

Withdrawal/Redaction Sheet

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

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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]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6/11

00742255

FG001-02

Per Christine Varney and
Bruce Lindsay, Baobell
no longer wants to pursue
this

P.

B → to send
letters to China
no movement w/in 30 days
we'll take action
→ Norway to be certified
- Memo to Rubin, Cohen
- at process

EF

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Document No. 00742255

FG001-02

WHITE HOUSE STAFFING MEMORANDUM

DATE: 3/16/93 ACTION/CONCURRENCE/COMMENT DUE BY:

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

SUBJECT:

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☐	PASTER	☐	☒
McLARTY	☐	☐	RASCO	☐	☐
GEARAN	☐	☐	RUBIN	☐	☐
PANETTA	☐	☐	SEGAL	☐	☐
EMANUEL	☐	☐	STEPHANOPOULOS	☐	☐
GIBBONS	☐	☐	VARNEY	☐	☐
HALE	☐	☐	WATKINS	☐	☐
HERMAN	☐	☒	WILLIAMS	☐	☐
LAKE	☒	☒		☐	☐
LINDSEY	☒	☐		☐	☐
MONTOYA	☐	☐		☐	☐
NUSSBAUM	☐	☐		☐	☐

REMARKS:

RESPONSE:

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JOHN D. PODESTA
Assistant to the President
and Staff Secretary
Ext. 2702

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	re: Draft of message (1 page)	n.d.	P5

COLLECTION:

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Jamie Mettrailer
2006-0193-F
jm566

RESTRICTION CODES

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

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CORRESPONDENCE SENT TO:

United States Naval Ship Repair Facility
c/o Captain E. C. Bermudes, USN
PSC 455
Box 191
FPO, AP 96540-1400

Debbie - —

Who has always felt
that "Desert Storm" is Bush's
thing - we either use
more current military actions,



or, as in this case,
don't specify. ^{ok!}
— Thanks! ^{sinks.}
WPH

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To The Special Representative for Guam Commonwealth from Teresa Roseborough. Subject: Mutual Consent Provisions in The Guam Commonwealth Legislation. (12 pages)	07/28/1994	P5
002. report	Draft Guam Commonwealth Bill. Comments on Selected. (7 pages)	10/1997	P5

COLLECTION:

Clinton Presidential Records
Counsel's Office
Dawn Chirwa
OA/Box Number: CF 1674

FOLDER TITLE:

Puerto Rico/Guam Bills: Puerto Rico and Guam Bills [2]

Van Zbinden
2006-0193-F
vz1176

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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U. S. Department of Justice

Office of Legal Counsel

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 *TR*
Deputy Assistant Attorney GeneralRe: 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

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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. We therefore have carefully reexamined this issue. Our conclusion is that these clauses raise serious constitutional issues and are legally unenforceable.²

In our view, it is important that the text of the Guam Commonwealth Act not create any illusory expectations that might 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 Waboh v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Waboh, ___ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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.

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

* 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 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.

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.

¹¹ 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.

¹² 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.

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001. memo	To President Clinton through Marcia Hale from John Garamendi. Subject: Guam Commonwealth (4 pages)	12/30/1996	P5
002. briefing paper	re: Governor Gutierrez of Guam (3 pages)	n.d.	P5
003a. note	re: Comments on Guam's proposed Commonwealth negotiations directive (1 page)	n.d.	P5
003b. draft	To All Departments and agencies from President Clinton. Subject: Negotiations between the USG and the government of Guam (Typed comments) (1 page)	n.d.	P5
004. 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

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U. S. Department of Justice

Office of Legal Counsel

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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 *TR*
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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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 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.

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001. memo	To Special Representative for Guam Commonwealth from Teresa R. Roseborough. Subject: Mutual consent provisions in the Guam Commonwealth legislation (12 pages)	07/28/1994	P5
002. statement	re: Comments on DOJ memorandum regarding mutual consent provision in the Guam Commonwealth legislation (53 pages)	08/26/1994	P5
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

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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 *TR*
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

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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. Hooover & 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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), *cert. denied sub nom.* Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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. Tingley, 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. Grav 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."

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

¹⁰ 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 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.

¹¹ 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 retained authority to amend in the exercise 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).

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." Id. at 460.

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

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, Wabot 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

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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.

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.

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

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.

Commerce Clause is relatively narrow. The court must defer to a congressional finding...if there is any rational basis for such a finding...This established, the only remaining question 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. 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 exercises its Territorial Clause authority. See, Wabot v. Villacrusis, 958 F.2d 145, 1460 (9th Cir. 1992) ("The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to

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. v. 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

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 Curriu 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. Curriu 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 its provisions alone 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 Simms v. Simms, 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 retains 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 Fletcher v. Peck, 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 divest (sic) those rights.")¹⁰ This, too, the Memorandum

¹⁰ Although the Department in its memorandum focus' on the dissenting opinion in U.S. Trust Co. v. New Jersey, 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

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 Cases, 98 U.S. 700, 719 (1879). The Court in Barcellos and Wolfson 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 deprivation 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. Cir. 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 it 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 retained 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 POSSE." Id. at 460. Obviously the author did not like the test used by the Court. Nevertheless his criticism makes clear what the test is.

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 rationale 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

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.

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001. report	Draft Guam Commonwealth bill. Comments on selected new policy proposals (7 pages)	n.d.	P5
002. 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
003. report	Draft Guam Commonwealth bill. Comments on selected new policy proposals (7 pages)	n.d.	P5

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U. S. Department of Justice

Office of Legal Counsel

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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 *HR*
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

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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.

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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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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 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.

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U. S. Department of Justice

Office of Legal Counsel

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 *TR*
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. We therefore have carefully reexamined this issue. Our conclusion is that these clauses raise serious constitutional issues and are legally unenforceable.²

In our view, it is important that the text of the Guam Commonwealth Act not create any illusory expectations that might 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:

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.

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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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.

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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 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.

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.

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 United States Trust Co. v. New Jersey, 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.

Notetheless, 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 divest (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.

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

¹⁰ 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 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.

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.

¹¹ 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.

¹² 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.

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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
002. statement	re: Comments on DOJ memorandum regarding mutual consent provision in the Guam Commonwealth legislation (53 pages)	08/26/1994	P5
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

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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 Legal Counsel

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 *TWR*
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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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

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. Grav 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.

⁷ 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."

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

* 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 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 retained authority to amend in the exercise 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).

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." Id. at 460.

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

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 Leave 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, Wabot 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

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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.

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.

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

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.

Commerce Clause is relatively narrow. The court must defer to a congressional finding...if there is any rational basis for such a finding...This established, the only remaining question 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. 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 exercises its Territorial Clause authority. See, Wabot v. Villacrusis, 958 F.2d 145, 1460 (9th Cir. 1992) ("The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to

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

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 Curriu 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. Curriu 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 its provisions alone 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 Simms v. Simms, 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 retains 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 Fletcher v. Peck, 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 divest (sic) those rights.")¹⁰ This, too, the Memorandum

¹⁰ Although the Department in its memorandum focus' on the dissenting opinion in U.S. Trust Co. v. New Jersey, 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

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 Cases, 98 U.S. 700, 719 (1879). The Court in Barcellos and Wolfson 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 deprivation 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. Cir. 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 it 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 retained 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 POSSE." Id. at 460. Obviously the author did not like the test used by the Court. Nevertheless his criticism makes clear what the test is.

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

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.

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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
002. statement	re: Comments on DOJ memorandum regarding mutual consent provision in the Guam Commonwealth legislation (53 pages)	08/26/1994	P5
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

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Washington, D.C. 20530

July 28, 1994

**MEMORANDUM FOR
THE SPECIAL REPRESENTATIVE
FOR GUAM COMMONWEALTH**

From: Teresa Wynn Roseborough *TR*
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

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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.

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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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. Ry., 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."

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

¹⁰ 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 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.

¹¹ 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 retained authority to amend in the exercise 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).

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." Id. at 460.

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

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, Wabot 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.

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.

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

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.

Commerce Clause is relatively narrow. The court must defer to a congressional finding...if there is any rational basis for such a finding...This established, the only remaining question 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. 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 exercises its Territorial Clause authority. See, Wabot v. Villacrusis, 958 F.2d 145, 1460 (9th Cir. 1992) ("The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to

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

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 Curriu 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. Curriu 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 its provisions alone 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 Simms v. Simms, 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 retains 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 Fletcher v. Peck, 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 divest (sic) those rights.")¹⁰ This, too, the Memorandum

¹⁰ Although the Department in its memorandum focus' on the dissenting opinion in U.S. Trust Co. v. New Jersey, 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

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 Cases, 98 U.S. 700, 719 (1879). The Court in Barcellos and Wolfson 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 deprivation 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. Cir. 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 it 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 retained 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 POSSE." Id. at 460. Obviously the author did not like the test used by the Court. Nevertheless his criticism makes clear what the test is.

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

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.

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002. 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
003. statement	re: Comments on DOJ memorandum regarding mutual consent provision in the Guam Commonwealth legislation (53 pages)	08/26/1994	P5

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Office of Legal Counsel

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 *TR*
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

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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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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."

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

¹⁰ 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 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 retained authority to amend in the exercise 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).

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." Id. at 460.

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

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, Wabot 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.

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.

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

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.

Commerce Clause is relatively narrow. The court must defer to a congressional finding...if there is any rational basis for such a finding...This established, the only remaining question 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. 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 exercises its Territorial Clause authority. See, Wabol v. Villacrusis, 958 F.2d 145, 1460 (9th Cir. 1992) ("The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to

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

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 Curriu 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. Curriu 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 its provisions alone 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 Simms v. Simms, 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 retains 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 Fletcher v. Peck, 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 divest (sic) those rights.")¹⁰ This, too, the Memorandum

¹⁰ Although the Department in its memorandum focus' on the dissenting opinion in U.S. Trust Co. v. New Jersey, 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

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 Cases, 98 U.S. 700, 719 (1879). The Court in Barcellos and Wolfson 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 deprivation 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. Cir. 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 it 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 retained 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 POSSE." Id. at 460. Obviously the author did not like the test used by the Court. Nevertheless his criticism makes clear what the test is.

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

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.

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003. schedule	Phone No.'s (Partial) (4 pages)	11/00/1998	P6/b(6)
004. briefing paper	re: Deliverable issues for Guam (4 pages)	n.d.	P5
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Deliverable Issues for Guam

Micronesian Compact Impact Aid

Background:

The U.S. 'free association' compacts with Micronesia, the Marshall Islands, and Palau have enabled thousands of citizens of those states to move to Guam, Hawaii, and the Northern Mariana Islands. The Compact law authorizes reimbursement of the costs to the U.S. islands' social programs.

\$4.6 million is being provided by Interior annually to Guam through FY01. Almost no funds are provided to Hawaii and the Northern Marianas. Governor Gutierrez says that \$10 million is the minimum amount Guam needs. Governor Caeytano has recently said that Hawaii should be reimbursed. The Northern Marianas is not being provided funding in light of the other assistance that it gets.

Proposal:

Announce a FY00 budget proposal to increase the reimbursement to Guam to \$10 million annually. The funds would be made available by decreasing the \$11 million a year subsidy to the Northern Marianas, which is resisting the Administration's efforts to enact Federal immigration and minimum wage laws for the Commonwealth as authorized in the covenant by which they came under U.S. sovereignty. The other \$5.5 million could be made available for Hawaii.

End Interior Auditing of Guam

Background:

The Interior IG audits spending of local funds by the smaller territorial jurisdictions as well as their use of Federal funds. There is no similar auditing in our largest territorial jurisdiction, Puerto Rico. The smaller jurisdictions consider the auditing colonial.

Proposal:

Announce a bill to end the auditing of local funds as Guam and other islands are certified to have independent local auditing agencies.

Liberalize Trade Restrictions

Background:

Guam and the other smaller territorial jurisdictions are outside the customs territory of the U.S. but can import products into the U.S. market free of duties and quotas if the products meet specific tests ('substantial transformation' of foreign components into a new product and 'value added' locally to the components). Guam has sought the elimination of most of these restrictions.

Proposal:

We have cleared -- but not yet announced -- legislation to eliminate redundant value added requirements. It would not apply to garments in light of the abusive Northern Marianas garment industry.

Excess Military Property Conveyances

Background:

The military owns 44,800 acres in Guam. Most of the land does not appear to be used and is held for contingency purposes. Guamanians contend the extent and location of this land limits their economic development. They also feel some of the land was unfairly acquired in the wake of the liberation of the island from enemy hands in World War Two. Some former owners feel they have missed out on fortunes others made by selling their land to Japanese investors.

Proposal:

The President would announce --

- The intent to transfer 4,678 acres of Air Force including 360 housing units,
- The intent to transfer 3,821 acres of Navy land.
- The transfer of 44 acres of former navy land worth \$4.5 million for a waste treatment plant.
- Plans to ask Congress to complete action on umbrella Guam excess land transfers legislation, which would eliminate some of the usual restrictions on land transfers. (The bill passed the Senate this Congress. Guam's desire to have land go free to former owners who were already compensated for it has been the sticking point on the legislation. Cong. Underwood has just suggested a compromise that would have the former owners pay back what they were paid for the property plus interest.)

There are also some excess military facilities that would be the basis of announcements.

- The Navy will expedite the transfer of the Naval Air Station Agana (1,939 acres). Added to the basic property will be the NAS Agana officers family housing parcel (92 acres). Further, EDA will seriously consider a \$1 million plus grant for infrastructure improvements on the site to enhance its commercial viability.

- The Navy will expedite the transfer of the Guam Ship Repair Facility (100 acres).

Finally, a senior DoD official ensure that Guam land transfers are expedited.

Ship Repair Facility Assistance

Background:

The Navy closed the ship repair facility and the territory is trying to keep it in open as a private commercial operation. The Maritime Administration's (MarAd) decision to repair a ship which is based in Guam in Japan November 2 was a blow requiring 100 plus layoffs at the already scaled-down facility.

Proposal:

Announce --

- A Navy commitment to continue to sole-source work at the yard.
- That MarAd will work with the yard to finance a major modernization of the facility on a low-cost basis and provide marketing assistance.

DOD Ombudsman

Background:

Guam has a number of military issues and tensions between the community and field officers have increased.

Proposal:

DOD has agreed with out request to designate a senior DOD appointee in Washington to monitor and address major complaints of the Governor or Delegate.

Economic Development Plan

Background:

The Asian economic downturn has depressed Guam's major industry: tourism.

Proposal:

The Interior Department will fund a major study of Guam's economic options.

Coral Reef Initiative

Background:

The President announced a major initiative to protect coral reefs this year.

Proposal:

The President would announce that the FY00 budget will propose \$2 Million for reef protection near Guam and other territorial jurisdictions and include the governors of the areas on the initiative task force.

Micronesia/Marshall Islands Aid Package

Background:

The Presidents of Micronesia and the Marshall Islands will be present on Guam. Our \$2.5 billion, 15 year assistance commitment to these freely associated states expires in 2001. The compact with them requires negotiations on the expiring provisions beginning in 1999.

Proposal:

The President would announce the intent to begin talks with the areas on a post 2001 assistance package.

Palau Road

Background:

The U.S. committed in the free association compact with Palau to build a road through much of

Deliverable Issues for Guam

Micronesian Compact Impacts- The U.S. Free Association Compacts with Micronesia, the Marshall Islands, and Palau have enabled 10,000 citizens of those states to move to Guam. The Compact law authorizes reimbursement of costs to Guam and other U.S. islands. \$4.6 Million is being provided annually through FY01. If we support it, Interior will increase this to 10 Million- (the minimum the governor says is needed) by subtracting from the allotment to the CNMI discretionary.

End Interior Auditing of Guam- The Interior IG audits both local spending by the smaller territorial areas as well as the use of federal funds. There is no similar auditing in our largest territorial area, Puerto Rico. The other territories consider this auditing colonial. We would propose a bill to end the auditing as Guam and other islands were certified to have independent local auditing agencies.

Guamanian U.S. Attorney- The nomination of a U.S. Attorney for Guam - as requested by the Governor and the Delegate to Congress - is not ready for announcement.

Liberalize Trade Restrictions- Guam and the other small territorial areas are outside the Customs territory of the U.S. market if they meet specific tests. Guam has sought the elimination of most free trade restrictions. We have cleared but not yet announced proposed legislation to eliminate redundant value added requirements. It would not apply to garments in light of the abusive Northern Marianas garment industry.

Excess Military Property Conveyances- 30% of Guam is federally-owned, most of this is under military control. Much of the military holdings are seldom or not used. (It is being held for contingencies.) Guamanians feel the extent and location of this land limits their economic development. Additionally, some of the land was unfairly acquired. Former owners feel they have missed out on fortunes others made by selling to Japanese investors. The President may be able to announce plan to convey:

- 2, 136 acres Air Force acres;
- 360 Air Force housing units on another 519 acres; and
- some Navy property

We may also want to announce plans to:

- ask Congress to enact umbrella land transfers legislation without all the usual restrictions on such transfers. (The bill passed the Senate this Congress. Guam's desire to have land go free to former owners who were already compensated for it may be the sticking point that discourages such an announcement.) We may also want to announce the designation of a senior DOD official to expedite Guam and transfers.

There are also some excess military facilities that may be the basis of some announcements.

- The Navy will expedite the transfer of 1,900 acres of land and facilities at the former Naval Air Station Agaña (the name of the capital) which is adjacent to the commercial airport. EDA will seriously consider a \$1 Million plus grant for infrastructure improvements on the site to enhance its commercial viability.
- The Air Force will turn over its water systems to the insular system.

Ship Repair Facility Assistance- The Navy closed its ship repair facility on Guam and the territory is trying to keep it open as a private commercial operation. Maritime Administration's (MarAd) decision to repair a ship which is based in Guam in Japan November 2 was a blow requiring 100 plus layoffs at the already scaled-down facility. A plan to enhance the viability of the yard may include:

- A Navy commitment to continue to sole-source 25,000 man days of work a year at the yard.
- A MarAd yard modernization low-cost loans.
- Repairs to a small vessel to prevent some of the immediate layoffs
- The transfer of Navy facilities including a dry dock 2.5 times the size of the existing one at the yard.

DOD Ombudsman- Guam has a number of military issues and tensions between the community and field officers have increased. DOD has agreed with our request to designate a senior DOD appointee in Washington to monitor and address major complaints of the Governor or Delegate.

Economic Development Plan- The Asian economic downturn has depressed Guam's major industry: tourism. The Interior Department will fund a major economics study in Guam.

Coral Reef Initiative- The President will propose \$2 Million for Guam and other territorial areas in his Coral Reef Initiative and include the governor's of the areas on the initiative task force.

Relations/Status- The President would reiterate that the Administration has addressed Guam's 'Commonwealth' proposals for autonomy and economic benefits and it is now up to Congress to act. He would also recognize Guam's inherent right to full self-government and his intent to try to have the Executive Branch place a greater focus on the island's situation, needs, and proposals under the current status through a senior level interagency group co-chaired by the White House and Interior.

Micronesia/Marshall Islands Aid Package- The Presidents of Micronesia and the Marshall Islands will be present. Our \$2.5 Billion, 15 year assistance commitment to these freely associated states expires in 2001. The President should be able to announce the intent to begin talks with the areas on a post 2001 assistance package. (State has the lead because these are diplomatic relations. Interior has a big stake because it currently coordinates the assistance. DOD has an interest because military rights is one of our major objectives.)

Palau Road- The U.S. committed in the free association compact with Palau to build a road through much of its largest but largely undeveloped island. The President of Palau will be in Guam. The President should be able to announce a \$150 Million plan for this road.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	FBI Individual Name [partial] (1 page)	08/05/1997	P6/b(6), b(7)(C), b(7)(F)
002. memo	To Fred Du Val from Jeff Farrow. Subject: Navy Guam privatization study (1 page)	07/21/1997	P5
003. note	Phone No.'s (Partial) (1 page)	n.d.	P6/b(6)
004. memo	To Mickey Ibarra through Fred Du Val from Jeffrey Farrow. Subject: Guam Commonwealth bill plan (4 pages)	06/19/1997	P5
005. memo	To Sylvia Matthews through Mickey Ibarra from Fred Du Val. Subject: Guam (3 pages)	07/22/1997	P5

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Jeffrey Farrow
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FOLDER TITLE:

Guam - Various I

Jamie Metrailler
2006-0193-F
jm106

RESTRICTION CODES

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

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

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

RR. Document will be reviewed upon request.

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]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

July 21, 1997

To: Fred DuVal

Fr: Jeff Farrow

Re: Navy Guam Privatization Study

This is an immediate reaction to the Navy's plan to expand its study of whether it would be more efficient to contract for services now performed by personnel on Guam from some 1200 to 1800 jobs.

1. 'Outsourcing' of this magnitude might have a significant impact on Guam in view of its small population but it also would seem to be consistent with our Reinventing Government efforts and might create some opportunities for the Government and people of Guam (in terms of services which they could provide).
2. I've put in a call to Asst. Sec. Pirie's Deputy (who's on our Puerto Rico IG).
3. Interior was unaware of the proposal, not having heard about it from either Guam or Navy. (While Interior doesn't have authority over matters within the jurisdiction of other agencies, it has responsibilities that could be impacted and it might be able to help Guam.) At least Guam should find out if Interior can help. (I've sent a copy of the letter to Al Stayman.)

Finally, I don't want to read too much into this but A) Guam seems to be losing some of its military role (and the leverage that it hoped to gain on other issues from that role) and B) Guam's complaints about military domination of resources and facilities may have encouraged more of a military pullback than its officials are happy to see materialize.

6.4

June 19, 1997

Memorandum To: Mickey Ibarra

Through: Fred DuVal

From: Jeffrey Farrow

Subject: Guam Commonwealth Bill Plan

This is to prepare you for a decision on how to proceed on the Guam Commonwealth Bill, which will probably, ultimately, need to be made by Erskine. There is a lot of background -- including statements by the President -- that needs to be considered. We have also outlined some options.

Background

Guam, the southernmost island of the Marianas chain of the Micronesian islands, became U.S. territory through the Spanish-American War. In the mid-'70s, the U.S. entered into a 'Covenant' with the chain's northern islands that also made them U.S. territory. The Covenant provided the new Commonwealth of the Northern Mariana Islands with several of Guam's unmet Federal policy objectives: exemption from having to use American vessels for U.S. shipping; SSI; and a commitment not to unilaterally change key provisions of the arrangement for the islands' status.

Consequently, Guamanians decided that they, too, wanted 'Commonwealth' in 1982. In spite of Federal cautions, the then governor drafted a Federal bill that covered almost all conceivable policies from Guam's perspective and went far beyond the Covenant. He then obtained voter approval of the draft in referenda in 1987 in spite of congressional concerns that doing so would make it difficult for Guam to accept necessary changes to the bill.

Federal officials objected to almost every section in a 1989 House Subcommittee hearing. The underlying problem was that the bill combined autonomy that would be appropriate for an area that would be separate from but in 'free association' with the U.S. (as the three other areas of Micronesia were becoming) with many Federal benefits commensurate with U.S. state or territory status. The Subcommittee then asked the Bush Administration to try work out a compromise bill with Guam's leaders and consult Congress as it did so.

An Interior-led interagency group worked out a compromise in 1992, but some of its provisions were unilaterally changed in the Bush Administration's final review of the compromise. Among the reasons were the precedents that would be set for Puerto Rico Commonwealth proposals.

The President, as a candidate in 1992, pledged to work for a mutually-acceptable law.

Interior began new talks with Guam during the President's first term, although without consulting Congress. In 1994, it agreed to language that suggested that the Federal Government would not be able to unilaterally change any provision of the law once it was enacted -- language that went

beyond the Marianas Covenant Mutual Consent commitment. By last August, Interior Dep. Sec. Garamendi had negotiated the rest of a substitute bill that contained much of what Guam wanted ... in many areas without agreement of the agencies with jurisdiction over the policies concerned.

Governor Gutierrez and Delegate Underwood tried to get this substitute endorsed in the Democratic Platform but Harold, IGA, and NSC staff had the Platform, instead, simply commit to work for an agreement. Garamendi then brought Gutierrez and Underwood in to see Leon and ask for presidential support. Because supporting the substitute required policy changes on issues such as Mutual Consent and the application of Federal laws and regulations that have also been sought by Puerto Rico's Commonwealthers and would be of concern to Puerto Rico statehooders, Leon decided that the matter should be deferred until after the Election.

In November, Garamendi suggested an urgent need to proceed to ensure access to vital U.S. military bases. Harold then asked the NSC for an assessment.

While the NSC was reviewing the matter, Gutierrez met with the President and, afterwards, publicly suggested progress. (The President merely pledged that the substitute would be seriously and expeditiously considered.) Reports that the substitute was being approved, however, caused House Committee Chairman Don Young to write the President 1) expressing concern about two provisions that Guam says are essential -- Mutual Consent and limiting an insular vote on the status question to descendants of residents as of 1898 -- and 2) complaining about the lack of consultation. Ranking Democrat George Miller also privately expressed concern about Mutual Consent and proposals on labor, immigration, and environmental laws.

The NSC then reported: 1) concern about the substitute on the part of all of the agencies contacted; 2) agency feelings that they were being end-run or ignored in developing the substitute and consternation that they did not know its specific contents; 3) the NSC's own concern about many elements of the substitute; 4) its lesser concern about base access; and 5) a need for a White House-led rewrite effort involving the agencies concerned and congressional consultation.

Noting the issues of concern listed in the first attachment to this memo, Marcia recommended such an effort. Sylvia said that Erskine approved of it and the President wrote Young that: 1) he agreed with some of Young's views; 2) Federal policy concerns had to be satisfied; 3) there would be expeditious action; and 4) Congress and the agencies would be consulted.

As the effort got underway, however, The Washington Post reported that the Administration had changed longstanding positions on key issues such as immigration and labor control after Gutierrez raised \$1 million for the DNC and Clinton-Gore. It quoted unnamed agency officials as suggesting that the funds influenced the policy changes and Gutierrez as saying that they got him access. The article, which spawned stories in other national media, linked the proposals to the Northern Marianas' problematic immigration and minimum wage exemptions.

In denying the allegations, we told the Post et. al. that we had already begun a rewrite effort.

The effort was delayed, however, by 1) Garamendi objections to the agenda and 2) the departure of John Emerson. It was put on hold pending Fred's arrival, as I explained to Underwood when he raised it in a meeting with the President and, separately, to Sylvia. The President made it clear to me prior to the meeting that he wanted to respond to Guam's petition.

The delay led Guam's leaders to try to force us to respond by getting Young to hold a hearing this Summer (even though he told them that 1) he would not pass the bill and 2) they should become a Commonwealth the way that Puerto Rico had -- by writing an insular constitution). Young additionally, however, began an investigation of the campaign contributions allegations. His staff says that Government Operations Committee Chairman Burton will do the same.

OMB and agencies, concerned about a hearing on the bill, are now pressing for the rewrite effort to proceed. Garamendi, however, wants to wait until after the hearing, expecting expressions by Guamanians and Members of Congress to encourage greater acceptance of the substitute.

Options

1. Proceed Immediately with a White House-led Effort to Rewrite the Substitute.

This is what we have publicly committed to do. It would, however, necessitate 1) a great deal of effort and 2) policy decisions that would require Garamendi or agencies to compromise on issues.

2. Postpone Until After the Hearing and, maybe, Contributions Influence Investigations.

Garamendi believes that this approach would help create the right climate for compromise by the agencies. It would, however, 1) seem to substantiate speculation that the Administration had intended to go along with the substitute and just stopped when attention was focused on the contributions; 2) contradict what has been said publicly; and 3) only postpone the real problem.

3. Give Garamendi Parameters for Negotiation with the Agencies on the Substitute.

This would have the advantages of 1) not requiring as much involvement here after some basic policy decisions are made and 2) suggesting policies that would be more likely to be approved but it would probably still require us to mediate disputes and answer questions on details.

4. Ask for Agency and Congressional Comments on the Substitute.

These are the first steps in the first option but the expectation here is that they will expose the extent of the problems with the substitute -- and the clear need for revision before White House action -- to Guam without us being directly involved. This could create a situation in which Garamendi could justify compromise to Guam as well as produce a more reasonable substitute.

It should be recognized that Guam's leaders may initially be unhappy with any of the options.

① John B.

② Call OMB. → timing of Young
→ 3 weeks deadline

July 23-24 →

Aug 12 → Big Mayan } pm - evening w/ the POTUS.

* VP office schedule 12- → Archer + Grossman →
→ who (a eff) →

→ Res A →

R6A → Chair?

THE WHITE HOUSE
WASHINGTON

July 22, 1997

MEMORANDUM TO SYLVIA MATHEWS

THROUGH: Mickey Ibarra *MI*

FROM: Fred DuVal

SUBJECT: Guam

This memo seeks to enlist your help in clarifying White House strategy regarding Guam. Our objective is to honor the President's commitment to Governor Carl Gutierrez (D-Guam) that the White House will seriously consider 1) Guam commonwealth legislation and 2) the recommendations made by Special Representative to Guam and Deputy Interior Secretary John Garamendi regarding this legislation. (See Attachment A).

Last January, Erskine Bowles approved an IGA-lead staff effort to work out differences of opinion among the agencies on the proposed draft Guam commonwealth legislation. (See Attachment B). Over the past six months, this effort has stalled and the issue is whether to now reinvigorate it at the White House and, if so, how?

I. Background

In 1987, Guamanians passed a commonwealth ballot proposition which significantly redefined Guam's relationship to the United States. The proposition called for the U.S. government to transfer jurisdiction and change U.S. policy in ways considered untenable and unimplementable. The passage of this proposition was in many ways unprecedented for a territory, and in many instances contradicting the existing federal law.

Since 1989, every Administration has attempted to respond to this unimplementable proposition by negotiating alternative commonwealth proposals that would adequately satisfy both the Guamanians and the federal agencies with responsibilities and roles in Guam. These efforts have, thus far, been unsuccessful.

The most vigorous effort was led by our third Special Representative to Guam, John Garamendi. His work has resulted in a draft commonwealth proposal which the Guamanians support but which many of our agencies oppose. The most contentious issues facing the future of Guam are the following: (1) Mutual consent -- no provision of law may be changed without Guam's approval, (2) Immigration -- ceding INS responsibilities to Guam, (3) Right to vote limitations -- limiting the right to vote on status to native-born Chamorrans (residents of Guam), (4) U.S.-Guam Commission -- creating a joint U.S.-Guam Commission empowered to (a) modify the

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application of any agency's regulations on Guam and (b) make recommendations on modifying laws on which Congress would have to vote. About a dozen less controversial issues also remain unresolved. (See Attachment C).

II. Current Situation

- The Government of Guam has become very upset about the delay in Administration action, and Deputy Secretary Garamendi recently wrote Defense Secretary Cohen and others about the threat of demonstrations on the island. (See Attachment D). In addition, Guam is beginning to threaten withdrawal of cooperation on national security issues unless the U.S. government makes considerable progress on its self-determination status.
- House Resources Committee Chairman Don Young (R-Alaska) has indicated a commitment to hold house hearings on Guam in August (after he concludes Puerto Rico hearings in July), which may include testimony on both Guam commonwealth issues and alleged campaign fund raising improprieties.
- Federal agencies with a stake in Guam are anxious about upcoming, Young-led hearings without a unified Administration position on the key issues.
- The Garamendi-led effort has stalled due to agency opposition and his own view that further work on Guam should be postponed until after the Young hearings.
- Our work on Guam was the subject of some unfavorable media attention. (See Attachment E).
- Counsel's Office (Bill Marshall) is involved and comfortable with moving forward on the Guam issue.

III. Options For Consideration

1. *Take no position on Guam Commonwealth.*
2. *Wait for Congressional Hearing on Status of Guam* to conclude before directing White House staff to coordinate an Administration position on Commonwealth.
3. *Immediately circulate the Garamendi draft Commonwealth proposal* through the OMB referral process and collect written reaction and input from the affected agencies to clarify areas of agreement and disagreement, and to give Garamendi some direction on the areas in dispute.
4. *Begin an immediate sequence of White House-hosted meetings* to address disputed issues as quickly as possible and attempt to harmonize the Administration's position before August hearings.

IV. Recommendation

IGA recommends we choose option three (OMB referral) to flesh out the issues in a non-confrontational and low-key way, demonstrating forward movement to Congress and Guam but not prematurely raising Guamanians' expectations for an immediate resolution.

Withdrawal/Redaction Sheet

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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
004. draft	re: Jeff Farrow suggestions concerning Administration comments on Guam Commonwealth Draft Act, H.R. 100 (23 pages)	10/29/1997	P5

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Guam - Various II [1]

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2006-0193-F
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RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

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

THE WHITE HOUSE
WASHINGTON

October 27, 1997

MEMORANDUM FOR ERSKINE BOWLES
SYLVIA MATHEWS

FROM: Mickey Ibarra *MS*
Fred DuVal
Jeffrey Farrow

Subject: Request for Funds for Guam

Cc: Frank Raines Janet Murguia
T. J. Glauthier Lucia Wyman

This memo is intended to: 1) outline the measures that we recommend be taken to "soften the blow" of the Administration's testimony on the Guam Commonwealth Bill, and 2) seek your assistance.

As indicated in the attached memo to the President, these measures would need to be made public ASAP in order to have the most impact.

The measures -- in order of their anticipated positive impact -- are:

- 1) deciding to stop at Guam during next year's China or APEC (Thailand) trips;
- 2) committing to \$5.5 million a year from Fiscal Years 1999 to 2002 to reimburse Guam for costs imposed upon it by migration resulting from Free Association agreements that the Federal Government has entered into with three other Micronesian island groups; and
- 3) inviting Gutierrez to the China State Dinner Wednesday.

Requests regarding the first and third measures above have been sent to the appropriate staff. We would very much appreciate your asking OMB to agree to the second measure. Our rationale is outlined below.

Compact Impact Funds

The Compacts of Free Association with Micronesia, the Marshall Islands, and Palau executed in 1986 and 1993 enabled citizens of those non-U.S. islands to migrate freely into the U.S. and its territories. The laws authorizing the Compacts' implementation authorized the funds necessary to reimburse Guam and other U.S. islands for the costs imposed on the U.S. islands' social services

and infrastructure by this migration.

The bulk of the impact has been on Guam. Thousands of the estimated 175,000 Micronesians have moved to Guam, the largest Micronesian island, imposing costly burdens on its health, education, and other systems. However, relatively few Federal dollars have been appropriated for reimbursement, exacerbating discontent in Guam with its current Federal relationship and fueling its Commonwealth Bill request to control immigration (which the Administration will essentially oppose Wednesday).

Questions about the net cost have been used to explain not providing more funding, but the budget deficit has probably been a greater reason. Increasing funding has been a priority unrealized objective of Guam's Governor and Delegate to the U.S. House. Governor Gutierrez claims that as much as \$15 million a year is needed now.

In response to our inquiry, the Interior Department's Insular Affairs Office said that \$10 million a year is about the minimum that would be required to fulfill Guam's expectation under the law. The office is now providing \$4.5 million a year and has identified \$10 million a year that it can provide effective FY '03. Our request is for OMB to work out a means of filling the shortfall for Interior -- \$5.5 million a year through FY '02 -- or, at least, commit to a significant proposal for increased funding that can be publicly announced even if a specific amount is not released yet.

While it may, at first, seem to be a very substantial monetary commitment to make on such short notice, we believe that: 1) this matter has been considered enough at OMB and Interior to enable a quick decision to be made, and 2) the commitment would be helpful enough in terms of additional goodwill to warrant the focus necessary for such a decision.

Please contact us if we can provide any information that would facilitate approval of this request.

Exhibit A

~~Summary of~~ Administration Comments On
Guam Commonwealth Draft Act, H.R. 100
October 29, 1997

PREAMBLE

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

(The Administration would support this provision if it were revised to replace)
Current Position. Federal misgivings arise because: (1) the reference to "the right of self-determination ... of the Chamorro people" might appear to endorse the Chamorro-only vote (about which there is disagreement in connection with section 102(a)); and (2) the reference to Guam acting "in concert" with the United States implies that they are equal parties, and that the Commonwealth Act is akin to a bilateral treaty. The Administration remains open to discussing alternate preambular formulations with Guam. Among other things, we would suggest replacing the word "obligations" with the phrase "purposes and principles" of the UN Charter and Treaty of Paris. We would also qualify the term "self-determination" to mean as provided in the Guam Commonwealth Act and ~~we~~ specify that the Commonwealth would be within the American political system.

TITLE I - POLITICAL RELATIONSHIP

Section 101(a) - Creation of Commonwealth Government

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

The Administration would support this provision if
Current Position. There was general agreement on this section, as modified by language to that would clarify that the Commonwealth of Guam will remain "under the sovereignty of the United States".

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

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

be able to adapt (that would have to)

Exhibit A

would support this provision if it were modified to include

Current Position. The Administration recommends the need for Congressional approval of the Commonwealth Constitution, based on prior precedent, and the need to insure ~~delete~~ *delete* Guam's compliance with the elements required to be included in the Constitution pursuant to Section 101(b). As to the modifier "full" for self-government, we object because the term creates ambiguity, particularly when other modifiers of the term elsewhere in the legislation differ. Our concern is based, principally, on the Northern Mariana experience, which suggests that omission of the term "full" could be used in later litigation to diminish the authority of the United States. *We also would recommend deleting reference to the Commonwealth Act, since it would be covered by the reference to "laws of the United States" and deleting reference to the Guam Constitution, as it seems more appropriate for the Guam Constitution (when adopted) to define its place in relation to other Commonwealth laws.*

STET

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

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

would support this provision if it were modified to include

Current Position. The Administration is supportive ~~as modified by the addition of the words~~ legislative consent to be sued as "evidenced by enacted law."

Section 101(d) Public Education System/Inherent Powers

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

does not object.

Current Position. The Administration recommends deletion of the original subsection dealing with creation of a public educational system as unnecessary. There was also disagreement as to Guam's previously proposed substitute subsection (d), dealing with the "non-waiver" of the "inherent powers of the Commonwealth of Guam." Guam's rationale for this new language was to support its view that the Guam Commonwealth Government would be created with "full" self-government. Although it has disclaimed it, Guam may also desire to express a concept akin to the Tenth Amendment of the U.S. Constitution -- i.e. powers not expressly delegated to the Federal Government are expressly reserved to the respective States, or to the people.

Exhibit A

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

Subsection 102(a) - Chamorro Self-Determination.

Summary of Provision. Congress recognizes the inalienable right of self-determination by indigenous Chamorros, who are defined as those born on Guam before August 1, 1950, and their descendants. The act of self-determination shall be provided in Guam's Constitution.

Current Position. The Special Representative has preliminarily proposed to revise this provision to state that "Congress hereby requests the Chamorros provide an expression of their desire for the Commonwealth of Guam's future political status." This language *sought* seeks to clarify that the "expression of desire" to be taken by Chamorros would be non-binding and non-governmental in nature. Nevertheless, there remain concerns in the Administration that the provision may be implemented in a manner that violates the protection of voting rights under the Fifteenth Amendment and the doctrine of equal protection pursuant to the Due Process Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment. Any expression of political desire by the Chamorro people must be without any sponsorship by either the Federal government or the Commonwealth government and not under auspices of either government.

Section 102(b). Voting to Ratify Commonwealth.

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

The Administration would support this provision provided
Current Position. There are concerns because this subsection references section 102(a) and implies an endorsement of the Chamorro-only vote. An amendment to section 102(a) Chamorro Self-Determination, as recommended above, would remove Federal concerns regarding section 102(b).

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Section 102(c) Federal Programs For Chamorros

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

Current Position. The responsibility imposed upon the United States should not be

Exhibit A

mandatory. Furthermore, under Adarand Construction v. Peña, 515 U.S. 200 (1995), any benefit provided exclusively to the Chamorro people would likely be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment, and thus would need to be narrowly tailored to serve a compelling government interest. Finally, any new training programs should be coordinated with existing workforce development programs.

Section 102(d) Continued Eligibility Under Existing Programs

Summary of Provision. Provides that new programs under 102(c) will not affect eligibility of all minorities under existing programs.

Current Position. ~~Agreement.~~ *The Administration supports this provision.*

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

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

Current Position. ~~Agreement with Guam that~~ ^{This} the subsection can be eliminated as unnecessary.

Section 102(f) Chamorro Land Trust

Summary of Provision. Requires the Government of Guam to establish a Chamorro Land Trust for the benefit of indigenous Chamorros, comprised of lands returned to Guam by the U.S. Authorizes return or lease of lands to original owners.

Current Position. There are strong concerns that this subsection may be race-based and subject to constitutional infirmity based on the Metro Broadcasting decision of the Supreme Court. Section 102(f) is also inconsistent with the Administration position on Section 4, of S.210, the proposed Guam Excess Lands Act.

Section 102(g) Residency Requirements

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

Exhibit A

Current Position ^{The Administration would} Support if it is amended to specify "bona fide" residency and not permit durational requirements which could be longer than the Supreme Court has found to be the maximum permitted by the Constitution. ^{This provision}

Section 103. Mutual Consent

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

Current Position. The first Special Representative attempted to strike a compromise by proposing that Guam and Congress agree to mutual consent "to the extent constitutionally permissible." The Administration, however, has strong reservations regarding this proposal because of the firm legal conviction that a mutual consent *statute* cannot preclude the plenary *constitutional* authority of Congress to enact laws regarding a United States territory. Therefore, it is our considered view that the proposed mutual consent language cannot preclude a future Congress from unilaterally modifying or repealing the Guam Commonwealth Act. Hence, we are concerned that inclusion of the recommended provision -- even with the "to the extent constitutionally permissible" proviso -- risks misleading the people of Guam and others regarding the legal force of the Federal commitment not to modify the Guam Commonwealth Act without the consent of the people of Guam. For this reason, if the proposal is to be used, it is essential that it be made clear to all concerned that the provision is not enforceable. In any event, the Administration is supportive of a statement that the Federal government is committed, as a matter of sound policy and principle, not to alter Guam's Commonwealth status without the consent of the people of Guam. Finally, any mutual consent policy should not go beyond provisions that establish the basic political relationship between Guam and the United States and should not reach ancillary matters (e.g. tax) that the Federal government should be free to alter.

TITLE II - APPLICABILITY OF FEDERAL LAW**Section 201. Applicability of the United States Constitution.**

Summary of Provision. In addition to particular provisions of the U.S. Constitution that already apply to Guam, Section 201 provides for the application to the Commonwealth of additional Constitutional provisions: Article IV, section 2, clause 2; Article IV, section 4; the Tenth Amendment; and the first sentence of the Fourteenth Amendment.

The Administration would **Exhibit A** *(this provision)*

Current Position. Support with amendments to specifically set forth all provisions of the Constitution that will apply in Guam after enactment of the Commonwealth Act, including reference to the territorial clause, but deletion of references to the Tenth Amendment and to the first sentence of the 14th Amendment. As a non-state area under the sovereignty of the United States, Guam, even as a Commonwealth, would remain subject to the Territory Clause of the Constitution (Article IV, Section 3, Clause 2) and thus subject to the plenary legislative power of Congress. Any attempt to extent the Tenth Amendment to Guam would thus not be consistent with the Territory Clause.

Section 202. Effect of Federal Law (Mutual Consent)

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

The Administration Current Position. Recommend deletion because *for this provision* this provision is inconsistent with United States sovereignty over Guam and also contrary to Congress's plenary powers over territories under the Territorial Clause. There are also a number of administrative and jurisdictional concerns regarding the possibility that two sets of potentially conflicting federal standards would need to be enforced: one for Guam and one for the rest of the United States if Guam objected to policies uniformly applied elsewhere. *responsibility*

Section 203. Joint Commission.

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

Current Position: The Special Representative had proposed a Joint Commission under Federal control comprised of 3 federal officials and 2 Guam officials which would have three functions: (i) be a forum for regular consultations between the U.S. and Guam; (ii) be an advisory body to recommend modifications in the application of selected federal laws to Guam; and (iii) be a decision-making body in determining the application of selected federal regulations to Guam.

