

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
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001. memo	re: Migrants and CNMI (1 page)	04/16/1999	P5 6058
002. memo	re: Migrants and CNMI (1 page)	04/16/1999	P5 6058 Dup.
003. memo	re: Migrants and CNMI (1 page)	04/16/1999	P5 6059
004. memo	re: Migrants and CNMI (1 page)	04/16/1999	P5 6058 Dup.

COLLECTION:

Clinton Presidential Records
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FOLDER TITLE:

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Jamie Metrailler
2006-0194-F
jm553

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]

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Reasons for CNMI: We believe that this vessel of migrants should be taken to the CNMI for processing. (Such processing will include screening to determine whether any of these migrants may be refugees.) The Deputy Attorney General has spoken to Governor Pedro Tenorio, who has agreed to this course of action. Besides Guam and the CNMI, there are no other places close enough to be able to carry out this operation safely. Since federal immigration law has not yet been implemented in the CNMI, we will be able to process these individuals far more quickly there than in Guam.

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The Department of the Interior is concerned that this plan may provide an argument for Governor Tenorio and Representative Tom DeLay (R-TX) to use in opposing our proposal to apply federal immigration law in the CNMI and may establish a precedent for future similar situations. We believe the current problems on Guam and our strong interest in deterring further alien smuggling outweigh these concerns. Additionally, we hope to partially address Interior's concerns by seeking to limit the amount of time these migrants will remain on the CNMI, possibly by effecting their transit to a third country.

Legal Authority: Because the Immigration and Nationality Act does not extend to the CNMI, the Attorney General does not have the legal authority to detain and process these migrants there. Nor does any other U.S. government agency. However, under your broad powers to regulate illegal immigration into the United States, you may delegate to the Attorney General the requisite statutory authority to carry out this operation. The attached memorandum accomplishes the delegation of authority to the Attorney General to permit her to deal with these migrants as well as others who may be encountered in the region.

We will be developing a longer-term strategy to address the problem of Chinese illegal migration in the region.

RECOMMENDATION

That you sign the attached delegation of authority.

Attachments

- Tab A Memorandum to the Attorney General
- Tab B Letter from the Governor of Guam

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Reasons for CNMI: Because of the lack of detention capacity on Guam, and the difficulty we are currently having in expeditiously processing Chinese migrants who reach Guam, we believe that the current vessel of migrants should be taken to the CNMI for processing. Because U.S. immigration laws do not apply on CNMI, we will be able to process these individuals more quickly there. (Such processing will include standard screening procedures for determining whether any of these migrants may be refugees. Those who have credible claims to refugee status will be brought to the United States for full processing of their claims.)

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Such a course of action creates some awkwardness, since we are currently seeking to extend the application of U.S. immigration laws to the CNMI. However, given the absence of detention capacity on Guam and our interest in deterring the increasing flow of Chinese migrants to Guam, we consider the only reasonable ~~feel that we have little choice to be but to~~ proceed with the vessel to the CNMI. There are no other places close enough to be able the boat to carry out this operation safely. Nevertheless, we intend to seek to the limit amount of time these migrants will remain on the CNMI, including by possibly effecting their transit to a third country. The Deputy Attorney General has spoken to the Governor of CNMI, who has agreed and he is agreeable to this course of action.

Legal Authority: Because the Immigration and Nationality Act does not extend to the CNMI, the Attorney General does not have the necessary legal authority to detain and process these migrants there. Nor does any other U.S. government agency. However, under your broad powers to regulate illegal immigration into the United States, you may delegate to confer upon the Attorney General the requisite statutory authority to carry out this operation. Existing delegations of authority do not specifically address the issue of agency responsibility for the detention and processing of migrants in situations such as this one. The attached memorandum accomplishes the is-delegation of authority to the Attorney General to permit her to deal with these migrants as well as those in other vessels that may be encountered in the general area of the Northern Marianas Islands. ~~task.~~

~~We will be seeking to are developing a longer term permanent solution to the problem of illegal Chinese migration in the region. over the next several days.~~

RECOMMENDATION

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001. letter

To Don Young from Kent Markus. Subject: Views of the Department
of Justice on H.R. 1056 (28 pages)

n.d.

P5

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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath
OA/Box Number: 9860

FOLDER TITLE:

Guam/CNMI - Guam/CNMI

Jamie Metrailler

2006-0194-F

im580

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U. S. Department of Justice

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Office of Legislative Affairs

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Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Don Young
Chairman
Committee on Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter complies with your request for the views of the Department of Justice on H.R. 1056, the "Guam Commonwealth Act" ("Commonwealth Act").

