible and that we be specific to where and why we agree or disagree. While we intend to emphasize the progress and positive aspects of our negotiations at Wednesday's hearing, both Governor Gutierrez and Delegate Underwood will be disappointed with our ultimate conclusions. Depending upon local political considerations in Guam, you should be prepared for the Governor and other Guam leaders to attack us for "bad faith" or otherwise "reneging" on prior understandings.

I will work closely with White House staff to engage Governor Gutierrez and Delegate Underwood constructively prior to the hearing to minimize this potential. In this regard, we are actively discussing proposals to bolster a positive reaction from Guam. Besides emphasizing progress and areas of support in regard to the Commonwealth proposal, White House staff and I are considering alternatives to reinforce your continuing interest and engagement in Guam. This could be immediately accomplished in any number of ways, including the pre-hearing announcement of any of following:

- Committing to a visit by you to Guam within the next year, possibly within the context of a potential trip to Asia;

- Inviting Governor Gutierrez to sit with the First Lady at the State of the Union and recognizing Guam in the context of remarks you will make on the Race initiative;

- Inviting the Governor to the China State Dinner on Wednesday, following the hearing;

- Proposing the long-authorized, but as of yet provided, appropriation of funds or, alternatively, the reallocation of existing funds to defray the cost of immigration to Guam.

caused by the Compact of Free Association with the freely associated states of Micronesia, Palau and the Marshall Islands;

- Supporting Guam's formal participation in the Smithsonian's current plans to commemorate the centennial of the Spanish-American War, which occurs next year.

Finally, you should be aware that I had considered proposing to offer the people of Guam the option of undertaking a federally-sponsored political status plebiscite in 1998, the centennial of America's acquisition of Guam. The three status options proposed included: independence, free association and status quo with incremental improvements over time. We shared this idea with the Governor and Delegate, who opposed it as being premature because of their belief that further negotiations between Guam and the U.S. was warranted to reach a final conclusion on Commonwealth. Given my testimony's emphasis on positive progress and its call for Congressional participation in the further development of Commonwealth, the White House staff and I agreed to delete this proposal from my testimony. At some time in the future, however, it may be appropriate to re-visit this as an option.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	To Carl T.C. Gutierrez from David W. Ogden. Subject: Position of the Office of the Legal Counsel of the Justice Department (2 pages)	10/24/1997	P5
002. letter	To Franklin D. Raines from Andrew Fois. Subject: Views of the Department of Justice regarding H.R. 100 (13 pages)	10/24/1997	P5
003. letter	To Guam Delegation from Bill Clinton. Subject: Campaign (2 pages)	07/15/1992	Personal Misfile
004. memo	To Mickey Ibarra through Fred Du Vall from Jeffrey Farrow. Subject: Guam Commonwealth bill plan (4 pages)	06/19/1997	P5
005a. letter	To Carl T.C. Gutierrez from David W. Ogden. Subject: Position of the Office of the Legal Counsel of the Justice Department (2 pages)	10/24/1997	P5
005b. letter	To Franklin D. Raines from Andrew Fois. Subject: Views of the Department of Justice regarding H.R. 100 (13 pages)	10/27/1997	P5
006a. letter	To President Clinton from Phil Caplan. Subject: Administration stance toward Guam (Annotations) (1 page)	10/27/1997	P5 4134
006b. memo	To President Clinton from Mickey Ibarra and Fred Du Val. Subject: Response to Guam's 1987 Federal policy package (Annotations) (4 pages)	10/27/1997	P5 Dup
007. report	Draft Guam Commonwealth Bill. Comments on selected (7 pages)	n.d.	P5

COLLECTION:
Clinton Presidential Records
Intergovernmental Affairs
Jeffrey Farrow
OA/Box Number: 24087

FOLDER TITLE:
Guam - Various II [2]

Jamie Metrailer
2006-0193-F
jm108

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.
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]
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]

THE PRESIDENT HAS SEEN
10-27-97

THE WHITE HOUSE
WASHINGTON

October 27, 1997

MR. PRESIDENT:

I agree with some of their concerns, but Guam was badly hurt by base closings and we need to do all we can to help economically — what other options for Guam are there?
BC

The attached memo from Mickey Ibarra updates you on the Administration's stance toward Guam. *You do not need to make any decisions here.* But you should know that Deputy Secretary of Interior Garamendi will be testifying on the Hill on Wednesday. In short, he will make clear the Administration's opposition to the Guam Commonwealth Bill -- a controversial bill advanced by Gov. Gutierezz and Del. Underwood that is more akin to the Free Association Compacts reached with other non-U.S. Micronesian Islands rather than the Commonwealth model.

Garamendi's testimony has been coordinated closely among OMB, other agencies and the appropriate WH offices. Key Members of Congress -- including George Miller and Ted Stevens -- also agree that many provisions of the bill would require constitutional and policy changes that are unacceptable.

Garamendi will indicate areas of agreement as well as some alternative measure the Administration could support and will commit to work further with Congress and Guam on the bill. But Gov. Gutierezz will likely be very unhappy. Although he has asked for a "clear statement" from the Administration for some time, it's not necessarily what he wants to hear.

Mickey et al are also looking at other non-substantive, more personal ways to "soften the blow" with the Governor and the citizens of Guam.

Copied
Ibarra
DuVal
Mathews
COS

Phil Caplan
PM