While the Administration supports the concept of providing Guamanian officials with a formal mechanism to advise and consider Federal laws and policies regarding Guam, the structure and function of the Joint Commission raises constitutional concerns. Under the Appointments Clause of the Constitution (Article II, Section 2, Clause 2) Federal statutes may be enforced only by officers of the United States, *i.e., persons who have been* *land policy*

Exhibit A

appointed by the President, with the advice and consent of the Senate, or in the case of inferior officers, if authorized by Congress, the President alone, the courts of law, or the heads of departments. Buckley v. Valeo, 424 U.S. 1, 119-141 (1976). In addition, the Administration objects, as a matter of policy, to granting the Commission ultimate decision-making authority to suspend or modify federal policies, whether by statute or regulation, to Guam. Furthermore, a grant of authority to suspend any or all federal regulations is not a technical or trivial matter. The proposal provides the Joint Commission with review power over all manner of federal rules and regulations, even where the subject matter of such regulations is not within the substantive expertise of the members of the Joint Commission. This provision would effectively allow the Joint Commission -- made up of only a handful of U.S. officials and Guamanian officials -- to supplant the knowledge and expertise of entire agencies on particular issues. The Administration believed that various agencies with knowledge and expertise on a particular subject, after proper consultation and advisement by the Joint Commission, should continue to be vested with ultimate authority to enact and apply Federal regulations to Guam. The Administration does not object to a consultative forum between Guam and the Federal government and is prepared to support the creation of an advisory Commission in which Guam would have input and representation and which could provide recommendations to Federal agencies regarding the application of Federal policies to Guam. If such a Commission were created with Guam members and U.S. members, we recommend that each government bear the expense of the Commission's work through a mutually agreeable cost-share agreement.

Section 204. Delegation of Authority.

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

Current Position: We recommend that the proposed provision clarify that, if the President elects to delegate authority to the Governor of Guam, the Governor of Guam would not thereby become a federal official. Rather, he would remain a Guamanian official and thus need not be appointed in conformity with the Appointments In implementing such a designation, there are concerns regarding the application of Federal conflict of interest statutes to Guamanian officials.

TITLE III - FOREIGN AFFAIRS AND DEFENSE

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

Exhibit A

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

Current Position. The word "complete" must be inserted before "responsibility." The Administration believes that defense and foreign affairs authority is constitutionally lodged in the Federal government and that in the international arena a country must speak with one voice. The CNMI Commonwealth Covenant states that the U.S. has "complete responsibility and authority" for these functions. If the word is omitted in Guam's provision, which is otherwise the same as the CNMI's, the implication could arise that a lessening or limitation of U.S. defense and foreign affairs authority was intended. This should be avoided by the addition of the word "complete" before "responsibility" in the first line of the revised provision.

Section 302. Consultation with Guam.

Summary of Provision. Subsection (a): The U.S. will consult with Guam before signing treaties or agreements which affect Guam; (b) no military security zones or foreign military personnel on the island without Guam's approval (except in case of war) and no new U.S. bases without consultation with Guam; (c) no increases/decreases in DOD activities without consultation with Guam.

Current Position. The appropriate Federal agencies, primarily State and Defense, usually consult with Guam officials, consistent with national security interests, before taking actions that could impact the island. But some consultations and certainly the approval requirements which Guam seeks would seriously hamper the U.S. ability to respond to international crises. As drafted, subsection (a) is overly broad and not consistent with the constitutional scheme for Federal responsibility over foreign affairs. In regard to foreign affairs consultations, several concerns were raised: (a) in view of the hundreds of international agreements that the Executive Branch concludes each year, a requirement for "prior consultations" with Guam would cripple the ability of the U.S. to negotiate timely and effective international agreements; (b) since the Constitution gives the President the sole authority to negotiate treaties and sole power to make Executive Agreements, it follows that Congress lacks the authority to compel the Executive Branch to consult with Guam. Consequently, in lieu of a "prior consultation" requirement, language is recommended that would provide sympathetic U.S. consideration of Guam's views on international matters directly affecting Guam and provide opportunities for effective presentation of such views to an extent comparable to opportunities provided to any other Commonwealth, territory or possession. (Similar to Section 904(a) of the CNMI Covenant.) In regard to defense consultations, the U.S. cannot agree to the "security zone" and "foreign personnel" provisions requiring Guam's approval, but is

to provide for a) consideration of Guam's views on international matters and b) consultation regarding the stationing of foreign military personnel, the establishment of new military bases, or major changes in the level of military activities, consistent

Administration would support it amended
to provide for a) consideration of Guam's views on international matters and b) consultation regarding the stationing of foreign military personnel, the establishment of new military bases, or major changes in the level of military activities, consistent

Exhibit A

willing to agree to required consultation, consistent with national security, with Guam on these issues. In this regard, it is recommended that such consultations not be applicable in time of war or national emergency, and be further limited to consultations regarding the stationing of foreign military personnel, the establishing of military bases and the significant increase or decrease of U.S. military personnel on Guam.

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

Summary of Provision: 303(a)(1) The U.S. will help Guam set up offices in U.S. and abroad; 303(a)(2) U.S. will help Guam become a member of or participant in regional and other international organizations (including South Pacific Forum and Asian Development Bank). Guam shall be free to accept financial and technical assistance from these organizations, enter agreements with members of these groups and other sovereign states, relating to trade and tax questions; 303(b) U.S. will obtain from foreign countries favorable treatment for exports from Guam.

Current Position. Section 303 (a)(1): Consular offices would not be needed if the Federal Government can reach a compromise agreement on the immigration provision that leaves control and authority with the U.S.. The U.S. was ready to assist Guam to set up offices abroad to promote tourism, economic, and cultural interests. These target areas should be specified in provision. The Administration position recognizes that Guam can enter certain types of agreements of a non-governmental or commercial character or which do not entail the creation of binding rights or obligations but merely set forth agreed understandings or procedures. *The Administration would support it modified to not require Federal expenditures and clarify that Federal assistance is discretionary.*

Section 303(a)(2): While the U.S. will continue to assist Guam in joining regional organizations for which Guam is qualified, the U.S. cannot force organizations whose rules limit membership to sovereign states to accept Guam. The rules of the South Pacific Forum and Asian Development Bank - of which Guam wishes to be a member - currently restrict membership to nations that are responsible for their foreign affairs. The U.S. supports Guam's participation in appropriate international groups, and will consider requests on a case-by-case basis. The federal position recognizes that Guam can enter certain types of international agreements of a non-governmental, commercial, or cultural character. But a grant of independent authority to Guam to conclude tax and trade treaties with sovereign states is incompatible with the Constitutional authority of the federal government, and could create confusion as to the U.S. guaranteeing that its constituent parts comply with U.S. treaty obligations. *The Administration would support this provision if it is modified to limit Federal assistance to membership requiring a sovereign status, not permit Guam to conclude tax and trade treaties with sovereign states, and limit Guam's authority to enter into international agreements.*

Section 303(b): The U.S. is supportive of helping Guam gain favorable treatment for its exports from foreign states under various trade preference programs on a case-by-case

if amended to provide that the U.S. will, as appropriate,

to those of a non-governmental, cultural, or commercial nature, and U.S. consideration of Guam's requests for the U.S. to negotiate agreements with other countries.

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Exhibit A

basis.

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

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

~~Current Position~~ ^{Administration} ~~Recommend deletion of this section.~~ The objectives of this section are largely achievable through the application of existing U.S. statutory and regulatory requirements as well as international agreements the U.S. has concluded. There are objections to the language of the original provision because it is ambiguous, contradictory, unspecific, and generally does not conform to existing environmental standards constrained in laws such as CERCLA and RCRA. The term "clean up," for example, is undefined and should refer to the authority under which the cleanup will take place. There are also particular concerns regarding the uncertain effect of this broad language on the management of radioactive material on naval vessels and on the temporary storage of routinely generated radioactive wastes at hospitals from medical procedures using radio pharmaceuticals. Finally, the Federal Tort Claims Act provides adequate protection. *Thus, the*

TITLE IV - COURTS

Note: The Administration is presenting a position on H.R. 2370, the "Guam Judicial Empowerment Act of 1997." Among other things, H.R. 2370 would amend the Organic Act of Guam by establishing the local court system of Guam, including the local appellate court known as the Supreme Court of Guam, as a co-equal branch of the Government of Guam and permitting the election or appointment of the Attorney General of Guam. The Administration has no objection to H.R. 2370, if it is modified as proposed by the Administration's testimony.

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

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

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courts and State courts.

The Administration would *this provision of the highest decisions of the court of Guam are renewable by the Ninth Circuit for a specified period of time, as in current law, although the Administration would support reducing the currently authorized 15 years to a shorter period.*

Current Position. Supportive if amended as recommended in Attachment 18 of the 1993 Task Force Report. The Administration is open to reducing the previously proposed Ninth Circuit review period from 15 years to a shorter period.

Section 402. Jurisdiction of the District Court.

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

The Administration

Current Position. Support, if amended to delete subsection (a), which "continued" the District Court, and further modified to add "and any additional special jurisdiction given it by Congress." The reason for the Federal proposal is that it might become necessary or desirable, to confer on the Guam District Court jurisdiction over claims against the U.S. that arise exclusively on Guam - e.g. claims stemming from federal land acquisition on Guam after World War II.

this

Section 403. Applicable District Court Rules.

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

The Administration would *this provision*

Current Position. Support, if it is clarified that there are provisions of the Federal Rules where designation of the U.S. Attorney may need to be retained, even if the action concerns local Guam law -- e.g. Rule 4(I) regarding service on the U.S. Attorney in cases where the United States is a defendant.

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

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

Current Position. Support, with minor updating of references as provided in Attachment 18 of the 1993 Task Force Report.

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TITLE V - TRADE

Section 501. Guam-United States Free Trade Area

Summary of Provision. Guam remains outside U.S. customs territory and proposes the creation of a free trade area with the United States in which all "products of Guam" would enter the U.S. customs territory duty and quota free. The bill defines "product of Guam" as articles containing at least 30 percent value added in Guam. The U.S. would not impose any duties or quotas or other restrictions on products of Guam or treat them as originating in any other country. The Governor of Guam only would certify what constituted a product of Guam for purposes of export to U.S. customs territory.

Current Position: With the subsequent passage of North American Free Trade Agreement, Guam informally proposed amendments to Section 501 which sought to update the provision and achieve the following objectives: (a) Guam wants to control imports/exports restrictions vis-a-vis foreign countries; (b) Guam wants to be treated as if it is a state and part of the U.S. customs territory through a reciprocal free trade arrangement; (c) Guam wanted trade laws that would encourage the development and diversification of its economy, which would be also beneficial for the U.S. by reducing the amount of federal subsidies to Guam; and (d) Guam wanted certainty in the application of trade laws, due to past experiences with sudden amendments to Headnote 3(a) that undermined Guam's watch and sweater industries. The Administration supports the continuance of Guam remaining outside the U.S. customs territory and remains willing to review and consider these or any new trade proposals further with Guam.

free entry of Guam's products into the U.S. market, subject to the national necessity to impose limits in certain circumstances and Guam's ability to impose limits on foreign products and exports.

TITLE VI - TAXATION

Section 601. Mirror Image Tax.

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

(For Guam's replacement of the IRC as its tax code)

Current Position: Under the authority of the 1986 Tax Reform Act, an implementation agreement was negotiated and signed in 1989, but its effective date was postponed. The principal reason for the postponement was to coordinate the agreement with the larger Commonwealth Act legislation. Representatives of Guam have met with Treasury Department representatives to develop acceptable tax delinkage provisions and a revised

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implementation agreement. At the present time, the result of those negotiations, a set of draft legislative provisions that would supersede all of Title VI, is under review at the Treasury Department.

TITLE VII - IMMIGRATION

*Asked Treasury
to revise*

Section 701. Guam Immigration Authority.

Summary of Provision. ^{This} Section states that the recent influx of substantial numbers of immigrants from Asia and the Pacific has severely strained Guam's infrastructure. In order to limit the number of immigrants to Guam, Congress grants the Commonwealth of Guam the authority to control entry of all aliens into the island. Federal immigration law will apply for a 2-year transition period after Commonwealth is enacted. Thereafter, locally-enacted immigration laws will apply. Among other things, local authority over immigration shall not impair the free movement of U.S. citizens between Guam and the U.S., shall not include naturalization of aliens for U.S. citizenship, and shall not make Guam a port of entry into the U.S. for permanent resident aliens for purposes of calculating duration of physical presence in U.S. prior to naturalization.

Current Position. The Administration is sensitive to Guam's legitimate concerns regarding the impact of uncontrolled immigration to Guam on the island's infrastructure and the necessity to attract adequate numbers of workers to fill vacancies in Guam's growing economy. In trying to balance Guam's desire for local immigration control with Federal concerns regarding the possible duplication of labor and immigration problems occurring in the CNMI, the Special Representative made a preliminary proposal as follows:

The United States would transfer control to the local government after an appropriate transition period during which adequate safeguards are developed and instituted to protect immigrants and to enforce applicable labor and immigration laws. Before any transition from federal to local control can be considered, the U.S. Attorney General must review and approve: (a) a draft Guam immigration code passed by the local legislature and approved by the Governor of Guam; (b) a detailed program for ensuring effective enforcement of immigration and related labor laws; and (c) a reasonable time frame for implementing such plan. Furthermore, the Guam immigration plan would need to be consistent with all existing international obligations of the United States. There would also be specific content requirements for the draft Guam immigration code and a process by which the Attorney General approves, disapproves, modifies or revokes local immigration authority.

Exhibit A

Although it recognizes Guam's unique geographic, economic, cultural and historical situation, the Administration does not support either the original provision or the Special Representative's proposal for the following reasons: (a) ~~Guam lacks~~ the basic infrastructure and intelligence information to ensure adequate enforcement of immigration laws consistent with the interests of the United States; (b) granting Guam control over immigration could have serious security implications, ~~given Guam's strategic location and proximity to some of the poorest and most heavily populated countries in the world~~; (c) ceding control could create potential conflicts with the United State's international obligations regarding, among other things, treatment of refugees, nonrefoulement, and migration of professionals under the General Agreement on Trade and Services and the North American Free Trade Agreement; (d) Guam's stated intention to use temporary unskilled workers to fill permanent jobs runs contrary to longstanding U.S. immigration policies and national values regarding the use of permanent and enfranchised workers for permanent positions; and (e) granting Guam immigration control runs would set an unwise precedent for other U.S. ~~territories and possessions~~ and runs contrary to the current Administration policy of establishing a Federal immigration framework for the CNMI.

Nevertheless, the Administration is sensitive to Guam's legitimate concerns regarding the impact of uncontrolled immigration and the shortage of labor on the island. The Administration is ~~prepared to discuss with Guam ways to address these concerns within the context of the existing Federal immigration framework. Specifically, the Administration is willing to discuss with Guam a proposal under which the United States would limit the number of persons who may be admitted initially as lawful permanent residents on the basis of an approved family-sponsored immigrant visa preference petition at any Port of Entry in Guam. Under this proposal, the INS, upon the request of the Governor of Guam and after consultation with the appropriate Federal agencies, could adjust this number annually. With respect to the issue of labor shortages, the Administration is willing to consider a proposal under which the United States Government would set aside a limited number of unused employment-based immigrant visa numbers which could be used to fill permanent positions in Guam requiring unskilled workers. The Administration adheres to the position, however, that temporary workers should not be allowed to fill positions that are permanent in nature.~~

Section 702. Guam-Only Visa.

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

Current Position. The existing Guam Visa Waiver Program addresses the tourist

Exhibit A

promotion aspect of this provision. It waives the visa requirement for visitors from selected countries coming solely to Guam for a period not exceeding 15 days for business or pleasure. Countries that have qualified for this program include: Australia, Brunei, Darussalm, Burma, Indonesia, Japan, Malaysia, Nauru, New Zealand, Papua New Guinea, the Republic of Korea, Singapore, the Solomon Islands, the United Kingdom, Vanuatu, Western Samoa and Taiwan. With respect to the foreign investment aspect of Section 702, the Administration is willing to develop a provision that would allow foreign investors to come to Guam direct and develop businesses in which they have invested a substantial amount of capital.

TITLE VIII - LABOR

Section 801. Federal Employment.

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

The Administration would
Current Position. Supportive if modified as follows: (a) that the preference applies only to new Federal employees hired in Guam (not transfers of existing federal employees from off-island); (b) that the term "qualifications" is substituted for "age" and other standards because of Federal prohibition on age discrimination; (c) that Federal anti-discrimination laws in employment continue to apply in Guam; (d) that the preference for veterans and spouses of military personnel continues to apply and takes priority over the preference to residents of Guam provided for in the section; and (e) a subsection is added providing a remedy in Federal court for persons claiming to be aggrieved.

Section 802. Guam Labor Laws.

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

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

Exhibit A

order to make Guam a more attractive/competitive labor market for foreign investment. The Task Force and Guam reached a preliminary agreement on this issue (1993 Task Force Report, Attachment 26). As set forth in Attachment 26, the prior agreement allows the Government of Guam to assume responsibility for enacting and enforcing employment laws in Guam if they meet certain conditions. Guam must submit its proposed legislation or regulation to the Secretary of Labor. Upon consultation with any other Federal agency that may be affected, the Secretary of Labor may approve the legislation or regulation provided that it includes standards and enforcement mechanisms as stringent as the Federal laws and regulations which it supplants or provided that the Secretary finds that the Guam legislation or regulation is required by compelling conditions in Guam. In addition, the Secretary of Labor must find that Guam has provided an agency with sufficient funds, legal authority and staff to enforce the local law. The Secretary of Labor is given 180 days to approve or to disapprove a proposed Guam statute or regulation. Upon approval, the corresponding Federal law or regulation that would otherwise apply is superseded.

Current Position. In discussions with the Special Representative, Guam indicated its willingness to go forward with a previous informal agreement. (1993 Task Force Report, Attachment 26). Because of this and his belief that the prior agreement adequately safeguarded Federal interests, the Special Representative proposed for Administration approval the agreement outlined in the 1993 Task Force Report. In regard to the problems occurring in the CNMI, the Special Representative indicated that each insular area should be considered on its own merits and that the labor problems in the CNMI should be seen from the perspective avoiding similar problems in Guam by formulating and enforcing adequate safeguards, rather than denying Guam the opportunity to enact its own labor policies. There are, however, strong Federal objections to this proposal, including: (a) that the proposal constitutes an inappropriate, over broad delegation of authority to the Secretary of Labor and heads of other Federal Departments and agencies; (b) the term "laws regulating employment" has never been adequately defined or delimited, and could potentially apply to over 180 Federal labor laws governing such areas as child labor, minimum wages, welfare benefit plans, occupational safety and health, mine safety and health, prevailing wages, civil rights, unemployment insurance, workers' compensation and labor-management standards, which are administered by the Department of Labor as well as other agencies such as the National Labor Relations Board and the Equal Employment Opportunity Commission; (c) there is potential ambiguity and overlap between the proposal and the functions of the Joint Commission discussed in Section 203; (d) the indeterminate scope and breadth of the proposal introduces great potential for confusion and litigation; (e) Guam's adherence to labor standards should also meet international labor standards that the U.S. has espoused and not affect U.S. responsibility in the conduct of foreign affairs. The Administration

Does not support this provision but

Exhibit A

^{is} nevertheless remains willing to consider the application or enforcement of particular Federal laws specifically identified by Guam on a statute-by-statute basis, *providing*

TITLE IX - TRANSPORTATION AND TELECOMMUNICATIONS

Section 901. Maritime Shipping (Jones Act).

Summary of Provision. This section would allow (1) the use of certain foreign-built vessels in Guam's waters and in the EEZ surrounding Guam; (2) a limited exemption for Guam from the Jones Act for shipping fish; (3) a periodic review of Federal coastwise laws in order to determine the desirability of continuing their application to Guam based solely on whether they are in Guam's economic interests and a requirement that the Federal government ensure adequate service to Guam as long as these laws apply.

Current Position. The Administration is opposed to any relaxation of U.S. cabotage laws in regard to Guam. Exempting Guam would set a precedent which would encourage coastal States to seek similar exemptions, thereby undermining U.S. cabotage laws. Furthermore, if Guam were exempt from the Jones Act, it is unlikely that foreign flag operators would provide more reliable or cheaper shipping services to the island. Moreover, any attempt to exempt Guam from the Jones Act will endanger the reliable shipping services to both U.S. military installations and the civilian populations located in the strategic non-contiguous areas of the U.S.

Section 902(a). Airlines.

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

Current Position. Support a provision to increase Guam's role in the process of determining air service that directly impacts the island. Object to the original language of Section 902(a).

Exhibit A**Section 902(b). Essential Air Service.**

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

Current Position. *The Administration has provided*
Support with recommendations to conform the language to a recent recodification of title 49, United States Code: (a) the term "eligible point" should be changed to read "eligible place"; and (b) the public law citation should be changed to 49 U.S.C. 41731.

Section 902(c). Domestic Air Routes.

Summary of Provision. Requires domestic air carriers to obtain the concurrence of the Governor of Guam on applications for new, additional, or changed routes to Guam, in addition to complying with any other Federal requirement.

Current Position. *The Administration would*
Support if amended to require prior notice, rather than concurrence.

Section 903. Telecommunications.

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

Current Position. Section 903 has been superseded. Through administrative procedures before the FCC, Guam has been incorporated into the North American Numbering Plan effective July 1997 and into domestic rate integration effective August 1997.

TITLE X – LAND, NATURAL RESOURCES AND UTILITIES**Section 1001(a) Eminent Domain Power By Guam.**

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

Exhibit A

Current Position. Support if amended to clarify that Guam's eminent domain power should not extend to federal landholding in Guam.

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

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

Current Position. Although the Administration agrees with the principle that Guam ~~is~~ ^{would support a provision to enable} ~~should~~ benefit economically from the exploitation of the EEZ, it has serious concerns about giving Guam the ability to enact, administer and enforce its own laws within the EEZ. There are numerous federal laws and regulations as well as international treaties and agreements that apply on a uniform basis to all domestic EEZ's. Section 1001(b) would create insurmountable problems of coordination, enforcement and regulation by federal agencies currently charged with management of the EEZ. There is also concern that the confusion stemming from inconsistencies between Guam laws and federal/international provisions would weaken the present regulatory structure. Finally, there is concern that the provision has no mechanism to ensure that Guam laws would be as least as stringent as existing federal/international laws. Nevertheless, Guam and the Federal government have had a successful working partnership in the fisheries management of the EEZ in cooperation with and under the auspices and structure of the Western Pacific Regional Fishery Management Council. Guam already has the authority to develop its own EEZ management and conservation regime with respect to its vessels, consistent with federal law. In addition, the Administration sought and, on October 11, 1996, obtained amendments to the Magnuson-Stevens Fishery Conservation Act. This granted authorization to cover over revenues collected for foreign fishing under Pacific Insular Area fishery agreements. Federal jurisdiction is expressly asserted over the U.S. EEZ surrounding Guam. but

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

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

Current Position. The Administration supports federal land acquisitions by voluntary

Exhibit A *Formal*

means unless it becomes impracticable, in which case the U.S. would use its eminent domain powers, whether or not there is a declaration of war.

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

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

Current Position. The Administration is presenting a position on the disposition of federal excess lands in Guam in regard to section 4 of S.210. The Administration is supportive of giving the Government of Guam a "right of first refusal" to obtain Federal lands declared excess in Guam, subject to certain conditions that are outlined in the Administration's position on section 4 of S.210. To the extent that the Administration's proposal is adopted and enacted by Congress, it has been understood by the Federal government and acknowledged by Guam that such excess land proposal would substitute for any provision in the Guam Commonwealth Draft Act, H.R. 100, which covers the same, similar or overlapping subject matter.

Section 1003. Access to Federal Property.

Summary of Provision. (a) Recreational, historical and archaeological sites on federal property shall be open to public use so long as military security is not compromised. (b) Except as prevented by military security requirements, easements for public access through federal property shall be granted to Guam when such easements constitute the only practicable means access. (c) The Joint Commission shall determine which recreational facilities and what easements over Federal property should be available to the public.

Current Position. *We are not* ~~Opposed~~ *cannot support* vesting exclusive authority in a Joint Commission controlled by Guam representatives to make decisions regarding access to federal property because: (a) there is no mechanism to prevent the Commission from ignoring a base commander's stated needs for military security, safety and operational requirements; and (b) determination of public easements and access on federal property can only be exercised

Exhibit A

by U.S. officials appointed pursuant to the Appointments Clause of the Constitution. Section 1003 generally presents an unworkable and undue interference on military operations, base security, and military obligations under historic and archaeological preservation laws. Furthermore, subject matter of Section 1003(b), granting the Government of Guam public access through property military or Federal civil authority, is the subject of current litigation between the United States and the Government of Guam. The parties are attempting to reach a mutually satisfactory resolution to this litigation.

Section 1004. Transfer of Federal Utilities to Guam.

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

Current Position. *The Administration would* ~~Support if amended to provide that the transfer of federal water, power and sewer utilities would be made subject to the terms of separate agreements being negotiated between the U.S. and Guam. Exceptions from transfer include portions of utilities which are located within federal property and systems necessary for mission-critical military purposes. Once the utilities are transferred, the utility rates charged by Guam to the U.S. must be cost-based and applied on a non-discriminatory basis.~~ *this provision if there amended*

TITLE XI -- UNITED STATES FINANCIAL ASSISTANCE

Section 1101. Transfer of Taxes and Fees.

Summary of Provision. There will be paid into the Treasury of Guam various Federal revenues derived from Guam, including Federal income taxes derived from Guam, the proceeds of taxes collected on Guam products shipped to the United States or the U.S. insular areas, the proceeds of any other taxes levied by Congress on the inhabitants of Guam, and quarantine passport, immigration and naturalization fees collected on Guam.

Current Position. *The Administration would* ~~Support if amended to provide that all taxes and fees transferred to Guam shall be "expended for the benefit and government of Guam" and to provide for an advance payment based on an estimate provided by Guam, which would then be followed by an adjustment, upward or downward as appropriate, the following year, if the actual revenues did not match the estimate.~~ *this provision if it were amended*

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Exhibit A

connected with Guam's assumption of Commonwealth status; (b) Federal appropriations "to implement a long-term capital improvement program"; and (c) Federally funded revolving fund to establish an Economic Development Fund to "assist the financing the private sector needs of Guam . . . and to develop the economic resources needed to meet the responsibilities of local self-government."

This section should be deleted.

Current Position. ~~The Administration recommends deletion of this section.~~

TITLE XII -- TECHNICAL AMENDMENTS AND INTERPRETATIONS

Note: Since no agency comments were received on any provision of Title XII in time for the hearing and since Guam has previously indicated a desire to re-write this entire title, the Administration withholds comment at this time.

Sec. 1201 (a) The Administration does not support this provision.

Sec. 1201 (b)

Sec. 1202 The Administration would support this provision if it were amended to make the effective date the date of the establishment of the Commonwealth.

Sec. 1203 (a) The Administration does not support this provision.

Sec. 1203 (b) [Same as 1202]

Sec. 1203 (c) The Administration supports this provision.

Sec 1203 (d) The Administration would support this provision with a technical amendment.

Sec 1203 (e) [Same as 1203 (c)]

Sec 1204 [Same as 1203 (c)]

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
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
007. report	Draft Guam Commonwealth Bill. Comments on selected (7 pages)	n.d.	P5

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Jeffrey Farrow
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FOLDER TITLE:

Guam - Various II [2]

Jamie Metrailler
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]
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- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

RR. Document will be reviewed upon request.

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



Office of the Attorney General
Washington, D.C. 20530

DRAFT

October 24, 1997

CLINTON LIBRARY PHOTOCOPY

The Honorable Carl T.C. Gutierrez
Governor of Guam
Agana, GU 96910

Dear Governor Gutierrez:

MaryEva Candon has provided me with a copy of your letter, dated October 23, to Deputy Secretary Garamendi regarding my meeting yesterday with your representatives, Ms. Candon, Leland Bettis, and John ~~Witt~~^{SP?}. Ms. Candon also asked me to advise you if your letter inaccurately represents our discussion in any way. This letter responds to that invitation.

While correct in many respects, your letter does not completely or accurately reflect the positions of the Justice Department as Randy Moss of the Office of Legal Counsel and I attempted to communicate them yesterday. In order to avoid any further confusion regarding the Department's position on these important issues, I have received permission to provide you with the enclosure -- a copy of the Department's comment letter to Office of Management and Budget Director Frank Raines on certain preliminary recommendations from the Special Representative for the Guam Commonwealth Negotiations.

The enclosed letter reflects the views of the Justice Department and is consistent with the views that Mr. Moss and I explained to your representatives yesterday. I hope that the enclosure is helpful to you, and that it will make clear the areas in which the characterizations in your letter do not correspond to the Department's views.

I must emphasize that the positions embodied in the enclosure represent only the views of the Department of Justice. The Office of Management and Budget process for developing the position of the United States based on comments from each of the relevant agencies is not yet complete, so far as I am aware.

Finally, with respect to the immigration issue, the enclosure does not identify -- nor did we discuss in our meeting yesterday -- the specific ways in which the Department of Justice may be prepared to address Guam's concerns about immigration on the island within the framework of the Immigration and Nationality Act. We look forward to discussing these ideas with you. It is important that you should understand, however, that

The Honorable Carl T.C. Gutierrez
Page 2

although the Department is prepared to discuss ways to address potential labor shortages on the island, among other issues, the Department adheres to the position that temporary workers should not be allowed to fill positions that are permanent in nature.

I appreciated the opportunity to meet with your representatives yesterday. I also look forward to continued dialogue about outstanding issues.

Sincerely,

David W. Ogden
Counselor to the Attorney General

Enclosure

cc: MaryEva Candon

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4/5.5

6.2
June 19, 1997

CLINTON LIBRARY PHOTOCOPY

Memorandum To: Mickey Ibarra

Through: Fred DuVal

From: Jeffrey Farrow

Subject: Guam Commonwealth Bill Plan

This is to prepare you for a decision on how to proceed on the Guam Commonwealth Bill, which will probably, ultimately, need to be made by Erskine. There is a lot of background -- including statements by the President -- that needs to be considered. We have also outlined some options.

Background

Guam, the southernmost island of the Marianas chain of the Micronesian islands, became U.S. territory through the Spanish-American War. In the mid-'70s, the U.S. entered into a 'Covenant' with the chain's northern islands that also made them U.S. territory. The Covenant provided the new Commonwealth of the Northern Mariana Islands with several of Guam's unmet Federal policy objectives: exemption from having to use American vessels for U.S. shipping; SSI; and a commitment not to unilaterally change key provisions of the arrangement for the islands' status.

Consequently, Guamanians decided that they, too, wanted 'Commonwealth' in 1982. In spite of Federal cautions, the then governor drafted a Federal bill that covered almost all conceivable policies from Guam's perspective and went far beyond the Covenant. He then obtained voter approval of the draft in referenda in 1987 in spite of congressional concerns that doing so would make it difficult for Guam to accept necessary changes to the bill.

Federal officials objected to almost every section in a 1989 House Subcommittee hearing. The underlying problem was that the bill combined autonomy that would be appropriate for an area that would be separate from but in 'free association' with the U.S. (as the three other areas of Micronesia were becoming) with many Federal benefits commensurate with U.S. state or territory status. The Subcommittee then asked the Bush Administration to try work out a compromise bill with Guam's leaders and consult Congress as it did so.

An Interior-led interagency group worked out a compromise in 1992, but some of its provisions were unilaterally changed in the Bush Administration's final review of the compromise. Among the reasons were the precedents that would be set for Puerto Rico Commonwealth proposals.

The President, as a candidate in 1992, pledged to work for a mutually-acceptable law.

Interior began new talks with Guam during the President's first term, although without consulting Congress. In 1994, it agreed to language that suggested that the Federal Government would not be able to unilaterally change any provision of the law once it was enacted -- language that went

beyond the Marianas Covenant Mutual Consent commitment. By last August, Interior Dep. Sec. Garamendi had negotiated the rest of a substitute bill that contained much of what Guam wanted ... in many areas without agreement of the agencies with jurisdiction over the policies concerned.

Governor Gutierrez and Delegate Underwood tried to get this substitute endorsed in the Democratic Platform but Harold, IGA, and NSC staff had the Platform, instead, simply commit to work for an agreement. Garamendi then brought Gutierrez and Underwood in to see Leon and ask for presidential support. Because supporting the substitute required policy changes on issues such as Mutual Consent and the application of Federal laws and regulations that have also been sought by Puerto Rico's Commonwealthers and would be of concern to Puerto Rico statehooders, Leon decided that the matter should be deferred until after the Election.

In November, Garamendi suggested an urgent need to proceed to ensure access to vital U.S. military bases. Harold then asked the NSC for an assessment.

While the NSC was reviewing the matter, Gutierrez met with the President and, afterwards, publicly suggested progress. (The President merely pledged that the substitute would be seriously and expeditiously considered.) Reports that the substitute was being approved, however, caused House Committee Chairman Don Young to write the President 1) expressing concern about two provisions that Guam says are essential -- Mutual Consent and limiting an insular vote on the status question to descendants of residents as of 1898 -- and 2) complaining about the lack of consultation. Ranking Democrat George Miller also privately expressed concern about Mutual Consent and proposals on labor, immigration, and environmental laws.

The NSC then reported: 1) concern about the substitute on the part of all of the agencies contacted; 2) agency feelings that they were being end-run or ignored in developing the substitute and consternation that they did not know its specific contents; 3) the NSC's own concern about many elements of the substitute; 4) its lesser concern about base access; and 5) a need for a White House-led rewrite effort involving the agencies concerned and congressional consultation.

Noting the issues of concern listed in the first attachment to this memo, Marcia recommended such an effort. Sylvia said that Erskine approved of it and the President wrote Young that: 1) he agreed with some of Young's views; 2) Federal policy concerns had to be satisfied; 3) there would be expeditious action; and 4) Congress and the agencies would be consulted.

As the effort got underway, however, The Washington Post reported that the Administration had changed longstanding positions on key issues such as immigration and labor control after Gutierrez raised \$1 million for the DNC and Clinton-Gore. It quoted unnamed agency officials as suggesting that the funds influenced the policy changes and Gutierrez as saying that they got him access. The article, which spawned stories in other national media, linked the proposals to the Northern Marianas' problematic immigration and minimum wage exemptions.

In denying the allegations, we told the Post et. al. that we had already begun a rewrite effort.

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The effort was delayed, however, by 1) Garamendi objections to the agenda and 2) the departure of John Emerson. It was put it on hold pending Fred's arrival, as I explained to Underwood when he raised it in a meeting with the President and, separately, to Sylvia. The President made it clear to me prior to the meeting that he wanted to respond to Guam's petition.

The delay led Guam's leaders to try to force us to respond by getting Young to hold a hearing this Summer (even though he told them that 1) he would not pass the bill and 2) they should become a Commonwealth the way that Puerto Rico had -- by writing an insular constitution). Young additionally, however, began an investigation of the campaign contributions allegations. His staff says that Government Operations Committee Chairman Burton will do the same.

OMB and agencies, concerned about a hearing on the bill, are now pressing for the rewrite effort to proceed. Garamendi, however, wants to wait until after the hearing, expecting expressions by Guamanians and Members of Congress to encourage greater acceptance of the substitute.

Options

1. Proceed Immediately with a White House-led Effort to Rewrite the Substitute.

This is what we have publicly committed to do. It would, however, necessitate 1) a great deal of effort and 2) policy decisions that would require Garamendi or agencies to compromise on issues.

2. Postpone Until After the Hearing and, maybe, Contributions Influence Investigations.

Garamendi believes that this approach would help create the right climate for compromise by the agencies. It would, however, 1) seem to substantiate speculation that the Administration had intended to go along with the substitute and just stopped when attention was focused on the contributions; 2) contradict what has been said publicly; and 3) only postpone the real problem.

3. Give Garamendi Parameters for Negotiation with the Agencies on the Substitute.

This would have the advantages of 1) not requiring as much involvement here after some basic policy decisions are made and 2) suggesting policies that would be more likely to be approved but it would probably still require us to mediate disputes and answer questions on details.

4. Ask for Agency and Congressional Comments on the Substitute.

These are the first steps in the first option but the expectation here is that they will expose the extent of the problems with the substitute -- and the clear need for revision before White House action -- to Guam without us being directly involved. This could create a situation in which Garamendi could justify compromise to Guam as well as produce a more reasonable substitute.

It should be recognized that Guam's leaders may initially be unhappy with any of the options.

GUAM COMMONWEALTH BILL - SELECTED CONTROVERSIAL PROVISIONS

- Agreement that no provision of the law may be changed without Guam's approval.
- Invitation for individuals descended from residents as of the date of acquisition only to vote on the island's future status, excluding other citizens.
- Commission empowered to 1) modify the application of any agency's regulations to Guam and 2) make recommendations on modifying laws which Congress would have to vote on composed of Interior as chair, Defense, Justice, the Governor, and the Delegate.
- Authorization for the waiver any law or regulation to benefit Guam-U.S. trade by Interior or Commerce.
- Authorization for Guam to enter into agreements with international organizations.
- Guam control of immigration.
- Making Guam a priority for hazardous waste site clean-ups.
- Authority for Guam to adopt "reasonable" voting requirements.
- Authorization for delegating Federal agency functions to Guam.
- Guam taxation of U.S. income of residents (in lieu of federal taxation) and authority to rebate collections.
- Relinquishing the Federal power to govern in territories.
- Authorization for Guam to receive aid from foreign governments.
- Joint recommendations on the application of the requirement to use U.S. flag vessels using the sole criteria of the island's economic interest.
- SSI and any other Federal programs not now extended.
- Authorization for any funds needed for infrastructure, etc.
- Guam replacement of Federal labor laws.



Office of the Attorney General
Washington, D.C. 20530

October 24, 1997

The Honorable Carl T.C. Gutierrez
Governor of Guam
Agana, GU 96910

Dear Governor Gutierrez:

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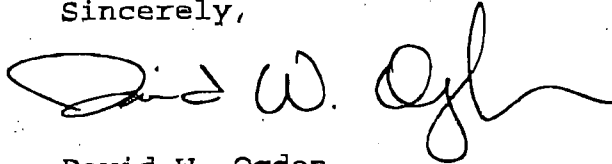
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The Honorable Carl T.C. Gutierrez
Page 2

I appreciated the opportunity to meet with your representatives yesterday. I also look forward to continued dialogue about outstanding issues.

Sincerely,

A handwritten signature in black ink, appearing to read "David W. Ogden". The signature is fluid and cursive, with a large, stylized "D" and "O".

David W. Ogden
Counselor to the Attorney General

Enclosure

cc: MaryEva Candon

Withdrawal/Redaction Sheet

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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
004. memo	Phone No. (Partial) (1 page)	12/31/1996	P6/b(6)

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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- 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]

Guam

Immigration

Apply the federal Act
 Commerce would transfer enforcement of
 federal act to Guam.

Amend Act so that Gov of Guam would
 Certify admission - no square
 Guam first

Create section for Guam for use temporary
 workers - language amending Act.

We are positioned as more helpful than Du Yang

Gov of Guam - will support "Solely Associated
 Sovereign Entity."

- DOT questions whether an area
 can become sovereign when so many
 American citizens

- Application to Tribes - analogy.

Constitutional framers notion of Territory
 as western land (future states)

3 facts: States, Incorporated Territory,
 & Unincorporated territory

> Contrast Philippines

in

Michael Hyman negotiated mutual consent
 deal representing DOI, but DOT
 never interpreted it as having any
 meaning. DOT says that

territorial clause of Constitution prohibits
delegation of authority to Guam
which ties the hand of future
Congress.

Carannendi joins Guam
lawyers view that this is an
ambiguous area of the law and
we would have to test it
one by one later.

DTS sees no ambiguity.

Johnny Aranza works for Stagnam
but was put there by Carannendi
to stop him. Johnny used to
work for Guam.

SSI application -

(1) ADPS committed to SSI to PR
(even though they don't pay into the system).

Goals: ① Give Guam honest opinion

what will fly and what won't.

② There was a WH mty to sort out
how to proceed - Stalled

③ Get Hill reaction on how to proceed

Young will hold hearing as a favor to Guam
to vet out issues but

the bills thus far are not passable.

POTUS
wants
a
bill

With participants: Cabinet Affairs - Kiri
Council - Bill Marshall
Legal Affairs - Lucia Wynne
NSC/NEC/DPC

* Resistance to having meetings due to
need for resources to sustain

The agencies have never actually seen the
specific Garamendi draft
- Ask for formal comment

July hearings - Garamendi testifies - gets
too far out in front of us.
(Underwood may submit SC draft as bill)

OMB circulates Garamendi proposal.

Immediate Steps:

- ① Meetings with Garamendi
- ③ ② Circulate draft.
- ② Initial WH acty on statute
 - OMB circulate draft idea
 - prep for bill

Withdrawal/Redaction Sheet

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

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jm593

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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July 22, 1997

MEMORANDUM TO SYLVIA MATHEWS

THROUGH: Mickey Ibarra

FROM: Fred DuVal

SUBJECT: Guam

This memo seeks to enlist your help in clarifying White House strategy regarding Guam. Our objective is to honor the President's commitment to Governor Carl Gutierrez (D-Guam) that the White House will seriously consider 1) Guam commonwealth legislation and 2) the recommendations made by Special Representative to Guam and Deputy Interior Secretary John Garamendi regarding this legislation. (See Attachment A).

Last January, Erskine Bowles approved an IGA-lead staff effort to work out differences of opinion among the agencies on the Guam commonwealth legislation. (See Attachment B). Over the past six months, this effort has stalled and the issue is whether to now reinvigorate it at the White House.

I. Background

In 1987, Guamanians passed a commonwealth ballot proposition which significantly redefined Guam's relationship to the United States. The proposition called for the U.S. government to transfer jurisdiction and change U.S. policy in ways considered untenable and unimplementable. The passage of this proposition was in many ways unprecedented for a territory, [clarify what or how it was illegal or remove end of sentence] and illegal in others.

Since 1989, every Administration has attempted to respond to this unimplementable proposition by negotiating alternative commonwealth proposals that would adequately satisfy both the Guamanians and the federal agencies with responsibilities and roles in Guam. These efforts have, thus far, been unsuccessful.

The most vigorous effort was led by our third Special Representative to Guam, John Garamendi. His work has resulted in a draft commonwealth proposal which the Guamanians support but which many of our agencies oppose. The most contentious issues [? of Garamendi's proposal, the commonwealth ballot proposition, or both] are the following: (1) Mutual consent -- no

provision of law may be changed without Guam's approval, (2) Immigration -- ceding INS responsibilities to Guam, (3) Right to vote limitations -- limiting the right to vote on status [? on status] to native-born Chamorrans, (4) U.S.-Guam Commission -- creating a joint U.S.-Guam Commission empowered to (a) modify the application of any agency's regulations on Guam and (b) make recommendations on modifying laws on which Congress would have to vote [? clarify what this means]. About a dozen less controversial issues also remain unresolved. (See Attachment C).

II. Current Situation

- The Government of Guam has become very upset about the delay in Administration action, and Deputy Secretary Garamendi recently wrote Defense Secretary Cohen and others about the threat of demonstrations on the island. (See Attachment D). In addition, Guam is beginning to threaten withdrawal of cooperation on national security issues unless the U.S. government makes considerable progress on its self-determination status.
- House Resources Committee Chairman Don Young (R-Alaska) has indicated a commitment to hold house hearings on Guam in August (after he concludes Puerto Rico hearings in July), which may include testimony on both Guam commonwealth issues and alleged campaign fundraising improprieties.
- Federal agencies with a stake in Guam are anxious about upcoming, Young-led hearings without a unified Administration position on the key issues.
- The Garamendi-led effort has stalled due to agency opposition and his own view that further work on Guam should be postponed until after the Young hearings.
- Our work on Guam was the subject of some unfavorable media attention. (See Attachment E).
- Counsel's Office (Bill Marshall) is involved and comfortable with moving forward on the Guam issue.

III. Options For Consideration

1. *Take no position on Guam Commonwealth.*
2. *Wait for Congressional Hearing* to conclude before directing White House staff to coordinate an Administration position on Commonwealth.
3. *Immediately circulate the Garamendi draft Commonwealth proposal* through the OMB referral process and collect written reaction and input from the affected agencies to clarify areas of agreement and disagreement, and to give Garamendi some direction on the areas in dispute.

4. *Begin an immediate sequence of White House-hosted meetings* to address disputed issues as quickly as possible and attempt to harmonize the Administration's position before August hearings.

IV. Recommendation

IGA recommends we choose option three (OMB referral) to flesh out the issues in a non-confrontational and low-key way, demonstrating forward movement to Congress and Guam but not prematurely raising Guamanians' expectations for an immediate resolution.

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. briefing paper	re: Deliverable issues for Guam (5 pages)	n.d.	P5
002. schedule	Phone No.'s (Partial); Manifest (Partial). (8 pages)	11/18/1998	P6/b(6), b(7)(E)

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FOLDER TITLE:

Guam - Various VI [1]

Jamie Metrailler
2006-0193-F
jml10

RESTRICTION CODES

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will not have page 5

Guam Deliverables

Micronesian Compact Impact Aid

Background:

The U.S. 'free association' compacts with Micronesia, the Marshall Islands, and Palau have enabled thousands of citizens of those states to move to Guam, Hawaii, and the Northern Mariana Islands. The Compact law authorizes reimbursement of the costs to their social programs.

\$4.6 million is being provided by Interior annually to Guam through FY01. Almost no funds are provided to Hawaii and the Northern Marianas. Gov. Gutierrez says that \$10 million is the minimum amount Guam needs. Gov. Cayetano says Hawaii should be reimbursed. The Northern Marianas is not being provided funding in light of a special \$11 million a year subsidy.

Proposal:

Announce a FY00 budget proposal to increase the reimbursement to Guam to \$10 million annually.

The additional \$5.4 million would come from the \$11 million a year general subsidy to the Northern Marianas, which is resisting the Administration's efforts to apply Federal immigration and minimum wage laws. If the Marianas continues to resist, the other \$5.6 million could be allocated to Hawaii.

Liberalize Trade Restrictions

Background:

Guam and the other smaller territorial jurisdictions are outside the customs territory of the U.S. but can import products into the U.S. market free of duties and quotas if the products meet specific tests -- 'substantial transformation' of foreign components into a new product and 'value added' locally to the components. Guam has sought the elimination of most of these restrictions.

Proposal:

Legislation to eliminate the value added requirements for products other than garments (in light of the abusive Northern Marianas garment industry).

Excess Military Property Conveyances

Background:

The military owns 44,800 acres in Guam. Most of the land does not appear to be used and is held for contingency purposes. Up to 25% is excess to military needs. Guamanians feel land was unfairly acquired in the wake of the liberation of the island from enemy hands in World War Two. They also contend the military holdings limit the island's development. Some former owners feel they have missed out on fortunes others made by selling their land to Japanese investors.

A 1994 law providing for the transfer of 3,213 acres has not been fully implemented. Transfers have been complicated by Guamanian demands for the land to be given to former owners.

Base closings have made other land and facilities available.

Proposal:

The President would announce (in summary fashion) the following --

- The intent to transfer the 3,213 acres provided for by the 1994 law in 1999.
- The availability of 561 acres of Air Force land on which 360 housing units are located.
- The availability of 1,805 other AF acres.
- An effort to expedite the transfer of 2,031 acres at the former Naval Air Station adjacent to the commercial airport, including a 92 acre officer's family housing parcel. EDA consideration of \$1 million for infrastructure and marketing of this property.
- An effort to expedite the transfer of the former Navy Ship Repair Facility. Consideration of MarAd low-cost financing of the yard as a commercial operation. Military Sealift Command commitment for contracting the yard(?). Navy donation of a larger drydock.
- The availability of another 2,779 acres of Navy land.
- The actual transfer of 44 acres of former Navy land worth \$4.5 million for a waste treatment plant.
- Plans to ask Congress to complete action on umbrella Guam excess land transfers legislation. (Passed the Senate this year.)
- A White House-led task force to ensure follow-up on the above.

U.S./Guam Relations

Background:

Guam has been disappointed with the Federal response to its "Commonwealth" proposals for national powers while under the U.S. flag and greater economic benefits. While it continues to pursue them, it has undertaken a second status initiative. This calls for a referendum next year on the internationally-recognized non-colonial statuses: free association; independence; and statehood. A problem with the new initiative is that the referendum would be limited to the plurality of the population who are descended from long-term residents. Many Guamanians do not seem to want a change in status as much as greater Federal attention and changed policies on economic matters.

Proposal:

The President would reiterate that the Administration has addressed Guam's Commonwealth proposals and Congress should now act. He would also recognize non-voting Guam's inherent right to full self-government if Guamanians want it. He would announce his intent to have the Executive Branch place a greater focus on the island's situation, needs, and proposals under the current status through a senior level interagency group co-chaired by the White House and Interior.

DOD Ombudsman

Background:

Guam has a number of military issues and tensions between the community and field officers have increased.

Proposal:

DOD has agreed with our request to designate a member of the Secretary's staff to monitor and address issues raised by Guam.

Micronesia/Marshall Islands Aid Package

Background:

The Presidents of Micronesia and the Marshall Islands will be present on Guam. Our \$2.5 billion, 15 year assistance commitment to these freely associated states expires in 2001. The compact with them requires negotiations on the expiring provisions beginning in 1999.

Proposal:

The President would announce the intent to begin talks with the areas on a post 2001 assistance package.

Palau Road

Background:

The U.S. committed in the free association compact with Palau to build a road through much of its largest -- but largely undeveloped -- island. The President of Palau will also be present in Guam.

Proposal:

The President would announce a \$150 million plan for the road.

THE FOLLOWING MORE MINOR INITIATIVES COULD ALSO BE ANNOUNCED.

Economic Development Plan

Background:

The Asian economic downturn has depressed Guam's major industry: tourism. Military activity has also been a major component of Guam's economy. The military has downsized operations.

Proposal:

The Interior Department will fund a major study of Guam's economic options. This would be part of a \$1 million increase in funds for technical assistance to the small territories.

Coral Reef Initiative

Background:

The President announced a major initiative to protect coral reefs this year.

Proposal:

The President would announce that the FY00 budget will propose \$.5 million for reef protection near Guam and other territorial jurisdictions and the governors of the areas will be members of the initiative task force.

Water/Sewage Grant

Background:

EPA has been providing Guam \$2 million a year to construct water and sewage facilities.

Proposal:

The President would announce an increase in the grant to \$3 million this year.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Phone No. (Partial) (1 page)	11/09/1998	P6/b(6)
002. memo	Phone No. (Partial) (1 page)	11/12/1998	P6/b(6)
003. draft	re: Guam deliverables (4 pages)	n.d.	P5
004. memo	Phone No. (Partial) (1 page)	11/12/1998	P6/b(6)
005. schedule	Phone No.'s (Partial); Manifest (Partial) (11 pages)	11/14/1998	P6/b(6), b(7)(E)
006. memo	To Erskine Bowles and Sylvia Mathews through Mickey Ibarra from Fred Du Val and Jeffrey Farrow. Subject: Guam Commonwealth bill plan (1 page)	06/24/1997	P5

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DRAFT
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Proposal:

Announce a FY00 budget proposal to increase the reimbursement to Guam to \$10 million annually.

There are two options for funding this. One would take the \$5.4 million from the \$11 million a year general subsidy to the Northern Marianas, which is resisting the Administration's efforts to apply Federal immigration and minimum wage laws. Under this option, the other \$5.6 million could be allocated to Hawaii. The second option would require OMB to find the funding elsewhere.

Liberalize Trade Restrictions

Background:

Guam and the other smaller territorial jurisdictions are outside the customs territory of the U.S. but can import products into the U.S. market free of duties and quotas if the products meet specific tests -- 'substantial transformation' of foreign components into a new product and 'value added' locally to the components. Guam has sought the elimination of most of these restrictions.

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We have cleared -- but not yet announced -- legislation to eliminate the value added requirements. It would not apply to garments in light of the abusive Northern Marianas garment industry.

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Proposal: The Interior Department will fund a major study of Guam's economic options. This would be part of a \$1 million increase in funds for technical assistance to the small territories.

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FOLDER TITLE:

Presidential Visit to Guam - November 1998 [1]

Jamie Mettrailer
2006-0193-F
jm594

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Deliverable Issues for Guam

Micronesian Compact Impacts- The U.S. Free Association Compacts with Micronesia, the Marshall Islands, and Palau have enabled 10,000 citizens of those states to move to Guam. The Compact law authorizes reimbursement of costs to Guam and other U.S. islands. \$4.6 Million is being provided annually through FY01. If we support it, Interior will increase this to 10 Million- (the minimum the governor says is needed) by subtracting from the allotment to the CNMI discretionary.

End Interior Auditing of Guam- The Interior IG audits both local spending by the smaller territorial areas as well as the use of federal funds. There is no similar auditing in our largest territorial area, Puerto Rico. The other territories consider this auditing colonial. We would propose a bill to end the auditing as Guam and other islands were certified to have independent local auditing agencies.

Guamanian U.S. Attorney- The nomination of a U.S. Attorney for Guam - as requested by the Governor and the Delegate to Congress - is not ready for announcement.

Liberalize Trade Restrictions- Guam and the other small territorial areas are outside the Customs territory of the U.S. market if they meet specific tests. Guam has sought the elimination of most free trade restrictions. We have cleared but not yet announced proposed legislation to eliminate redundant value added requirements. It would not apply to garments in light of the abusive Northern Marianas garment industry.

Excess Military Property Conveyances- 30% of Guam is federally-owned, most of this is under military control. Much of the military holdings are seldom or not used. (It is being held for contingencies.) Guamanians feel the extent and location of this land limits their economic development. Additionally, some of the land was unfairly acquired. Former owners feel they have missed out on fortunes others made by selling to Japanese investors. The President may be able to announce plan to convey:

- 2, 136 acres Air Force acres;
- 360 Air Force housing units on another 519 acres; and
- some Navy property

We may also want to announce plans to:

- ask Congress to enact umbrella land transfers legislation without all the usual restrictions on such transfers. (The bill passed the Senate this Congress. Guam's desire to have land go free to former owners who were already compensated for it may be the sticking point that discourages such an announcement.) We may also want to announce the designation of a senior DOD official to expedite Guam and transfers.

There are also some excess military facilities that may be the basis of some announcements.

- The Navy will expedite the transfer of 1,900 acres of land and facilities at the former Naval Air Station Agana (the name of the capital) which is adjacent to the commercial airport. EDA will seriously consider a \$1 Million plus grant for infrastructure improvements on the site to enhance its commercial viability.
- The Air Force will turn over its water systems to the insular system.

Ship Repair Facility Assistance- The Navy closed its ship repair facility on Guam and the territory is trying to keep it open as a private commercial operation. Maritime Administration's (MarAd) decision to repair a ship which is based in Guam in Japan November 2 was a blow requiring 100 plus layoffs at the already scaled-down facility. A plan to enhance the viability of the yard may include:

- A Navy commitment to continue to sole-source 25,000 man days of work a year at the yard.
- A MarAd yard modernization low-cost loans.
- Repairs to a small vessel to prevent some of the immediate layoffs
- The transfer of Navy facilities including a dry dock 2.5 times the size of the existing one at the yard.

DOD Ombudsman-Guam has a number of military issues and tensions between the community and field officers have increased. DOD has agreed with our request to designate a senior DOD appointee in Washington to monitor and address major complaints of the Governor or Delegate.

Economic Development Plan- The Asian economic downturn has depressed Guam's major industry: tourism. The Interior Department will fund a major economics study in Guam.

Coral Reef Initiative- The President will propose \$2 Million for Guam and other territorial areas in his Coral Reef Initiative and include the governor's of the areas on the initiative task force.

Relations/Status- The President would reiterate that the Administration has addressed Guam's 'Commonwealth' proposals for autonomy and economic benefits and it is now up to Congress to act. He would also recognize Guam's inherent right to full self-government and his intent to try to have the Executive Branch place a greater focus on the island's situation, needs, and proposals under the current status through a senior level interagency group co-chaired by the White House and Interior.

Micronesia/Marshall Islands Aid Package- The Presidents of Micronesia and the Marshall Islands will be present. Our \$2.5 Billion, 15 year assistance commitment to these freely associated states expires in 2001. The President should be able to announce the intent to begin talks with the areas on a post 2001 assistance package. (State has the lead because these are diplomatic relations. Interior has a big stake because it currently coordinates the assistance. DOD has an interest because military rights is one of our major objectives.)

Palau Road- The U.S. committed in the free association compact with Palau to build a road through much of its largest but largely undeveloped island. The President of Palau will be in Guam. The President should be able to announce a \$150 Million plan for this road.

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End Interior Auditing of Guam- The Interior IG audits both local spending by the smaller territorial areas as well as the use of federal funds. There is no similar auditing in our largest territorial area, Puerto Rico. The other territories consider this auditing colonial. We would propose a bill to end the auditing as Guam and other islands were certified to have independent local auditing agencies.

Guamanian U.S. Attorney- The nomination of a U.S. Attorney for Guam - as requested by the Governor and the Delegate to Congress - is not ready for announcement.

Liberalize Trade Restrictions- Guam and the other small territorial areas are outside the Customs territory of the U.S. market if they meet specific tests. Guam has sought the elimination of most free trade restrictions. We have cleared but not yet announced proposed legislation to eliminate redundant value added requirements. It would not apply to garments in light of the abusive Northern Marianas garment industry.

Excess Military Property Conveyances- 30% of Guam is federally-owned, most of this is under military control. Much of the military holdings are seldom or not used. (It is being held for contingencies.) Guamanians feel the extent and location of this land limits their economic development. Additionally, some of the land was unfairly acquired. Former owners feel they have missed out on fortunes others made by selling to Japanese investors. The President may be able to announce plan to convey:

- 2, 136 acres Air Force acres;
- 360 Air Force housing units on another 519 acres; and
- some Navy property

We may also want to announce plans to:

- ask Congress to enact umbrella land transfers legislation without all the usual restrictions on such transfers. (The bill passed the Senate this Congress. Guam's desire to have land go free to former owners who were already compensated for it may be the sticking point that discourages such an announcement.) We may also want to announce the designation of a senior DOD official to expedite Guam and transfers.

There are also some excess military facilities that may be the basis of some announcements.

- The Navy will expedite the transfer of 1,900 acres of land and facilities at the former Naval Air Station Agaña (the name of the capital) which is adjacent to the commercial airport. EDA will seriously consider a \$1 Million plus grant for infrastructure improvements on the site to enhance its commercial viability.
- The Air Force will turn over its water systems to the insular system.

Ship Repair Facility Assistance- The Navy closed its ship repair facility on Guam and the territory is trying to keep it open as a private commercial operation. Maritime Administration's (MarAd) decision to repair a ship which is based in Guam in Japan November 2 was a blow requiring 100 plus layoffs at the already scaled-down facility. A plan to enhance the viability of the yard may include:

- A Navy commitment to continue to sole-source 25,000 man days of work a year at the yard.
- A MarAd yard modernization low-cost loans.
- Repairs to a small vessel to prevent some of the immediate layoffs
- The transfer of Navy facilities including a dry dock 2.5 times the size of the existing one at the yard.

DOD Ombudsman- Guam has a number of military issues and tensions between the community and field officers have increased. DOD has agreed with our request to designate a senior DOD appointee in Washington to monitor and address major complaints of the Governor or Delegate.

Economic Development Plan- The Asian economic downturn has depressed Guam's major industry: tourism. The Interior Department will fund a major economics study in Guam.

Coral Reef Initiative- The President will propose \$2 Million for Guam and other territorial areas in his Coral Reef Initiative and include the governor's of the areas on the initiative task force.

Relations/Status- The President would reiterate that the Administration has addressed Guam's 'Commonwealth' proposals for autonomy and economic benefits and it is now up to Congress to act. He would also recognize Guam's inherent right to full self-government and his intent to try to have the Executive Branch place a greater focus on the island's situation, needs, and proposals under the current status through a senior level interagency group co-chaired by the White House and Interior.

Micronesia/Marshall Islands Aid Package- The Presidents of Micronesia and the Marshall Islands will be present. Our \$2.5 Billion, 15 year assistance commitment to these freely associated states expires in 2001. The President should be able to announce the intent to begin talks with the areas on a post 2001 assistance package. (State has the lead because these are diplomatic relations. Interior has a big stake because it currently coordinates the assistance. DOD has an interest because military rights is one of our major objectives.)

Palau Road- The U.S. committed in the free association compact with Palau to build a road through much of its largest but largely undeveloped island. The President of Palau will be in Guam. The President should be able to announce a \$150 Million plan for this road.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To Sylvia Mathews, Gene Sperling, and Frank Raines through Mickey Ibarra from Fred Du Val and Jeffrey Farrow. Subject: President's Puerto Rico investment proposal (2 pages)	12/17/1997	P5
002. memo	Phone No. (Partial) (1 page)	11/11/1998	P6/b(6)

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

Presidential Visit to Guam - November 1998 [3]

Jamie Mettrailer
2006-0193-F
jm113

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)]

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THE WHITE HOUSE

WASHINGTON

December 17, 1997

MEMORANDUM FOR SYLVIA MATHEWS
GENE SPERLING
FRANK RAINES

CLINTON LIBRARY PHOTOCOPY

THROUGH: Mickey Ibarra *for me*
FROM: Fred DuVal and Jeffrey Farrow *JF*
Co-Chairs, Interagency Group on Puerto Rico
SUBJECT: The President's Puerto Rico Investment Proposal
CC: John Hilley Janet Murguia
Maria Echaveste Joe Minarik

The President has committed to advocating for the repeal of the termination of IRC Sec. 30A -- the tax credit based on wages and other corporate spending in Puerto Rico. We urge that this commitment be reaffirmed in the FY 1999 budget. The cost was estimated in the FY '98 budget at \$417 million over five years.

Failure to do all that the Administration can to win the repeal in Congress would have major ramifications for Puerto Rico and cause a significant backlash among Puerto Ricans in the States as well as in the islands. It would also probably result in criticism from the Congressional Hispanic Caucus, Sen. Moynihan, and Rep. Rangel.

Background

Tax benefits for investment by companies from the States in Puerto Rico date to 1921 and are a key factor in its economy, relating to approximately 30% of the jobs. The islands have a 13% jobless rate even with them and with a workforce participation rate 50% lower than the States. The incentives are also a primary argument in the islands for their Commonwealth arrangement.

The President was elected with Puerto Ricans understanding that he would support what was then effectively an exemption for all income from the islands. The 1993 Economic Plan, however, proposed replacing the exemption under IRC Sec. 936 with a credit for wages -- which caused an outcry from Puerto Ricans. In response, the exemption was continued on a scaled-down basis and an alternative credit based on wages, capital investments, and local taxes (what is now Sec. 30A) was created.

The President objected when the Congress' 1995 budget bill proposed phasing-out both incentives over ten years. His veto message said that "any legislation must contain effective mechanisms to promote job creation in the islands."

The Administration subsequently proposed phasing-out the income exemption in its balanced budget plan. To reconcile this with the President's assurance to Puerto Ricans that "Puerto Rico was cut enough in 1993" and to address concerns of Reps. Serrano, Gutierrez, and Velazquez, and others, our plan proposed using the revenue from the partial phase-out for Puerto Rico needs.

When the Congress added its total phase-out plan to the 1996 Minimum Wage bill, the President called for the current Congress to restore the Sec. 30A credit in his signing statement. A similar commitment was added to the Democratic National Platform by our campaign.

The President pledged to work to open Sec. 30A to new investments and to continue the incentive for as long as Puerto Rico needs it in his message to Rossello's inauguration this year. The FY '98 budget proposed this although Treasury had not recommended it. The budget said that the proposal would provide "a more efficient incentive."

When the proposal was not included in the balanced budget tax bill, the President's signing statement said that the omission by Congress was "a mistake."

Cost

Joint Tax Committee estimates of the cost of our proposal were 50% higher than the \$417 million over five years in our FY '98 budget and might have been more accurate. But all of the estimates may need to be revised downward since companies that have used the current benefits are rechartering themselves as foreign to defer the taxes that would be due under the 1996 law.

Recommendation

We understand that Treasury officials again do not plan to recommend further action. They do not consider such incentives to be efficient or good tax policy.

However, we strongly recommend that the budget reflect the President's commitment to his initiative for a tax credit based on wages paid in this unrepresented area of the U.S. where 59% of the citizens still live below the poverty level. We look forward to working with you and others to ensure this.

Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

Clinton Presidential Records
Intergovernmental Affairs
Marcia Hale
OA/Box Number: 9712

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FOLDER TITLE:

Guam

Jamie Mettrailer
2006-0193-F
jm114

RESTRICTION CODES

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

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United States Department of the Interior

OFFICE OF THE DEPUTY SECRETARY
Washington, D.C. 20240

August 15, 1996

MEMORANDUM

TO: Marcia Hale, Director
White House Intergovernmental Affairs

FROM: John Garamendi, Deputy Secretary

SUBJECT: **Guam Issues**

I have just met with Jeff Farrow, who I understand to be a co-chair with you on the Interagency Working Group on Puerto Rico. I called the meeting because I had heard indirectly from White House sources that Jeff has voiced concerns that my efforts in the Guam Commonwealth negotiations may have adverse impacts on your work regarding Puerto Rico political status questions.

After discussing his concerns in detail today, I am convinced that any connection between Guam Commonwealth and Puerto Rico political status issues is, at best, tangential and certainly not direct or adverse. To the contrary, I believe that my work on Guam Commonwealth will be beneficial to the Administration's efforts to keep a neutral and even-handed position vis-a-vis the commonwealth and the statehood groups in Puerto Rico. Specifically, Jeff indicated that the Puerto Rican "commonwealthers" may feel that they are being treated unfairly by the President's commitment to sign the minimum wage bill, which has a provision eliminating Section 936 tax credits. My work in the Guam Commonwealth negotiations, which is supportive of a commonwealth status grounded on mutual consent, may help offset any perception of possible Administration bias against Puerto Rican "commonwealthers" because of Section 936.

As I discussed with Jeff today, the President has designated me the Administration's Special Representative in the Guam Commonwealth negotiations. All issues, concerns or questions regarding Guam issues at the White House should be referred directly to me so that I can provide timely input based on the *current* status of these negotiations. My discussions with Guam representatives and with numerous line agencies are currently at a critical period. These negotiations are ill-served by information to the White House regarding Guam that is not reviewed by me first.

Accordingly, I have asked Jeff to respect this situation and requested that he refer any issues, concerns or questions regarding Guam to me through my assistant in these matters, Danny Aranza. Should you have any questions, please do not hesitate to contact me.

cc: Bruce Babbitt
Harold Ickes
John Emerson
Jeff Farrow

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United States Department of the Interior

OFFICE OF THE DEPUTY SECRETARY

Washington, D.C. 20240

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John Emerson
Jeff Farrow

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2006-0193-F

~~Confidential~~

November 3, 1994

The Guam Mutual Consent Agreement and Puerto Rico

The Interior Department's Representative on Guam's 'Commonwealth' agenda (Michael Heyman) has reached an agreement with the territory's representatives that may force the Administration to take a position that could be decisive in Puerto Rico's continuing statehood vs. commonwealth contest.

The "mutual consent" agreement would ostensibly say that no provision of the entire "covenant" on the new Federal-insular relationship could be changed without the consent of the Commonwealth as well as the Congress. It is being promoted as a guarantee that will insulate policies of importance to the island embodied in a law covering a wide range of subjects (e.g., trade preferences) against unilateral Federal policy changes.

Although the agreement would only apply to Guam, it would positively address the fundamental and controversial question about 'commonwealth' in other insular areas as well: Can it reliably limit the broad powers that the Federal government has in territories, providing permanence in agreed-upon matters as well as local government autonomy?

The question is so much a part of Puerto Rico's debate that the first premise of the commonwealth petition that confronts the Administration from last year's status plebiscite claims the same local power that the Guam agreement is now generally understood to offer. And since both Puerto Rico and Guam have raised the same question, the Guam agreement will box the Administration into taking a position on it in Puerto Rico.

A positive answer would make commonwealth much more acceptable in Puerto Rico, since the commonwealth option has lost credibility due in part to Federal resistance to mutual consent ideas. It would mean that commonwealth is really different from territorial (colonial) status and offers both sovereignty as well as some benefits of the U.S. political family.

By the same token, a negative answer would tip the balance towards statehood and probably lead to a controversial statehood petition from Puerto Rico in the next few years.

Among the policy reasons for agreeing to such an arrangement is that not having one leaves territories in which statehood may not be possible nor desired (and in which independence is not desired) with no dignified and certain status option.

Among the policy reasons against agreeing to such an arrangement, however, is that it simply may not be constitutional.

In fact, the Justice Department, reflecting the predominant legal opinion, contends that Federal powers cannot be given up unless statehood or independence is granted.

The Guam agreement circumvented Justice's objections by including a clause to the effect that the mutual consent requirement is provided to the extent that it is constitutional.

This clause is likely to undermine the initial perception that the guarantee validates the commonwealth concept. But this, too, would create a special problem in Puerto Rico since the issue there goes beyond the question of whether a power-sharing agreement can be obtained to whether it already exists under the islands' current commonwealth arrangement. (Puerto Rico's commonwealth party leadership claims that it does even though there is no agreement similar to that signed with Guam.)

While the Guam-related consequences of agreeing to mutual consent would be relatively minor (because of the island's small population, distant location, etc.) the implications will be much greater in the case of much larger and closer Puerto Rico. They include the ramifications of practically endorsing the basic platform of the commonwealth party over the statehood party when both are led by Democrats (and the President has had the support of both.)

Factors involved in effectively taking sides include: the statehooders' current control of most public offices; the commonwealthers' greater participation in Democratic primaries; and the divisions among Puerto Ricans in the U.S. on status issues (which seem to favor commonwealth.)

Additionally, indicating a willingness to agree to mutual consent with Puerto Rico will raise questions in Congress (although, perhaps, not as many as would be raised by a petition for statehood.) Sen. Simon and Rep. Toricelli, among others, have already objected to the commonwealthers' mutual consent claims. Senate Chairman Johnston and House Members stimulated by Puerto Rico's Carlos Romero-Barcelo can be expected to at least seriously question it.

Recognizing that Puerto Rico's involvement could jeopardize any prospective mutual consent policy, Guam negotiators suggest that the arrangement does not have to be made available to Puerto Rico because it has the option of statehood (whereas Guam does not.)

The argument, however, assumes a consensus that Puerto Rico can become a state, which, of course, does not exist and which also involves significant political and economic factors!

The Guam agreement was reached without coordination with all interested elements of the Administration, in part because an effort to obtain greater authorization for the talks was not pursued (after questions about the approach were raised.)

Heyman (who has retained the Guam responsibility in spite of resigning other Interior posts) intends to try to reach other agreements with Guam's representatives by the end of the year on some of the subjects which would ultimately be "protected" by the mutual consent agreement. The subjects range in nature from the application of existing shipping laws to military activities rights. There is talk of having a bill ready before next Summer.

The agreement has left the Administration with a number of difficult options. They must be faced soon since the agreement may become an issue any day in Puerto Rico. The options include those which follow.

- Fail to endorse the Guam agreement.

This would tarnish the Administration's image in Guam as well as among some interested international observers, would undermine the commonwealth party in Puerto Rico, and would leave no good future status options for at least some of the insular areas.

- Admit that the guarantee probably won't be effective.

This would result in problems similar to those identified under the option above but, possibly, not as seriously.

- Make a similar offer to Puerto Rico.

This would encounter substantial opposition from supporters of statehood for Puerto Rico, in the islands and Congress.

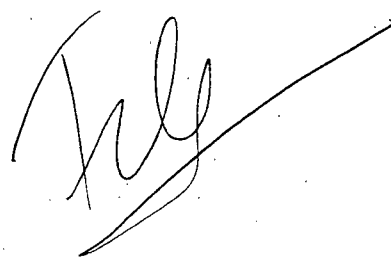
- Say that the option is not available to Puerto Rico.

This would devastate the commonwealth party in Puerto Rico and probably guarantee a statehood petition.

While the Guam agreement will create great difficulties for the Administration, at least in relation to Puerto Rico, the underlying -- and, really, more serious -- problem is caused by the lack of clear status options for insular areas and the lack of even an orderly process for developing options.

A better choice than those above might be to work with the interested Members of Congress on a process that enables the real status courses to be fairly pursued and negotiated by all areas.

August 19

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ADMINISTRATIVE MARKING~~Confidential~~INITIALS: JAM DATE: 9/15/2010
2006-0193-F

Note for Marcia

From Jeff Farrow

Please note the following memo re the NSC proposal on Guam's commonwealth petition when you get a chance. (The key points are highlighted.)

I sent it to Keith for his use but this matter is so critical to our Puerto Rico effort and so related to the overall question of the handling of insular matters that I'm also sending it to you.

Working out Guam commonwealth is important, but the proposal is either naive or would slip one by. In any case, it would probably ultimately fail and/or create problems.

It again demonstrates the need to set up an adequate way of handling all insular matters...and should provide a focus on that.

Also, the discussions on the proposal should really be kept internal.

In this connection, Guam Delegate Underwood suggested today that a hearing be planned on the Administration's handling of the subject -- which could create some further pressure.

Let's continue to try to get this done right.

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 (12 pages)	07/28/1994	P5
002. statement	re: Comments on DOJ memorandum regarding mutual consent provisions in the Guam Commonwealth legislation (53 pages)	08/26/1994	P5
003a. letter	To I. Michael Heyman from Walter Dellinger. Subject: Proposed language from Department of Justice on Guam Commonwealth legislation (2 pages)	06/29/1994	P5
003b. note	re: Proposed alternatives for mutual consent provision (2 pages)	06/29/1994	P5

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FOLDER TITLE:

File: Guam

Jamie Mettrailer
2006-0193-F
jm596

RESTRICTION CODES

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

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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 *TWR*
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

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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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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."

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

¹⁰ 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 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.

¹¹ 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 retained authority to amend in the exercise 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).

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." Id. at 460.

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

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, Wabot 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

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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.

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.

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

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.

Commerce Clause is relatively narrow. The court must defer to a congressional finding...if there is any rational basis for such a finding...This established, the only remaining question 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. 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 exercises its Territorial Clause authority. See, Wabol v. Villacrusis, 958 F.2d 145, 1460 (9th Cir. 1992) ("The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to

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

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 Curriu 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. Curriu 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 its provisions alone 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 Simms v. Simms, 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 retains 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 Fletcher v. Peck, 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 divest (sic) those rights.")¹⁰ This, too, the Memorandum

¹⁰ Although the Department in its memorandum focus' on the dissenting opinion in U.S. Trust Co. v. New Jersey, 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

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 Cases, 98 U.S. 700, 719 (1879). The Court in Barcellos and Wolfson 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 deprivation 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. Cir. 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 it 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 retained 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 POSSE." Id. at 460. Obviously the author did not like the test used by the Court. Nevertheless his criticism makes clear what the test is.

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

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.

Withdrawal/Redaction Sheet

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

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Guam

Jamie Metrailler
2006-0193-F
jml19

RESTRICTION CODES

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

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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2006-0193-F

~~Confidential~~

November 3, 1994

Keith,
FYI only
JCR

The Guam Mutual Consent Agreement and Puerto Rico

The Interior Department's Representative on Guam's 'Commonwealth' agenda (Michael Heyman) has reached an agreement with the territory's representatives that may force the Administration to take a position that could be decisive in Puerto Rico's continuing statehood vs. commonwealth contest.

The "mutual consent" agreement would ostensibly say that no provision of the entire "covenant" on the new Federal-insular relationship could be changed without the consent of the Commonwealth as well as the Congress. It is being promoted as a guarantee that will insulate policies of importance to the island embodied in a law covering a wide range of subjects (e.g., trade preferences) against unilateral Federal policy changes.

Although the agreement would only apply to Guam, it would positively address the fundamental and controversial question about 'commonwealth' in other insular areas as well: Can it reliably limit the broad powers that the Federal government has in territories, providing permanence in agreed-upon matters as well as local government autonomy?

The question is so much a part of Puerto Rico's debate that the first premise of the commonwealth petition that confronts the Administration from last year's status plebiscite claims the same local power that the Guam agreement is now generally understood to offer. And since both Puerto Rico and Guam have raised the same question, the Guam agreement will box the Administration into taking a position on it in Puerto Rico.

A positive answer would make commonwealth much more acceptable in Puerto Rico, since the commonwealth option has lost credibility due in part to Federal resistance to mutual consent ideas. It would mean that commonwealth is really different from territorial (colonial) status and offers both sovereignty as well as some benefits of the U.S. political family.

By the same token, a negative answer would tip the balance towards statehood and probably lead to a controversial statehood petition from Puerto Rico in the next few years.

Among the policy reasons for agreeing to such an arrangement is that not having one leaves territories in which statehood may not be possible nor desired (and in which independence is not desired) with no dignified and certain status option.

Among the policy reasons against agreeing to such an arrangement, however, is that it simply may not be constitutional.

In fact, the Justice Department, reflecting the predominant legal opinion, contends that Federal powers cannot be given up unless statehood or independence is granted.

The Guam agreement circumvented Justice's objections by including a clause to the effect that the mutual consent requirement is provided to the extent that it is constitutional.

This clause is likely to undermine the initial perception that the guarantee validates the commonwealth concept. But this, too, would create a special problem in Puerto Rico since the issue there goes beyond the question of whether a power-sharing agreement can be obtained to whether it already exists under the islands' current commonwealth arrangement. (Puerto Rico's commonwealth party leadership claims that it does even though there is no agreement similar to that signed with Guam.)

While the Guam-related consequences of agreeing to mutual consent would be relatively minor (because of the island's small population, distant location, etc.) the implications will be much greater in the case of much larger and closer Puerto Rico. They include the ramifications of practically endorsing the basic platform of the commonwealth party over the statehood party when both are led by Democrats (and the President has had the support of both.)

Factors involved in effectively taking sides include: the statehooders' current control of most public offices; the commonwealthers' greater participation in Democratic primaries; and the divisions among Puerto Ricans in the U.S. on status issues (which seem to favor commonwealth.)

Additionally, indicating a willingness to agree to mutual consent with Puerto Rico will raise questions in Congress (although, perhaps, not as many as would be raised by a petition for statehood.) Sen. Simon and Rep. Toricelli, among others, have already objected to the commonwealthers' mutual consent claims. Senate Chairman Johnston and House Members stimulated by Puerto Rico's Carlos Romero-Barcelo can be expected to at least seriously question it.

Recognizing that Puerto Rico's involvement could jeopardize any prospective mutual consent policy, Guam negotiators suggest that the arrangement does not have to be made available to Puerto Rico because it has the option of statehood (whereas Guam does not.)

The argument, however, assumes a consensus that Puerto Rico can become a state, which, of course, does not exist and which also involves significant political and economic factors!

The Guam agreement was reached without coordination with all interested elements of the Administration, in part because an effort to obtain greater authorization for the talks was not pursued (after questions about the approach were raised.)

Heyman (who has retained the Guam responsibility in spite of resigning other Interior posts) intends to try to reach other agreements with Guam's representatives by the end of the year on some of the subjects which would ultimately be "protected" by the mutual consent agreement. The subjects range in nature from the application of existing shipping laws to military activities rights. There is talk of having a bill ready before next Summer.

The agreement has left the Administration with a number of difficult options. They must be faced soon since the agreement may become an issue any day in Puerto Rico. The options include those which follow.

- o Fail to endorse the Guam agreement.

This would tarnish the Administration's image in Guam as well as among some interested international observers, would undermine the commonwealth party in Puerto Rico, and would leave no good future status options for at least some of the insular areas.

- o Admit that the guarantee probably won't be effective.

This would result in problems similar to those identified under the option above but, possibly, not as seriously.

- o Make a similar offer to Puerto Rico.

This would encounter substantial opposition from supporters of statehood for Puerto Rico, in the islands and Congress.

- o Say that the option is not available to Puerto Rico.

This would devastate the commonwealth party in Puerto Rico and probably guarantee a statehood petition.

While the Guam agreement will create great difficulties for the Administration, at least in relation to Puerto Rico, the underlying -- and, really, more serious -- problem is caused by the lack of clear status options for insular areas and the lack of even an orderly process for developing options.

A better choice than those above might be to work with the interested Members of Congress on a process that enables the real status courses to be fairly pursued and negotiated by all areas.

Nov. 16

~~Confidential~~

MARCIA,

I'm told this story was spread here by the former Reagan/Bush appointee with whom Interior's Heyman cut the mutual consent for changes in commonwealth policies deal.

If so, his motivation wasn't just political. He's trying to keep the Guam account by appealing to the local feeling that its 'the squeaky wheel that gets the grease.' Its a tactic in Puerto Rico as well and stimulated by not getting serious attention.

It may work with the new Democratic Gov. and Lt. Gov., Carl Gutierrez and Madeleine Bordallo, both of whom I know well.

One part of this blurb is misleading, though: While Guam doesn't have electoral votes, it does have convention votes.

That's why I've suggested Carl and Madeleine get congratulated. They'll control Guam's votes in '96. (In addition, Carl knows Jesse Jackson and Madeleine delivered the '92 delegation for us and is the most senior member of the DNC.)

This story obviously makes the point that insular areas shouldn't be ignored. But it doesn't really explain that there's a good reason for them to have a place (albeit with us) in international economic talks: They're not always a part of the U.S. in economic terms -- e.g., trade policies. (Fortunately, we're on the right track with Puerto Rico and the Americas Summit!)

That's something Interior's territories office has had a hard time trying to get across. (I understand they tried re APEC.)

Their inability to deliver in this and other areas is a reason House Republicans may revive the Gallegly proposal to cut the office and may not have opposition from House Democrats. (Senators are more likely to want to do the type of restructuring we were discussing earlier, though.)

Jeff

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THE WASHINGTON POSTNo Laughing Matter

■ Bad enough for President Clinton that he lost Congress and his own reelection is looking shaky. Now comes word that 150,000 Guamanians are upset at the administration as well, thanks to national security adviser Anthony Lake and National Economic Council boss Robert E. Rubin.

The two met with reporters last week to talk about the Asian Pacific Economic Cooperation meeting that Clinton attended this week. A reporter asked about the possibility of Guam, a U.S. territory, being admitted to the 18-member group. Lake and Rubin, according to an account in the Pacific Daily News, laughed heartily.

Guam Gov. Joseph F. Ada (R) fired off an angry letter to Clinton demanding that Lake and Rubin be fired unless both apologized. Demonstrators blocked

the roads leading to the U.S. Navy base in Guam. "The absence of an apology within twenty-four (24) hours will likely result in actions of civil disobedience directed at military installations as has occurred in Guam today," Ada said.

Guam Del. Robert A. Underwood (D) said he called Lake in Jakarta, Indonesia, on Monday to tell him "of the seriousness of the situation." An hour later the White House sent over a letter from Lake and Rubin calling the matter "what appears to be an unfortunate misunderstanding."

"Any mirth at the meeting was not directed at Guam, but at our surprise at the question," they said, adding that they "said nothing disrespectful of Guam, nor would we." Ada and Underwood accepted the explanation.

The territory's 150,000 residents do not vote in presidential elections, but Clinton apparently doesn't

TOTAL P.01

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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
002. statement	re: Comments on DOJ memorandum regarding mutual consent provision in the Guam Commonwealth legislation (4 pages)	08/26/1994	P5
003. statement	re: Comments on DOJ memorandum regarding mutual consent provision in the Guam Commonwealth legislation (52 pages)	08/26/1994	P5
004a. letter	To I. Michael Heyman from Walter Dellinger. Subject: Proposed language from Department of Justice on Guam Commonwealth legislation (2 pages)	06/29/1994	P5
004b. note	re: Proposed alternatives for mutual consent provision (2 pages)	06/29/1994	P5

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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 *TR*
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

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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 Wabot v. Villacrusis, 958 F.2d 1450, 1459 (9th Cir. 1992), cert. denied sub nom. Philippine Goods, Inc. v. Wabot, ____ 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 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.

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.

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 United States Trust Co. v. New Jersey, 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 divest (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. Tingley, 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."

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

¹⁰ 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 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.

¹¹ 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);

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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

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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 retained authority to amend in the exercise 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).

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." Id. at 460.

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

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, Wabot 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

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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

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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.

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..

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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).

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 (1891).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

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.

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.

Commerce Clause is relatively narrow. The court must defer to a congressional finding...if there is any rational basis for such a finding...This established, the only remaining question 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. 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 exercises its Territorial Clause authority. See, Wabot v. Villacrusis, 958 F.2d 145, 1460 (9th Cir. 1992) ("The incorporation analysis thus must be undertaken with an eye toward preserving Congress' ability to

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

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 Curriu 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. Curriu 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 its provisions alone 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 Simms v. Simms, 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 retains 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 Fletcher v. Peck, 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 divest (sic) those rights.")¹⁰ This, too, the Memorandum

¹⁰ Although the Department in its memorandum focus' on the dissenting opinion in U.S. Trust Co. v. New Jersey, 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

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 Cases, 98 U.S. 700, 719 (1879). The Court in Barcellos and Wolfson 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 deprivation 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. Cir. 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 it 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 retained 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 POSSE." Id. at 460. Obviously the author did not like the test used by the Court. Nevertheless his criticism makes clear what the test is.

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

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.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To Leon Panetta and Sandra Kristoff from John Garamendi. Subject: Situation in Guam. (2 pages)	10/18/1996	P5
002a. fax cover sheet	with marginalia. (1 page)	10/22/1996	P5
002b. memo	To Leon Panetta and Susan Kristoff from John Garamendi. Subject: Situation in Guam. (2 pages)	10/18/1996	P5
003. memo	For Robert Suettinger from John Garamendi. Subject: Guam Commonwealth Negotiations. (2 pages)	03/13/1996	P5

COLLECTION:

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

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FOLDER TITLE:

Guam--Agency Positions: Guam--DOI [Department of the Interior] Positions [2]

Van Zbinden
2006-0193-F
vz1177

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

U.S. DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

Facsimile Transmission

To

FromName Pritchard, Jack
Company NSC/Asian Affairs
Location Washington, D.C.Fax Number .. 9-456-9250
Voice Number . 202-456-9251Name Danny Aranza
Fax Number ..
Voice Number . 202-208-4709**Message or comment ...**

Sandy,
Did you get a copy of this?
I may be reading too much into it, but it sounds like Garamendi has been cooped by the fuamamans and has effectively thrown in the towel. Seems to me that Interior Vice Garamendi should be given the portfolio, thus involving Sec Bobbit. You are an addressee on this - which means we will see it again.

Jack

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	Classified fax number. [partial] (2 pages)	02/19/1997	b(2)
002. report	The Strategic Importance of Guam. (1 page)	02/03/1997	P1/b(1)
003. fax	Classified fax number. [partial] (1 page)	12/11/1996	b(2)
004. note	To Robert Uriu from Monette. Subject: Offer the Following Advice. (1 page)	12/09/1996	P5
005. fax	Classified fax number. [partial] (1 page)	12/06/1996	b(2)
006. memo	To Admiral William Perry from John Garamendi. Subject: Guam Commonwealth Negotiations. (4 pages)	12/02/1996	P5

COLLECTION:

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

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FOLDER TITLE:

Guam - Agency Positions: Land / DOD [Department of Defense]

Van Zbinden
2006-0193-F
vz518

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

RR. Document will be reviewed upon request.

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486-950

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Bob:

Phil Barringer, Ralph Thomas, Nicole Doucette and I met to discuss the upcoming interagency meeting on Guam. We offer the following advice:

- We all believe that there should be no ^{substantive} discussions with anyone representing Guam interests until we have a coordinated Federal position. Above all, this initial meeting, and any follow-on meetings, should be conducted freely and openly, without fear that interagency positions will be compromised.
- We suggest this strawman as a starting point for process:
 - Interior produces the draft USG Commonwealth Act based on Garamendi's views of where we stand, as referenced in his letters to Cabinet members.
 - Draft Act is distributed for interagency review.
 - Interagency meets and reps are assigned to Title sub-groups based upon expression of interest and organizational equities.
 - Within each sub-group, NSC should appoint lead agency to run groups, and given charter to staff level interagency position.
 - Titles are brought together for second, reissued draft.
 - Full draft text is circulated for staff review.
 - Once staff agrees on entire text, NSC seeks coordinated position on Act from each agency.
 - Act is presented to Guam as Federal response.

We see utility in NSC retaining control of the process. Interior is in a good position to draft the first Act, in light of their recent correspondence and research into Agency positions. Give us a call if you have more questions.



United States Department of the Interior

OFFICE OF THE DEPUTY SECRETARY
Washington, D.C. 20240

Honorable William J. Perry
Secretary of Defense
The Pentagon
Washington, D.C. 20301

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Dear Mr. Secretary:

I am writing you in my capacity as the Administration's Special Representative for the Guam Commonwealth negotiations. The essence of Guam Commonwealth is increased self-governance under the continued sovereignty of the United States. This proposal has been "vetted" within the executive branch since 1988, when the Guam Commonwealth Act was originally introduced in Congress by the Guam delegate. Unfortunately, despite almost a decade of extensive intergovernmental and interagency discussions, the issue has not yet been brought to closure. The people of Guam are still waiting for the United States to respond in a definitive way to their request. My personal goal is to have a legislative package endorsed by the Administration and transmitted to the 105th Congress early next year.

My staff and I have worked with representatives from your Department for the past year on Commonwealth issues that are within your Department's purview. We have reached a point where the outstanding issues have been fully discussed and differences in opinion noted. In the enclosed memorandum, I have taken the liberty of laying out the Commonwealth issues that I consider priorities for resolution by your Department. Please note that the positions ascribed to different agencies are informal in nature. Although there have been extensive discussions between our staffs, none of the issues outlined have gone through formal OMB clearance.

As we end the first term of this Administration, I seek your help in bringing immediate closure to these issues. It would be extremely detrimental to the negotiating process with Guam if resolution of these issues is delayed until after the transition to the second term -- a new team may be put in place, the learning curve would have to be restarted, and the same issues which have been around for almost a decade would be recycled for several more years.

In regard to effectuating change within large bureaucracies, someone once said, "Unyielding pressure applied unrelentingly yields unassuming changes measured incrementally." I seek your help in this endeavor and will be contacting your office directly to follow up on these issues.

Sincerely,

John Garandendi
Deputy Secretary

Enclosure

cc: Dr. John P. White, Deputy Secretary

CLINTON LIBRARY PHOTOCOPY

GUAM COMMONWEALTH RESOLUTION ISSUES FOR DEFENSE DEPARTMENT

December 2, 1996

Issues referred to in this report are based on an informal draft document that reflects my negotiations with Guam and federal agencies during the summer. Although the document as a whole has not been circulated, all sections have been discussed separately with agencies having an interest in particular issues or sections. Once negotiations are concluded and all open issues are brought to closure, I plan to circulate my final report and a completed document for formal Administration approval through the OMB referral process.

Excess Land

(Same sent to DOS)

Issue: *Should the Government of Guam be authorized to obtain federal lands declared excess in Guam, prior to screening by other federal agencies?*

A. Background

Guam is a small island, approximately 30 miles long, 7 miles wide and 220 square miles in area. About one-third of the island, or 44,800 acres is owned by the military. Of this amount, the Air Force controls approximately 24,500 acres and the Navy controls approximately 20,300 acres. In addition to the military, the U.S. Fish & Wildlife Service is a major federal land manager in Guam. It controls a 28,389 acres wildlife refuge on Guam, of which about 28,000 acres is overlaid upon lands owned by the military and about 371 acres is owned by the Service in an area known as Ritidian Point.

As the economy of Guam has grown, so has the demand for developable land. This has led to increasing pressure by the Government of Guam to seek return of Federally-owned lands. From Guam's perspective, land was taken by the military after World War II with the "understanding" that the land would be returned once it was no longer needed for military purposes. With military downsizing and base closure activities in Guam, there have been increasingly strident calls for the return of federal lands declared excess by the military. Approximately 11,400 acres of military land in Guam have been identified by the Defense Department as releasable or potentially releasable.

At the same time that the military is down-sizing and there are increasing calls for the return of land to local control, the FWS is seeking to consolidate ownership of land in Guam that it considers critical for the viability of the Wildlife Refuge. This has led to a situation where the FWS has sought and received the transfer of lands in Guam declared excess by the military. This has led to direct confrontation between Guam and the Federal government. On the legal front, the U.S. Attorneys Office in Guam and the Department of Justice in Washington are defending the Federal government against lawsuits brought by the Government of Guam and by private parties. The Government of Guam lawsuit alleges, among other things, that the transfer of Ritidian Point to the FWS was illegal and seeking return of the parcel to local control. The

unacceptable

DOD, DOS,
FWS

private parties have brought lawsuits seeking title and access through military and Refuge property.

B. Proposal

In addition to litigation, Guam has concurrently sought legislative relief through two avenues. The first consisted of various sections in the draft Guam Commonwealth Act. As originally drafted, the Commonwealth provisions sought an extremely broad scope of local authority over the identification, declaration and transfer of federal excess lands in Guam. The original Commonwealth proposals also had land provisions relating to federal powers of eminent domain, access to federal property and utilities and management of submerged lands in the exclusive economic zone. The second avenue consisted of separate legislation just on the excess lands issue, which was introduced by Guam Delegate Underwood. Underwood's proposals focused solely on giving Guam a "right of first refusal" -- i.e. it would have given Guam the right to obtain excess federal lands on the island, at no costs and prior to screening by federal agencies.

In the waning days of the 104th Congress, there was a last-minute attempt to pass a form of the Underwood legislation. It was strongly opposed by the FWS, the Defense Department, the General Services Administration and the Justice Department's environmental division. Due to agency opposition, the Guam excess lands legislation failed to pass either the House or the Senate.

C. Arguments Against Excess Lands Authority For Guam

The FWS argued that providing Guam with a "first refusal" right would undermine its current access to excess military land necessary for viability of the Wildlife Refuge. The Justice Department expressed concerns regarding the effect of such a policy in its current litigation against Guam. Among other things, Justice points out that there is currently no law, policy or legal precedent that allows the Government of Guam or private landowners to obtain property obtained legally by eminent domain and paid for (in some cases more than once) by the United States. The Defense Department argued that any Guam excess lands legislation should be considered only within the context of the Guam Commonwealth negotiations. The General Services Administration stressed that it was against making any special exceptions for Guam in the uniform application of the general laws governing disposal of real property, including the payment of fair market value.

D. Arguments In Support of Excess Land Authority For Guam

It is important to realize that the disposition of excess federal lands in Guam is one of the most highly-charged political issues in the island. It is driven by the economic value of scarce land resources in Guam. It also finds its strength in the people's perception that the United States "stole" land from original landowning families. It also plays into charges of U.S. colonialism,

that one federal land baron transfers "stolen property" to another federal land baron. The land issue is so strong that some believe that it drives Guam's quest for Commonwealth status.

From my perspective, if the land issue is not resolved soon, it will form the basis for an increasingly hostile and uncooperative attitude from Guam's political and community leaders. Unlike the immigration issue or the Chamorro self-determination issue, which find different sectors of the local community on opposite sides, the land issue seems to have the potential to unite all groups in Guam. Thus far, most of the hostility has been limited to political rhetoric, lawsuits and sporadic protests by certain landowning families and a small but vocal nationalist movement. The trend towards increased agitation against the United States will only grow stronger and more widespread the longer the land issue remains unresolved.

In the long-term, this growing tension will only serve to make military and federal agency presence in Guam more difficult and less stable. Guam, after all, is an insular community located thousands of miles from the U.S. mainland, separated not just by geography but by history, culture and tradition. Short of sheer military force, the United States has few options if the entire local community becomes galvanized to actively work against federal operations in the island. While this may seem like a remote possibility at this time, stranger things have happened on a global scale -- viz. the dissolution of the Soviet Union and the end of the Cold War.

It is important to emphasize that the lands that Guam wants are limited only to those that the military has determined that it no longer needs to accomplish its mission on the island and in the region. Taken on its face, providing excess military lands to Guam would not jeopardize any national security interests. On the contrary, returning such lands to local control would provide long-term stability to the relationship between the U.S. and Guam.

With respect to concerns raised by the agencies, we can agree to the principle of giving Guam a "right of first refusal" while accommodating agency concerns through careful drafting of the provision. First, in order to address FWS interests, Guam's "right of first refusal" can be structured to apply only to excess federal lands not currently within the boundaries of the Guam Wildlife Refuge. This would assure that FWS has continued access to excess military lands that are necessary for the viability of the refuge. With respect to Justice's concerns regarding impact on current litigation, there is a clear distinction between existing real property laws and policies, which support continued U.S. control of existing federal lands in Guam, and a prospective law which will apply only to the transfer of future federal lands declared excess by the United States. With respect to Defense's concern that the excess lands issue be discussed within the context of the Commonwealth negotiations, this concern is met by being cognizant of the excess lands issue and understanding its interplay with other land issues in the Commonwealth proposal. It should not mean that excess lands legislation cannot be considered separately and on a faster track than the Commonwealth legislation. Finally, concerns raised by GSA appear centered on retention of the *status quo*, which I do not believe is a reasonable response to Guam.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION

001. note	Handwritten notes on Guam issues. (2 pages)	c. 1996	P5

COLLECTION:

Clinton Presidential Records
National Security Council
Asian Affairs (Robert Suettinger)
OA/Box Number: 1044

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FOLDER TITLE:

Robert Uriu Notebooks: [Guam]

Van Zbinden
2006-0193-F
vz1179

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

RR. Document will be reviewed upon request.

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

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

Gutierrez - 600k? Wash. Post.

right to give - ok

Dem. in Guam legislature -

if he had spent even $\frac{1}{2}$ of that money on Guam,

Dem lost control of legislature in Nov. election

Underwood - gave money, but not getting anything we asked for

Sam Koe - Democratic ^{party member} ~~candidate~~

~~Underwood~~ Bordales - ^{was} liberal

Gutierrez - centrist.

potential unity

want to make pol. stable

post call -
at expenses.

form of protest.

other protest.

Sen. Tom Adda

Sen. Hewson Guerrero

Dem Party Chair

WH process -

- making cost, not get money.

even if WH submits legislation, won't get through

Putty pressure to speed things up

land - ok,

but not Jt. Comm, Mutual Consent.

local political problem



survey last week, 74% don't know who's in charge

65-75% of people happy re: post call

would rather talk to Russians

what likely to occur?

will block ^{any} road to carrier?

to Com Nav Marians HQ

3 hours then left, (4/15/20)

92%, over extended

→ Gutierrez: statement

US military is truly ally. if we agree

won't give us higher benefits.

battle group not welcome

(symbolic)

before Saturday

wanted money that post call brings.

elaborate money making activities

heads up to other

only made press release last Thursday, let Underwood do it

<Ginger Criz. Gov. PAO>

how to react.

telling all heart on 600 K.

letters to the Outrigger
WP, Gannett, CNN

also say ~~some~~ ^{advertising}
no support from ~~Wt~~ # 5

last week wanted to fly to DC meet w/ BC
advisors - let it die down.

talked to someone,
only for support.
getting raw end of deal
letting G. look real bad

press - A. P. want
DC and support

now local problems:

this is potential suicide.

Admiral had lost full Dem. Party he was really combative!
members.

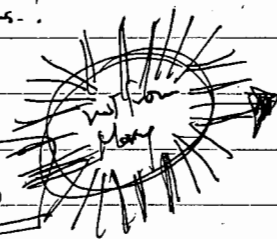
320
300 - Guam Dem. Party
600 Gov. Fund

senior member
on island

went to GINE,
not up chain
command.

Admiral Sanzale, on Guam
Rafael

just arrived
600 days 671-349-5200



Hotel
(703) 845 1010

if statement doesn't work.

Then, if no effect, demonstrate
all ships will be on 800 property
can't do much else.

how to calm things down?

no ideas →

Guang contacts: Laramie CINC.
in DC

staff on 157

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION

001. note	Handwritten Notes regarding Guam. (2 pages)	11/1994	P5

COLLECTION:

Clinton Presidential Records
National Security Council
Assistant to the President for National Security Affairs (Lake Subject Files, 1993-1996)
OA/Box Number: 1465

FOLDER TITLE:

Guam

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2006-0193-F
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RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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DMS for
Tunisia
Int'l Affairs

fax: 202 208 3390

Al Stander - Interior

208-482

(tel)

unincorporated
territory

9 years ago - asked for enhanced status

Congress pushed to Admin. (Kefauver)

no const.
organ laws
written by
Cong. -

want Commonwealth - but goes beyond

from authority by authority

2 Commonwealth -

Puerto Rico

No. Marianas

sphere of local self gov't

lot of folks in Cong. - doubts

up to point

last Admin. -

Commission

views on proposals
scaled down considerably
to RR, N. Marianas

highly nationalistic

Adm - increasingly outspoken in statements

just at UN - spoke b4 4th Committee

1 person - who one can

vote of self determination

1960 + earlier - Navy controlled - then other

now nation - minority - 40-45%

Guillermo - = member
dependent

no answer will be satisfactory
negotiations ongoing

Guillermo - priv. try to figure way
out

other candidate - not a Chamorro

more
child

ambassador
charge

only Chamorro candidate

APEL Map -

1 further radicalize the current leadership,
political leadership
very bad timing - new government
willing to compromise (privately)
domestic politics

456-2232

response:

Judith -
bomb thrown

clarify facts
no insult intended

→ tremendous potential role in region

commonwealth - nation - contributing

456-2232

1 Keith

Mason

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. draft	Memo to Sandra Kristoff and Bob Bell from Don Kerrick. Subject: POTUS Stop in Guam. With marginalia. (1 page)	10/28/1997	P5
001b. memo	To Sandy Berger and Jim Steinberg from Mickey Ibarra and Fred DuVal. Subject: Guam. (1 page)	10/27/1997	P5
002. email	From James Seaton to @NSA, Leon Fuerth, and Sandra Kristoff. Subject: Rep. Underwood. With marginalia. (1 page)	07/28/1997	P5

COLLECTION:

Clinton Presidential Records
National Security Council
Defense Policy (James Seaton)
OA/Box Number: 1236

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FOLDER TITLE:

Guam BRAC [Base Closure and Realignment Commission]

Van Zbinden
2006-0193-F
vz1181

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

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

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
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THE WHITE HOUSE
WASHINGTON

October 28, 1997

TO: SANDY KRISTOFF
BOB BELL

FROM: DON KERRICK (D)

SUBJECT: POTUS Stop in Guam

Thought you should see attached note suggesting the President stop in Guam next year on one of his trips to Asia.

Enclosure
as

cc: Glyn Davies
Nicole Elkon

Jim:
Any merit from
a defense
perspective to
a POTUS
visit to
U.S. military
facilities there
Bob

NOT SURE I agree
with merits of
case, but we will
have to address
yell 1998 trip
planning.

None that I can think
of. I can, however,
think of several good
reasons Not to stop in
Guam -- related to BRAC
fall-out, Interior Dept. issue,
etc.

Jim

THE WHITE HOUSE

WASHINGTON

October 27, 1997

MEMORANDUM TO SANDY BERGER
JIM STEINBERG

FROM: Mickey Ibarra
Fred DuVal

SUBJECT: Guam

CC: Erskine Bowles
Sylvia Mathews
Stephanie Streett
Craig Smith
Thurgood Marshall, Jr.

Jeff Farrow
Janet Murguia
Lucia Wyman
Bill Marshall
Sandra Kristoff

*DM - I understand
what we are asking for
here is unlikely to get
a quick response
but I'd appreciate
your help as to
ans. situation.
Whiskey*

For many years, the territory of Guam has been seeking federal government support for a bill to change its status within U.S. sovereignty. However, many of the bill's proposals are unacceptable to the Administration. This will be made clear at a U.S. House hearing Wednesday. The reaction in Guam will be one of major disappointment.

For this reason -- and because of the President's interest in our citizens in Guam who often question whether their small and distant island is appreciated in Washington, we are trying to identify an action that can be taken contemporaneously with the hearing that will signal the continuing U.S. commitment to Guam.

Announcing a Presidential visit would be such an action. It would significantly "soften the blow" and emphasize the continuing importance that Guam's relationship to the U.S. has to the Administration.

Since a trip of such magnitude is only feasible in connection with travel elsewhere in the region, we would like to propose that we tell the Governor of Guam -- who is in Washington for the hearing -- and Guam's Delegate to Congress this week that the President will stop in Guam in route to either China or APEC next year.

With major Air Force and Naval bases, Guam is a logical stopover to Asia and has been used for that purpose in past Administrations.

We recognize that many decisions on prospective Asia travel are not yet made, but anticipating that a trip will occur sometime next year, we would like to recommend that this decision be expedited.

Kelly, Sandra L.

From: Seaton, James B.
Sent: Monday, July 28, 1997 4:38 PM
To: @NSA - Natl Security Advisor; Fuerth, Leon S.; Kristoff, Sandra J.
Cc: @DEFENSE - Defense Policy; Danvers, William C.
Subject: Rep Underwood/Guam Schools [UNCLASSIFIED]

PLEASE PASS TO SANDY BERGER and LEON FUERTH

Bill Danvers and I visited with Representative Underwood (Guam) today to listen to the Congressman's concerns regarding the recent DoD decision to establish separate DoD dependents schools (military dependents currently attend Guam-run schools). The DoD decision came a year earlier than Underwood expected and resulted from poor educational, health and safety conditions in the local schools.

Underwood's real issue is that this is yet another instance where the Federal government is running roughshod over Guam. At a time that Guam is taking on greater strategic importance (with closure of bases in Philippines, unrest in Okinawa, resettlement of Kurds, etc.), the USG is not cultivating its relationship with Guam. In addition to the DoD schools issue, the USG is not working closely with Guam to overcome the economic effects of base closures nor to expeditiously turnover land to Guam. These actions, explained Underwood, of which the school issue is only the latest, are "in ironic contrast to the President's race initiative" and demonstrate that there really has been "no progress in Guam's political status on the part of the Clinton Administration."

*Jim -
About a month ago
I gave DoD
(Fred Pang)
an WSC
"green light"
to go*

*ahead with
this since
I found
Defense's
argument
persuasive.*

Bob

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Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

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

FOLDER TITLE:

Guam #2 [1]

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Van Zbinden
2006-0193-F
vz1182

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

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- b(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]

[54] From: Danny Aranza at ~IOS 2/14/95 12:36PM (4075 bytes: 77.1n)
To: Tom Collier, BJ Parker, Leslie Turner, TIM ELLIOTT at ~ISOL,
SECSI@SIVM.SI.EDU at ~INTERNET, John Wright
Subject: GUAM COMMONWEALTH - REPLACEMENT FOR MIKE HEYMAN

----- Message Contents -----

(1) I am informed that Congressman Underwood had a very positive telephone conversation with Richard Mallery. Underwood relayed his positive reaction to Governor Gutierrez and the word back is that the Governor is also upbeat regarding Mallery's possible selection as Mike Heyman's replacement.

(2) Due to the positive reaction to Mallery by the Governor, Underwood's office has asked whether the Secretary could publicly announce his designation of Richard Mallery as the Administration's Special Representative on Guam Commonwealth BY NEXT WEEK.

(3) Underwood is seeking an announcement by next week because Governor Gutierrez will be in D.C. FEBRUARY 21 to 24. While the Governor is in town, they would like to arrange meetings with Secretary Babbitt, Secretary Heyman and Richard Mallery (if he can be flown in from Phoenix).

* If a public announcement is doable by next week, I propose two meetings: (a) one meeting would include Secretary Babbitt, Secretary Heyman, Richard Mallery, Governor Gutierrez and Congressman Underwood -- this could be structured as a joint press conference/photo opportunity announcing Mallery's designation as Special Representative for Guam Commonwealth; (b) a second meeting would be a private, working meeting among Secretary Heyman, Richard Mallery, Governor Gutierrez and Congressman Underwood (plus staff of the principals) to discuss moving forward with the negotiating process.

(4) Issue for Immediate Decision: IS SECRETARY BABBITT READY AND WILLING TO MAKE A PUBLIC ANNOUNCEMENT OF MALLERY'S SELECTION BY NEXT WEEK?

If so, the following tasks need to be undertaken immediately:

- o resolution of personnel-type issues with Mallery - e.g. contractual arrangements (Secretary, Collier, Mallery, Tim Elliott - SOL)

- o drafting letter from the Secretary designating Richard Mallery "with the concurrence of the President" (as was done with Mike Heyman, this will need some kind of clearance from the White House) (Collier, Turner, Aranza);

- o drafting a press release to be issued jointly by the Secretary, Governor Gutierrez and Congressman Underwood and preparing for a press conference (Aranza, Wright);

- o coordinating schedules of the principals for a press

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conference and a private working meeting between February 21 and February 24 (Barbara Atkinson, Barbara Cederborg, Sharon Herald, Faye Jones)

o preparing an agenda and materials for the private working meeting on next steps in the process (Heyman, Mallery, Turner, Aranza, Elliott)

(5) The Secretary's decision can be relayed to Danny Aranza via cc:mail or phone (208-4709) and Aranza will initiate coordination of the various tasks required.

(6) Note: Notwithstanding their positive reaction to Mallery and for reasons having to do with Guam's local political situation, Underwood and Gutierrez will be sending the Secretary a letter recommending that Stan Roth be selected as Special Representative, with a proviso that they understand that Roth's present duties may not permit him to undertake this position.

cc: Richard Mallery (fax - (602) 382-6070)

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Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

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

FOLDER TITLE:

Guam #2 [5]

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2006-0193-F
vz1183

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.



OFFICE OF THE
SECRETARY OF THE INTERIOR
WASHINGTON

June 16, 1994

Note

To: Morton Halperin

From: Mike Heyman *Mike*

Received the attached this afternoon. I am shocked that Dellinger purports to decide without even affording us a hearing. (I suspect that all he is doing is signing letters prepared by Marcusa.)

Can you get us an audience? I return Wednesday, June 22. You and I have an appointment that afternoon. We should see him then or soon thereafter.

Attachment

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Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

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

FOLDER TITLE:

Guam [1]

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2006-0193-F
vz553

RESTRICTION CODES

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

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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Jeffrey L. Farrow
04/09/98 04:31:39 PM

Record Type: Record

To: Fred DuVal/WHO/EOP

cc:

Subject: Scott Busby/NSC

I just met with Scott and am cool to that they want to do -- put Pol Pot in the NMI because the Immigration Act (that we're trying to apply) doesn't. I told him I'm cool because the opposition to extension will use our using the NMI as a rationale for not extending, this will raise concerns with the George Millers and Akakas on the Hill, and the issue has gotten too much media attention not to get noticed. I'm also not sure that there's not the asylum problem that he thought they'd be avoiding.

I suggested further consideration of other insular areas such as Palau or the Marshall Islands which are outside US sovereignty but still pretty much under our control.

He's open to the idea, wanted me to talk to Justice, and I'll go to an interagency meeting tomorrow on the matter.

I also said I'd help with the intergovernmental/congressional aspects if the decision is the NMI (its pretty far down the line and I don't think its the end of the world to go that way). I also said Interior ought to be involved and he and I will talk to John Berry.

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Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

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

FOLDER TITLE:

Guam [2] CLINTON LIBRARY PHOTOCOPY

Van Zbinden
2006-0193-F
vz523

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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Withdrawal/Redaction Sheet

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

COLLECTION:

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

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Guam [2]

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2006-0193-F
vz523

RESTRICTION CODES

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

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National Security Council
The White House

PROOFED BY: _____ LOG # 3101
URGENT NOT PROOFED: _____ SYSTEM PRS NSC INT ARS
BYPASSED WW DESK: _____ DOCLOG 15 A/O _____

	SEQUENCE TO	INITIAL/DATE	DISPOSITION
<i>CSG</i> Coeppf			
Rice	<u>1</u>	<u>(C) 4/23</u>	
Davies			
Kerrick	<u>2</u>	<u>(C) 4/23</u>	
Steinberg	<u>com</u>		
Berger	<u>com</u>		
Situation Room			
West Wing Desk	<u>3</u>	<u>(C) 4/24</u>	<u>2</u>
Records Mgt.	<u>4</u>		<u>2</u>

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc:

COMMENTS:

Chin
Guan

~~ECR~~ ① - are we
slammy Justice?

② why no
demonstration yet?

Exec Sec Office has diskette

① Language changed
② Demonstration in next couple of days (we have crush hatch).

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Phone No. (Partial). (1 page)	11/11/1998	P6/b(6)
002. briefing paper	re: Deliverable issues for Guam (2 pages)	n.d.	P5
003. list	re: Trip meeting (1 page)	10/21/1998	P1/b(1)
004. memo	Samuel Berger to Stephane Streett to President William J. Clinton re: Post-APEC-travel (3 pages)	09/29/1998	P1/b(1), P5
005. memo	Samuel Berger to Stephane Streett to President William J. Clinton re: Post-APEC-travel (3 pages)	09/29/1998	P1/b(1), P5

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FOLDER TITLE:

Guam. Malaysia, Japan and Korea 11/13 -11/22/98

Jamie Metrailler

2006-0193-F

im115

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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G. 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]
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Deliverable Issues for Guam

Micronesian Compact Impacts- The U.S. Free Association Compacts with Micronesia, the Marshall Islands, and Palau have enabled 10,000 citizens of those states to move to Guam. The Compact law authorizes reimbursement of costs to Guam and other U.S. islands. \$4.6 Million is being provided annually through FY01. If we support it, Interior will increase this to 10 Million- (the minimum the governor says is needed) by subtracting from the allotment to the CNMI discretionary.

End Interior Auditing of Guam- The Interior IG audits both local spending by the smaller territorial areas as well as the use of federal funds. There is no similar auditing in our largest territorial area, Puerto Rico. The other territories consider this auditing colonial. We would propose a bill to end the auditing as Guam and other islands were certified to have independent local auditing agencies.

Guamanian U.S. Attorney- The nomination of a U.S. Attorney for Guam - as requested by the Governor and the Delegate to Congress - is not ready for announcement.

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- 2, 136 acres Air Force acres;
- 360 Air Force housing units on another 519 acres; and
- some Navy property

We may also want to announce plans to:

- ask Congress to enact umbrella land transfers legislation without all the usual restrictions on such transfers. (The bill passed the Senate this Congress. Guam's desire to have land go free to former owners who were already compensated for it may be the sticking point that discourages such an announcement.) We may also want to announce the designation of a senior DOD official to expedite Guam and transfers.

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- The Navy will expedite the transfer of 1,900 acres of land and facilities at the former Naval Air Station Agana (the name of the capital) which is adjacent to the commercial airport. EDA will seriously consider a \$1 Million plus grant for infrastructure improvements on the site to enhance its commercial viability.
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Relations/Status- The President would reiterate that the Administration has addressed Guam's 'Commonwealth' proposals for autonomy and economic benefits and it is now up to Congress to act. He would also recognize Guam's inherent right to full self-government and his intent to try to have the Executive Branch place a greater focus on the island's situation, needs, and proposals under the current status through a senior level interagency group co-chaired by the White House and Interior.

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Withdrawal/Redaction Sheet

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001. briefing paper	re: Deliverable issues for Guam (2 pages)	n.d.	P5
002. memo	To Jeff Farrow from Joan M. Plaisted. Subject: President's trip to Guam (1 page)	11/03/1998	P5
003. draft	re: Guam deliverables (4 pages)	n.d.	P5
004. briefing paper	re: Framing speech: America's next agenda (1 page)	n.d.	P5

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Clinton Presidential Records
Speechwriting
June Shih
OA/Box Number: 16420

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Guam 11/23/98 [1]

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2006-0193-F
jm601

RESTRICTION CODES

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

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EMBASSY OF THE UNITED STATES OF AMERICA
MAJURO - REPUBLIC OF THE MARSHALL ISLANDS - 96960

DATE: November 3, 1998

TO: Mr. Jeff Farrow

FAX: (202) 456-2889

FROM: Ambassador Joan M. Plaisted
American Embassy Majuro

FAX: (692) 247-4012
PHONE: (692) 247-4011
Office direct (692) 247-7532

THIS TRANSMISSION CONSISTS OF PAGE(s)

Dear Jeff,

Thanks for the information on the President's trip to Guam. As promised, here is the press report on the Micronesian leaders possible meeting with the President. As I mentioned on the phone, President Tito of Kiribati, who is the head of the Council of Micronesian Chief Executives, should be included in any reception.

I'd recommend two points to include in the President's speech:

1. The Compact itself is not up for renegotiation. Our great Free Association status remains. We will begin renegotiations on the provisions of the Compact that expire (mainly the economic provisions) beginning in October and November 1999 with the RMI and the FSM, respectively. (FYI: Foreign Minister Muller told the American Vice President of the Asian Development Bank who was just on island that the US would begin negotiations early and the RMI would deal with the Congress, not the administration. He also said they would get so much money from the US they won't need the ADB. So it is important to clarify our position from the top.)
2. We value the relationship and know the Freely Associated States do. We note the FSM and RMI's efforts to date and encourage more on public sector reform, government downsizing, and stimulating the private sector. (FYI: The FSM is further along than the RMI on making the necessary reforms). We urge them not to do things that could jeopardize their benefits and their efforts to stimulate the private sector, such as engaging in fraudulent passport sales and interfering in the judicial process. President Clinton should mention buzz words of "good governance" and/or "ethics in government" and the importance of an independent judiciary, accountability, and transparency to private sector development. (FYI: President Kabua just escaped a no confidence motion by one vote and could face another early next year. The High Court judge here is under attack from the President and Cabinet for ruling against the President when Kabua questioned the no confidence procedures the legislature followed. Kabua appealed the case to the Supreme Court and is now busy trying to select the judges who will hear it. He has removed one long-time member of the Judicial Service Commission, which has a say in selecting the judges, and replaced him with a crony.)

In sum, President Clinton's comments and actions need to be balanced and nuanced.

Let me get to work with you
Clinton
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DRAFT
Guam Deliverables

Micronesian Compact Impact Aid

Background:

The U.S. 'free association' compacts with Micronesia, the Marshall Islands, and Palau have enabled thousands of citizens of those states to move to Guam, Hawaii, and the Northern Mariana Islands. The Compact law authorizes reimbursement of the costs to their social programs.

\$4.6 million is being provided by Interior annually to Guam through FY01. Almost no funds are provided to Hawaii and the Northern Marianas. Gov. Gutierrez says that \$10 million is the minimum amount Guam needs. Gov. Cayetano says Hawaii should be reimbursed. The Northern Marianas is not being provided funding in light of the other assistance that it gets.

Proposal:

Announce a FY00 budget proposal to increase the reimbursement to Guam to \$10 million annually.

There are two options for funding this. One would take the \$5.4 million from the \$11 million a year general subsidy to the Northern Marianas, which is resisting the Administration's efforts to apply Federal immigration and minimum wage laws. Under this option, the other \$5.6 million could be allocated to Hawaii. The second option would require OMB to find the funding elsewhere.

Liberalize Trade Restrictions

Background:

Guam and the other smaller territorial jurisdictions are outside the customs territory of the U.S. but can import products into the U.S. market free of duties and quotas if the products meet specific tests -- 'substantial transformation' of foreign components into a new product and 'value added' locally to the components. Guam has sought the elimination of most of these restrictions.

Proposal:

We have cleared -- but not yet announced -- legislation to eliminate the value added requirements. It would not apply to garments in light of the abusive Northern Marianas garment industry.

Excess Military Property Conveyances

Background:

The military owns 44,800 acres in Guam. Most of the land does not appear to be used and is held for contingency purposes. Up to 25% is excess to military needs. Guamanians feel land was

unfairly acquired in the wake of the liberation of the island from enemy hands in World War Two. They also contend the military holdings limit the island's development. Some former owners feel they have missed out on fortunes others made by selling their land to Japanese investors.

A 1994 law providing for the transfer of 3,213 acres has not been fully implemented. Transfers have been complicated by Guamanian demands for the land to be given to former owners.

Base closings have made other land and facilities available.

Proposal:

The President would announce the following --

- The intent to transfer the 3,213 acres provided for by the 1994 law in 1999. *for as there on 1994 law*
- The availability of 561 acres of Air Force land on which 360 housing units are located. *— bureaucracy didn't move it.*
- The availability of 1,805 other AF acres.
- An effort to expedite the transfer of 2,031 acres at the former Naval Air Station adjacent to the commercial airport, including a 92 acre officer's family housing parcel. EDA consideration of \$1 million for infrastructure and marketing of this property.
- An effort to expedite the transfer of the former Navy Ship Repair Facility. Consideration of MarAd low-cost financing of the yard as a commercial operation. Military Sealift Command commitment for contracting the yard(?). Navy donation of a larger drydock.
- The availability of another 2,779 acres of Navy land.
- The actual transfer of 44 acres of former Navy land worth \$4.5 million for a waste treatment plant. *44 acres now*
- Plans to ask Congress to complete action on umbrella Guam excess land transfers legislation. (Passed the Senate this year.)
- A White House-led task force to ensure follow-up on the above.

DOD Ombudsman

Background:

Guam has a number of military issues and tensions between the community and field officers have increased.

Proposal:

DOD has agreed with our request to designate a member of the Secretary's staff to monitor and address issues raised by Guam.

U.S./Guam Relations

Background:

Guam has been disappointed with the Federal response to its "Commonwealth" proposals for national powers while under the U.S. flag and greater economic benefits. While it continues to pursue them, it has undertaken a second status initiative. This calls for a referendum next year on the internationally-recognized non-colonial statuses: free association; independence; and statehood. A problem with the new initiative is that the referendum would be limited to the plurality of the population who are descended from long-term residents. Many Guamanians do not seem to want a change in status as much as greater Federal attention and changed policies on economic matters.

Proposal:

The President would reiterate that the Administration has addressed Guam's Commonwealth proposals and Congress should now act. He would also recognize non-voting Guam's inherent right to full self-government if Guamanians want it. He would announce his intent to have the Executive Branch place a greater focus on the island's situation, needs, and proposals under the current status through a senior level interagency group co-chaired by the White House and Interior.

Coral Reef Initiative

Background:

The President announced a major initiative to protect coral reefs this year.

Proposal:

The President would announce that the FY00 budget will propose \$2 Million for reef protection near Guam and other territorial jurisdictions and the governors of the areas will be members of the initiative task force.

Micronesia/Marshall Islands Aid Package

Background:

The Presidents of Micronesia and the Marshall Islands will be present on Guam. Our \$2.5 billion, 15 year assistance commitment to these freely associated states expires in 2001. The compact with them requires negotiations on the expiring provisions beginning in 1999.

Proposal:

The President would announce the intent to begin talks with the areas on a post 2001 assistance package.

pen
Palau Road

Background:

The U.S. committed in the free association compact with Palau to build a road through much of its largest -- but largely undeveloped -- island. The President of Palau will also be present in Guam.

Proposal:

The President would announce a \$150 million plan for the road.

THE FOLLOWING MORE MINOR INITIATIVES COULD ALSO BE ANNOUNCED.

Water/Sewage Grant

Background:

EPA has been providing Guam \$2 million a year to construct water and sewage facilities.

Proposal:

The President would announce an increase in the grant to \$3 million this year.

Economic Development Plan

Background:

The Asian economic downturn has depressed Guam's major industry: tourism. Military activity has also been a major component of Guam's economy. The military has downsized operations.

Proposal: The Interior Department will fund a major study of Guam's economic options. This would be part of a \$1 million increase in funds for technical assistance to the small territories.

FRAMING SPEECH: AMERICA'S NEXT AGENDA

Purpose

This 'framing' speech will be an opportunity for the President to interpret the results of the election (perhaps implicitly), and to spell out what we believe the nation's upcoming agenda should be. This speech is not a 'mini State of the Union' – the policies will not be new – but will frame what you believe the next several months should be about. (In short, even if they want to move forward on investigations, we want to move forward on Social Security and other matters.) It should remind people of just how successful the President has been, and make clear that he has more work to do.

Themes and outline

We are now barely a year away from the new millennium. Six years ago, America was sluggish, falling behind in the world, seemingly unable to grapple with longstanding problems. Today, America is a different place. We have built a new prosperity, made remarkable progress over social problems, and renewed progressive government. Our vision has now swept the world. Now we have a duty to seize these good times – to move forward or risk falling back. Recent turmoil in the world economy reminds us that prosperity is never simply guaranteed; we must continue to steer the nation through new and complex challenges at every turn.

The election spoke loudly: the American people do not want their leaders to indulge in the luxury of partisanship. The political season is now over. These must be months of action and achievement, not stalemate and partisanship. Here are the immediate priorities over the next several months:

1. Intensifying the effort to save Social Security – discuss the conference and its goals.
2. Pressing for peace in the Middle East and Kosovo (including the trip to Gaza).
3. Acting to strengthen the economy -- continuing to rally the leading economies to address the financial crisis (preview the APEC trip).
4. Education (especially school construction) -- pledge to unveil new proposals in SOTU
5. Health care (Patient's Bill of Rights).

Does it also make sense to discuss campaign finance (in the light of the massive spending by GOP and affiliated interest groups), the minimum wage and/or tobacco (the other elements of the campaign litany)? If we do these, we will need to figure out how to frame them, since there won't be much action to take before next year.

Withdrawal/Redaction Sheet

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

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Guam, Political Status, Reform])
OA/Box Number: 250000

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[4/14/1994 - 3/5/1999]

Whitney Ross
2006-0193-F
wr599

RESTRICTION CODES

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

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RECORD TYPE: PRESIDENTIAL (RECONSTRUCTED EMAIL)

CREATOR: Donsia Strong (STRONG_D) (OPD)

CREATION DATE/TIME: 14-APR-1994 09:09:00.00

SUBJECT: insular territories

TO: Carol H. Rasco (RASCO_C) (OPD)

READ: UNKNOWN

TEXT:

You may recall late last year DPC and DOI discussed establishing, by EO, an interagency council to coordinate and address insular territories policy. This was prompted by legislation which would statutorily establish and dictate its operation.

By way of background, during the previous administrations, DOI's policy towards the territories was abysmal and maybe hostile. Many sought to abolish the Office of Insular Territories Administration in DOI. In addition, the territorial executives have no mechanism to contact other executive branch officials but had to rely on the delegates.

After we had gone some way toward preparing and vetting a draft EO, the House delegates objected. In my view, this was brought on solely by one House staffer (DeLugo), Jeff Farrow, who 1) held the WH insular policy job during Carter; 2) worked on the transition and expected a WH job; and 3) is now working over at Commerce and co-chairing with Marcia Hale, a cmte on Puerto Rico policy and politics. (The Senate is miffed because a lame duck non voting delegate gets more reaction from the WH than more powerful Senators--Moynihan and Johnston) Therefore, we never established a mechanism for ensuring that policy which affected insular territories was affected.

DOI would like policies, which are currently being reviewed and developed in small 2 agency working groups, brought before the DPC for resolution. I do not believe they are any longer looking for a formalized structure to have issues coordinated and discussed.

With respect to Guam, their feeling is that the political status question should be handled by Intergovernmental but brought before the DPC for final resolution. The complicating issue here is the DOD wants to preserve and protect its use of Guam for military use no matter what.

I spoke to House staffers about the issue and Leslie Turner. In my opinion, we can easily resolve this issue by occasionally putting insular issues on Monday DPC agenda, show some resolution successes and make the Hill happy. One issue sure to affect the territories is welfare reform and changes to the formula. We should make sure Leslie is briefed at the appropriate time so she can help defend it.

You may want to inform ASec'y Turner that when the working groups have completed their work, she should ask Sec'y Babbitt to list the matter for the DPC agenda and then attend if he won't.

Let me know if there is anything you want me to do.

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001. email	Adam Kreisel to Eri O'Connor, re: Rep. Underwood (1 page)	3/23/1995	P5
002. email	Grace Garcia to Stefanie Sanford [partial] (1 page)	1/9/1997	P6/b(6)

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Political Status, Reform])
OA/Box Number: 500000

FOLDER TITLE:

[3/25/1994 - 6/13/1997]

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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]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Adam R. Kreisel (KREISEL_A) (WHO)

CREATION DATE/TIME: 23-MAR-1995 11:36:41.52

SUBJECT: Rep. Underwood

TO: Erin A. O'Connor

(OCONNOR_E) (WHO)

READ: 23-MAR-1995 12:21:08.51

TEXT:

Erin: As you know, Rep. Underwood is trying to get meet with Leon regarding the Guam political status negotiations. John on Underwood's staff told me that both the Congressman and the Administration are starting to get bad press in Guam for failing to resolve this. Underwood is going back to Guam on Saturday and would like to meet with Leon before he leaves.

Does Pat think that he should do this meeting instead?

Contact: John Witt 225-1188

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Fred DuVal to Maurice Daniel (1 page)	11/5/1997	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Political Status, Reform])
OA/Box Number: 500000

FOLDER TITLE:

[6/13/1997 - 10/5/1998]

CLINTON LIBRARY PHOTOCOPY

Whitney Ross
2006-0193-F
wr601

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

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

RR. Document will be reviewed upon request.

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

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

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 5-NOV-1997 17:51:04.00

SUBJECT: Re:

TO: Maurice Daniel (CN=Maurice Daniel/O=OVP @ OVP [UNKNOWN])

READ:UNKNOWN

CC: Craig T. Smith (CN=Craig T. Smith/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

Well, on the theory that he has to refuel somewhere , it is an option. In fact, you might even consider overnighing there and acclimating to the time change before the three hour flight to Japan.

The history of the politics of Guam is important and unfortunately, complicated. But in short, the incumbent Governor is a real friend of the Presidents. His great hope has been that the US federal government would address the aspirations of the citizens in Guam for a new political status vis-a-vie the US. We have been unable to satisfy these hopes for a complicated set of proper constitutional, legal and policy reasons. This being the case, we have sought to communicate our concern about Guam and reinforce the importance of Guamanians as US citizens and as a part of our strategic geopositioning in the eastern pacific theater (did you like that? Impressed? I love sounding like a former state dept guy!)

They have been badly neglected, but there are some real politics here. Craig has history on the subject and will have an informed opinion. NOTE CRAIG...the fact that we came down the way we did in hill testimony last week should put alot of issues behind us. Let's discuss...

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION

001. email	Jeffrey Farrow to Michael Ahola, re: V.I. budget (1 page)	6/25/1999	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Political Status, Reform])
OA/Box Number: 500000

FOLDER TITLE:

[6/7/1999 - 3/10/2000]

CLINTON LIBRARY PHOTOCOPY

Whitney Ross
2006-0193-F
wr602

RESTRICTION CODES

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

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

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

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.

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]
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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]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 25-JUN-1999 11:40:28.00

SUBJECT: Re: V.I. budget

TO: Michael J. Ahola (CN=Michael J. Ahola/OU=ONDCP/O=EOP@EOP [ONDCP])

READ: UNKNOWN

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

READ: UNKNOWN

James Kazel (James Kazel [OMB])

READ: UNKNOWN

TEXT:

Good question and thanks for not losing interest.

The wage rollback was a key element of Turnbull's plan but had not been well thought out in terms of political viability. He needs to take politically tough steps but still steps that can be accomplished. He's committed to substitute other measures to save at least as much money. Interior staff were put off by being surprised about his pullback, but Babbitt recognized Turnbull needs some flexibility on how to make savings (so long as they are made) in a meeting yesterday.

The Governor did not like the optics of a Federal board per se in the meeting but did not object to the function within the Federal Government. Senate Interior Approps just reported \$5.4 for VI capital improvements contingent on the VI meeting Interior or other budgetary reform stipulations. (The problem with this is that they took it from funds the President personally proposed for Guam.) Interior is drafting a bill that would provide a new \$10 million for VI capital improvements if the VI meets Federally stipulated budgetary reform benchmarks. We haven't met because they've taken so long in deciding on what they want to propose. The Governor told me last night he's gotten the message that the VI has to help itself first before expecting much aid here and needs to do more to convey that to the legislature, etc. He and the Congresswoman will briefly see the President late today and I've given the President a couple of talking points on this. The Congresswoman privately agrees the Governor needs to be stronger.

The VI still wants to push for FEMA loan forgiveness. (The capital improvement money won't solve its debt burden problem.) I see us exploring other debt aid as the VI makes real spending and taxing reforms.

A draft from Interior will give us the basis to resume our discussions.

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Keith Parsky to Jeffrey Farrow, re: Guam (2 pages)	6/19/2000	P5
002. email	Keith Parsky to Jeffrey Farrow, re: Guam (3 pages)	6/22/2000	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Political Status, Reform])
OA/Box Number: 500000

FOLDER TITLE:

[5/24/2000 - 6/23/2000]

CLINTON LIBRARY PHOTOCOPY

Whitney Ross
2006-0193-F
wr603

RESTRICTION CODES

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

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

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

RR. Document will be reviewed upon request.

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

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- 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]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Keith_Parsky@ios.doi.gov (Keith_Parsky@ios.doi.gov [UNKNOWN])

CREATION DATE/TIME:19-JUN-2000 09:41:57.00

SUBJECT:

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

READ:UNKNOWN

CC: Sandra_King@ios.doi.gov (Sandra_King@ios.doi.gov [UNKNOWN])

READ:UNKNOWN

CC: Danny_Aranza@ios.doi.gov (Danny_Aranza@ios.doi.gov [UNKNOWN])

READ:UNKNOWN

TEXT:

A.3. Second Action Item: Haven't we finished reviewing HR 2462 sec 3?
No- there is another meeting contemplated, a SAP to be fashioned(possibly 2 different SAPs-one for House and one for Senate)

If the concern here is where the issue stands, the SAPS will reflect exactly where the Administration stands on the issue of Section three- and it will be written so as to say, if Guam takes certain actions to cure the local law's applicability, then the Administration supports the proposal- if Guam does not take this action, then the Administration is against the section. Since the SAP has not been written at this time, the entry on the IGIA Report had to be general.

But Keith, we don't anticipate changing our position do we?

I don't think so.

A.4. Third Item: Haven't the DoJ, VI, Guam meetings already taken place and the reimbursement figures been discussed?

NOT TO MY KNOWLEDGE- the meetings were between VI and all Fed. departments who are owed money by the VI to arrive at a comprehensive way to handle the VI requests for favorable treatment.

Keith, I think both Guam and the VI have met with DoJ. DoJ sent someone from the Marshals Service to Guam without resolution. Jack Lew wrote Guam. I called Mary Eva Candon and set up conversations and heard a couple of reports from INS they were progressing. VI AG came up here and VI has exchanged correspondence with BoP. Peter Hiebert has been working on this. Can you check status?

Will accomplish today-between Edgar Johnson and me.

A.7. Second Action Item: Should we say OIA is seeking favorable comment on legislation before clearance?

Yes-why not?

Keith, we should reflect an Administration position and not set up or project conflict. The Administration may not agree to the proposal.

I have changed this language to take out preferences to favorable. See the fix, and let me know if this does not work for you.

A.13. Second Action Item: Doesn't the law (the 76 territories act I think) already provide for this?
I do not know this- but I will ask around here on this one.
Keith, have you checked yet?

Yes, Steve Sander and I both looked through the '76 zTerritories' Act and found nothing on point. On an unrelated note, I did find interesting language in P.L. 95-134: October 15, 1977, 91 Stst.1163 at Title IV- Sec. 402 which authorized compensation for Guam and the VI as a result of unexpected revenue loss occasioned by the Tax Reduction Acts of 1975 abd the Tax Reform Act of 1976, and at Title V- Sec 501 I found language which appeared to authorize the administrative authority to waive matching requirements

AS.9. Action Item; Didn't ASG and FEMA meet a few weeks ago?

Not to my knowledge. The only meeting was to present the VI arguments. Keith, ASG Counsel and Treasurer met with FEMA Dir. Witt some weeks ago. Jane Leipsen accompanied them.

Nik Pul anad I will have this answered by today COB as well.

AS.10. Action Item: Should be singular.DONE What monitoring is contemplated?

Purposely vague-not sure other than keeping tabs on any developments. Keith, we should say "work for" vs monitor.

Language changed to reflect your comment.

GUAM.2. Action Item: Make title singular. Done. What are the "relevant functional disciplines"?

Don't know- this was the DOD language that DOD insisted upon. They would not entertain any change to this language.

Keith, tell them they need to. How about "offices"?

I made this change and will be talking to Lori Hancock about this today. I believe she will agree to the change, but they were very insistent about this language before. I will mention your name in the discussion.

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Keith_Parsky@ios.doi.gov (Keith_Parsky@ios.doi.gov [UNKNOWN])

CREATION DATE/TIME: 22-JUN-2000 14:25:25.00

SUBJECT:

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

READ: UNKNOWN

CC: Nikolao_Pula@ios.doi.gov (Nikolao_Pula@ios.doi.gov [UNKNOWN])

READ: UNKNOWN

CC: Danny_Aranza@ios.doi.gov (Danny_Aranza@ios.doi.gov [UNKNOWN])

READ: UNKNOWN

TEXT:

Jeff:

See AS #9- still waiting for G-#2

Keith Parsky

06/20/2000 05:55 PM

To: Jeffrey_L._Farrow@who.eop.gov

cc: Danny_Aranza/OIA/OS/DOI@DOI, Nikolao_Pula/OIA/OS/DOI@DOI

Subject: IGIA fixes- still awaiting one item- not re-submitted yet

A.3. Second Action Item: Haven't we finished reviewing HR 2462 sec 3?

No- there is another meeting contemplated, a SAP to be fashioned (possibly 2

different SAPs-one for House and one for Senate)

If the concern here is where the issue stands, the SAPS will reflect exactly where the Administration stands on the issue of Section three- and it will be written so as to say, if Guam takes certain actions to cure the local law's applicability, then the Administration supports the proposal- if Guam does not take this action, then the Administration is against the section. Since the SAP has not been written at this time, the entry on the IGIA Report had to be general.

But Keith, we don't anticipate changing our position do we?

I don't think so.

A.4. Third Item: Haven't the DoJ, VI, Guam meetings already taken place and the reimbursement figures been discussed?

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Keith, I think both Guam and the VI have met with DoJ. DoJ sent someone from the Marshals Service to Guam without resolution. Jack Lew wrote Guam. I called Mary Eva Candon and set up conversations and heard a couple of

reports from INS they were progressing. VI AG came up here and VI has exchanged correspondence with BoP. Peter Hiebert has been working on this. Can you check status?

On April 11, 2000, Virgin Islands' Attorney General Stridiron and Bureau of Prisons/Department of Justice Director Sawyer, memorialized an agreement which

provides, among other things, that the Government of the Virgin Islands will remit

timely payment for monthly charges on a current basis, for housing Virgin Islands prisoners beginning with the March 2000 invoice. The agreement further provides that the Government of the Virgin Islands will take approximately 10 inmates out of Bureau of Prisons' custody each month, until all prisoners are returned to the Virgin Islands. The total amount of such delinquent debt is \$9.75 million. The Bureau of Prisons/Department of Justice will continue to work with the Virgin Islands' officials regarding the return of their inmates and will work to develop a plan which resolves the delinquent debt issue.

A.7. Second Action Item: Should we say OIA is seeking favorable comment on legislation before clearance?

Yes-why not?

Keith, we should reflect an Administration position and not set up or project conflict. The Administration may not agree to the proposal.

I have changed this language to take out references to favorable. See the fix, and let me know if this does not work for you.

A.13. Second Action Item: Doesn't the law (the 76 territories act I think)

already provide for this?

I do not know this- but I will ask around here on this one.

Keith, have you checked yet?

Yes, Steve Sander and I both looked through the '76 territories' Act and found nothing on point. On an unrelated note, I did find interesting language in P.L. 95-134: October 15, 1977, 91 Stat.1163 at Title IV- Sec. 402 which authorized compensation for Guam and the VI as a result of unexpected revenue loss occasioned by the Tax Reduction Acts of 1975 and the Tax Reform Act of 1976, and at Title V- Sec 501 I found language which appeared to authorize the administrative authority to waive matching requirements.

AS.9. 9. Forgiveness by FEMA of disaster assistance loans

ASG would like forgiveness of certain FEMA debts incurred after Hurricanes.

A February 4, 2000 working meeting was arranged between American Samoa's Governor and FEMA followed up by letter dated April 7, 2000 by FEMA to the Governor. FEMA's Pacific Area Office was instructed to work with American Samoa to resolve issues.

Action Item:

T abLetter dated May 3, 2000 from FEMA to American Samoa government proposed a resolution of American Samoa's obligations to FEMA which American Samoa will appeal. The IGIA will facilitate the negotiations between FEMA and American Samoa and help bring them to resolution.

AS.10. Action Item: Should be singular. DONE What monitoring is contemplated?

Purposely vague-not sure other than keeping tabs on any developments. Keith, we should say "work for" vs monitor.

Language changed to reflect your comment.

GUAM.2. Action Item: Make title singular. Done. What are the "relevant functional disciplines"?

Don't know- this was the DOD language that DOD insisted upon. They would not entertain any change to this language.

Keith, tell them they need to. How about "offices"?

I made this change and will be talking to Lori Hendricks about this again today. She assured me that she will have an answer tomorrow. (Thursday, June 22) I believe she will agree to the change, but they were very insistent about this language before. I will mention your name in the discussion.

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Mary Smith to Maria Echaveste, re: Hearing news [partial] (1 page)	9/5/2000	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Political Status, Reform])
OA/Box Number: 500000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[7/31/2000 - 10/4/2000]

Whitney Ross
2006-0193-F
wr604

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
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C. Closed in accordance with restrictions contained in donor's deed of gift.

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

RR. Document will be reviewed upon request.

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

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- 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]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mary L. Smith (CN=Mary L. Smith/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 5-SEP-2000 14:01:32.00

SUBJECT: Re: Hearing news

TO: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: laura efurd (CN=laura efurd/OU=who/O=eop@eop [who])
READ:UNKNOWN

CC: jeffrey l. farrow (CN=jeffrey l. farrow/OU=who/O=eop@eop [who])
READ:UNKNOWN

CC: irene bueno (CN=irene bueno/OU=who/O=eop@eop [who])
READ:UNKNOWN

CC: lynn g. cutler (CN=lynn g. cutler/OU=who/O=eop@eop [who])
READ:UNKNOWN

TEXT:

I think we were very clear in our testimony and in the report that we cannot support or condone breaking away from the United States, and that this group advocating a separate nation-state should not read our position as supporting them. I agree with Lynn that Akaka and Inouye will have to manage this faction, but I think that the majority view in Hawaii is in favor of the legislation that Akaka introduced. I think that Akaka and Inouye are going to try to get hearings and try to get this passed this year. I think that is unlikely though as it seems that this legislation needs to percolate a bit longer. I don't think there is anything we need to do at this point except be supportive of the Hill

Maria Echaveste
09/05/2000 11:41:47 AM
Record Type: Record

To: Lynn G. Cutler/WHO/EOP@EOP, Jeffrey L. Farrow/WHO/EOP@EOP, Mary L. Smith/WHO/EOP@EOP
cc: Irene Bueno/WHO/EOP@EOP, Laura Efurd/WHO/EOP@EOP
bcc:
Subject: Re: Hearing news

well, well--this story on hawaiian hearing was quite interesting--perhaps, the state dept was right to be concerned about this bill--what do you all think? What are the next steps here?

Lynn G. Cutler
09/05/2000 11:20:51 AM

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. email	Emory Mayfield to Aviva Steinberg [partial] (1 page)	1/2/1998	P6/b(6)
001b. email	Emory Mayfield to Jeffrey Farrow [partial] (1 page)	1/7/1998	P6/b(6)
001c. email	Fred Duval to Jeffrey Farrow [partial] (1 page)	1/8/1998	P6/b(6)
001d. email	Suzanne Dale to Jeffrey Farrow [partial] (1 page)	1/15/1998	P6/b(6)
001e. email	Fred Duval to TJ Glauthier, re: vetting (1 page)	1/15/1998	P5
001f. email	Fred Duval to Mickey Ibarra, re: SOTU (1 page)	1/16/1998	P5
001g. email	Joseph Minarik to Jeffrey Farrow, re: Tobacco Taxes (1 page)	1/16/1998	P5
001h. email	Fred Duval to Jeffrey Farrow, re: Russello (1 page)	1/21/1998	P5
001i. email	Fred Duval to Jeffrey Farrow, re: Our SOU invitation to Rossello (1 page)	1/21/1998	P5
001j. email	Janet Murguia to Michael Waldman, re: Puerto Rico/SOU (1 page)	1/22/1998	P5
001k. email	WAVES confirmation appointment for Solermari [partial] (1 page)	1/27/1998	P6/b(6), b(7)(E)

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Political Status, Reform])
OA/Box Number: 500000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[1/12/2001 - 1/18/2001]

Whitney Ross
2006-0193-F
wr605

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
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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]

Message Sent

To:

Emily Bromberg/WHO/EOP@EOP
Lynn G. Cutler/WHO/EOP@EOP
Fred DuVal/WHO/EOP@EOP
Sky Gallegos/WHO/EOP@EOP
Cecily C. Williams/WHO/EOP@EOP
Mona G. Mohib/WHO/EOP@EOP
Emory L. Mayfield/WHO/EOP@EOP
Jeffrey L. Farrow/WHO/EOP@EOP

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

From: E. Irene James on 01/15/98 05:09:48 PM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re: IRC Collections for Puerto Rico

Thanks for all your help on this!

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/15/98 05:39:06 PM

Record Type: Record

To: T J. Glauthier/OMB/EOP@EOP
cc: Jeffrey L. Farrow/WHO/EOP@EOP
Subject: Re:

me too, Farrow is vetting but I think what he has found is that the Gov
cares more about leveraging the pass-through than the ultimate
beneficiary. Will get you final OK asap.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/15/98 05:47:21 PM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re:

yes, he said "sounds good to me but I am surprised the Gov will buy it"

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/15/98 06:57:48 PM

Record Type: Record

CLINTON LIBRARY PHOTOCOPY

do memo from us to Waldman and Lewis. Copy Begala, Blumenthal, Verveer, Lovell, Smith, Murguia, Silverman, Echeveste, Ibarra.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/16/98 11:32:07 AM

Record Type: Record

To: Mickey Ibarra/WHO/EOP@EOP
cc: Jeffrey L. Farrow/WHO/EOP@EOP, Emily Bromberg/WHO/EOP@EOP
Subject:

Jeff and I would like to prepare a memo to the SOU team recommending that POTUS address Puerto Rico in the SOU. Murguia supoports. Three potential hooks: (1) Millenium, (2) Race, or (3) that the territories are left out of all the new social program initiatives because of their undefined status

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/16/98 01:07:03 PM

Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re:

----- Forwarded by Fred Duval/WHO/EOP on 01/16/98 01:01
PM -----

Emily Bromberg
01/16/98 12:10:46 PM
Record Type: Record

To: Fred DuVal/WHO/EOP
cc:
Subject: Re:

but not state parity, right? i think we are right on the policy, but i'm not sure what the argument is for inclusion in SOU.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/16/98 01:07:22 PM

Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re:

----- Forwarded by Fred Duval/WHO/EOP on 01/16/98 01:01
PM -----

Emily Bromberg
01/16/98 11:58:07 AM
Record Type: Record

To: Fred DuVal/WHO/EOP
cc:
Subject: Re:

yes, but why would the president point this out in the SOU?

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Joseph J. Minarik

01/16/98 03:14:09 PM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc: fred duval/who/eop@eop, janet murguia/who/eop@eop
Subject: Re: Tobacco taxes

Happy to talk, though today is a mess.

FYI: The language in the budget book will make reference to tobacco settlement legislation. The State AGs negotiated a settlement with the companies, but its provisions required Federal legislation to make it work, hence the role of Federal legislation. The settlement made reference to lump-sum payments from the companies to some recipient entity (not specified), not increases in tobacco taxes per se. Accordingly, we make no reference to any tobacco "tax" in the budget.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

From: E. Irene James on 01/16/98 06:14:00 PM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re: Marianas numbers

CLINTON LIBRARY PHOTOCOPY

It went up to \$250 M beginning in FY 1999, and remains at that level through FY 2003.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject:

We need to clarify the Russello seating issue. We can get him confirmed standing room or a wait list for random balcony seating, or ask Gore for one of his seats (although he has a lot of demand to handle). Everyone asks - why do we have to do this since he - unlike everyone else - has floor privileges.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 01:10:34 PM

Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re: Rossello SOU seating

I'll put him on the back-up list for gallery (will depend on declines). What do we do if he doesn't get in? - which is likely. Should we line up back-up now? I think Alvaro should get his lobbyists on this -

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 02:06:53 PM

Record Type: Record

To: Mickey Ibarra/WHO/EOP@EOP
cc: Jeffrey L. Farrow/WHO/EOP@EOP
Subject:

I don't think we should use one of our two seats for Russello. We have other vehicles and will work it out.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 03:54:43 PM

Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re: Gutierrez

what?

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 03:56:13 PM

CLINTON LIBRARY PHOTOCOPY

Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: rum tax

when and how would you propsoe we roll this out?

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 03:58:00 PM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re: Gutierrez

got it: I was thinking you were refering to Gov of Guam!

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 07:06:40 PM

Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject: Re: Our SOU invitation to Rossello

a littlrle disinguinueness. Alvaro said they were coming weather or not the DGA event hit critickalk mass. I spoke with him and if the Gore mtg occurs we have our line. Our invitation was premised on the fact that he has floor privileges - if he doesn't want to use it I don't know if we should find him an alternative. Most folks don't have ANY options.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 07:11:50 PM

Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc:
Subject:

If the VP mtg doesnt happen, who wshould tell Russello ab Rum tax...OMB official or Interior official. I like Raines or Lew. what do you think?

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Fred Duval 01/21/98 07:56:47 PM

CLINTON LIBRARY PHOTOCOPY

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

JANET MURGUIA
01/22/98 06:04:17 PM
Record Type: Record

To: Michael Waldman/WHO/EOP@EOP, Craig T. Smith/WHO/EOP@EOP
cc: Fred DuVal/WHO/EOP@EOP, Jeffrey L. Farrow/WHO/EOP@EOP
Subject: Puerto Rico/SOU

I suggest the following regarding the language that Fred Duval and Jeff Farrow gave you on the Puerto Rico status problem. It would broaden the Congressional appeal. (There are a large number of sponsors of the current legislation on both sides of the aisle but a few opponents of statehood -- one of the options we support being included). I suggest:

Delete "complete its work on bipartisan legislation to" and "have local self-government."

You could also substitute "provide Puerto Ricans with the options for their islands' future status" after "finally" (but its ok either way).

It would then read:

1998 is the Centennial of the acquisition of Puerto Rico. Its nearly four million residents are citizens, but the islands are not fully a part of our country. As we are the champion of democracy around the globe, so must we be here at home. Congress should finally provide Puerto Ricans with the options for their islands' future status.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 05:35 PM -----

Kevin S. Moran
01/22/98 07:36:04 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: President's Initiative on Race Talking Points

Talking Points and Accomplishments Documents for

ONE AMERICA IN THE 21ST CENTURY:
The President's Initiative On Race

CLINTON LIBRARY PHOTOCOPY

Attached find the following documents:

A one-page, talking-points document for discussing the broad outlines of the President's Initiative on Race. These talking points should be useful

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
12/11/97 04:01:30 PM
Record Type: Record

To: Suzanne Dale/WHO/EOP
cc: Fred DuVal/WHO/EOP
Subject: 12/12/97 Weekly

Insular Affairs

Puerto Rico Governor Pedro Rossello (D/NP) became President of the Council of State Governments and began taking over the chairmanship of the DGA. Puerto Rico Senator Kenneth McClintock, head of the pro-statehood minority of the islands' 1996 Democratic Convention delegation, became Chairman-Elect of the Council of State Governments.

With Legislative Affairs, we continued work with agencies in follow-up to Virgin Islands Delegate Donna Christian-Green's (D) request to you for aid for the territory. We are also exploring aid requests from Governor Roy Schneider (I) and working with other offices on issues related to your upcoming trip to the islands.

At Puerto Rico Resident Commissioner Carlos Romero-Barcelo's (D) request, we are working with USTR on litigation in Belgium challenging the labeling of Puerto Rico products as "Made in the USA." Support of the use of the label is being communicated to Belgium.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
12/12/97 02:55:43 PM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Suzanne Dale/WHO/EOP
cc: Fred DuVal/WHO/EOP
Subject: Addition to Weekly

Fred thought that we should add an item on our major insular budget issues. I agree.

We are working to ensure that the FY '99 budget is fulfills your commitments to and addresses the most critical needs of the country's four million unrepresented citizens in the insular areas. We are recommending that it: (1) not drop your initiative to provide a investment incentive primarily based on wages paid in Puerto Rico; (2) provide the equitable Children's Health Care funding that you pledged to work for when Congress unilaterally gave the areas 1/6 of the share of the new program that you proposed; (3) slightly increase the caps on Medicaid in the

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. email	Jeffrey Farrow to Suzanne Dale, re: 12/12/97 Weekly (1 page)	12/11/1997	P5
001b. email	Jeffrey Farrow to Suzanne Dale [partial] (1 page)	1/15/1998	P6/b(6)
001c. email	Jeffrey Farrow to Mickey Ibarra, re: Gov. Gutierrez (1 page)	6/5/1998	P5
001d. email	Jeffrey Farrow to William White Jr., re: Weekly (1 page)	7/9/1998	P5
001e. email	Jeffrey Farrow to Fred Duval, re: POTUS on Insular (2 pages)	10/14/1998	P5
001f. email	Jeffrey Farrow to Maria Soto [partial] (1 page)	2/26/1999	P6/b(6)
001g. email	Jeffrey Farrow to Maria Soto, re: Weekly (2 pages)	4/16/1999	P5
001h. email	Jeffrey Farrow to William White, re: Weekly (1 page)	7/15/1999	P5
001i. email	Jeffrey Farrow to Maria Echaveste, re: Vieques and Poster (1 page)	8/4/1999	P5
001j. email	Jeffrey Farrow to Jacqueline Lain, re: Weekly (2 pages)	1/6/2000	P5
001k. email	Jacqueuline Lain to Jeffrey Farrow, re: Weekly (1 page)	1/21/2000	P5

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Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Political Status, Reform])
OA/Box Number: 500000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[1/18/2001] [3]

Whitney Ross
2006-0193-F
wr608

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]

Jeffrey L. Farrow
06/05/98 03:05:10 PM
Record Type: Record

To: Fred DuVal/WHO/EOP
cc:
Subject: Gutierrez Call

Are we sure we can say there'll be trip later this year? The president's comment on the Weekly as that we're not ready and something Gagnon of NSC said makes me question this.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
06/05/98 05:30:44 PM
Record Type: Record

To: Mickey Ibarra/WHO/EOP
cc: Fred DuVal/WHO/EOP
Subject: URGENT- Gov. Gutierrez call recommendation

Fred and I think your goal in talking to Podesta and Melanne about the Guam visit should be to resolve whether it will happen rather than to have a call made now.

In response to the last Weekly, the President agreed that the announcement with Gov. Gutierrez needed to happen but said it couldn't right now because of the uncertainty re India, etc. Fred and I have explained this to Gov. Gutierrez's reps and they understand.

We do, though, need closure on the question of how the President relates to the Governor ASAP because of the Governor's other requests. We think that concerns about contributions and the Commonwealth bill policies were obviated by the positions we took but we will continue to encounter roadblocks and frustrate Gutierrez until others here agree. And, if the final decision is opposed to interaction with Gutierrez, we need to know so we know how to handle other requests.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
06/11/98 05:59:56 PM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: William H. White Jr./WHO/EOP
cc: Fred DuVal/WHO/EOP, Emory L. Mayfield/WHO/EOP
Subject: Weekly

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
07/09/98 11:00:22 AM
Record Type: Record

To: William H. White Jr./WHO/EOP
cc: Fred DuVal/WHO/EOP, Emory L. Mayfield/WHO/EOP
Subject: Weekly

I submitted this late last week. Include this week if it wasn't sent to Mickey last week. I will also have a graph on the Puerto Rico strike.

Insular Affairs

Secretary of the Interior Babbitt, who is responsible for general relations with Guam, the Northern Marianas, Samoa, and the Virgin Islands, proposed the creation of an interagency group concerning those areas under the co-chairmanship of his office and mine. It would be similar to the group you established relating to Puerto Rico, for which the White House has direct policy responsibility. The proposal responds to long-standing insular requests, including one made during your recent meeting with the Congressional Asian-Pacific Islanders Caucus.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
07/09/98 11:52:07 AM
Record Type: Record

To: William H. White Jr./WHO/EOP
cc: Fred DuVal/WHO/EOP, Emory L. Mayfield/WHO/EOP
Subject: Weekly

Puerto Rico unions conducted a 48 hour work stoppage in opposition to the insular government's decision to sell a controlling interest in the Islands' telephone company. It supported a strike by phone company workers. It was also a rallying point for Commonwealth party opposition to Governor Pedro Rossello (D) even though his Commonwealth party predecessor had also tried to sell the company. Rossello is currently engaged in confidential talks with phone company unions on employment/unionization issues.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow

CLINTON LIBRARY PHOTOCOPY

Jeffrey L. Farrow
10/14/98 12:28:28 PM
Record Type: Record

To: Fred DuVal/WHO/EOP
cc: Emory L. Mayfield/WHO/EOP
Subject: POTUS on Insular \$

I want to make sure you saw that the President noted on the Weekly that our FY99 spending negotiators should "try to do" (underscored thrice) his Puerto Rico/VI rum tax and Territories CHIP proposals.

Any ideas for making sure our negotiators are aware of his directive? I've sent e-mails re it to Maria E. and Janet and Danny Mendelson and Joe Minarik of OMB.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
10/17/98 12:23:08 PM
Record Type: Record

To: Mickey Ibarra/WHO/EOP
cc:
Subject: Weekly

Did you finish Weekly? I can add a bullet or two quickly if not. (I tried to get through yesterday from PR but it wasn't possible.)

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
10/17/98 02:23:25 PM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Mickey Ibarra/WHO/EOP
cc:
Subject: Re: Weekly

Overall the trip was good and positive but there were some glitches that were lesser in real importance.

On the positive side:
Witt personally went down, learned about, and got committed to the situation;
it highlighted our efforts;
we got some problems solved;

the insular government and Cong. Romero appreciated it; we clarified issues re several concerns that had become public; and we touched Commonwealther bases.

On the glitches:

(1) Sec. Cuomo is upset. (A) He wasn't invited (even though Aida was along). (B) An AP story suggests Witt committed to a 50,000 home building program (that Cuomo is pushing with Gov. Rossello). I think the truth is that Rossello's COS announced it (in Spanish), Witt then said we were working together, and a reporter suggested it was a joint announcement. (I'm waiting to see the clip.)

(2) The House Speaker (an RNC member) refused to go to a meeting with the joint Legislature leadership because we (including Romero) settled on it being in the Senate President's office (a Dem by the way). He then declined to met with Witt.

I am not concerned about this: He looks petty. His fight is with the Senate President. We accomplished the purpose of the meeting -- meeting with the Commonwealth party leaders who statehooders didn't want us to see. (Among those who wanted this were Melanne, who responded to a letter to the First Lady with a call and got harangued by a Commonwealther.) James Lee and I also thought we needed to see the Commonwealthers -- to eliminate complaints about lack of access and set them straight on the facts. We got it down without offending the Gov's people, etc.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
10/19/98 11:23:11 AM
Record Type: Record

To: Mickey Ibarra/WHO/EOP
cc: Janet Murguia/WHO/EOP, Fred DuVal/WHO/EOP
Subject: Re: Weekly

Thanks for talking to Sec. Rubin re rum tax.

Re Joe Crapa: I want to do letters to a few Members of Congress who were key and thought I'd include him. Janet, in particular we needed to tell Schumer he would get some credit re territories CHIP because D'Amato was pushing so hard. I've tried to do that with a couple of Puerto Rico reporters but a POTUS letter would be good for him to have.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
10/24/98 10:50:13 AM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Maria E. Soto/WHO/EOP, /WHO/EOP
cc:
Subject: Weekly

The Coast Guard intercepted a boat with 152 Chinese citizens apparently bound for Guam to claim asylum on U.S. soil. Governor Carl Gutierrez (D) and Congressman Robert Underwood (D) complained about the Immigration and Naturalization Service not housing some 492 illegal-entrant Chinese asylum seekers who have already made it to Guam recently and have filled its jails to capacity. We are working with an NSC-led interagency task force on the problems.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
04/16/99 05:28:17 PM
Record Type: Record

To: Maria E. Soto/WHO/EOP@EOP
cc:
Subject: Weekly

Where are you on Weekly? What is your time frame? I want to finalize re Guam boat people.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
04/16/99 05:59:05 PM
Record Type: Record

To: Maria E. Soto/WHO/EOP@EOP
cc:
Subject: Re: Weekly

We will wrap up Guam boat people soon.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
04/16/99 06:45:42 PM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Maria E. Soto/WHO/EOP@EOP
cc: Fred DuVal/WHO/EOP@EOP, Todd A. Bledsoe/WHO/EOP@EOP, William H. White Jr./WHO/EOP@EOP
Subject: Weekly

Our work with NSC and agency staff on the boat of 152 Chinese citizens apparently bound for Guam culminated in the recommendation Sandy Berger

and I made that you grant the Attorney General authority to detain the people in the Northern Mariana Islands and a directive to agencies to take them there and process them for repatriation or asylum. Governor Pedro Tenorio (I) agreed to the request. We are working with NSC staff to have an interagency meeting next week consider the further concerns of Guam Governor Carl Gutierrez (D) and Congressman Robert Underwood (D) regarding the 492 Chinese who have already made it to Guam and others who may try to go there illegally to seek asylum.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
04/16/99 06:57:27 PM
Record Type: Record

To: Maria E. Soto/WHO/EOP@EOP
cc:
Subject: Re: Weekly

As far as I'm concerned.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
04/16/99 07:15:38 PM
Record Type: Record

To: Maria E. Soto/WHO/EOP@EOP
cc:
Subject: Re: Weekly

This replaces the original.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
04/22/99 07:23:34 PM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Maria E. Soto/WHO/EOP@EOP
cc:
Subject: Weekly

The only change is that the following sentence substitutes for the third and fourth sentences in what I gave Bill.

Governor Pedro Rossello (D), Congressman Carlos Romero-Barcelo (D), and the legislature called for ending live ammunition practice on the island municipality.

the name of the islands' independence.

Guam at the UN: Guam representatives led by Governor Carl Gutierrez (D) raised State Department concerns in appearances at the U.N. They invited the decolonization committee to observe a status choice vote limited to the island's indigenous people which the Administration does not support. They also criticized the U.S. for not establishing a process to enable the territory to become self-governing.

Vieques Demonstration: A reported 50,000 people, including Representative Luis Gutierrez (D-IL), called for an end to military activity on Vieques in a Puerto Rico demonstration.

July 4th Puerto Rico Message: At the request of Governor Rossello, Puerto Rico Interagency Group Co-Chair Jeff Farrow delivered a message from you at the islands' U.S. Independence Day ceremony. It reiterated your commitment to enabling Puerto Ricans to choose the islands' status among all the options.

Gore Puerto Rico Vice Chairs: Five leaders from each of Puerto Rico's two largest political parties became Vice Chairs of the insular Gore for President campaign under Governor Rossello, its Chairman. They include Congressman Carlos Romero-Barcelo (D), a statehooder like Rossello, and Miguel Lausell, a 'Commonwealth'.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
07/15/99 05:37:28 PM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: William H. White Jr./WHO/EOP@EOP
cc: Fred DuVal/WHO/EOP@EOP, Todd A. Bledsoe/WHO/EOP@EOP
Subject: Weekly

Insular Areas

Navy Concludes Vieques Bombing Needed: Navy Secretary Danzig joined the Atlantic commanders of the Navy and the Marines in reporting that bombing practice on the Puerto Rican island of Vieques is needed and is not unusual. The report goes to the special panel Defense Secretary Cohen established at your direction to consider Puerto Rican objections to the bombing as well as military needs. Naval officials did, however, suggest the possibility of slight reductions in the bombing, safety and noise improvements, the transfer of some land to the municipality, and substantial economic aid for the community.

Guam/Marianas Illegal Migrants Reimbursement: We worked with NSC and OMB to fund costs Guam and the Northern Mariana Islands incurred in detaining Chinese citizens caught by Federal agencies trying to enter the U.S. through Guam. An \$18 million FY99/00 Budgets amendment will be sent to Congress.

Insular Office Subpoena: House Resources Committee Chairman Don Young (AK) launched an investigation of whether the Interior Department's Insular Affairs Office has conducted partisan activity against House Republican leaders Tom DeLay (TX), Dick Armey (TX) and Dana Rohrabacher (CA) and Senate Energy and Natural Resources Committee Chairman Frank Murkowski.

Record Type: Record

To: William H. White Jr./WHO/EOP@EOP
cc:
Subject: Re: IGA Weekly Report

Bill, thanks!

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
08/04/99 06:33:19 PM
Record Type: Record

To: Maria Echaveste/WHO/EOP@EOP
cc: Leslie Bernstein/WHO/EOP@EOP, Marjorie Tarmey/WHO/EOP@EOP
Subject: Vieques & Poster

I thought you might like to see (or have) the poster of Ruben Berrios on Vieques. FYI, the President wrote the bombing "should be stopped!!" on our IGA Weekly Report. I heard our Vieques visitors today were pleased with the meeting. We'll see how it plays in the press. Some, including Jose Rivera, had a hard time making it through the Secret Service system. Underwood was also pleased with his meeting

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
08/05/99 04:46:20 PM
Record Type: Record

To: William H. White Jr./WHO/EOP@EOP
cc: Fred DuVal/WHO/EOP@EOP, Todd A. Bledsoe/WHO/EOP@EOP
Subject: Weekly

Insular Areas

Vieques Bombing: Senator Charles Schumer (D-NY) reportedly said he will sponsor legislation to force an end to military bombing practice at Vieques, Puerto Rico if necessary. He and nine House Members joined Puerto Rican activists demonstrating at the Capitol on the issue.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow

CLINTON LIBRARY PHOTOCOPY

12/17/99 10:43:30 AM
Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Jacqueline F. Lain/WHO/EOP@EOP
cc:
Subject: Weekly

I will update this after 11 am meeting today

Insular Areas

Vieques Bombing Practice: John Podesta and Maria Echaveste led marathon talks on the issue with Governor Pedro Rossello's chief aide, Secretary Cohen's COS, Navy Secretary Danzig, and others with our help. They produced a draft agreement on the issue that closely tracks the recent Vieques announcement but also includes the provisions the Governor said were missing based on his conversations with you and made what was announced unacceptable. When consulted, the Governor said he would accept the draft accord, however, the Chief of Naval Operations and the Commandant of the Marine Corps were not ready to.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
01/06/2000 12:47:39 PM
Record Type: Record

To: Jacqueline F. Lain/WHO/EOP@EOP
cc:
Subject: Weekly

Insular Areas

Vieques Bombing Practice: Noting that you, Secretaries Cohen and Danzig, and others of us have tried to work out a solution to the dispute, Governor Pedro Rossello (D) said Navy Operations Chief Johnson and Marine Corps Commandant Jones were not and were insubordinate to you. He was reacting to the service chiefs private insistence the Navy be able to shoot live ordnance at the range from ships even though you and the Secretaries announced only inert ordnance will be used and to unofficial reports of Navy views. Stronger statements were made by other Puerto Rican leaders. The reaction here to the Governor's comments said such statements were not helpful and you have full confidence in the chiefs. Meanwhile, Cohen and Danzig continued to discuss the draft agreement with Rossello on the issue with the Admiral and General. Additionally, the head of the Independence Party resigned his Senate seat to continue heading the live-in on the range and protesters are building permanent housing there.

Millennium Celebration: We worked with other offices to meet Guam Governor Carl Gutierrez's (D) requests for participation.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

CLINTON LIBRARY PHOTOCOPY

Jeffrey L. Farrow
01/06/2000 01:38:32 PM
Record Type: Record

To: Jacqueline F. Lain/WHO/EOP@EOP
cc:
Subject: Weekly

Jackie, this is an update.

Insular Areas

Vieques Bombing Practice: Saying efforts by you, Secretaries Cohen and Danzig, and others of us had produced enormous progress on the issue, Governor Pedro Rossello (D) said Navy Operations Chief Johnson and Marine Corps Commandant Jones blocked it and were insubordinate. He was reacting to the service chiefs private insistence the Navy be able to shoot live ordnance at the range from ships even though you and the Secretaries announced only inert ordnance will be used and to unofficial reports of such Navy views. Stronger criticism of the chiefs came from other Puerto Rican leaders. The reaction here to the comments said such statements were not helpful and you have full confidence in the chiefs. Meanwhile, Cohen and Danzig continued to discuss the draft agreement with Rossello on the issue with the Admiral and General. Additionally, the head of the Independence Party resigned his Senate seat to continue heading the live-in on the range and protesters are building permanent housing there.

Millennium Celebration: We worked with other offices to meet Guam Governor Carl Gutierrez's (D) requests for participation.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

Jeffrey L. Farrow
01/12/2000 06:08:43 PM
Record Type: Record

To: Jacqueline F. Lain/WHO/EOP@EOP
cc:
Subject: The Weekly

Insular Areas

Rossello Hospitalized: Puerto Rico Governor Pedro Rossello (D) was hospitalized for a gallstones problem and was scheduled for surgery today. We had a note from you sent to him.

Vieques Bombing Practice: Governor Rossello hopes you will stick with the plan to resolve the dispute that he agreed to even though military officers now want to change what they agreed to.

Subject: Re: Weekly

I would put Vieques first, Guam election second, Interagency group third and the other two as you see fit. I have made a few slight changes on the below. Thanks.

Jacqueline F. Lain
01/21/2000 02:51:42 PM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
CC:
Subject: Re: Weekly

Jeff, I found the piece about Vieques Bombing Practice confusing. Please read below to ensure I didn't misinterpret where I had questions. I also indicated one remaining question for you to answer. I meshed your paragraph on the Interagency Insular Affairs meeting with a paragraph Mickey submitted.

Vieques Bombing Practice: We joined other staff in presenting the military chiefs', new proposal to Governor Pedro Rossello (D). The Governor objected to (1) the statement that a return to live ordnance remains a U.S. goal, (2) making the community aid announced earlier contingent upon local agreement to live ordnance and, possibly, permanent bombing, and (3) the refusal to give Puerto Rico title to most of the land occupied by the Navy in the event of a Navy exit. Rossello considered the proposal insulting in light of the joint effort to resolve the dispute and inflammatory given the more acceptable plan that was announced last month and Puerto Rican views. The Governor will be very disappointed if the issue is left as it is now but will try to minimize Federal-insular confrontations.

Insular Interagency Group: On January 18, Jeff Farrow and John Berry, Assistant Secretary of the Department of the Interior, co-chaired the first meeting of the Interagency Group on Insular Areas created last year at your direction to coordinate federal activity involving Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands.

Samoa Fuel Waiver: The Environmental Protection Agency, pursuant to Governor Tau'ese Sunia's (D) request, agreed to a one-year waiver of a fuel requirement for the main power plant. The fuel requirement would have been costly for the impoverished territory to meet.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/18/2001 10:49 PM -----

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Ronald Levy to M. Gibbons, re: HR-1056 (2 pages)	6/26/1995	P5
002. email	Vivian Grishkot to Carl Snoddy et al. [partial] (1 page)	9/12/1996	P6/b(6)
003. email	Vivian Grishkot to Cabinet Affairs [partial] (1 page)	6/17/1997	P6/b(6)

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
Default ([Guam, Political Status, Reform])
OA/Box Number: 1100000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[5/25/1993 - 10/10/2000]

Whitney Ross
2006-0193-F
wr610

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]

RECORD TYPE: FEDERAL (EXTERNAL MAIL)

CREATOR: Ronald Levy@8=RL@4=Asst GC Legis Litig Regu@5=Department of the Treasury@3=

CREATION DATE/TIME:26-JUN-1995 11:09:00.00

SUBJECT: HR-1056-B LRM No. 1583

TO: GIBBONS_M@A1@CD

READ:26-JUN-1995 11:26:19.51

CC: ASSOC GEN COUNSEL (LLR)

(ASSOC (LLR)@8=AGC(@4=Asst GC Legis Litig

READ:NOT READ

TEXT:

HR-1056-B LRM No. 1583: Justice Proposed Report
H.R. 1056, Guam Commonwealth Act

Jill:

Below are comments from our tax and international trade folks:

Tax:

The Justice Department was correct in identifying two problems concerning the treatment of taxation in the bill:

Concerning Title VI - Taxation, Justice noted that the legislation should refer to the current version of the tax law rather than to an obsolete version. This is correct. However, the reference should be to the Internal Revenue Code of 1986 as amended from time to time.

Second, Justice noted that the provisions of Title VI are inconsistent with and should be coordinated with section 1271 of the Tax Reform Act of 1986. This is correct. Guam is not permitted to replace the mirror code with its own tax laws unless it enters into an implementing agreement with the U.S. to alleviate certain problems with tax administration.

Tax Policy has additional serious problems with the bill, including:

-- with section 303, which would delegate to Guam the power to enter into tax treaties with foreign governments,

-- with section 603, which allow Guam to rebate any taxes received by it,

-- with section 604, which would allow Guam to determine under its laws the amount of taxes imposed on the income and property of persons within its jurisdiction, which could affect U.S. taxation of U.S. persons,

-- with section 605, which would exempt Guam's bonds from taxation by any State, Territory or political subdivision thereof (an exemption not granted to the states, and

-- with section 1105, which would establish an Economic Development Fund, which would, inter alia, grant tax incentives to start or expand commercial businesses in Guam in order to provide employment and ownership opportunities for residents of Guam.

International Trade

The bill is objectionable because it would permit Guam to enter into trade agreements with foreign governments

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Jeffrey Farrow to Marianas Asylum Issue (3 pages)	12/10/1999	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Guam, Legislation, Tourism])
OA/Box Number: 250000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[12/10/1999 - 10/20/2000]

Whitney Ross

2006-0193-F

wr611

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]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:10-DEC-1999 14:54:02.00

SUBJECT: Marianas Asylum Issue

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Scott Busby (CN=Scott Busby/OU=NSC/O=EOP@EOP [NSC])

READ:UNKNOWN

Danny_Aranza@ios.doi.gov (Danny_Aranza@ios.doi.gov @ inet [UNKNOWN])

READ:UNKNOWN

Anna M. Briatico (CN=Anna M. Briatico/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

Please note the message which follows from the Interior Department's Insular Affairs Director. I think the suggestion of an interagency meeting here on the proposal is a good one. I have also heard concerns about the INS proposal today from Rep. George Miller's staffer.

Reaction?

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on 12/10/99
02:30 PM -----

Danny_Aranza@ios.doi.gov
12/10/99 12:44:00 PM

Record Type: Record

To: Jeffrey L. Farrow@eop

cc:

Subject: CNMI Immigration Matter

CLINTON LIBRARY PHOTOCOPY

This follows up on our conversation today. I have also discussed this with Ed Cohen, Jim Beirne and Marie Howard. Their comments are set forth below. I also plan to call Bo Cooper at INS today. In any event, it would be good to have our CNMI interagency group briefed by Bob Bach on this issue before he acts on it.

Bob Bach, INS associate commissioner for programs, briefed me on his recent visit to Saipan. Bach indicated that INS wants to settle part of the asylum litigation filed by the two Chinese workers against the U.S. and CNMI. Specifically, he is proposing to enter into an MOU with the CNMI that has four parts:

1. At CNMI's request, INS will send trained federal officials to Saipan on an as-needed basis to conduct the interviews of asylum applicants and to assure that the appropriate asylum or non-refoulment standards, protocols and procedures are followed to ensure that the workers are protected. The INS officials will then make recommendations to the CNMI government on whether particular applicants qualify. The ultimate decision remains with the

CNMI as
to whether to follow the INS recommendations.

++ According to Bach, this has the benefit of: (a) ensuring that the workers are processed by trained officers and their rights are protected; and
(b) leaves the ultimate legal authority and responsibility for this process with
the CNMI.

-- However, folks on the Hill are extremely skeptical and do not believe
that INS should be abdicating a U.S. responsibility to the CNMI. What, would
happen, for example, if the INS officer recommends asylum or non-refoulment, and
the CNMI nevertheless says no and sends the workers back?

2. INS will offer an intensive and extensive training of CNMI DOLI officials in INS asylum procedures. It is contemplated that, prior to taking
this training, all CNMI officials will have gone through the regular Federal
screening and security clearances.

++ According to Bach, the theory here is two-fold: (a) it will develop a
professional cadre of local immigration officials who will be knowledgeable in
INS regulations and procedures; and (b) in the event that the INS is extended to
the CNMI, there will be a number of trained and cleared local professionals that
the INS can hire.

-- This proposal does not appear to be problematic. However, if this is
something that INS can already do, it should be doing this even without a settlement agreement.

3. If asylum or non-refoulment is ultimately approved for particular applicants, CNMI will agree to provide that person with a formal, official status
under CNMI local immigration law and still remain the official responsibility of
the CNMI government. In addition, the Federal government (through existing
refugee assistance programs at State and Justice) will provide financial assistance to non-governmental organizations (e.g. church groups or others) in
the CNMI to enable these groups to find sponsors for the approved applicants and
to take the lead in relocating the applicants as appropriate.

++ According to Bach, this is advantageous because: (a) the U.S. does not
undertake legal responsibility for the approved aliens, and (b) the NGO's over
time will develop the institutional capability to assist CNMI refugees in the

transition and relocation, which will be helpful in the event that the INA is eventually extended to the CNMI.

-- Folks on the Hill see problems with this. First, who's to say who these third party groups will turn out to be -- it's even possible that individuals associated with the garment industry might set up an NGO for these purposes. Second, there's a general concern about the U.S. government surrendering control and oversight on this process to third parties.

4. INS continues to be concerned about smuggling of non-resident aliens from the CNMI to Guam. Unfortunately, there is currently no local laws with teeth that will allow Federal authorities to crack down on these activities in the CNMI -- current laws permit Federal intervention at the point of entry into U.S. immigration territory. INS hopes to persuade the CNMI to enact a local law based on model legislation that the U.S. has worked out with foreign countries, which makes such activities a felony and allows Federal officials extraterritorial jurisdiction to enforce these laws.

++ According to Bach, this will provide INS with a critical tool in stemming the continuing stream of illegal aliens to Guam.

-- Folks on the Hill disagree with point. They believe that there must already be existing Federal statutes that will allow the FBI, U.S. Attorney's office or other law enforcement agencies to prosecute perpetrators of smuggling rings while they are in the CNMI. There is also a sense that the INS will probably be unable to persuade the CNMI to go along with doing this.

Personally, I think that the terms of the MOU have some merit, particularly 2 and 4. However, I told Bach frankly that I could also see such an MOU being misused to argue that federalization is no longer necessary. The argument would be something like -- Why do we need to extend the INA? We have a great MOU that takes care of all our immigration problems.

Our Solicitor's office has misgivings about this matter.

Please note that Bach/INS plan to meet with CNMI officials in Honolulu next week on this. It is important to bring Bach in to explain his proposal in more detail to the White House (Intergovernmental, NSC and DPC) as well as other agencies (particularly State, Justice and Labor and Interior).

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Mickey Ibarra to Capricia Marchal, re: State Dinner (1 page)	10/27/1997	P5
002. email	Mickey Ibarra to Douglas Sosnik, re: State Dinner (1 page)	10/27/1997	P5
003. email	Fred Duval to Emory Mayfield, re: Puerto Rico Rep. (2 pages)	1/23/1998	P5
004. email	Jeffrey Farrow to Maureen Hudson, re: Guam Gov. Gutierrez (1 page)	4/6/1998	P5
005. email	Dorinda Salcido to Roger Salazar [partial] (1 page)	10/27/1998	P6/b(6)

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[2/26/1997 - 12/22/1998]

Whitney Ross
2006-0193-F
wr612

RESTRICTION CODES

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

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

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

RR. Document will be reviewed upon request.

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

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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 27-OCT-1997 10:38:49.00

SUBJECT: State Dinner

TO: Capricia P. Marshall (CN=Capricia P. Marshall/OU=WHO/O=EOP @ EOP [WHO])
READ: UNKNOWN

CC: Cecily C. Williams (CN=Cecily C. Williams/OU=WHO/O=EOP @ EOP [WHO])
READ: UNKNOWN

CC: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])
READ: UNKNOWN

TEXT:

Sylvia Mathews and I just completed discussing the possibility of the Governor of Guam, Carl Gutierrez (D), who is in town dealing with Guam status legislation, being invited to the the China State Dinner. This would help us "soften the blow" he has received with the announcement that we are unable to support the current proposed legislation. Is such an invitation possible? I have not contacted NSC.

Second, I'm hoping you can ask your staff to identify for me or Cecily Williams our electeds invited to the After Dinner entertainment. Tahnks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 27-OCT-1997 17:33:42.00

SUBJECT: State Dinner

TO: Douglas B. Sosnik (CN=Douglas B. Sosnik/OU=WHO/O=EOP @ EOP [WHO])
READ: UNKNOWN

TEXT:

Partner, can you help me again on the request below. Since Guam is only a 1,000 miles from China, their number one trading partner, and the Gov. is in town I really want to make a push on this. Any advise?

----- Forwarded by Mickey Ibarra/WHO/EOP on 10/27/97
05:21 PM -----

Mickey Ibarra
10/27/97 10:36:46 AM
Record Type: Record

To: Capricia P. Marshall/WHO/EOP
cc: Fred DuVal/WHO/EOP, Cecily C. Williams/WHO/EOP
Subject: State Dinner

Sylvia Mathews and I just completed discussing the possibility of the Governor of Guam, Carl Gutierrez (D), who is in town dealing with Guam status legislation, being invited to the the China State Dinner. This would help us "soften the blow" he has received with the announcement that we are unable to support the current proposed legislation. Is such an invitation possible? I have not contacted NSC.

Second, I'm hoping you can ask your staff to identify for me or Cecily Williams our electeds invited to the After Dinner entertainment. Tahnks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 23-JAN-1998 16:08:10.00

SUBJECT: Re: Puerto Rico Rep.

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

READ: UNKNOWN

TEXT:

print

----- Forwarded by Fred DuVal/WHO/EOP on 01/23/98 04:02 PM

Jeffrey L. Farrow

01/23/98 04:05:48 PM

Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Fred DuVal/WHO/EOP

cc:

Subject: Re: Puerto Rico Rep.

I agree. I also told Dem Chair Miranda I'd tell him if there was anything and would need to call Cong. Gutierrez's staffer who called for the Commonwealthers. I would make calls at the appropriate moment to make sure it was properly understood and get some positive Commonwealther reacts (e.g. , Hernandez Agosto and Lausell).

A few points just so you understand how intense P.R. politics is and then one about Guam:

1. The current leaders of the party would be happier if nothing positive happened until whenever it may be that they win office again. Example: the \$3 rum tax and health care funding are their ideology, the Conservation Trust is controlled by Commonwealthers, the lack of the funding in these areas now is a major issue against Commonwealth, and they may publicly applaud the Pres. doing the funding, but they'll privately not be happy it came when statehooders were in power.

2. We have striven to do what is fair, right, and sensitive to the needs of all parties (in addition to the people as a whole) as well as be reasonably consistent. We don't do things that we would otherwise do because of the Commonwealthers' sensitivities. They will bluff us into doing less if they can. (The statehooders would as well if they needed to.)

3. We held back on status in '95 and '96 for the Commonwealthers, impeding congressional action but we also promised Cong. Serrano as well as Rossello and Romero we would be serious participants after '96. (The statehood leaders were unhappy with us then.) The President personally and publicly committed to work for legislation as of '97. We have obtained some 30 amendments so far to the current bill, mostly for the Commonwealthers.

4. P.R. politics is excessively next-day's-paper oriented. We've done well

thinking about ther long haul and the people as well as the day to day party demands.

Guam - Cong. Underwood wrote asking for a mention in the SOU. I told Janet,, as we briefly discussed, I'd think of something re Guam's status. I'm think of a brief letter from the Presd. to the Gov. and Cong. reiterating the Administration's willingness to work on the legislation, following up on the testimony, and noting that we will soon be making supplementary comments (tax and trade proposals not fully addressed before).

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 6-APR-1998 11:54:23.00

SUBJECT: Guam Gov. Gutierrez

TO: Maureen A. Hudson (CN=Maureen A. Hudson/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Carmen B. Fowler (CN=Carmen B. Fowler/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

The two matters I thought it would be appropriate to mention are noted below.

Recovery from the devastation caused by Typhoon Paka which hit the island last December with the highest winds ever recorded anywhere. Legislation to improve the Federal-territorial relationship, the "Commonwealth bill." [This needs to be carefully phrased -- or just mentioned -- since Guam proposed many changes in Federal policy that we (like the Bush and Reagan Administrations) did not accept. We did, though, suggest the positive measures that we could take as an alternative in a Commonwealth bill.] You might reference the territory's long "quest" for legislation to establish a Commonwealth of Guam and for Congressional action on it, which we are encouraging (to the extent of the policy changes we support).

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	John Berry to Fred Duval, re: Virgin Islands Economic Revitalization Legislation (1 page)	7/22/1999	P5
002. email	Danny Aranza to Fred Duval, re: Virgin Islands Economic Revitalization Legislation (2 pages)	7/22/1999	P5

COLLECTION:

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

FOLDER TITLE:

[1/21/1999 - 11/1/1999]

CLINTON LIBRARY PHOTOCOPY

Whitney Ross
2006-0193-F
wr613

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]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: John_Berry@os.doi.gov@INET@LNGTWY (John_Berry@os.doi.gov@INET@LNGTWY [UNK

CREATION DATE/TIME:22-JUL-1999 09:33:01.00

SUBJECT: Re: Virgin Islands Economic Revitalization Legislation

TO: Fred Duval@eop (Fred Duval@eop [WHO])

READ:UNKNOWN

TEXT:

We need to be careful here - there are real sensitivities with Guam right now -

VI just got \$16 million for Y2K computer fixes and Guam got \$60,000.....Guam

also lost the \$5 million the President PROMISED them and we MUST solve this as

well. If the Dept and the Admin are seen as advancing MORE moeny for VI BEFORE

we have solved the Guam issue, we could have a very problematic situation.

Karen - please get with John T and me and lets discuss asap.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Danny_Aranza@os.doi.gov@INET@LNGTWY (Danny_Aranza@os.doi.gov@INET@LNGTWY [

CREATION DATE/TIME:22-JUL-1999 11:34:51.00

SUBJECT: Re: Virgin Islands Economic Revitalization Legislation

TO: Fred Duval@eop (Fred Duval@eop [WHO])

READ:UNKNOWN

TEXT:

John -

Per our conversation this morning, I've asked Dee to tentatively scheduled a 3

p.m. meeting in your office to discuss where we are with the Virgin Islands issue, and its probable interplay with Guam sensitivities. I agree with your

sentiments -- things have gotten so sensitive with Guam and the Y2K discrepancy,

that I have had to schedule an emergency trip to Guam this weekend to have personal face time with Governor Gutierrez to calm him down and give him some

comfort that Guam will be treated fairly. We plan to get out a new Guam-only

Y2K report by Wednesday next week for Departmental review, prior to submission to OMB.

Danny

P.S. - Karen, I understand Dee will be checking with you to confirm your availability at 3 p.m. today.

CLINTON LIBRARY PHOTOCOPY

John Berry

07/22/99 09:30 AM

To: Karen Kovacs/ASFW/OS/DOI@DOI

cc: Anne Shields/SIO/OS/DOI@DOI, Danny Aranza/OIA/OS/DOI@DOI, John Trezise/POB/OS/DOI@DOI, Donald Barry/ASFW/OS/DOI@DOI, David Heggstad/OIA/OS/DOI@DOI, Duval_f@al.eop.gov

Subject: Re: Virgin Islands Economic Revitalization Legislation

(Document link
not converted)

We need to be careful here - there are real sensitivities with Guam right now -

VI just got \$16 million for Y2K computer fixes and Guam got \$60,000.....Guam

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Karen - please get with John T and me and lets discuss asap.

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Anna Briatico to Lisa Fairhall, re: Interior Response to VA Braunch and OPM Comments ton H.R. 755 (2 pages)	6/22/2000	P5
002. email	Anna Briatico to Jame Kazel, re: Late Comment from Justice (1 page)	7/25/2000	P5
003. email	Nicholas Gess to Jeffrey Farrow [partial] (1 page)	8/9/2000	P6/b(6)
004. email	Nicholas Gess to Jeffrey Farrow, re: Guam Urgent Request (2 pages)	8/10/2000	P5

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[6/22/2000 - 9/19/2000]

Whitney Ross
2006-0193-F
wr614

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]
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- 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]

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Anna M. Briatico (CN=Anna M. Briatico/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME: 22-JUN-2000 18:53:59.00

SUBJECT: Interior Response to VA Branch and OPM comments on H.R. 755 - Guam War Res

TO: Lisa B. Fairhall (CN=Lisa B. Fairhall/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

TO: Toni S. Hustead (CN=Toni S. Hustead/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

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

READ: UNKNOWN

TO: Anita Chellaraj (CN=Anita Chellaraj/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

TO: James B. Kazel (CN=James B. Kazel/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

CC: John D. Burnim (CN=John D. Burnim/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

TEXT:

This e-mail provides additional information from the Department of the Interior that accompanied the revised amendment (circulated under LRM AMB 373). Specifically, Interior responded to the comments from the VA Branch and OPM as follows

Original comments from the VA Branch:

We have no objection to form a commission to study this issue. However, there are some concerns we would like to highlight.

The bill requests the commission to assess parity of war claims paid to the residents of Guam under the War Claims Act of 1945 with war claims paid to US citizens who lived in or had holdings in foreign countries.

Guamanians were not citizens of the US until 1950. Since they were not citizens of the US at the time of war, why compare them to US citizens? Many Filipinos were granted US citizenship for the war effort even though the Phillipines is not a territory of the US. Will this commission compare the Guam situation to the Filipino situation? We have not compensated nurses and other non-military personnel who have served during wars? What do we owe them? Will the commission study that?

In order for the commission to be effective, it should consider all situations in the Pacific region before they recommend granting benefits to the Guamanians. Is there anyway we can ensure that the Commission will study all the relevant situations? We would recommend section 3 read: "In its review, the Commission shall examine the circumstances of the taking and occupation of Guam to determine if resulting treatment was unique to Guam or was part of a pattern of Japanese occupation, and shall examine whether or not there was parity of proper war claims were awarded paid to residents of Guam under the Guam Meritorious War Claims Act of November 11, 1945, with war claims awards paid to United States citizens who lived in or had holdings in foreign countries, in parity with

individuals with similar situations during the WWII period.

Department of the Interior response:

We have a problem with the OMB suggested language. But first to the OMB questions:

(1) Of course, Guamanians were not U.S. citizens at the time. They were "virtual" U.S. citizens. Citizenship was granted in 1950. If they had been on the same track (not isolated in the Pacific) as Puerto Rico and the Virgin Islands, they would have had their citizenship decades earlier. The entire piece of legislation is premised on judging the Guamanian claims as if they were United States citizens. That concept must stay.

(2) Yes. The Commission may look at how U.S. citizens in the Philippines were treated.

(3) No. Nurses and other non-military serving during wars are irrelevant. We're talking about civilians on Guam and others similarly situated who were not "serving."

Our compromise at the end of section 3 is to (1) keep the U.S. citizenship standard, (2) utilize the following words from the 1948 War Claims Act ? "in territory occupied or attacked by the Imperial Japanese military forces", and (3) keep the following OMB language ? "during the World War II period".

Also, we would delete the word "all" from the first line section 3, and have added the word "civilian" to sec. 3 "analogous categories of civilian war claims" for clarification.

Department of the Interior Response to OPM comments:

We accepted the OPM suggestions on compensation.

Please let me know by 2 p.m. tomorrow if you have any concerns regarding the revised substitute. Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Anna M. Briatico (CN=Anna M. Briatico/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME: 25-JUL-2000 16:07:07.00

SUBJECT: Late comment from Justice on LRM-AMB413, HR2462, Guam Omnibus Opportunitie

TO: James B. Kazel (CN=James B. Kazel/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

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

READ: UNKNOWN

CC: John D. Burnim (CN=John D. Burnim/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

TEXT:

FYI

----- Forwarded by Anna M. Briatico/OMB/EOP on 07/25/2000
04:17 PM -----

"Silas, Adrien" <Adrien.Silas@usdoj.gov>

07/25/2000 03:48:06 PM

Record Type: Record

To: Anna M. Briatico/OMB/EOP

cc:

Subject: LRM-AMB413, HR2462, Guam Omnibus Opportunities Act (Control
-1823)

We would have amended the SAP in the following way:

(2) allow Guam, with some exceptions, the right to acquire federal land on Guam deemed excess and not be bound to put that property to a "public purpose" in the event payment of "compensation" is forthcoming. This provision portends controversy because the extent of the compensation required is not defined in the proposed legislation;

I have been advised that this is a big deal for us. We will have someone call to explain.

CLINTON LIBRARY PHOTOCOPY

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: "Gess, Nicholas M" <Nicholas.M.Gess@usdoj.gov> ("Gess, Nicholas M" <Nichol

CREATION DATE/TIME:10-AUG-2000 13:55:41.00

SUBJECT: RE: Guam Urgent Request

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

READ:UNKNOWN

CC: Mark D. Magana (CN=Mark D. Magana/OU=WHO/O=EOP [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

Jeff,

Part of the problem is that Guam's people aren't blameless. Witt has failed to return two phone calls. I'm not sure if he relayed that tidbit to you. If he calls you for any reason, please ask him to call Joe Fanaroff at DOJ/IGA. Joe is poised to help him out.

Thanks. Nick

-----Original Message-----

From: Jeffrey_L._Farrow@who.eop.gov@inetgw2

[mailto:Jeffrey_L._Farrow@who.eop.gov]

Sent: Wednesday, August 09, 2000 12:33 PM

To: Gess, Nicholas M

Cc: Mickey_Ibarra@who.eop.gov@inetgw2;

Mark_D._Magana@who.eop.gov@inetgw2

Subject: Guam Urgent Request

Remember Delegate Underwood of Guam's request in June for help re INS staffing on tourist arrivals? INS is now addressing the problem but it has worsened and adequate help is reportedly several months away. Gov. Gutierrez has now asked for help today. How can we?

The banner headline in the Pacific Daily Newstoday reads "Tourist entry delayed/Visitors wait up to 4 hours for processing." The story reports that:

processing used to take 45 minutes but has lengthened due to the end of visa waiver programs;

the American Federation of Government Employees has filed a greivance over the issue;

All Nippon Airways and the Westin Resort have complained;

INS says additional personnel with be there in several months;and

INS collects \$ 7 million a year in user fees but spends only \$1.5 million on services.

Asian tourism is the major component of Guam's economy. Gov. Gutierrez says INS should have 70 agents but has only 40 slots of 58 filled.

Gutierrez wants (1) to see if agents can be detailed from Hawaii or elsewhere and (2) something said today to the effect that we are working on the problem.

Thanks in advance for getting on this.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Jeffrey Farrow to Mickey Ibarra, re: Guam War Claims EO (1 page)	12/13/2000	P2
002. email	Jeffrey Farrow to Scott Beale, re: Weekly (1 page)	12/15/2000	P2
003. email	Jeffrey Farrow to Scott Beale, re: Weekly (1 page)	12/15/2000	P2

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[10/19/2000 - 1/17/2001]

Whitney Ross
2006-0193-F
wr615

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

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

- b(1) National security classified information [(b)(1) of the FOIA]
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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:13-DEC-2000 17:02:08.00

SUBJECT: Guam War Claims EO

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

READ:UNKNOWN

TEXT:

Delegate Underwood called to recommend doing his WWII claims legislation by EO (and appointing Gerri Gutierrez to chair it) as Gov. Gutierrez requested. Did the Gutierrez request make it in the Daily?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-DEC-2000 11:49:07.00

SUBJECT: Weekly

TO: Scott Beale (CN=Scott Beale/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

Records Management@EOP (Records Management@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

Just go with this on Vieques. Thanks.

Insular Areas

Vieques: Governor-elect Sila Calderon (I) said she would press the next administration -- and not you -- to immediately end training and that she had established working relationships with Senate Majority Leader Lott and House Speaker Hastert. She also said that she would not be deterred in acting to force an end to training by that delaying the land transfers and community development projects that are based on the Government of Puerto Rico's support of limited training. Navy Secretary Danzig had cautioned her about the consequences of her plans to break the Vieques agreement. Governor Pedro Rossello (D) said he was very pleased Danzig set the referendum date (November 6) in response to Rossello's request to you. However, Resident Commissioner-elect Anibal Acevedo said he would fight the referendum because it does not include an immediate end to training option.

Gutierrez Requests: Governor Carl Gutierrez (D) asked for two executive orders. One would establish a commission to review compensation to Guamanians for suffering during the enemy occupation of the island in World War Two. This order would be based on legislation we supported. Gutierrez also asked that you name his wife Geri to chair the commission. Delegate Robert Underwood (D) who sponsored the legislation does not favor such an order or the appointment of Mrs. Gutierrez. The other order would transfer to local ownership land in the Guam National Wildlife Refuge. The Interior Department has declined to relinquish this land in return for rights to land Guam owns. Gutierrez also invited you to speak on Pacific policy at Georgetown University February 27.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 15-DEC-2000 11:30:04.00

SUBJECT: Weekly

TO: Scott Beale (CN=Scott Beale/OU=WHO/O=EOP@EOP [WHO.])

READ: UNKNOWN

Records Management@EOP (Records Management@EOP [UNKNOWN])

READ: UNKNOWN

TEXT:

Did the first item get in the Daily? I want to know where to start on Vieques.

2nd item is for Weekly.

Insular Areas

Vieques: Navy Secretary Danzig requested the referendum next November 6. Governor Pedro Rossello (D) said he was pleased a date was finally set in response to his request to you.

Gutierrez Requests: Governor Carl Gutierrez (D) asked for two executive orders. One would establish a commission to review compensation to Guamanians for suffering during the enemy occupation of the island in World War Two. This order would be based on legislation we supported. Gutierrez also asked that you name his wife Geri to chair the commission. Delegate Robert Underwood (D) who sponsored the legislation does not favor such an order or the appointment of Mrs. Gutierrez. The other order would transfer to local ownership land in the Guam National Wildlife Refuge. The Interior Department has declined to relinquish this land in return for rights to land Guam owns. Gutierrez also invited you to speak on Pacific policy at Georgetown University February 27.

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Thurgood Marshall to Sylvia Mathews, re: FYI re Guam (2 pages)	8/9/1997	P5
002. email	Lisa Levin to Helen Veit [partial] (1 page)	1/8/1998	P6/b(6)
003. email	Jeffrey Farrow to Cecily Williams, re: Guam Proposal (2 pages)	4/3/1998	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Economic Development, Military])
OA/Box Number: 500000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[9/7/1995 - 10/13/1998]

Whitney Ross
2006-0193-F
wr616

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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RR. Document will be reviewed upon request.

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

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

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Thurgood Marshall Jr (CN=Thurgood Marshall Jr/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 9-AUG-1997 13:21:50.00

SUBJECT: FYI re Guam

TO: Sylvia M. Mathews (CN=Sylvia M. Mathews/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

CC: Stephen B. Silverman (CN=Stephen B. Silverman/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

Elisabeth Steele (CN=Elisabeth Steele/OU=WHO/O=EOP [WHO])

READ:UNKNOWN

TEXT:

As you may have heard, Governor Gutierrez of Guam was headed last night on a collision course with U.S. military folks handling the rescue/investigation on Guam. The Governor had wanted to lead relatives of victims on a search for victim remains (there are still some 100 bodies believed to be among the wreckage) and the U.S. military was resisting; it is an NTSB investigation site and the U.S. military presence is mindful of that.

The Governor was also demanding an opportunity to bring relatives of victims to one location where all victim remains could be made available for identification.

Steve Silverman worked last night with Glen Davies and Mickey Ibarra (Mickey's note on this is attached hereto) and the anticipated standoff was averted, as follows: The Governor will bring small groups of relatives in to search the wreckage and, for identification, photos will be provided rather than an examination of the actual remains.

On a related note, the Governor taped his conversation with the POTUS and has been replaying the tape for press and others.

----- Forwarded by Thurgood Marshall Jr/WHO/EOP on
08/09/97 01:07 PM -----

Mickey Ibarra

08/09/97 12:22:32 PM

Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Thurgood Marshall Jr/WHO/EOP

cc:

Subject: Guam

----- Forwarded by Mickey Ibarra/WHO/EOP on 08/09/97
12:14 PM -----

Mickey Ibarra

08/09/97 11:56:42 AM

Record Type: Record

To: Fred Duval/WHO/EOP

cc: Suzanne Dale/WHO/EOP

Subject: Guam

Fred, I spoke to Gil Shinohara, advisor to Gov. Guterrez of Guam late last night at the request of Steven Silverman. I expressed to Gil our concern regarding the tension which has developed between the NSTB, US Military and the Governor regarding matters related to the airplane crash there. Gil, and Steven confirmed, that the situation has improved very recently. The Gov. was meeting with the Admiral when I called. Gil agreed to contact me if the situation worsened in anyway and also agreed to share our concern with the Governor. (I tried to reach you last night and am concerned that I was unable to. Is there a problem with your pager? Please check it out.) I did receive your page message this morning. On Monday , let's talk about the phone taping and other Guam matters. Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 3-APR-1998 12:06:05.00

SUBJECT: Guam proposal

TO: Cecily C. Williams (CN=Cecily C. Williams/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

You did a good job but here are a few suggestions.

PURPOSES:

(1) To demonstrate the President's interest in the island's 140,00 residents, overcoming a view that they are generally ignored by the Federal Government due to their lack of votes in it as well as their small population and distant location. (2) To mitigate disappointment caused by the Administration's unwillingness to make most of the Federal policy changes Guam sought in its 'Commonwealth' proposal and provide an opportunity to highlight the positive measures that we support/are taking.

BACKGROUND:

The trip through the area around Guam is scheduled to begin just days after the Centennial of the taking of the island during the Spanish-American War -- an anniversary that would provide a greater context for a visit to the national news media and will have great significance to Guamanians. For Guamanians and veterans across the country, the date would also recall the liberation of the island from a brutal foreign occupation through a bloody battle in the Summer of 1944.

Governor Carl Gutierrez (D) and Delegate to the House Robert Underwood (D) have repeatedly sought a stop during the President's trips in the region and the President has suggested interest in going. Guam is the center of the five insular areas linked to the U.S. in the region. A visit could also focus on (1) efforts to help with recovery from a devastating typhoon that hit with the highest winds ever recorded anywhere and (2) personnel at our major military bases on Guam.

PREVIOUS PARTICIPATION:

The island is a reasonable stop during travel through the area. Several presidents have used it as a rest stop.

BRIEFING TIME:

On the plane. (?) Minimal. (?)

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DURATION:

Can be as little as an hour. [I'd hope for at least four]

OUTLINE OF EVENTS:

Option 1: Open arrival/greet insular officials/remarks/rope line/greet military personnel/departure.

Option 2: Open arrival at insular airport. Drive with Governor Gutierrez and Congressman Underwood through capital of Agana. Brief meeting wiutn insular electeds. Drive to military land to be transferred TBD. Remarks to public rally. Drive to Navy side of airport. Rope line with milirary personnel/dependents. Depart.

REMARKS REQUIRED:

Yes.

ORIGIN OF THIS PROPOSAL:

as you have it substituting "Delegate" for "Rep."

RECOMMENDED BY:

Fred

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Mark Magana to Biran Mason, re: NPR on Vieques (7 pages)	1/5/2000	P5
002. email	Jeffrey Farrow to Jacqueline Lain, re: Insular Areas [partial] (1 page)	1/12/2000	P6/b(6)
003. email	Ann Donovan to Caroline Croft, re: Guam Participation in the Millennium Celebration (3 pages)	1/28/2000	P5
004. email	MaryEva Candon to Anne Donovan, re: Guam Participation in the Millennium Celebration (2 pages)	1/28/2000	P5
005. email	Paul McCarthy to Jeffrey Farrow, re: Guam Participation in the Millennium Celebration (3 pages)	2/2/2000	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Guam, Economic Development, Military])
OA/Box Number: 500000

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FOLDER TITLE:

[1/5/2000 - 2/28/2000]

Whitney Ross

2006-0193-F

wr619

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]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mark D. Magana (CN=Mark D. Magana/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 5-JAN-2000 17:08:58.00

SUBJECT: NPR on Vieques

TO: Brian S. Mason (CN=Brian S. Mason/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN

TEXT:

Brian -- FYI -- Vieques E-mail traffic in Reverse order

----- Forwarded by Mark D. Magana/WHO/EOP on 01/05/2000
05:08 PM -----

Jeffrey L. Farrow
01/04/2000 10:11:10 AM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: NPR on Vieques

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on
01/04/2000 10:08 AM -----

Seth J. Applebaum
01/04/2000 10:02:40 AM
Record Type: Record

To: Mickey Ibarra/WHO/EOP@EOP
cc: Jeffrey L. Farrow/WHO/EOP@EOP
Subject: NPR Segment.

This segment aired on NPR (Morning Edition) today. I can order a transcript of the segment for \$18 if you are interested.

Vieques Island Dispute -- Leda Hartman reports from the Puerto Rican island of Vieques on developments surrounding an eight month protest. Demonstrators are upset over the death of a civilian who was working on the U.S. Navy base there. The Clinton Administration is trying to come up with an agreement that satisfies both the Puerto Rican government and the Navy, but the agreement could lead to the Navy's eventually leaving the island.
(5:12)

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Message Sent

To:

Maria Echaveste/WHO/EOP@EOP
Mara E. Rudman/NSC/EOP@EOP
Marjorie Tarmey/WHO/EOP@EOP
Leslie Bernstein/WHO/EOP@EOP
John Podesta/WHO/EOP@EOP
James R. Fallin/NSC/EOP@EOP
James E. Kennedy/WHO/EOP@EOP
Barry J. Toiv/WHO/EOP@EOP
Brian A. Barreto/WHO/EOP@EOP
Katharine Button/WHO/EOP@EOP
Charles W. Burson/OVP@OVP
Leon S. Fuerth/OVP@OVP
Mark D. Magana/WHO/EOP@EOP
Joseph F. Bouchard/NSC/EOP@EOP
Miles M. Lackey/NSC/EOP@EOP
Mark J. Tavlarides/NSC/EOP@EOP
Dawn M. Chirwa/WHO/EOP@EOP
Beth Nolan/WHO/EOP@EOP

----- Forwarded by Mark D. Magana/WHO/EOP on 01/05/2000
05:08 PM -----

Jeffrey L. Farrow
01/05/2000 04:23:15 PM
Record Type: Record

To: Mickey Ibarra/WHO/EOP@EOP, Maria Echaveste/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Guam Illegals Reimbursement

FYI, Guam and Justice agencies are disputing the amount Guam should be reimbursed for holding in tents many of the illegal Chinese migrants who entered the territory last year. At this stage, I am in agreement with INS and OMB on how to handle the issue.

Essentially, Guam just wants the \$98/day the Marshals Service pays it for housing detainees in its prison and INS wants an amount based on the actual services and costs in the tents. So far, INS has calculated about a third of the in prison rate and Guam has declined to provide justification data. At INS' request, I contacted the Governor's office beginning a few weeks ago to seek resolution conversations. As of this point, Guam has not engaged although I have continued to get promised it will.

If nothing else develops this week, Justice will set the rate based on the data it has and have its IG make a determination re the rate. Any additional costs that are justified will be reimbursed.

As you'll recall, we agreed to Guam's request that these illegal migrants be detained, unsuccessfully asked Congress to earmark State Criminal Alien Assistance Programs funds for the purpose, and INS has already provided Guam \$4.4 million for it.

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Message Copied

To:

Mark D. Magana/WHO/EOP@EOP

Scott Busby/NSC/EOP@EOP

Steven M. Mertens/OMB/EOP@EOP

Michael Deich/OMB/EOP@EOP

Irène Bueno/OPD/EOP@EOP

Marjorie Tarmey/WHO/EOP@EOP

James B. Kazel/OMB/EOP@EOP----- Forwarded by Mark D.

Magana/WHO/EOP on 01/05/2000 05:08 PM -----

Jeffrey L. Farrow

01/05/2000 04:47:13 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: NPR report on Vieques

FYI transcript of NPR report on Vieques yesterday. Mara and Jim, Rossello was interviewed but note that would not discuss details in talks. He did say our 12/3 plan went a long way but assurance mechanisms are needed. He also suggested he would accept inert bombing.

This is NPR's MORNING EDITION. I'm Bob Edwards.

For the last eight months, protesters on the Puerto Rican island of Vieques have forced the US Navy to stop training at a base there. The demonstration follows the death of a civilian working on the base. The Clinton administration has been trying to work out an agreement acceptable to both the Puerto Rican government and the Navy, which could lead to the Navy's eventual departure. From Vieques, Leda Hartman prepared this report.

(Soundbite of protesters chanting)

LEDA HARTMAN reporting:

Since April, protesters chanting 'Navy out' have gathered 24 hours a day at the gates of Camp Garcia, the US naval base on Vieques. That's when a civilian guard named David Sanes was killed by two stray bombs during US naval exercises. To understand why one death unleashed such a torrent of resentment, you have to talk to people like 83-year-old Luisa Guadalupe(ph), who comes to Camp Garcia almost daily. Her family lost its farm in 1943 when the Navy took two-thirds of the land in Vieques, claiming eminent domain during the World War II crisis.

Ms. LUISA GUADALUPE (Vieques Resident): (Through Translator)

In the towns of Mosquito and Playa Grande, the Navy knocked down the houses with a mechanical shovel and threw the whole thing into a truck.

HARTMAN: Guadalupe says living next door to a bombing range is like living in a war zone.

Ms. GUADALUPE: (Through Translator) At night when you're asleep, there's a mountain of helicopters in the sky flying low. They make noise right over our roofs night and day. And the kids get scared. That's why a lot of people have left the island.

HARTMAN: Many Viequesans also fear that contamination from the bombing has led to unusually high cancer rates on the island. A Puerto Rican Department of Public Health study shows cancer rates on Vieques are 26 percent higher than on the mainland. The Navy questions that conclusion.

Few people protested the Navy's presence until the death of David Sanes. Robert Raban has lived on Vieques for 20 years, and he's an organizer with the Committee for the Rescue and Development of Vieques, the group coordinating the protests.

Mr. ROBERT RABAN (Committee for the Rescue and Development of Vieques): Peoples' souls, we think, have been shaken because there's never been this type of unity. And--you know, unity in Puerto Rico across ideological, philosophical, social class lines is--it's historic.

HARTMAN: The Navy acknowledges the hostility that has developed over the years, but maintains that Vieques is vital to national security. The Navy says Vieques is the only place in the Atlantic where live fire training can take place from the air, land and sea.

The Clinton administration has been trying to resolve the dispute, but has declined to comment on its negotiations. In early December, the administration made a proposal calling for the Navy to leave Vieques within five years and to train only with inert bombs, not live ones. Puerto Rico's governor, Pedro Rossello--a supporter of statehood--says the proposal went a long way in responding to local concerns, but didn't go far enough. He's looking for legal guaranties that the Navy would depart on a specific date.

Governor PEDRO ROSSELLO (Puerto Rico): It's very important that whatever solution is reached, that there be an assurance that this time around we have the mechanisms in place that will guarantee that whatever is decided will be done.

HARTMAN: The protesters on Vieques have praised Rossello's firmness, but many remain adamant that all bombing of any kind stop. The governor says the possibility of inert bombing is still on the table.

Gov. ROSSELLO: We still have not agreed on all the points, and I have to faithfully keep our promise that we will not discuss the details.

(Soundbite of waves hitting shoreline)

HARTMAN: No matter what agreement is reached, the bombing range on Vieques' eastern shore is no longer the empty stretch of land it was eight months ago. Dozens of protesters are camped out illegally here in an event to stave off further military exercises. Alejandro Torres is one.

Mr. ALEJANDRO TORRES (Protestor): The people here is a guarantee--like a human shield--to prevent the Navy from bombing the area. We have people that have been living here for more than seven

months.

(Soundbite of people speaking in Spanish)

HARTMAN: The protesters are here for the long haul. At Torres' camp, there is a solar collector and a wind turbine. There are even pots of seedlings to help reclaim the bombing range, a cratered stretch of land littered with old planes and tanks used for target practice. Bombs, spent and unspent, are everywhere. Independence Party President Ruben Berrios has lived at the bombing range continuously since May.

Mr. RUBEN BERRIOS (President, Independence Party): (Spanish spoken)

HARTMAN: Berrios tells his supporters that if they can maintain a solid block of resistance to the Navy's presence, President Clinton will have no other choice but to pull out without letting one more bomb be dropped.

(Soundbite of helicopter flying over)

HARTMAN: As he speaks, a Navy helicopter circles in low around his lean-to. The door opens, and someone leans out and snaps a photo. For now, the helicopters in the skies over Vieques just take pictures, but that may change in spring when the George Washington battle group is scheduled to begin military exercises here. Berrios says he'll be here unless the Navy leaves or he's arrested. For NPR News, I'm Leda Hartman in Vieques, Puerto Rico.

END

Message Sent

To:

Maria Echaveste/WHO/EOP@EOP
Mara E. Rudman/NSC/EOP@EOP
James R. Fallin/NSC/EOP@EOP
James E. Kennedy/WHO/EOP@EOP
Alejandro G. Cabrera/OVP@OVP
Charles W. Burson/OVP@OVP
Leon S. Fuerth/OVP@OVP
John Podesta/WHO/EOP@EOP
Brian A. Barreto/WHO/EOP@EOP
Mark D. Magana/WHO/EOP@EOP
Katharine Button/WHO/EOP@EOP

----- Forwarded by Mark D. Magana/WHO/EOP on 01/05/2000
05:08 PM -----

Mara E. Rudman
01/05/2000 04:54:02 PM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Re: NPR report on Vieques

JEff--

I heard NPR yesterday and thought it was fine.

Unfortunately, the reports we're getting from reporters on the Governor's comments today are not so good. Far harsher than your description in terms of the words he used to describe Johnson and Jones and their position.

We are working on press guidance now, to coordinate with OSD, that disavows an "us v. them" posture/position.

Message Copied

To:

maria echaveste/who/eop@eop
james r. fallin/nsc/eop@eop
james e. kennedy/who/eop@eop
alejandro g. cabrera/ovp@ovp
charles w. burson/ovp@ovp
leon s. fuerth/ovp@ovp
john podesta/who/eop@eop
brian a. barreto/who/eop@eop
mark d. magana/who/eop@eop
katharine button/who/eop@eop
Joseph F. Bouchard/NSC/EOP@EOP
Miles M. Lackey/NSC/EOP@EOP----- Forwarded by Mark D.
Magana/WHO/EOP on 01/05/2000 05:08 PM -----

Jeffrey L. Farrow
01/05/2000 05:06:28 PM
Record Type: Record

To: Mara E. Rudman/NSC/EOP@EOP
cc: See the distribution list at the bottom of this message
Subject: Re: NPR report on Vieques

Yes, the Governor went beyond what Morey expected. A second hand source says Rossello said the chiefs were working against resolution, wanted to go back to pre-accident use of Vieques with live fire, totally divorced from the realistic possibilities on the island, and "insubordinate" calling civilian control of the military into question.

Message Copied

To:

maria echaveste/who/eop@eop
james r. fallin/nsc/eop@eop
james e. kennedy/who/eop@eop
alejandro g. cabrera/ovp@ovp
charles w. burson/ovp@ovp
leon s. fuerth/ovp@ovp

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john podesta/who/eop@eop
brian a. barreto/who/eop@eop
mark d. magana/who/eop@eop
katharine button/who/eop@eop
joseph f. bouchard/nsc/eop@eop
miles m. lackey/nsc/eop@eop

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Anne F. Donovan (CN=Anne F. Donovan/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 28-JAN-2000 18:19:50.00

SUBJECT: Guam Participation in the Millennium Celebration

TO: Caroline J. Croft (CN=Caroline J. Croft/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN

CC: Amy Comstock (CN=Amy Comstock/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN

CC: Ellen M. Lovell (CN=Ellen M. Lovell/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN

CC: Jeffrey L. Farrow (CN=Jeffrey L. Farrow/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN

CC: Paul McCarthy (CN=Paul McCarthy/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN

TEXT:
Caroline:

fyi-stay tuned. Talk with me though before you have copies of the tape duplicated. I'm leaving the tape on your chair. Have you gotten anyplace with State being willing to pay for the duplication? I spoke to Jeff Farrow this morning about this and he was going to check with Mary Eva on where they were with everything. I'll call him now before I leave and will let you know the results.

Paul:

Has anyone ever heard from Brian or anyone there as to where they will play the Guam tape?

Anne

----- Forwarded by Anne F. Donovan/WHO/EOP on 01/28/2000
06:15 PM -----

MaryEva Candon <Candon@BCJLaw.com>

01/28/2000 05:15:08 PM

Record Type: Record

To: Paul McCarthy/WHO/EOP, Anne F. Donovan/WHO/EOP
cc:
Subject: Guam Participation in the Millennium Celebration

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Paul and Anne:

[I will also fax this to Amy Comstock and Jeff Farrow]

First, to all four of you, thank you for sitting down with us last week to try to resolve the damage unintentionally done to Governor Gutierrez.

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We have further "researched" the source of funds -- in all cases, local funds were used, not federal funds. Those to be thanked and the sources of the funds are as follows:

Mr. Jerry Yingling
Executive Manager
The Guam International Airport Authority \$100,000 from the
GIAA marketing budget
P.O. Box 8770
Tamuning, Guam 96931
Tel: 671-646-0300
Fax: 671-646-8823

Mr. James Nelson
Executive Director
The Guam Visitors' Bureau \$ 50,481 from the GVB
marketing budget
Pale San Vitores
Tumon, Guam 96910
Tel: 671-646-5278
Fax: 671-646-8861

Mr. Ed Untalan
General Manager
The Guam Economic Development Authority \$ 50,000 from monies saved in
the payroll budget because of early departures of
590 South Marine Drive
personnel
Suite 511 ITC Bldg.
Tamuning, Guam 96931
Tel: 671-647-4332
Fax: 671-649-4146

Of course, the Governor should be thanked:

The Honorable Carl T.C. Gutierrez
Governor
The Ricardo J. Bordallo Governors' Complex
Adelup
Hagatna, Guam 96910

Regarding our discussion about how to give Guam exposure, the idea of a video or something at the International Trade Center was well received. However, whatever is done the desire is to do it quietly for now so as not to create anymore bad press in Guam -- the taste is still bad and no one wants to be reminded of it right now. Therefore, we did not pursue the radio talk with Paul and Ellen Ratner.

However, having Guam's sponsorship mentioned in all the letters to the U.S. Ambassadors and to the foreign Ambassadors is considered an excellent idea as well as having the Guam sponsorship mentioned as a feeder in the video going to all embassies as well as mentioning Guam's sponsorship on the video case.

What were you all able to come up with?

Thank you again for your serious consideration of this difficult situation which we all wish had not happened.

MaryEva

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: MaryEva Candon (MaryEva Candon [UNKNOWN])

CREATION DATE/TIME: 28-JAN-2000 17:23:35.00

SUBJECT: Guam Participation in the Millennium Celebration

TO: Anne F. Donovan (CN=Anne F. Donovan/OU=WHO/O=EOP [WHO])
READ: UNKNOWN

TO: Paul McCarthy (CN=Paul McCarthy/OU=WHO/O=EOP [WHO])
READ: UNKNOWN

TEXT:
Paul and Anne:

[I will also fax this to Amy Comstock and Jeff Farrow]

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The Guam Economic Development Authority \$ 50,000 from monies saved in
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Suite 511 ITC Bldg.
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Thank you again for your serious consideration of this difficult situation which we all wish had not happened.

MaryEva

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Paul McCarthy (CN=Paul McCarthy/OU=WHO/O=EOP [UNKNOWN])

CREATION DATE/TIME: 2-FEB-2000 15:41:22.00

SUBJECT: Guam Participation in the Millennium Celebration

TO: Jeffrey L. Farrow (CN=Jeffrey L. Farrow/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Anne F. Donovan (CN=Anne F. Donovan/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Ellen M. Lovell (CN=Ellen M. Lovell/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

TEXT:

Jeff: From Mary Eva's E-mail, it would appear that they are primarily interested in the video mailing to the embassies. Ellen Lovell had spoken to the folks at GSA regarding the showing of a Guam video, and my understanding is that they were receptive to the idea. I do not believe the concept was brought to the implementation stage. If the ITC video display is still of interest to the Guam businesses, we need to get that program in place. Unfortunately, today is my last day here in Washington. I'm sure that Ellen or her designee will follow-up. Thanks for your efforts on our behalf. Paul

----- Forwarded by Paul McCarthy/WHO/EOP on 02/02/2000
03:33 PM -----

MaryEva Candon <Candon@BCJLaw.com>

01/28/2000 05:15:08 PM

Record Type: Record

To: Paul McCarthy/WHO/EOP, Anne F. Donovan/WHO/EOP
cc:
Subject: Guam Participation in the Millennium Celebration

Paul and Anne:

[I will also fax this to Amy Comstock and Jeff Farrow]

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MaryEva

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Ronald Levy to M Gibbons, re: HR 1056 (3 pages)	7/26/1995	P5
002. email	Alicia Kolaian to C Callahan, re: sample SAP paygo language for Guam War restitution (1 page)	9/27/1996	P5
003. email	Eric Dodds to Cabinet Affairs [partial] (1 page)	8/12/1998	P6/b(6)
004. email	Roger Stillwater to Dany Aranza, re: Accuracy of Guam's Section 30 Payments (2 pages)	4/5/1999	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
Default ([Guam, Economic Development, Military])
OA/Box Number: 1100000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[6/9/1995 - 9/30/1999]

Whitney Ross
2006-0193-F
wr620

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]
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- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: FEDERAL (EXTERNAL MAIL)

CREATOR: Ronald Levy@8=RL@4=Asst GC Legis Litig Regu@5=Department of the Treasury@3=

CREATION DATE/TIME:26-JUL-1995 10:16:00.00

SUBJECT: HR-1056-AR Rpt for OMB

TO: GIBBONS_M@A1@CD

READ:26-JUL-1995 10:19:25.54

CC: ASSOC GEN COUNSEL (LLR)

(ASSOC (LLR)@8=AGC(@4=Asst GC Legis Litig

READ:NOT READ

CC: JUKES_J@A1@CD

READ:26-JUL-1995 10:25:11.78

TEXT:

Jill:

Per our conversation of a few minutes ago I am attaching a draft report, for inteagency clearance, on H.R. 1056, the Guam Commonwealth Act.

In responding to your question, "what kind of clearance time-frame is Treasury looking for," we were sidetracked with the Justice/Interior disagreement, re constitutional issues, and I never did answer your question to me -

Knowing what agency workloads are, I am hesitant to request yesterday. I am equally reluctant to be indefinite or stretch the review period out too long. From our perspective, a five or six working day review period should get a clearance back to us in within two weeks.

Thanks!

Ron Levy

Attachment

□

The Honorable Don Young
Chairman
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

CLINTON LIBRARY PHOTOCOPY

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of the Treasury on H.R. 1056, "To establish the Commonwealth of Guam, and for other purposes." While the Department takes no position with regard to the merits of Commonwealth status, it does have specific concerns and objections with the bill that are set forth below.

Section 303(a)(2): The Department is opposed to that portion of section 303(a)(2) that would authorize the Commonwealth of Guam

to "enter into agreements with sovereign states, and the political entities resulting from the Trust Territory of the Pacific Islands, relative to reciprocal trade and tax questions and their application to the respective jurisdictions." This is authority that the Commonwealth of Puerto Rico does not have, and we are unaware of any reason to draw a distinction for Guam.

Section 601(d)(1) and (e): The references to the Internal Revenue Code of 1954 should be replaced by a references to the "Internal Revenue Code of 1986."

Section 603: The Department is opposed to the breadth of section 603. As drafted, section 603 authorizes the Commonwealth of Guam, by local law, to provide for the rebate or reduction of any taxes received by it in order to assist new industries coming to Guam or to assist Guam's economic development. This has the potential to undermine the mirror code tax system now in place for U.S. contributions to the treasury of Guam. Under current law, Guam cannot rebate taxes collected by the Internal Revenue Service and covered over by the U.S. to the Guam treasury. The U.S. "covers over" taxes in lieu of annual appropriations by Congress.

Section 604: The language of section 604(b) is ambiguous because it can be read to provide that only Guam may tax the income and property of persons within Guam's jurisdiction, from whatever source derived. However, to the extent that such persons and property are also within the jurisdiction of the United States, the United States should also tax such persons. The statutory rules for the prevention of double taxation would apply. To preserve the application of U.S. taxes persons and

-2-

property that are also within the jurisdiction of the United States, section 604(a)m should be amended to read as follows:

"(a) The Commonwealth of Guam shall have the power to determine under the laws of Guam the nature and amount of Guam's taxes imposed upon the income and property of persons within its jurisdiction, from whatever source derived." [underlined language has been added]

In addition, under section 604(b) Guam may move off the mirror code and enact a comprehensive local income tax and replace it without entering into an implementation agreement with the United States (the implementing agreement signed on April 5, 1989, is not yet in effect). Statutory language should be added to section 604(b) to the effect that the implementation of a local income tax may become effective only if, and so long as, an implementing agreement is in effect between the United States and the Commonwealth of Guam with respect to:

(1) the elimination of double taxation involving taxation by the Commonwealth of Guam and taxation by the United States,

(2) the establishment of rules under which the evasion or avoidance of United States income tax shall not be permitted

or facilitated in such possession,

(3) the exchange of information between the Commonwealth of Guam and the United States in accordance with the provisions of section 274(h)(6)(C) of the Internal Revenue Code (IRC) for purposes of tax administration, and

(4) the resolution of other problems arising in connection with the administration of the tax laws of the Commonwealth of Guam or the United States.

Any such implementing agreement shall be executed on behalf of the United States by the Secretary of the Treasury after consultation with the Secretary of the Interior.

Section 605: This section makes all bonds and obligations of the Commonwealth of Guam exempt from taxation by the Government of the United States, etc. This is too broad. In order for Guam-issued bonds to be exempt from Federal taxation they must derive their exemption from the tax code and conform to the statutory and regulatory provisions under section 103 and section 141-150 of the IRC. State bonds must conform to the same requirements

-3-

and Guam should not be free to issue non-conforming bonds. Section 103 limits Federal tax exemption to bonds issued by States, possessions and territories. Guam's ability to issue tax-exempt bonds as a "commonwealth" should be clarified under the IRC. Also, Guam-issued bonds should not be exempt from taxation by any State or territory or any political subdivision thereof, or by the District of Columbia.

Section 1105(4): This section would authorize a revolving fund to "establish an Economic Development Fund on Guam . . . To this end, the Economic Development Fund is authorized to provide financial and other assistance to increase investments (including loans, tax incentives, guarantees and equity capital). . . ." The role of the fund in providing "tax incentives," and the nature of the tax incentives are unclear and should be deleted.

The Office of Management and Budget had advised that there is no objection from the standpoint of the Administration program to the submission of this report to your Committee.

Sincerely,

Edward S. Knight
General Counsel

RECORD TYPE: FEDERAL (NOTES MAIL)

CREATOR: Alicia K. Kolaian (CN=Alicia K. Kolaian/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME: 27-SEP-1996 17:45:56.00

SUBJECT: sample SAP paygo language for Guam War restitution

TO: CALLAHAN_C (CALLAHAN_C @ A1 @ CD @ LINGTWY [EOP]) (OMB)

READ: UNKNOWN

CC: E. Irene James (CN=E. Irene James/OU=OMB/O=EOP @ EOP [OMB])

READ: UNKNOWN

TEXT:

Try this.

H.R. 2041 affects direct spending; therefore it is subject to the pay-as-you-go requirements of OBRA. The establishment of a surcharge on military sales would result in new collections, while the creation of an entitlement to certain benefits would result in new direct spending.

I guess we should just be silent about estimates.

I hope that if Roz really disagreed she would have called after reading my e-mail.

CLINTON LIBRARY PHOTOCOPY

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: FEDERAL (NOTES MAIL)

CREATOR: Roger_Stillwell@os.doi.gov (Roger_Stillwell@os.doi.gov [UNKNOWN])

CREATION DATE/TIME: 5-APR-1999 11:45:13.00

SUBJECT: Accuracy of Guam's Section 30 payments

TO: Danny_Aranza@os.doi.gov (Danny_Aranza@os.doi.gov [UNKNOWN])
READ:UNKNOWNTO: David_North@os.doi.gov (David_North@os.doi.gov [UNKNOWN])
READ:UNKNOWNTO: Allen_Stayman@os.doi.gov (Allen_Stayman@os.doi.gov [UNKNOWN])
READ:UNKNOWN

TEXT:

MEMO TO AL AND DANNY
FROM: ROGER STILLWELL
DATE: APRIL 5, 1999

RE: PDN EDITORIAL OF 4\4\99 AND SECTION 30 \$\$\$\$

The April 4th PDN carried a column by a John A. B. Pangelinan (whom I do not know) who alleged that Guam could be owed more money under Section 30 of the Organic Act if (as he believes) DOD undercounted the number of military personnel stationed on Guam in past years. As you know, the Federal Government pays to Guam taxes collected from military personnel stationed in Guam or those who use Guam as their Home of Record. I believe Mr. Pangelinan may not understand how Section 30 money is calculated.

In reality, the bookkeeping process used by IRS to account for the annual Section 30 payments are such that Guam has most likely been substantially overpaid. Nancy Fanning and I discovered this back in the late 1970's when Guam was asking for a review of Section 30 payments, looking for more money.

Section 30 mandates that Guam should receive the total tax payment due from Guam-based military personnel in any given year. From this one would assume that the Feds figure out what each military taxpayers owes Uncle Sam and then give that amount to Guam. Not so. IRS and DOD says that calculating the exact amount owed was far too much work (at the time) and it was easier for Washington to simply give Guam all the taxes that were withheld, as opposed to owed. As we all know, the amount withheld is usually more than the amount we owe. Guam thus ended up with a gross payment of taxes withheld instead of a net payment, as should be the case and was paid millions more than it technically was owed.

Note: Mr. Won Pat

□,s office added taxes paid by Navy ships that come into Guam for a while. Mr. Won Pat even persuaded Phil Burton to do even better by giving Guam their Section 30 payments a full year in advance with any corrections due at the end of the fiscal year. This was done to ease the fiscal pressure on the territorial treasury. Considering the amounts involved, Guam is in essence receiving a massive interest-free loan from Washington each time they receive their advance Section 30 \$\$\$\$.

While IRS may no longer continue to calculate the Guam Section 30 money as generously as it used to, I thought this bit of background would be

helpful. By any standard, Guam has no complaint and in fact, should be grateful that Uncle Sam was too busy or lazy to make the bottom line accurate.

Pangelinan also says Guam is owed more money from a 1985 law called the Payment in Lieu of Taxes. Since I was not on the Hill in 1985, he could be right.

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Jeffrey Farrow to Steven Mertens, re: INS (2 pages)	3/26/1999	P5
002. email	Jeffrey Farrow to Steven Mertens, re: Guam illegal entries (1 page)	4/14/1999	P5
003. email	Jeffrey Farrow to Steven Mertens, re: Guam boat people (1 page)	4/16/1999	P5
004. email	Jeffrey Farrow to Irene Bueno, re: Guam Asylum Exemption Bill (1 page)	5/11/1999	P5
005. email	Jeffrey Farrow to Irene Bueno, re: Guam Asylum Exemption Bill (1 page)	5/12/1999	P5

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Farrow: Guam])
OA/Box Number: 250000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[03/22/1999 - 5/17/1999]

Whitney Ross
2006-0193-F
wr621

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]
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RR. Document will be reviewed upon request.

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 26-MAR-1999 17:18:38.00

SUBJECT: Re: INS not holding illegals in Guam

TO: Steven M. Mertens (CN=Steven M. Mertens/OU=OMB/O=EOP @ EOP [OMB])
READ: UNKNOWN

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP @ EOP [OPD])
READ: UNKNOWN

TEXT:

Help. The Gov. of Guam's rep here said today INS told them there's not money to return to a no release policy in Guam! Of course, I heard that just hours after assuring Rep. George Miller's staffer to the contrary. Miller is very hot on the problem of foreign workers in the neighboring U.S. territory of the Northern Mariana Islands (which handles its own immigration) sneaking into Guam. Where are we? Thanks.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on 03/26/99

04:18 PM -----

Irene Bueno
03/12/99 05:26:10 PM

Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP
cc:
Subject: Re: INS not holding illegals in Guam

FYI

----- Forwarded by Irene Bueno/OPD/EOP on 03/12/99 05:27
PM -----

Steven M. Mertens

CLINTON LIBRARY PHOTOCOPY

03/12/99 04:46:21 PM
Record Type: Record

To: Maria Echaveste/WHO/EOP
cc: See the distribution list at the bottom of this message
Subject: Re: INS not holding illegals in Guam

I have talked with INS and Justice regarding your e-mail concerning INS' detention of illegal aliens in Guam. INS practice has been to incarcerate both criminal and illegal aliens on Guam pending final removal. FY 99 detention funding constraints resulted in INS revisiting this policy for the last group of illegals being held in Guam. INS notified the Governor of this change and its future plans to only incarcerate those determined to be non-criminal aliens with little flight risk or threat to the community. In response, the Governor decided to provide adequate detention space to continue to incarcerate all illegal

aliens (apparently at no charge to INS) so no illegal aliens would be released in Guam.

INS has assured me the \$111 million in additional funding for detention (\$80 million in Central American sup and \$31 million in reprogrammed resources) in FY 99 will permit a return to a "no release" policy in Guam at INS expense.

If you have any questions, please let me or Irene know. Thanks.

Message Copied

To:

irene bueno/opd/eop

Michael Deich/OMB/EOP

Kenneth L. Schwartz/OMB/EOP

David J. Haun/OMB/EOP

Ingrid M. Schroeder/OMB/EOP

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:14-APR-1999 16:52:48.00

SUBJECT: Re: Guam illegal entries

TO: Steven M. Mertens (CN=Steven M. Mertens/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TEXT:

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

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

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:16-APR-1999 18:56:29.00

SUBJECT: Guam boat people

TO: Steven M. Mertens. (CN=Steven M. Mertens/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

Records Management@EOP (Records Management@EOP [UNKNOWN])
READ:UNKNOWN

TEXT:

Sandy Berger and Mickey Ibarra have sent the President a memo recommending he grant the AG the authority to detain in the Northern Mariana Islands the boat of 152 Chinese citizens apparently bound for illegal entry and seeking asylum in Guam. Agencies have been directed to take them to the Marianas and process them for repatriation or asylum. Governor Tenorio has agreed to the plan.

Scott Busby is arranging an interagency meeting next Thursday that will consider Guam Governor Gutierrez and Congressman Underwood's further concerns re the 492 Chinese who have already made it to Guam and have filled the territory's jails to capacity and others who may try to go there.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:11-MAY-1999 12:56:25.00

SUBJECT: Guam Asylum Exemption Bill

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TEXT:

The House Immigration Subcommittee will hold a hearing 5/18 I believe on Guam Congressman Underwood's bill to exempt Guam from the asylum provisions of the INA as a partial solution to the current problem of boatloads of Chinese asylum seekers. Guam Gov. Gutierrez will also testify in favor. From speaking with John Morton/Justice and Scott Busby, I assume we'll want to oppose the bill. Agree? Beau Cooper/INS will testify. I think we'll have to carefully explain our position for a number of reasons. Some relate to asylum policy/politics. In addition, we're for amending the INA for Guam to address Guam specific problems with national immigration law. I think Beau will also have to explain what we're doing about the current problem. I will keep you plugged in on this and welcome any advice.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:12-MAY-1999 18:51:30.00

SUBJECT: Re: Guam Asylum Exemption Bill

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TEXT:

We are committed to reimbursing Guam's costs. Whether OMB/INS want to be statutorily required may be another question.

I don't have a strong view at all. Scott Busby and John Morton were negative.

Arguments against: We are for asylum for those who qualify; its a basic American policy and should be available in all U.S. areas. We want to make it available in the Northern Marianas. We're granting it to Chinese taken there even though the INA asylum provisions don't apply yet. We have international asylum commitments. Human rights advocates would think we're undermining the principles of asylum if we agree to exempt a U.S. territory. Exemption from the INA asylum provisions wouldn't mean we wouldn't grant asylum in Guam, so this is not the solution to the current problem. The solution to illegal immigration shouldn't be exempting our border areas.

Given Interior's position, I thought a meeting might be worthwhile. Your inclinations confirm that. You may want to call in tomorrow 9:10 am 757-2104 code 5642. This is a call on the Guam/Marianas operation. Interior will raise the issue on it. I thought it might then justify a meeting.

Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

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

Whitney Ross
2006-0193-F
wr622

RESTRICTION CODES

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

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

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

- C. Closed in accordance with restrictions contained in donor's deed of gift.
- PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
- RR. Document will be reviewed upon request.

Withdrawal/Redaction Sheet

Clinton Library

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

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

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

Whitney Ross

2006-0193-F

wr622

RESTRICTION CODES

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

- P1 National Security Classified Information [(a)(1) of the PRA]
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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 9-JAN-1998 17:01:25.00

SUBJECT: Guam Compact Impact

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

READ: UNKNOWN

TEXT:

OMB today declined to clear Interior's draft of the annual report required by law on the issue. Its due Wednesday by court order and OMB, which got it last night, said (1) there isn't enough time for review by other agencies and (2) it didn't meet the requirements of the law or court order. Interior was told to send it anyway to meet the deadline but without indicating that it had Administration approval, although it is supposed to be a Presidential report.

Guam (and, perhaps, the Marianas and Hawaii) can be expected to complain about the report (as well as the lack of additional reimbursement \$). This is a Presidential responsibility by law but can be delegated by law and Interior is running the show. After their giving up the additional \$ for Guam, I would, frankly, direct the islands there.

I'd be happy to fix the handling of this but would have to take over the lead more from them. The situation is unfortunate but not as critical as Guam Commonwealth. We could always do more if we feel we have to for Gutierrez or some other reason.

Finally, I think I've mentioned that Interior is trying to get out of the responsibility by shifting responsibility for the report from the President to the Governors. I don't advise this and the islands probably don't like it but I haven't objected because Interior seems like a lost cause on this anyway and the islands haven't made an issue of it,.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 6-FEB-1998 16:20:49.00

SUBJECT: Lausell/Guam FEMA match

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

READ: UNKNOWN

TEXT:

Lausell: Now wants to get together another time.

Guam FEMA match: My guess after talking to FEMA staff is that this will take a push. Territories laws I helped write and get enacted provide special waiver authority but they were enacted over agency opposition. (Bush said the '92 law wouldn't "diminish matching requirements" in signing it even though it did.) I favor pushing and the President might want us to do so. I think its the type of special treatment that he has favored in conversations with Gov. Gutierrez and on Puerto Rico. Do you want to weigh in?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 7-APR-1998 14:07:17.00

SUBJECT: Guam lead

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

READ:UNKNOWN

TEXT:

Whatever happens with D/S at Interior, it would be good to use Garamendi's departure to for a better insular relations arrangement/support.

You should also know that Guam status is not a part of the D/S portfolio per se, it fell to Garamendi after some 'presidential' reps (an NSC staffer and ex Rep. Dennis Echardt, who found he had a conflict) left and someone was needed ASAP.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 8-APR-1998 14:41:09.00

SUBJECT: Guam Stop cover note

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

READ:UNKNOWN

CC: Cecily C. Williams (CN=Cecily C. Williams/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

Suzanne Dale (Suzanne Dale [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

You may want to make the points which follow in a cover note to Podesta and Berger for the Guam stop schedule proposal. I also recommend copying Janet on it.

Attached is a copy of a proposal for the President to make a brief stop on Guam en route to or from China that I hope you will also seriously consider.

The President has never visited this jurisdiction of our country in spite of many requests that he do so from its Democratic Governor and Congressman and his expressed interest in visiting. Because of its location, a visit is only feasible in connection with an Asian trip but, as past administrations have recognized, it provides a convenient and easy resting or refueling point on the way.

Even a brief stop would be very helpful to relations with the territory. Guamanians really feel ignored because of their location and lack of votes. The significance to them of a visit during the Centennial of the taking of their island in war cannot be overstated and would be understood nationally.

Finally, questions which would have been raised by a stop during much of last year were obviated by the positions that we eventually took on Guam's 'Commonwealth' bill in a congressional hearing last Fall. The questions would have related to (1) recommendations from the Administration's representative to Guam on the bill to which other agencies objected and (2) substantial campaign contributions from the territory. We did not accept the recommendations and even a congressional Republican who had questioned them has acknowledged that the contributions could not have influenced the policies that the Administration finally stated.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 9-APR-1998 19:15:17.00

SUBJECT: Weekly - Guam bullet

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

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

TEXT:

I didn't include a bullet on our Guam stop proposal so as not to have other (senior) staff think we're end-running them. I also, though, think that it might get the answer we want and that it is legitimate in terms of informing the President about requests. I defer to your judgment and will send Suzanne the bullet below (or a revised one) if you still want to raise this.

Guam Governor Carl Gutierrez (D) and U.S. House Delegate Robert Underwood (D) very much want you to visit the territory -- on the Centennial of its acquisition by the U.S. -- on your China trip. They have consistently requested a stop during your Asian trips, noting that the island generally feels ignored. We are exploring the possibility of a brief stop with other staff.

CLINTON LIBRARY PHOTOCOPY

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 28-APR-1998 19:35:18.00

SUBJECT: Guam Commonwealth rep/Territories IG(me)

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

READ: UNKNOWN

TEXT:

1. Guam Commonwealth rep --

John Berry is moving to get Interior to recommend that he be the new rep. As you know, I think this makes sense if we have a clear understanding on coordinating positions.

I told Al Stayman and Treasury today that we need to resolve our positions on the outstanding issues (tax and trade) without waiting for a new rep and that the new rep's function is to work in Congress from the Administration positions. I will tell the same to OMB and USTR. I want the President to be able to say in June that Congress should act (since he has).

Guam may have the idea of a Geo. Mitchell but there's not much for a name negotiator to negotiate now. The best we can do is real action on realistic measures. (Guam also needs to decide what it really wants. The Commonwealth commission is still asking for action on the territory's Commonwealth package but the territory also has a Chamorro-only vote scheduled by law on the full self-government options -- statehood, independence and free association this Fall.)

2. Territories IG --

Stayman will recommend an interagency group for coordinating policy re the four unincorporated areas for which Interior has limited responsibilities -- Guam, the Virgin Is. Samoa, and the Marianas -- co-chaired by Interior and IGA.

While Interior is responsible for relations with them, it specifically lacks authority for matters within the responsibility of other agencies and, thus, often can't other agencies to do what is needed. That requires EOP intervention -- which Interior requests.

We have an IG for Puerto Rico (for which the White House has policy responsibility) and there is one for the freely associated states (for which State and Interior have policy and funding responsibilities respectively).

An IG re the other areas is needed. It shouldn't add work here (since IGA gets requests anyway) but should organize the process for some requests to be staffed at Interior or other agencies.

This could be the coordination mechanism re Guam Commonwealth, etc.

3. Me

I haven't gotten into it with Stayman but the territories IG could provide a basis for my work on territories matters here. So, too, could an additional designation to advise here on Insular Affairs. That would

provide a basis for memos, external interaction, etc. Right now its awkward and confusing to people.

3.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 6-MAY-1998 12:53:29.00

SUBJECT: Re: Guam

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

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

1. Budget/Logistical issues: DoD/Interior funding

Message/Political Issues: Us (including Janet and with Craig's support and in consultation with Interior).

2. The President was very clear about wanting to stop this year.

3. I had been thinking about a Gutierrez/Stephanie (and us, etc.) meeting that could get publicity as "we're consulting with the Gov. on the possibility of a stop on a foreign trip" as an alternative to a Gov/Pres meeting that would be much more committal -- especially next week given where Stephanie is. I'm sure May Eva wouldn't like it as an alternative but I think it would make it clear in Guam that Gutierrez is a main player in a stop.

We can also, though, reinforce Gutierrez's close working relationship with us by the Oceans Conf. and APEC invitations. They are actually better in terms of public impact.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:12-MAY-1998 17:30:51.00

SUBJECT: Guam proclamation

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

READ:UNKNOWN

TEXT:

Danny Aranza suggested a Centennial proclamation for Guam, possibly with a photo-op signing. I think the only downside would be doing one for Puerto Rico too.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 3-JUN-1998 12:37:40.00

SUBJECT: Guam message

TO: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: KRISTOFF_S (KRISTOFF_S @ A1 @ CD @ VAXGTWY [UNKNOWN]) (NSC)
READ:UNKNOWN

CC: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

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

Suzanne Dale (CN=Suzanne Dale/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

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

TEXT:

Would you please tell me if you think there should be any changes to the attached draft message to Guam? It was drafted for a video for the Centennial of the raising of our flag there June 21 (but could also be the basis of remarks during a visit to the Island later this year). Delegate Underwood and Governor Gutierrez requested a message.

I think it would convince Guamanians that the President understands their basic concerns even though we have not agreed to their (unrealistic) 'Commonwealth' proposals and that it is appropriate given Guam's history. Please call (6-5179) if you have any questions.

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D25]MAIL44100735K.126 to ASCII,
The following is a HEX DUMP:

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:16-JUN-1998 14:01:16.00

SUBJECT: Re: Guam Centennial Video

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

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

I sent the contingent message request last week.

It would be disappointing -- and wrong -- though not to do more than a written message. (I know you support doing more.) The President is sending a delegation to the Philippines. Guam is much smaller than the Philippines but the Philippines opted for independence and Guam is U.S. (Guam is also near the Philippines.) Further, even though it is part of our country, it has no vote in its national government -- the one that the President heads.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:17-JUN-1998 14:26:28.00

SUBJECT: Guam/State Dept. nexus

TO: Jennifer M. Palmieri (CN=Jennifer M. Palmieri/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Stephanie S. Streett (CN=Stephanie S. Streett/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Patrice L. Stanley (CN=Patrice L. Stanley/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

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

TEXT:

Here are a couple ideas re State Dept. business that could be done on Guam.

Guam is the logical place to meet (briefly) with the presidents of our three 'freely associated states'. (State handles relations with them.) They are made up of Micronesian islands; Guam is the largest Micronesian island; and tens of thousands of their citizens live in Guam. We are required by law to begin renegotiating the association with two of the states weeks prior to the time of the South Asia trip.

We have major Navy and Air Force bases on Guam. It is a logical place for addressing regional security issues. (We also have important DoD land/community relations issues we're addressing.)

As the westernmost point of U.S. soil, Guam is a logical place for other meetings/speaking related to the region. Guam, in particular has links to the Philippines and Japan.

The President said he liked the idea promoted by the Congressional Asian/Pacific Islands Caucus of a Pacific Islands Summit including the many independent nations in the region as well as our three freely associated states and two territories. They proposed it for next year in Hawaii but Guam would also be a logical place.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 4-AUG-1998 11:24:35.00

SUBJECT: Guam stop announcement

TO: Simeona F. Pasquil (CN=Simeona F. Pasquil/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Craig T. Smith (CN=Craig T. Smith/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on 08/04/98
11:23 AM -----

Mickey Ibarra
08/04/98 08:27:23 AM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP
cc: Janet Murguia/WHO/EOP, Fred DuVal/WHO/EOP
Subject: Guam

We reached agreement this morning that we are now ready to announce our Guam trip for November. However, we do not want to do this until tomorrow with the Governor. So, if Underwood asks the President about it in the CHC meeting, I suggest he respond 'we are working on this and expect to have an answer very soon.' Please coordinate this carefully with Janet so we ensure a simultaneous notification to the Governor and Underwood. Thanks.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 5-AUG-1998 10:50:37.00

SUBJECT: Guam

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

READ:UNKNOWN

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

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

FYI, we will be lucky to actually have Guam stop come off after tonight's event. Craig and Stephanie feel very used and misled by Mary Eva et. al. We're at 45 people for the 30 person total event. We know that they will do press out of the closed press event (done to get video the Governor could use later). After the discussions last night, Stephanie, however, did reiterate announcing the stop tonight.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 20-AUG-1998 17:49:50.00

SUBJECT: Re: Guam

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

READ: UNKNOWN

TEXT:

I don't disagree. We don't need to do anything until then and it will be easier then to clarify the terms of the designation, i.e., not renegotiating our Commonwealth Bill positions but explaining them and answering Congressional questions.

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Jeffrey Farrow to Craig Smith, re: As Guam Goes... (1 page)	11/3/1998	P5
002. email	Jeffrey Farrow to Aviva Steinberg, re: Guam Stuff (6 pages)	11/6/1998	P5
003. email	Jeffrey Farrow to Fred Duval, re: Guam Election (6 pages)	11/6/1998	P5
004. email	Jeffrey Farrow to Aviva Steinberg, re: Guam Points (2 pages)	11/9/1998	P5
005. email	Jeffrey Farrow to Fred Duval, re: Guam Points (2 pages)	11/9/1998	P5
006. email	Jeffrey Farrow to Mickey Ibarra, re: Guam Relations (1 page)	11/14/1998	P5

COLLECTION:

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

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FOLDER TITLE:

[10/29/1998 - 11/17/1998]

Whitney Ross

2006-0193-F

wr623

RESTRICTION CODES

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

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

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

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(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]

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.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 3-NOV-1998 13:26:10.00

SUBJECT: As Guam Goes . . .

TO: Craig T. Smith (CN=Craig T. Smith/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

CC: John Podesta (CN=John Podesta/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

CC: Monica M. Dixon (CN=Monica M. Dixon/O=OVP @ OVP [UNKNOWN])

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

Guam Gov. Gutierrez won -- looks like 53% to 47% with absentees not yet counted. Cong. Underwood won overwhelmingly -- last I heard almost three to one. GOP took 12 of 15 Legislature seats.

Do you want to recommend a congrats call -- if only to highlight the first Dem gubernatorial and congressional victory of today? If so, it should be joint to Gutierrez and Underwood.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 6-NOV-1998 12:03:45.00

SUBJECT: Re: guam stuff

TO: Aviva Steinberg (CN=Aviva Steinberg/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

Leaders:

U.S. Territorial Jurisdictions --

Governor Tau'ese Sunia (D) of the territory of American Samoa

Governor Pedro P. Tenorio (I) of the Commonwealth of the Northern Mariana Islands

States Freely Associated with the U.S. --

President Kuniwo Nakamura of the Republic of Palau

President Jacob Nena of the Federated States of Micronesia

President Imata Kabua of the Republic of the Marshall Islands

Governors of the four states of the Federated States -- Yap, Kosrae, Phonpei, and Chuuk

Foreign Countries --

President of Nauru

President Tito of Kiribati

I will get missing names soon.

Election:

No resolution.

Mary Eva called a few hours ago to say Counsel to Election Commission agrees that blank ballots should not be counted -- a major aspect of Gutierrez's contention -- but there are also mismarked ballots and write-ins at issue.

Republican Joe Ada said it doesn't look like he lost and he will fight to the end.

Some of the six election commissioners -- split three Dems, three GOP -- are reportedly off-island. One is at a 9th Circuit hearing in SF. One is in the hospital in Honolulu.

Again, final count, commission decision, and litigation could be involved. Nov. 17 is fixed date for run-off.

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CLINTON LIBRARY PHOTOCOPY

CLINTON LIBRARY PHOTOCOPY

of , DI'll get you names/titles of other insular leaders shortly. (I have to check a few.)

Guam election:

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 6-NOV-1998 13:55:33.00

SUBJECT: Re: guam election

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

READ:UNKNOWN

TEXT:

No resolution.

Mary Eva says Counsel to Election Commission agrees that blank ballots should not be counted -- a major aspect of Gutierrez's contention -- but there are also mismarked ballots and write-ins at issue.

Republican Joe Ada said it doesn't look like he lost and he will fight to the end.

Some of the six election commissioners -- split three Dems, three GOP -- are reportedly off-island. One is at a 9th Circuit hearing in SF. One is in the hospital in Honolulu.

Again, final count, commission decision, and litigation could be involved. Nov. 17 is fixed date for run-off.

CLINTON LIBRARY PHOTOCOPY

CLINTON LIBRARY PHOTOCOPY

CLINTON LIBRARY PHOTOCOPY

CLINTON LIBRARY PHOTOCOPY

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Guam election:

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 9-NOV-1998 20:57:19.00

SUBJECT: Guam points

TO: Aviva Steinberg (CN=Aviva Steinberg/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

Background.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on 11/09/98
08:57 PM -----

Jeffrey L. Farrow

11/09/98 08:53:52 PM

Record Type: Record

CLINTON LIBRARY PHOTOCOPY

To: Fred DuVal/WHO/EOP

CC:

Subject: Guam points

Guam Election Complication Points

The Guam Elections Commission's preliminary results from the gubernatorial election give Governor Gutierrez 49.79% of the vote -- just short of the required 50% plus one vote. Unless a candidate receives a majority, a runoff election is required two weeks after the general election, or November 17.

November 17 is two days after the President was scheduled to appear at events arranged as official with Governor Gutierrez. The Governor may be a candidate on virtually the eve of an election at that point.

Governor Gutierrez is challenging the preliminary finding that he did not receive an absolute majority and we have no doubt that he is right. We understand that is also the conclusion of the commission's legal adviser.

We understand that is not the position of his Republican challenger, however. Further, the commission -- which is evenly split between Republicans and Democrats -- has not ruled.

Instead, we understand the commission is conducting a recount and will not meet until Thursday. How the recount may affect the situation is, obviously, unclear. What the commission will do is also unclear.

The major paper has editorialized twice suggesting a runoff

Further, there are reports from the challengers' side that they will go to court, making resolution of the issue even less certain.

In any case, the atmosphere is highly charged politically and planning a trip could be intrusive and become a lightning rod in the debate.

The President wants to visit the people of Guam to demonstrate that he

takes his responsibilities to all of them as seriously as he does to their fellow citizens in the States. He wants to focus on the island's future development with the election resolved

There are substantial differences between an official trip and a political trip. They involve issues of payment and appropriate activities.

The costs involved in a delay to the end of this trip to Asia would be staggering. If a Guam stop became political, they would be beyond what Governor Gutierrez's campaign could reasonably be expected to pay. There would be other huge costs from a delay for the Federal Government. There would also be enormous logistical problems and burdens placed on individuals and support equipment in the field.

Planning a visit takes substantial lead time that would not be available if it takes a couple of more days to completely resolve the election issue.

In the time between now and when he visits, we're going to focus on working with Gov. Gutierrez and Cong. Underwood on improving Federal policies concerning Guam and Guam's situation, needs, and proposals.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 9-NOV-1998 20:56:03.00

SUBJECT: Guam points

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

READ:UNKNOWN

TEXT:

Guam Election Complication Points

The Guam Elections Commission's preliminary results from the gubernatorial election give Governor Gutierrez 49.79% of the vote -- just short of the required 50% plus one vote. Unless a candidate receives a majority, a runoff election is required two weeks after the general election, or November 17.

November 17 is two days after the President was scheduled to appear at events arranged as official with Governor Gutierrez. The Governor may be a candidate on virtually the eve of an election at that point.

Governor Gutierrez is challenging the preliminary finding that he did not receive an absolute majority and we have no doubt that he is right. We understand that is also the conclusion of the commission's legal adviser.

We understand that is not the position of his Republican challenger, however. Further, the commission -- which is evenly split between Republicans and Democrats -- has not ruled.

Instead, we understand the commission is conducting a recount and will not meet until Thursday. How the recount may affect the situation is, obviously, unclear. What the commission will do is also unclear.

The major paper has editorialized twice suggesting a runoff

Further, there are reports from the challengers' side that they will go to court, making resolution of the issue even less certain.

In any case, the atmosphere is highly charged politically and planning a trip could be intrusive and become a lightning rod in the debate.

The President wants to visit the people of Guam to demonstrate that he takes his responsibilities to all of them as seriously as he does to their fellow citizens in the States. He wants to focus on the island's future development with the election resolved

There are substantial differences between an official trip and a political trip. They involve issues of payment and appropriate activities.

The costs involved in a delay to the end of this trip to Asia would be staggering. If a Guam stop became political, they would be beyond what Governor Gutierrez's campaign could reasonably be expected to pay. There would be other huge costs from a delay for the Federal Government. There would also be enormous logistical problems and burdens placed on individuals and support equipment in the field.

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if it takes a couple of more days to completely resolve the election issue.

In the time between now and when he visits, we're going to focus on working with Gov. Gutierrez and Cong. Underwood on improving Federal policies concerning Guam and Guam's situation, needs, and proposals.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:14-NOV-1998 16:28:31.00

SUBJECT: Re: Guam relations

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

READ:UNKNOWN

TEXT:

You sent the memo to John and it was approved. You then wanted to make sure OMB cleared it. That took a while. (Much of this was the OMB Counsel but some of it has been me. on either side, we've been distracted by budget talks, hurricanes, trip, etc.) OMB has given me a draft EO. I think we should do some consultations before paper is issued. (This action will not be controversial like Federalism but we should talk with electeds beforehand.)

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Jeffrey Farrow to Janet Irwin, re: President on Guam (1 page)	11/18/1998	P5
002. email	Jeffrey Farrow to June Shih, re: Guam Reception (1 page)	11/20/1998	P5
003. email	Jeffrey Farrow to Sylvia Mathews, re: Guam Announcement (1 page)	11/25/1998	P5
004. email	Jeffrey Farrow to Sylvia Mathews, re Guam Announcements Addendum (1 page)	11/30/1998	P5
005. email	Jeffrey Farrow to Maria Echaveste, re: INS (1 page)	3/6/1999	P5
006. email	Jeffrey Farrow to Steven Mertens, re: Guam Asylum Entries (1 page)	4/12/1999	P5
007. email	Jeffrey Farrow to Maria Soto, re: Guam (1 page)	4/15/1999	P5
008. email	Jeffrey Farrow to Mickey Ibarra, re: Guam Illegal Entries (2 pages)	4/15/1999	P5
009. email	Jeffrey Farrow to Mindy Myers, re: Guam Boat People (1 page)	4/16/1999	P5
010. email	Jeffrey Farrow to Maria Echaveste, re: Call on Guam Chinese Boat People (1 page)	4/28/1999	P5
011. email	Jeffrey Farrow to Fred Duval, re: Guam US Atty. (1 page)	4/30/1999	P5
012. email	Jeffrey Farrow to Carol Dennis, re: Guam Asylum Bill (1 page)	5/12/1999	P5

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[11/17/1998 - 6/30/1999]

Whitney Ross
2006-0193-F
wr624

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]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
013. email	Jeffrey Farrow to Steven Mertens, re: Guam Asylum Bill (2 pages)	5/12/1999	P5
014. email	Jeffrey Farrow to Irene Bruno, re: Guam Asylum Exemption Bill (1 page)	5/12/1999	P5
015. email	Jeffrey Farrow to Fred Duval, re: Guam Money Issues (2 pages)	6/8/1999	P5

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[11/17/1998 - 6/30/1999]

Whitney Ross

2006-0193-F

wr624

RESTRICTION CODES

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

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

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P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
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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]
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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]

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.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:18-NOV-1998 19:22:11.00

SUBJECT: President on Guam

TO: Janet E. Irwin (CN=Janet E. Irwin/OU=OMB/O=EOP @ EOP [OMB])

READ:UNKNOWN

TEXT:

Consensus here to go with increasing Compact Impact Aid to Guam \$5.42 m from subsidy now going to the Northern Mariana Islands.

Any developments on Coral Reef \$ My inclination is that, if anything, the President say that he will propose special funding for the territories (presuming your \$500,000 or whatever) as well as the inclusion of the territorial governors on the task force.

Finally, Interior keeps suggesting a technical assistance study of Guam's economic alternatives. I'm not keen on announcing that; studies sound lame. They're talking about a \$1 m increase in TA from this year. Is that what you advise or just what OIA wants us to help get this way?

Thanks.

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:20-NOV-1998 17:09:46.00

SUBJECT: Re: Guam reception

TO: June Shih (CN=June Shih/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

David Goodfriend also spoke to me about the thanks for the land language. He suggested we already say enough thanks and that will cover land and we could also insert a line recognizing the Chamorro language and culture.

He also suggested people of Guam instread of Guamanian.

I agree in all respects.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 25-NOV-1998 14:31:01.00

SUBJECT: Guam announcement

TO: Sylvia M. Mathews (CN=Sylvia M. Mathews/OU=OMB/O=EOP @ EOP [OMB])
READ: UNKNOWN

CC: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])
READ: UNKNOWN

CC: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [WHO])
READ: UNKNOWN

TEXT:

I was surprised to learn of a problem, am sorry about it, and tried to avoid one. I did talk to OMB. The principal subject was about the money issue, which was a further reallocation of mandatory territories spending, to take more of the funds away from the Northern Mariana Is. and use them for Guam. I checked this out with appropriate staff and understood it was livable.

Another issue was the territories interagency process which was discussed a while back and for which OMB staff drafted a presidential memorandum in preparation for the trip. Incidentally, I think this mechanism will help avoid any problems in the future concerning these relatively obscure issues (although this was an extraordinary circumstance). I think our Puerto Rico interagency coordination has helped with that area's issues -- Joe Minarik serves as a base within OMB.

I think a big part of the clearance problem was that the speech wound up being circulated late (much after I did the original draft) and, unfortunately, ran you into the weekend.

Additionally, my repeated recommendation was that Fred go on the trip and I work on the substance issues. As it was, I wound up doing a substantial amount of the planning for the trip itself, etc. as well as the substance and traveling. With many of the issues not finalized (even from our point of view) until very late, I reiterated this precisely to be here to be able to answer any questions and make any needed changes. That was not the decision.

The President very much wanted to do what he could for Guam. We cobbled together what is really a very minor package, much of it by dusting off and spinning measures. It worked very well for him.

I am very keen on coordination. As Maria and Fred know that's what I've been pressing for re territories in general and Guam specifically for years. I have really battled internally for this.

You have been especially helpful and sensitive to issues on which it is hard to get attention. I am very chagrined that there was a problem.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:30-NOV-1998 18:59:14.00

SUBJECT: Re: Guam announcements addendum

TO: Sylvia M. Mathews (CN=Sylvia M. Mathews/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TEXT:

Yes, I first sent my e-mail on the announcements backgrounder to Sonyia Matthews by error and that prevented you from seeing it earlier. (I must have clicked on the wrong line when e-mail didn't recognize how I typed your name.)

The backgrounder, incidentally, was something: the press office pressed for; I completed late Friday; which I said I didn't want released unless it was OK with you, having heard your question about the speech; and wasn't essential from my point of view, given the content of the speech.

OMB folks I spoke with included Interior Branch Chief Janet Irwin on the Compact Impact \$ and Dep. Counsel Mac Reed on the territories interagency group but I hope you don't put them on the spot. Blame me (within the context of a flawed process overall). I'll try to make sure we don't get out of synch again.

I really do appreciate your attention and sensitivity. (And, totally unrelated, do want to talk to you all about the next budget soon.)

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 6-MAR-1999 12:37:03.00

SUBJECT: INS not holding illegals in Guam

TO: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

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

READ:UNKNOWN

CC: Marjorie Tarmey (CN=Marjorie Tarmey/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

Guam Gov. Gutierrez raised the issue of INS no longer holding illegal aliens in Guam after administrative violations processing and before criminal charges. This is a problem for the territory since foreign workers in the Northern Mariana Islands sneak into Guam. (One of the many reasons we don't like the NMI system.)

Eric Holder's office told me you are working on the national funding problem re this. I want to make sure you are aware of the need in Guam.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:12-APR-1999 17:59:54.00

SUBJECT: Guam Asylum Entries

TO: Steven M. Mertens (CN=Steven M. Mertens/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

CC: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

Guam Gov. Gutierrez (D) has asked for help re the illegal entry into the territory of aliens seeking asylum. The help he wants is both in preventing further entries and removing asylum seekers to the location(s) of their hearings. He wonders if the substantial Navy and Air Force resources there can help the INS in housing and transportation.

A boatload of another 50 Chinese crashed into a reef in Guam waters this past weekend. There are some 350 illegal entrants seeking asylum now in the territory of 140,000 people. Many of the entrants are sneaking over from the adjacent Northern Mariana Islands, a U.S. territory but not subject to the INA. The President has proposed applying the INA to the Marianas. He also greatly disappointed Gov. Gutierrez, a friend, by not agreeing to Gutierrez's request for a Guam exemption from the INA. One of Gutierrez's main arguments for exemption was that Guam could better enforce immigration laws in the territory than the INS.

What can be done to help? Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-APR-1999 17:31:15.00

SUBJECT: Guam

TO: Maria E. Soto (CN=Maria E. Soto/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TEXT:

I am on an NSC-interagency call right now on this working out interagency differences. Interior doesn't want to use the Marianas more than essential. Justice wants to use the Marianas. Underwood wants the Marianas instead of Guam. I am going along with Marianas but agree with Interior to limit it to the minimum and then try to send the 152 people on the boat abroad. I also want to use the situation to get DoD to free up vacant base housing in Guam to house the 492 people already in Guam. Simply going along with Justice will not get the latter done.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-APR-1999 07:49:14.00

SUBJECT: Re: Guam illegal entries

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

CC: Todd A. Bledsoe (CN=Todd A. Bledsoe/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Maria E. Soto (CN=Maria E. Soto/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Mindy E. Myers (CN=Mindy E. Myers/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

TEXT:

Yes. I spoke with Underwood and said we would have a meeting. We had a conference call coordinated by NSC last night and will have another one this AM. NSC scheduled a meeting next Thursday but will try, at my further request, to do it earlier. (A key State Dept. official is having an operation.) We need a little Administration work before we sit down with Underwood or others.

Also prompting the NSC is Coast Guard spotting of another boat headed for Guam with an estimated 80 Chinese on board. INS and others want to prevent it from landing, steer it to the Northern Marianas, and get China's agreement to send the people home. The Marianas would be used since the Immigration Act does not apply and the individuals can't claim asylum. Law enforcement types want to use this vessel to send a message to the organized shippers of these Chinese that their new Guam approach to U.S. soil will be stopped.

Interior is opposed to this plan because it would enable Gov. Tenorio and Rep. DeLay to argue there's an important benefit from the non-application of the Immigration Act to the Marianas -- which we strongly want to end. While I was initially sympathetic to Interior's opposition, there does not seem to be a foreign island alternative without endangering the people on this decrepit boat.

I disappointed Interior on the call last night by siding with the other agencies (Justice, State, and Coast Guard as well as NSC) in agreeing to the Marianas plan with the concessions that (1) DoD and State see if the people can be quickly transhipped to one of the freely associated states or the Philippines, (2) we not tell Gov. Tenorio that we've steered the people away from Guam so as not to give him the ammunition Interior rightly fears, (3) we try to develop a freely associated state or Philippines option not involving the Marianas for future boats, and (4) we explore with DoD using vacant Air Force housing on Guam to house the illegal asylum seekers already there. Underwood and Gov. Gutierrez are complaining

about.

We need to be very careful about what we tell Underwood and Gutierrez though because we don't want to give the Marianas and deLay ammunition against our marianas proposal.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:16-APR-1999 18:51:46.00

SUBJECT: Guam boat people

TO: Mindy E. Myers (CN=Mindy E. Myers/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

Records Management@EOP (Records Management@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

Mickey has joined Sandy Berger in sending a memo to the President recommending the President grant the AG the authority to detain in the Northern Mariana Islands the boat of 152 Chinese citizens apparently bound for Guam to illegally enter and seek asylum. Agencies have been directed to take them there and process them for repatriation or asylum. Underwood is happy that they are not coming to Guam. We will have an NSC chaired interagency meeting next Thursday that will consider Underwood's further concerns re the 492 Chinese who have already made it to Guam and others who may try to go there illegally to seek asylum. Underwood also wants a meeting he and the Governor can attend or be represented. I told him we would do that as well.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 28-APR-1999 12:55:36.00

SUBJECT: 1 pm call on Guam Chinese boat people

TO: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP@EOP [WHO])

READ: UNKNOWN

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

READ: UNKNOWN

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

READ: UNKNOWN

CC: Marjorie Tarmey (CN=Marjorie Tarmey/OU=WHO/O=EOP@EOP [WHO])

READ: UNKNOWN

TEXT:

Coast Guard is holding another undocumented boat with Chinese 1/2 mile off Guam and wanted instructions this AM on whether to take it to the Marianas or let it go to Guam. I persuaded them to wait until 1pm. Scott Busby is calling them now to see if we can buy any more time but the 1 pm call is on.

The major problem with either location -- the Marinas being preferred -- is that DoD will need to assist and has been mostly unwilling to. ('Gen. Shelton doesn't want another G'tmo, we're not authorized to do this, we're tapped out by Kosovo, we don't want to get into the immigration control business.') Scott is trying to get Eric Holder to call DoD. Holder staffer John Morton wanted a call from here and for DoD to agree not to be reimbursed for some costs.

The other major problem is the money for this. Justice wanted a supplemental. Michael Deich wanted DoJ to find the money within its budget. Justice is working on that. DoD wants full reimbursement for whatever they do. Overall costs for Guam and the Marianas so far are projected at \$10m-15m. INS has exhausted its emergency fund. Neither Governor wants more boat people unless they can be reassured about issues involving costs.

Call is 7-2104 pin 5642.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 30-APR-1999 17:58:55.00

SUBJECT: Guam US Atty.

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

READ: UNKNOWN

TEXT:

Holder's candidate is the same. He also want to put in a new 1st Assistant. He is moving expeditiously and will have a final (hopefully?) meeting next week. He's being absolutely thorough. The incumbent U.S. Atty. is said to be investigating allegations relating to the incumbent local administration.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 12-MAY-1999 14:22:39.00

SUBJECT: Guam Asylum Bill

TO: Carol R. Dennis (CN=Carol R. Dennis/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

Records Management@EOP (Records Management@EOP [UNKNOWN])

READ: UNKNOWN

TEXT:

Anna Briatico told me you are going to handle testimony on Guam Delegate Underwood's bill to exempt Guam from the asylum provisions of the INA, HR 945, for the hearing 5/18. I coordinate issues re the territories for the WH.

A major effort to smuggle Chinese into the U.S. entering in Guam prompted the bill. From conversations with John Morton, Counsel to the Dep AG, as well as Scott Busby/NSC, I believe we should oppose it. INS Dep. Gen. Counsel Beau Cooper is to testify.

We will, however, need to carefully explain our reasons because of (1) asylum policy/politics and (2) our willingness to amend the INA to address Guam problems.

Cooper will also need to be prepared to explain how we're responding to the current Chinese smuggling problem. (This includes a presidential memo authorizing the AG to detain interdicted illegals in the Northern Mariana Islands, the newest territory in the same chain as Guam where the INA does not yet apply although we are trying to get it extended. Four boats with about 480 people have been interdicted in the past few weeks. This is being done to alleviate overcrowding Guam's jails, which are housing 600 illegals for INS. Coast Guard has sent out a plane and two large cutters for increase surveillance. Justice has committed to try to find funds to pay Guam for housing the illegals who have made it to Guam. State is pressing China on local enforcement.)

I have asked Morton to get draft testimony and q's and a's in soon. Interior which is responsible for Guam relations and leading on the initiative to extend the INA and others laws to the NMI needs to be involved.

I am at 6-5179, fax 6-2889.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:12-MAY-1999 14:45:47.00

SUBJECT: Guam Asylum Bill

TO: Steven M. Mertens (CN=Steven M. Mertens/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TEXT:

FYI. Also Justice is to brief AG tomorrow Am on reprogramming for Guam/NMI costs. i ahev told John Morton we need to have domething more solid before 5/18 hearing.

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on 05/12/99
02:44 PM -----

Jeffrey L. Farrow

05/12/99 02:22:27 PM

Record Type: Record

To: Carol R. Dennis/OMB/EOP@EOP

CC:

Subject: Guam Asylum Bill

Anna Briatico told me you are going to handle testimony on Guam Delegate Underwood's bill to exempt Guam from the asylum provisions of the INA, HR 945, for the hearing 5/18. I coordinate issues re the territories for the WH.

A major effort to smuggle Chinese into the U.S. entering in Guam prompted the bill. From conversations with John Morton, Counsel to the Dep AG, as well as Scott Busby/NSC, I believe we should oppose it. INS Dep. Gen. Counsel Beau Cooper is to testify.

We will, however, need to carefully explain our reasons because of (1) asylum policy/politics and (2) our willingness to amend the INA to address Guam problems.

Cooper will also need to be prepared to explain how we're responding to the current Chinese smuggling problem. (This includes a presidential memo authorizing the AG to detain interdicted illegals in the Northern Mariana Islands, the newest territory in the same chain as Guam where the INA does not yet apply although we are trying to get it extended. Four boats with about 480 people have been interdicted in the past few weeks. This is being done to alleviate overcrowding Guam's jails, which are housing 600 illegals for INS. Coast Guard has sent out a plane and two large cutters for increase surveillance. Justice has committed to try to find funds to pay Guam for housing the illegals who have made it to Guam. State is pressing China on local enforcement.)

I have asked Morton to get draft testimony and q's and a's in soon. Interior which is responsible for Guam relations and leading on the initiative to extend the INA and others laws to the NMI needs to be involved.

CLINTON LIBRARY PHOTOCOPY

I am at 6-5179, fax 6-2889.

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 12-MAY-1999 17:36:51.00

SUBJECT: Guam Asylum Exemption Bill

TO: Irene Bueno (CN=Irene Bueno/OU=OPD/O=EOP@EOP [OPD])

READ: UNKNOWN

TEXT:

Arguments For Exemption: The Chinese are only going to Guam to get to the States. We're taking interdicted aliens to the adjacent Northern Mariana Islands, a territory in which the INA does not yet apply, so we can repatriate them quickly -- a few weeks vs. close to a year under the INA. Guam's original population is being diluted, contrary to our international responsibility re a territory -- a claim that resonates with the UN Decolonization Committee.

Other Exemptions: Territories are not treated equally in laws. The Constitution's Uniformity Clause does not apply and there are many areas of different treatment, including exemptions. Importantly, we have said we would be willing to amend the INA to address Guam and Marianas specific problems, treating them differently than the States.

INS Testimony: I asked John Morton in the Dep. AG's office to make sure we have time with the testimony.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 8-JUN-1999 12:43:12.00

SUBJECT: Guam money issues

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

READ: UNKNOWN

TEXT:

----- Forwarded by Jeffrey L. Farrow/WHO/EOP on 06/08/99
12:43 PM -----

Scott Busby

06/08/99 09:41:12 AM

Record Type: Record

To: Maria Echaveste/WHO/EOP@EOP

cc: See the distribution list at the bottom of this message

Subject: Guam money issues

Maria --

Wanted to bring you up to date on where we are. As you may know, FY 2000 budget amendments went up yesterday (sooner than expected) and thus did not incorporate solution to this problem. But that is not our only chance to fix it. What we need first is an interagency agreement on the roles of each agency.

I am refining a general migrant burden-sharing proposal that we intend to apply to the Guam operation as well as all future similar migrant interdiction operations. Simultaneously, Justice and Defense are finalizing their own views on what their roles should/should not be on these issues. We have insisted on receiving those views in the next couple of days. (Justice in particular is all over the map on this issue; they need to have the AG resolve.)

As soon as we have agency views, Eric intends to host a small meeting with agency reps to see whether he can get buy-in at the A/S level on our proposal. If so, then to Deputies and/or Principals for ratification.

That would mean we have a course of action roughly one week from now. Tough to resolve before then without a firm Justice position (which they are solidifying now).

Scott

Message Copied

To:

Marjorie Tarmey/WHO/EOP@EOP

Jeffrey L. Farrow/WHO/EOP@EOP

Steven M. Mertens/OMB/EOP@EOP

Irene Bueno/OPD/EOP@EOP

Clara J. Shin/WHO/EOP@EOP

CLINTON LIBRARY PHOTOCOPY

Eric P. Schwartz/NSC/EOP@EOP

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Jeffrey Farrow to Elwood Holstein, re: Guam Compact Impact (1 page)	10/21/1999	P5
002. email	Jeffrey Farrow to Elwood Holstein, re: Guam Compact Impact (1 page)	11/11/1999	P5
003. email	Jeffrey Farrow to Steven Mertens, re: Guam Detention Letters (2 pages)	2/11/2000	P5
004. email	Jeffrey Farrow to Christopher Scully [partial] (1 page)	7/12/2000	P6/b(6)
005. email	Jeffrey Farrow to Sandra King, re Guam Bill (1 page)	7/20/2000	P5

COLLECTION:

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

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[6/30/1999 - 8/21/2000]

Whitney Ross

2006-0193-F

wr625

RESTRICTION CODES

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

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

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

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.

- 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]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 21-OCT-1999 15:19:05.00

SUBJECT: Guam Compact Impact

TO: Elwood Holstein (CN=Elwood Holstein/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN

CC: Sylvia M. Mathews (CN=Sylvia M. Mathews/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN

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

Records Management@EOP (Records Management@EOP [UNKNOWN])
READ: UNKNOWN

TEXT:

I hope you'll continue to keep in mind the President's proposal while in Guam of \$5.4 million to pay for migration costs to the territory of the U.S. compacts with other Micronesian areas. As you know, the Interior Appropriations conference would use the money for capital projects in the fiscally even harder pressed Virgin Islands. The funds would come from the \$11 m subsidy for the Northern Marianas, which has labor policies to which we strongly object.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:11-NOV-1999 10:58:36.00

SUBJECT: Guam Compact Impact

TO: Elwood Holstein (CN=Elwood Holstein/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

CC: Sylvia M. Mathews (CN=Sylvia M. Mathews/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

CC: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

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

READ:UNKNOWN

Records Management@EOP (Records Management@EOP [UNKNOWN])

READ:UNKNOWN

TEXT:

Any progress re the President's proposal while in Guam for \$5.4 million to pay for migration costs to the territory of the U.S. compacts with other Micronesian areas?

As you'll recall, the Interior Appropriations bill would give the money to the Virgin Islands for infrastructure. That's OK but we also wanted the \$5.4 m for Guam. The \$5.4 m we proposed would come from the \$11 m subsidy for the Northern Marianas, which has labor policies to which we strongly object.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:11-FEB-2000 20:01:45.00

SUBJECT: Re: Guam Detention Letters

TO: Steven M. Mertens (CN=Steven M. Mertens/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: douglas pitkin (CN=douglas pitkin/OU=omb/O=eop@eop [OMB])
READ:UNKNOWN

Sylvia Matthews (Sylvia Matthews [UNKNOWN])
READ:UNKNOWN

TEXT:

The attached includes my suggested edits. The key change I suggest is referring to the territory vs to Guam officials not providing justification. I think that will make it seem less critical. I also think its important the Governor get a letter not later than the Delegate. (This will require coordination since he is on the other side of the Earth.) Thanks for your good work on the issue.

Steven M. Mertens

02/11/2000 09:55:48 AM
Record Type: Record

To: Jeffrey L. Farrow/WHO/EOP@EOP, Douglas Pitkin/OMB/EOP@EOP
cc:
Subject: Guam Detention Letters

Jeff: Sylvia Mathews has reviewed the letters to Representative Underwood and Governor Gutierrez and is concerned the tone may be too abrupt. Prior to sending the letters forward, Doug and I softened the tone somewhat. My concern is that the message be unambiguous -- especially after the past three months of unsuccessful negotiations.

I know you have reviewed and edited these letter before -- but with your knowledge of the best method to get this message through to Guam without doing it in a way that sends an inappropriate tone to its elected officials -- I would appreciate if you could review, edit and sign-off on these letters once again.

Any change please let Doug or me know. Many thanks.

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===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D3]ARMS27953305X.046 to ASCII,
The following is a HEX DUMP:

FF575043D5040000010A020100000000205000000056200000000200000875144AB3A5A937E68E775
85B5AD1BC65447AF1D1DA2B0F04B4AC7E491C43CACAE3978093E4AC9D85134CA8492D169E637A4

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME: 20-JUL-2000 11:33:03.00

SUBJECT: Re: Guam Bill

TO: Sandra_King@ios.doi.gov (Sandra_King@ios.doi.gov [UNKNOWN])

READ: UNKNOWN

TEXT:

Who agreed to that?!!! It seems a strategy likely to lock agencies into negative positions vs. resolve issues.

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email attachment	Memo for William Ratchford from Margaret Haggerty, re: HR 2462 (1 page)	10/20/2000	P5
002. email	Jeffrey Farrow to Mickey Ibarra, re: Guam (1 page)	12/12/2000	P2, P5

COLLECTION:

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

FOLDER TITLE:

[8/21/2000 - 1/17/2001]

CLINTON LIBRARY PHOTOCOPY

Whitney Ross
2006-0193-F
wr626

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]

CLINTON LIBRARY PHOTOCOPY

October 20, 2000

MEMORANDUM FOR WILLIAM R. RATCHFORD
ASSOCIATE ADMINISTRATOR (S)

FROM: MARGARET M. HAGGERTY
ASSISTANT REGIONAL COUNSEL (9L)

SUBJECT: H.R. 2462 Revised Guam Omnibus Opportunities Act

I am responding on behalf of the Office of General Counsel. We have also consulted with the Office of Property Disposal (PR).

We primarily are concerned about the impact of (d)(2)(C) (see page 4 of the draft attached to your memo), which permits the military department to transfer administrative control over certain property to the General Services Administration subject to any terms and conditions applicable to such property. In other words, as drafted, GSA will be responsible for all aspects of the property, including environmental liability. This is troubling since we are not involved in the negotiations regarding its ultimate disposition. Moreover, pursuant to (d)(2)(E), GSA could not dispose of the property until there is an agreement between the Government of Guam and the Fish and Wildlife Service or Congress authorizes otherwise.

Thus, we make the following suggestion:

The last sentence of (d)(2)(C) be revised to read ". . .to the General Services Administration subject to the approval of the Administrator and any other terms and conditions applicable to such property".

Alternatively, the last sentence of (d)(2)(C) be revised to read ". . .to the General Services Administration subject to the terms of an Inter-Agency Agreement, among the participating agencies, and any terms and conditions applicable to such property."¹

Thank you for providing us with the opportunity to submit comments. Please contact me if you have questions. I can be reached by telephone at (415) 522-2600.

¹ A copy of a proposed agreement is attached. DOI has informally advised that they would not oppose executing such an agreement; however, they have not reviewed this particular document.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:12-DEC-2000 10:46:45.00

SUBJECT: Re: Guam

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

READ:UNKNOWN

TEXT:

I haven't seen these yet but his office talked to me about two: transfer of Federal land at Ritidian Point (possibly in a swap for Guam land) and a commission on WWII claims to be chaired by his wife. Sec Babbitt has really worked on Ritidian but has told Gov he cannot because of FWS objections (and I have spoken with FWS Dir Clark and Asst Sec Smith about it a couple of times and gotten the same answer). I would like to try to create the commission. After months, we worked out a compromise bill for this with Delegate Underwood but it was too late to enact into law. Geri Gutierrez chairing it would be interesting, she is a victim and is toying with running to succeed Carl. Underwood also hopes to and there will probably be a strong GOP candidate. Both of these proposals address major issues in Guam.

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Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Grace Garcia to Cabinet Affairs [partial] (1 page)	1/9/1997	P6/b(6)
002. email	Mary Eva to Emory Mayfield, re: President's Visit to China (4 pages)	3/27/1998	P5

COLLECTION:

Clinton Presidential Records
Tape Restoration Project [Email]
Default ([Guam, Political Status, Reform])
OA/Box Number: 1100000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[1/9/1997 - 10/2/1999]

Whitney Ross
2006-0193-F
wr627

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]
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- 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]

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: FEDERAL (TRP NOTES MAIL)

CREATOR: maryevac (maryevac@bradyberliner.com@INET@LNGTWY [UNKNOWN])

CREATION DATE/TIME: 27-MAR-1998 22:39:00.00

SUBJECT: President's Visit to China

TO: Emory L. Mayfield (Emory L. Mayfield@eop [UNKNOWN])

READ: UNKNOWN

TEXT:

Emory - I am faxing you some of the previous correspondence regarding

the

standing invitation of the President to visit Guam during a visit across

the

Pacific. The upcoming visit to China in June will be at least the fourth

time the President has visited Asia and not visited Guam. The last time

in

November 1996 was particularly egregious because the President's schedule

took him to three locations around Guam (Hawaii, Australia and Thailand, I

think), which meant the plane had four or five opportunities to stop in

Guam

but didn't. This was noted by the people of Guam with great

disappointment,

which the Pacific Daily News opinion piece indicates.

The following are compelling reasons within the context of

"inter-governmental affairs" for the President to honor Governor

Gutierrez's

invitation during this next visit to Asia:

1) If President Clinton stops to visit the Governor and the people of

Guam,

and Air Force One lands at the Guam International Airport rather than the

U.S. Air Force base, he will be the first U.S. President to recognize the

people of Guam with that honor. Three previous President's have visited Guam

(Nixon, Johnson and Reagan) but it is my understanding that these stops were

related to U.S. military concerns -- Nixon and Johnson's, I believe, were

directly related to the Viet Nam War.

2) The Governor has extended written invitations to the President at least

three times (two faxed to you) and verbal invitations numerous times. The President has indicated privately and publicly that he will visit Guam.

3) This is the 100th anniversary year of the United States acquisition of Guam. June 21 will be the 100th anniversary of the American flag being raised on Guam.

4) The people of Guam are frustrated by the standstill in the Guam political

status negotiations. They are not angry, but they are disappointed. They feel disregarded. A stop by the President of the United States will reassure

them that even though they have no political status within our Democratic framework, their value to the US is not entirely ignored.

5) Note that the people of Guam have voted overwhelmingly in two plebiscites

to request "commonwealth" status with the United States. They are not divided. The President will not be caught in a quagmire of political division. On the contrary, the President will be received with

overwhelming

warmth and show of patriotism.

6) Guam is among the strongest economies in Asia (I think fourth behind Japan, Taiwan and Singapore). The President, leading us into the 21st century, can tout Guam as America in Asia. The President may also observe Guam's privatization efforts in the wake of U.S. military base closings.

7) The devastation of Super Typhoon Paka was extraordinary and the recovery since Typhoon Paka is quite remarkable. It is highly appropriate for the President to visit the devastated areas and to see the strength of our American economy in Asia.

8) The people of Guam are proud that their small island has such significance in U.S. national security. As the site from which our military operations will be launched in the event of any conflict throughout the world, it is terribly appropriate for the President to greet the native population that welcomes our presence in their home and to visit the U.S. service men stationed there.

Emory - this isn't quite what I had hoped to do for you but I hope this gives you some ideas. Unfortunately, I'll be away Saturday and Sunday, but I'll be in Monday morning.

Thank you so very much.

MaryEva===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

===== END ATTACHMENT 1 =====

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Ginger Cruz to Susan Hazard [partial] (1 page)	10/27/1998	P6/b(6)
002. email	Gordon Creed to Jeffrey Farrow, re: Guam Land (3 pages)	11/5/1998	P5

COLLECTION:

Clinton Presidential Records
Tape Restoration Project [Email]
WHO ([Guam, Legislation, Tourism])
OA/Box Number: 500000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[10/27/1998 - 11/17/1998]

Whitney Ross
2006-0193-F
wr628

RESTRICTION CODES

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

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

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

RR. Document will be reviewed upon request.

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

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

CLINTON LIBRARY PHOTOCOPY

RECORD TYPE: PRESIDENTIAL (TRP NOTES MAIL)

CREATOR: gordon.creed (gordon.creed@gsa.gov [UNKNOWN])

CREATION DATE/TIME: 5-NOV-1998 22:18:00.00

SUBJECT: Guam Land

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

CC: aki.nakao (aki.nakao@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: alfonso.mendez (alfonso.mendez@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: brian.polly (brian.polly@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: carol.arnold (carol.arnold@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: carolyn.fulton (carolyn.fulton@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: clark.vanepps (clark.vanepps@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP [WHO])
READ:UNKNOWN

CC: Dave.Barram (dave.barram@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: kenn.kojima (kenn.kojima@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: meg.haggerty (meg.haggerty@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: paul.chistolini (paul.chistolini@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: richard.butterworth (richard.butterworth@gsa.gov [UNKNOWN])
READ:UNKNOWN

CC: tony.costa (tony.costa@gsa.gov [UNKNOWN])
READ:UNKNOWN

TEXT:
Jeff --

1. NO, the entire 3,213 acres have not been reported to GSA.

Because of contamination issues, USAF & Navy are reconfiguring the
parcels and only reporting clean acreage. Navy has reported 852 of

CLINTON LIBRARY PHOTOCOPY

1,040 acres or 83% and USAF has reported 432 of 2,136 acres OR 20% excess to GSA. Our excess screening for further Federal reuse has resulted in Interior INFORMALLY expressing an interest in some of the parcels for use by the National Park Service & U.S. Fish & Wildlife Service.

2. Contained within the 3,213 acres mapped in the legislation are 37.52 acres that were reported excess by FAA. This property was excessed and screened with negative interest.

3. All of the above properties $852 + 432 + 37 = 1,321$ acres are bundled in an appraisal contract which GSA expects to receive, internally review and presumably approve by DECEMBER 31, 1998.

4. Gov Guam has submitted its Land Use Plan to the Congress.

5. Therefore, YES the President could correctly state that there are 1,321 acres in the pipeline that were released by USAF, NAVY & FAA for which the Administration (GSA) is diligently working to transfer to the Gov. of Guam as envisioned in P.L. 103-399.

6. NOTE: I checked further and found that there is a 44.37 acre of property in Agat, Guam that is exclusive of the 3,213 acreage addressed above. The property successfully proceeded through the excess and surplus stages with Gov Guam submitting an application for a no cost conveyance of the property. Gov Guam intends to use the property for public health purposes [Waste Treatment Plant.] On May 26, 1998, HHS executed a deed WITHOUT A CEREMONY, but Gov Guam as of today, has not accepted nor recorded the deed. This could be an opportunity.

Gordon

Reply Separator

Subject: Guam land

Author: jeffrey_l._farrow@who.eop.gov at internet

Date: 11/5/98 2:05 PM

Are all the 3,213 acres covered by PL 103-339 in process for transfer? The President could also say GSA expects to complete the required appraisals by 12/31?

Thanks.

CLINTON LIBRARY PHOTOCOPY

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Robert Uriu to Charles Pritchard and Robert Suettinger at 10:46. Subject: Guam...Guam...Guam...Guam [partial] (12 pages)	12/12/1996	P5, b(6)
002. email	From Joseph Sestak to Robert Uriu at 16:44. Subject: RE: Possible Guam Protest of Port Call. (1 page)	02/25/1997	P1/b(1)
003. email	Robert Uriu to Sandra Kristoff. Subject: Guam Meeting. (2 pages)	01/07/1997	P5
004. email	Robert Uriu to Roseanne Hill, Sandra Kristoff, Charles Pritchard, and Robert Suettinger. Subject: Report on 2/1/97 meeting on Guam. (1 page)	02/01/1997	P5
005. email	From Robert Uriu to Peter Bass, Kristen Cicio, Wilma Hall and Katherine Veit at 14:52. Subject: Guam Negotiations (pass to Berger) (2 pages)	12/13/1996	P1/b(1)

COLLECTION:

Clinton Presidential Records
NSC Emails
MSMail-Record (Sept 94-Sept 97) ([Guam])
OA/Box Number: 590000

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

[12/02/1996-02/25/1997]

Van Zbinden
2006-0193-F
vz552

RESTRICTION CODES

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

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

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

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.

- b(1) National security classified information [(b)(1) of the FOIA]
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an agency [(b)(2) of the FOIA]
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financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information
concerning wells [(b)(9) of the FOIA]

CLINTON LIBRARY PHOTOCOPY

DATE TIME	12 December 96 10:46
FROM	Uriu, Robert M.
CLASSIFICATION	UNCLASSIFIED
SUBJECT	Guam...Guam...Guam...Guam....[UNCLASSIFIED]
TO	Pritchard, Charles (Jack) L. Suettinger, Robert L.
CARBON COPY	NO CC's on THIS MESSAGE
TEXT BODY	For you Guam gluttons out there, this is the current status. We expect to have everything settled by tomorrow afternoon. Bob [[0GUAMSTR.DOC : 2592 in 0GUAMSTR.DOC]]
ATTACHMENT FILE DATE	11 December 96 21:55
ATTACHMENT FILE NAME	0GUAMSTR.DOC SUMMARY Objective Conclude negotiations on Commonwealth Act in reasonable time. Final product should be sensitive to Guam's concerns if possible, but must be acceptable on grounds of national security, agency interests, constitutionality, and prospects of Congressional approval. Assessment of Current Negotiations Bad. At present, major policy issues remain unresolved, including the fundamental parameters of Guam's future relationship to the U.S. Lack of progress has fostered an atmosphere of distrust in which both sides are taking uncompromising positions. Agencies have expressed a uniform distrust of current negotiator. Chances of present legislation passing Congress are nil.

Essential first steps

1. Federal government needs to formulate a united position. The administration should set out clear parameters on basic issues, beyond which we cannot compromise.

2. Given the broad range of issues involved -- policy, constitutional, legislative -- any single agency will be incapable of coordinating all interests. Current negotiating structure needs to be changed. Either:

a broader unit such as NSC should be responsible for coordinating positions, drafting legislation, etc., or

we should set up a Presidential Working Group similar to the one we have for Puerto Rico, in which all agencies are formally represented.

3. We need to communicate our positions clearly to Guam. Guam has never been told how far the Federal government can compromise -- they have been given the impression that our silence means that we can accept even their extreme positions.

A clear USG position will cause some resentment and strong opposition from a vocal leadership. But my assessment is that Guam prefers a negative response to continued dithering -- they have been

waiting for a clear answer for a long time. Resentment will eventually pass because Guam does not have attractive alternatives to

Commonwealth -- no one wants to give up U.S. citizenship, and statehood is not a viable option. But we should make sure we convey

our position diplomatically and demonstrate simultaneously that we will compromise wherever we are able.

Immediate Game Plan

1. Ickes meeting

In this meeting we should:

raise our and agency concerns about the current draft and the structure of negotiations.

get his input on how to restructure negotiations (I have had a long conversation with Jeff Farrow, head of the Puerto Rico Working Group, who also supports some change in structure. Jeff will also be at the meeting.)

agree with Ickes that we should keep Puerto Rico negotiations in mind as we conduct Guam negotiations.

2. Garamendi meeting

I have asked Aranza for their general assessment of negotiations, and discussion of fundamental issues (not minutia). I have also asked them to:

- assess what is needed to move the negotiations forward

- discuss the sections of the draft which Garamendi has labeled "resolved" without informing the agencies how they were resolved.

- assess the chances of Congress approving the current draft (if he says "good" he is deceiving us or himself).

We should then spring the idea of a IWG on him -- what tactics do you want to use?

3. IWG

The IWG should be for agency representatives only (i.e., not including Guam), and chaired by you. In the IWG we should:

- send a clear signal that the White House is turning its attention

- to the issue. One of Guam's biggest frustrations is that the issue is not being discussed at high enough levels. (At a later date we can ask for their input.)

- review progress to date, or lack of same. We should tackle the larger issues first, and get agency input on our negotiating parameters.

- depending on how you and Ickes decide, announce/discuss future structure of inter-agency negotiations

decide on how to restructure the drafting process:

if we stick with the existing Interior draft we should set up subgroups of agencies interested in each section to revise.

if we decide to redraft all or part of the Act, we should appoint a single agency or group of agencies to draft a counterproposal, which would then be circulated and discussed by the group as a whole.

Discussion of Other Issues

Background on Garamendi

Garamendi's objectives: Hard to decipher. One person familiar with him has said Garamendi has taken Guam's side because he is truly convinced that our relationship with Guam is a residual of colonialism, and that Guam deserves better than "indentured servitude." If this is the case he will continue to push the extreme Guam position. (As source put it, "there is not a lot of gamesmanship with Garamendi -- he is driven by what he truly believes... he fits the old saying, "often wrong, never in doubt."")

If his objective is to resolve the issue and take credit for it, he has handled the negotiations in the worst possible way. He also has not paid attention to gaining Congressional approval for it. Hard to believe for an experienced politician.

Strengths: Garamendi is a long-time Democrat from Northern California who helped run Clinton's 92 campaign in CA. This year he helped quell some explosive environmental issues in CA, just before the election, so may have won some points. He is extremely loyal to POTUS. Strong personality (can be charming).

(b)(6)

[001]

[001]

(b)(6)

Reactions on Guam

The Guam people have some very legitimate gripes, which we should be as receptive to as we can. They perceive themselves as historically occupied -- first by the Germans, then Spanish, then Japanese, then Americans. Navy has held more than 40 percent of the island, and took most of the prime pieces of land (now down to 28%, but prime pieces). Thus, their most common negotiating ploy is to cite Guam's "unique historical status."

Many of their positions and arguments, however, remain too extreme.

This is due to a vocal and active political leadership -- some of the top elected officials were formerly known as the Commonwealth "radicals."

The population as a whole is not that interested in the issue. One source says that they will never do anything to give up their U.S. citizenship -- this is the main interest of most of the people of

Guam. There is no independence movement, and little hope for leaders to whip up sustained anti-US demonstrations (although they will try). Statehood is not an option being discussed.

Guam thus will not back away from negotiations, even if things are going against them. The leadership will kick and scream, but because the majority of the Guam people see achieving Commonwealth status as the real goal, they will eventually compromise. (That said, we will help ourselves if we handle this diplomatically, say all the right words about Guam's uniqueness, etc., and show that we can deliver on specific compromises.)

A final note: opinion on Guam is divided between the Chamorro and non-Chamorro. In fact, source describes the Chamorro as racist and unfair to other minorities and new immigrants from Asia. Citizens from the U.S. (known as "State-siders") are treated well.

Relationship with Puerto Rico

Jeff Farrow, aide to Ickes and head of the Working Group on Puerto Rico, tells me that Ickes wants to make sure that the Guam negotiations do not complicate the negotiations with Puerto Rico.

Some in PR want enhanced Commonwealth -- i.e., more rights, powers and autonomy, while stopping short of statehood. These people are watching what we do with Guam very closely. If we give in to Guam's demands this will make it more difficult to deny to PR, as we have been doing.

PR and Guam are discussing many similar issues, but the difference

is that PR has become more realistic over time and is no longer making extreme demands. It will be especially problematic if we gave in to Guam on mutual consent, applicability of federal laws, defense and foreign affairs, immigration, labor, maritime shipping and aviation, environmental regulations, tax autonomy, equal finance -- in other words, everything!

One issue I did not discuss with Farrow: should we link the two negotiations in some way, even if only informally? This would be yet another way to unify/bolster our positions.

Congressional prospects

Farrow reports that one key Congressional staffer calls the current Guam draft "a joke." Garamendi has evidently made no effort to consult with anyone on the Hill -- a mistake that means that the current draft has virtually no chance of passing.

Whoever/whatever takes on this issue must have capacity to work together with Hill. This is another argument for a Presidential-level working group, staffed by people with Congressional experience (i.e., Farrow was key staffer on Insular Affairs Committee).

Alternative inter-agency structures

If we are able to change the current structure, I don't think NSC/Asia should try to take the lead in negotiating and coordinating the draft. This is a full-time job (as Stanley Roth discovered).

NSC also does not have the legal or congressional expertise or manpower needed (nor does our Legal or Legislative Affairs offices).

Many of the truly contentious issues are purely domestic, and thus out of our bailiwick.

I favor a presidential working group along the lines of the Puerto

Rico working group. This would ensure that all agencies have a formal voice in the entire drafting process. The group could also be given adequate legal and legislative expertise. I would prefer replacing Garamendi with a more neutral and experienced negotiator -- someone who is familiar with the inter-agency process and with Congress. If this is not politically possible, and Garamendi remains as the lead negotiator, we could at least surround him by reps from all interested agencies.

Specific Issues of Disagreement

1. Mutual Consent

Guam wants to include clause which prevents either side from changing the Act without mutual consent (this clause was included in Northern Marianas Covenant, but DOJ has since reconsidered).

Justice now opposes on constitutional grounds -- argues that agreements reached by one Congress cannot be immune from alteration by a subsequent Congress.

However, DOJ has already accepted a compromise, granting Mutual Consent "to the extent constitutionally permissible"; DOJ believes that it is not constitutionally permissible, Guam believes it is -- both believe they will win a court case.

_ NSC should support DOJ if they want to remove compromise clause.

2. Applicability of Federal Laws and the Joint Commission

Most seem to recognize that there should be some way to review whether US laws apply equally to Guam (some US laws are clearly not appropriate). But Guam wants to establish a Joint Commission, composed of Federal and Guam representatives, to have authority to make these determinations, and wants near parity in terms of representation. (Guam has recently agreed to downgrade Joint Commissions powers.)

All US agencies oppose giving too much autonomy to this Commission, and want to limit Guam's ability to dominate decisions

_ NSC agrees with agencies.

3. Foreign and Defense Policy

Guam wants to maximize its independence on the foreign policy front.

It wants the ability to join IOs on its own, be consulted on treaty

negotiations that affect it, and wants to be consulted on military

base issues, changes in DOD activities, stationing of US forces in Guam, etc.

State and Defense have finally talked this week, and both now want

to completely rewrite clause.

State maintains that the US must speak with one voice on foreign policy: we cannot allow states, territories, etc. to take independent action. Guam should accept limitations of Commonwealth or become an independent state. (State says that in practice we will consult at times, and that Guam can join some IOs, but that it opposes writing this into the Act.)

Defense flatly rejects consultation provision.

_ NSC fully supports State and Defense.

4. Excess Military Land

This is one of the most contentious issues -- the one issue on which

all on Guam seem to agree.

DOD has identified a considerable amount of land as excess, and is

willing to turn back to Guam. The problem is in the terms of the return. Under current GSA laws, other agencies can screen for excess land first, and can claim it if wanted. (Fish and Wildlife

has already claimed some choice excess DOD lands in this way, pissing off Guam.) Guam wants to have the "right of first refusal,"

allowing it first dibs. Also, wants to obtain the lands cost-free

and without conditions. Garamendi claims that unrest will grow

otherwise (I do not take this seriously).

We are still waiting for CINCPAC position paper on strategic assessment of Guam.

DOD prefers to keep current rules as is, to maintain flexibility.

If excess land is needed at a later date it will be easier and cheaper to take from, say, FWS than from private Guam owners.

FWS has a large 370-acre refuge at Ritidian Point, wants to protect on conservation grounds. Will likely take more DOD excess land if made available.

Justice, GSA also opposed to changing the rules just for Guam -- both because of the precedent it will set and because of the question of payment.

_ NSC position. If CINCPAC comes back with a strong rationale for retaining as much access as possible, then we should go with them.

_ Absent strong strategic needs for retaining access to Guam, we can

compromise on the land rules. Much of land DOD identified as excess is truly excess (some Navy people on the island even say it

is more costly and troublesome to hold onto it).

_ There is also some room for compromise: discussions are underway

on how to move Guam up the ladder in terms of rights of refusal (i.e., on par with the Federal agencies, or just after them);

DOD

also willing to commit itself to periodic excess land reviews; may be able to speed up the process of reversion; might have some

flexibility on money issues (confidential). Also, Guam source suggests that long-term (99-year leases) will be acceptable to Guam, and should be to DOD as well.

5. Immigration and Labor

Guam wants to maximize local control over permanent residency, in order to deter excessive immigration from Asia. At the same time,

Guam wants to be able to admit more temporary workers, for tourist

and other industries. It also wants local control over labor standards and enforcement.

Guam is divided on this. The native Chamorro population is close to falling under 50% of the total population, and wants to protect itself. Other immigrant groups on the islands, especially the Filipinos, have felt mistreated by the Chamorro majority; restrictions on permanent immigration will hurt them the most.

Labor opposes, in light of difficulties in the Northern Marianas, where there were many problems with exploitation of temporary workers from Asia. (Guam's immigration proposal comes straight from the NMI Covenant.)

INS opposes, on precedent and logistical grounds.

Justice also quietly argues that Guam government is too corrupt to handle these issues responsibly, which angers Guam.

State, DOD don't care.

_ NSC also takes no position. Garamendi's current proposal of allowing Guam control over immigration and labor standards to be phased in on 4-year basis may be acceptable. He also proposes that Guam be granted a Guam-only permanent immigrant visa. Some compromise possible if Labor allowed to include in the Act some extremely tough labor standards.

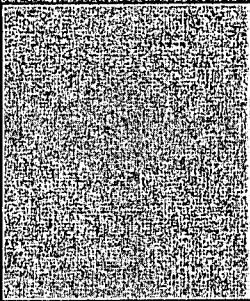
6. Chamorro Self-Determination

Chamorros have demanded a Chamorro-only vote, to decide on the island's future political status. As mentioned, this is opposed by other minorities on Guam.

Justice argues that any vote by a single minority/ethnic group cannot be binding or enforceable.

Still, DOJ was pushed into a compromise: mention of Chamorro self-determination appears in the Act, but will not involve USG in any official way, and USG is not bound by its results.

_ NSC takes no position (this issue may already be finessed).



7. Other Issues

There are a host of other disputes, many related to legal rather than policy matters.

- a. taxation
- b. commerce and trade
- c. transportation (maritime and civil aviation)
- d. environment, including the disposal of hazardous wastes

CLINTON LIBRARY PHOTOCOPY

M S M a i l

DATE-TIME 07 January 97 16:47
FROM Uriu, Robert M.
CLASSIFICATION UNCLASSIFIED
SUBJECT Guam meeting [UNCLASSIFIED]
TO Kristoff, Sandra J.
CARBON_COPY Pritchard, Charles (Jack) L.
Suettinger, Robert L.

TEXT_BODY

Sandy. A very productive meeting. This is more detail than you need, but there is likely to be a follow-up this Thursday and then next week.

The meeting started badly when John Angell expressed optimism that we could get everything resolved before the inauguration. He went through the main issues, using a memo from Lenga to Panetta that echoed Garamendi's assessment of the issues (Mutual Consent, Chamorro Self-Determination, Federal Excess Land, Joint Commission, and Immigration). He also expressed little concern over whether Congress would reject the draft out of hand, and didn't seem to care about what the agencies thought, either -- he simply wanted things done. (At the same time, he mentioned that he wasn't concerned if we didn't get everything resolved, since "certain people" are gone in 2 weeks anyway.)

Jeff Farrow did most of the heavy lifting in terms of raising objections, but I voiced agency concerns as well. On "our" issues, Angell was in full agreement on the DOD land issue, and wanted to simply reject Guam's demands

out of hand. (At a later point, when we discussed ways to move forward, I did suggest that DOD would be willing to give up land if the rules were favorable; would commit to periodic land reviews; and might consider long-term (99-year) leases on current lands.) We also discussed DOD's and State's objections to giving Guam too much autonomy in foreign affairs (consultations on treaties and troops, entering international organizations, receiving foreign aid, etc.). Angell agreed these provisions are unacceptable.

Jeff did a good job of raising a long list of particulars that are still in the bill that the USG and Congress will never approve. This list forced Angell to realize that everything wasn't going to be resolved in two weeks. At that point I spoke more candidly about the problems of the negotiations. I raised the agency's general distrust toward the process, and their complaints that Garamendi was ignoring them in making commitments to Guam. At the end I raised the suggestion that the WH restructure the negotiations

by creating a more formal mechanism that would focus WH attention and allow for agency input into the process. I suggested this was one way they could show "progress" in the next two weeks.

Angell will check with Garamendi and others on some outstanding questions. He wants another meeting Thursday at 1:30, and will then come to a final decision on what advice to give to Panetta.

P.S. Tell me if anything I said went beyond your instructions.

CLINTON LIBRARY PHOTOCOPY

M S M a i l

DATE-TIME 01 February 97 14:27
FROM Uriu, Robert M.
CLASSIFICATION UNCLASSIFIED
SUBJECT Report on Steinberg 2/1/97 meeting on Guam [UNCLASSIFIED]
TO Hill, Roseanne M.
Kristoff, Sandra J.
Pritchard, Charles (Jack) L.
Suettinger, Robert L.
Uriu, Robert M.
CARBON_COPY NO CC's on THIS MESSAGE
TEXT_BODY

Sandy. It turns out that Shearer/Aranza had not been informed about COS decision to move ahead with WH informal working group. They thus came in with standard pitch for why NSC should help push WH to get involved -- Guam's strategic importance, possibility of instability if status not resolved, etc. They asked for WH to take the lead, and to help put pressure on agencies to compromise.

They were thus surprised (and pleased) when Steinberg mentioned Bowles decision. We both assured them that WH is now focused and that we want to resolve the issue. (This is, however, an example of the danger of getting what you wish for -- the WH process is likely to move many provisions of the bill away from Guam's position.)

(BTW, since Garamendi was informed about COS decision yesterday, I had assumed Interior was calling this meeting in order to oppose the move -- especially if JG perceived this as lowering his position or complicating negotiations. My memo to Steinberg thus anticipated a negative reaction from them.)

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. memo	For John Podesta from Samuel Berger and Mickey Ibarra. Subject: Deterring Chinese Illegal Migration to Guam. Record ID: 9903101. (2 pages)	07/30/1999	P5
001b. memo	For John Podesta from Samuel Berger. Subject: Deterring Chinese Illegal Migration to Guam. Record ID: 9903101. (1 page)	04/24/1999	P5
001c. draft	Page 2 of 001a. (1 page)	07/1999	P5
001d. draft	Page 1 of 001a. (1 page)	07/1999	P5
002a. form	Routing Sheet with Annotations. (1 page)	04/24/1999	P5
002b. form	Photocopy of 002a. (1 page)	04/24/1999	P5
002c. memo	Duplicate of 001b. (1 page)	04/24/1999	P5
002d. draft	Duplicate of 001b. (1 page)	04/24/1999	P5
002e. draft	Duplicate of 001b. (1 page)	04/24/1999	P5

COLLECTION:

Clinton Presidential Records
NSC Records Management
[Guam]
OA/Box Number: 2725

CLINTON LIBRARY PHOTOCOPY

FOLDER TITLE:

9903101

Van Zbinden
2006-0193-F
vz1187

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]
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- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

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

RR. Document will be reviewed upon request.

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**National Security Council
The White House**

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LOG # 3101

URGENT NOT PROOFED: _____

SYSTEM ERS NSC INT ARS

BYPASSED WW DESK: _____

DOCLOG 13 A/O _____

SSB
Cosgriff

Rice

Davies

Kerrick

Steinberg

Berger

Situation Room

West Wing Desk

Records Mgt.

SEQUENCE TO

INITIAL/DATE

DISPOSITION

<u>1</u>	<u>(C) 4/23</u>	
<u>2</u>	<u>(C) 4/23</u>	
<u>comp</u>		
<u>comp</u>		
<u>3</u>	<u>(C) 4/24</u>	<u>J</u>
<u>4</u>		<u>N</u>

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc:

COMMENTS: *China Illegal Migration to Guam - memo to J. Podesta*

Exec Sec Office has diskette

yes

ERR - ① are we slanning Justice?

② why no demarche yet?

*① Language changed
③ Demarche in next couple of days (we have crissbach).*

National Security Council
The White House

PROOFED BY: _____ LOG # 3101
URGENT NOT PROOFED: _____ SYSTEM ERS NSC INT ARS
BYPASSED WW DESK: _____ DOCLOG 15 A/O _____

	SEQUENCE TO	INITIAL/DATE	DISPOSITION
<i>SSB</i> Cosgriff			
Rice	<u>1</u>	<u>(C) 4/23</u>	
Davies			
Kerrick	<u>2</u>	<u>(C) 4/23</u>	
Steinberg	<u>com</u>		
Berger	<u>com</u>		
Situation Room			
West Wing Desk	<u>3</u>	<u>(C) 4/24</u>	<u>J</u>
Records Mgt.	<u>+</u>		<u>N</u>

A = Action I = Information D = Dispatch R = Retain N = No Further Action

cc:

COMMENTS:

Chi Guan

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