The bill appears to be identical to H.R. 98 and S. 317, 101st Cong., 1st Sess. (1989), on which an Interagency Task Force, chaired by the Department of the Interior, submitted a report on August 1, 1989. This report raised objections to many aspects of the bill. Hearings were held on the bill in Honolulu, Hawaii in the winter of 1989-1990 before the Subcommittee on Insular and International Affairs of the House Committee on Interior and Insular Affairs. During those hearings the Subcommittee urged the Executive Branch and the Guam Commission on Self-Determination, headed by then-Governor Ada of Guam, to reconcile their differences and to agree to a draft bill that would be acceptable to both sides. During the following three years the Task Force and the Guam Commission held numerous meetings during which they reached a substantial number of agreements proposing amendments to the text of H.R. 98, but many irreconcilable conflicts remained. On January 19, 1993, the Task Force submitted a second report that noted the agreements reached and the questions that were left open. In 1993 and 1994 further talks were held between the Guam Commission and I. Michael Heyman, Special Representative for Guam Negotiations. We are not aware of the results reached in those negotiations, except for an agreement on section 103 of the bill, which is discussed below.

In November 1994, Carl Gutierrez was elected Governor of Guam. We do not know whether and to what extent he will approve the agreements reached thus far. In these circumstances, the Department of Justice believes that it must comment on H.R. 1056, as introduced, without regard to the agreements previously reached with the Commission while it was headed by Governor Ada.

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This bill covers many subjects that are outside the expertise of the Department of Justice. We shall therefore limit this report to those parts of the bill that are within the jurisdiction and the cognizance of the Department of Justice.

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THE PREAMBLE

The Preamble represents a statement of the motives and aspirations of the people of Guam in seeking the enactment of the Guam Commonwealth Act. As a preamble, it does not have the force and effect of law, and we therefore hesitate to take issue with it. In three particulars, however, the language seems to us imprecise, and therefore possibly misleading. First, at the end of the first subsection, reference is made to "the right of self-determination . . . of the Chamorro people of Guam." As we will explain in our commentary on subsections (a) and (b) of section 102 of the bill, we believe it is not constitutionally permissible to confer such a right upon only one part of the population of Guam.

Second, we are troubled by the reference in subsection (b) to the will of the people of Guam "in concert" with the United States, which seems to suggest that the Guam Commonwealth Act is in the nature of a bilateral treaty. We consider it imperative that Guam's future status be well understood and free from argument and therefore recommend instead the prefatory language used in parallel circumstances in the Northern Marianas Covenant, which refers to the establishment of a "self-governing commonwealth . . . within the American political system." We suggest that subsection (b) of the Preamble refer to "the wish of the people of Guam to establish a self-governing Commonwealth of Guam within the American political system."

Third, we are also concerned by the phrase in subsection (a) "conscious of their [the people of the United States] obligations under the Treaty of Paris of 1899 [sic] and the Charter of the United Nations." We are not aware of any pertinent obligations relating to the people of Guam that the United States undertook under the Treaty of Paris. While the cessions under which the United States acquired territory prior to the Treaty of Paris did contain obligations toward the inhabitants of the ceded territories, -- see, e.g., Louisiana Purchase: Art. III; Florida Treaty: Articles 5 and 6; Mexican Peace Treaty: Art IX; Alaska Purchase: Art. III -- the Treaty of Paris left the civil rights and the political status of the native inhabitants of the territories ceded to the United States to the discretion of Congress (Art. IX), with the exception set forth in Article X that the inhabitants shall be secured in the free exercise of

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their religion.¹ We defer to the views of the Department of State as to the extent, if any, of the obligations of the United States with respect to Guam under the Charter of the United Nations.

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Section 101(a). We have the following comments:

1. The bill would refer to the "Island of Guam, and its adjacent islands and waters," but does not define that term. The failure to define the term "adjacent islands" is not likely to create any practical problems. It is, however, important that there be clarity about the extent of the waters included in the Commonwealth of Guam. We recommend that the question of the Commonwealth's authority over the adjacent waters be addressed only in Title X.

2. The description of the relationship between the United States and Guam does not state in so many words that Guam would be under the sovereignty of the United States. We realize that section 101(b) requires that the Constitution of the Commonwealth "recognize . . . the sovereignty of the United States." Nevertheless we consider it important that the Commonwealth Act do so directly and expressly, and accordingly we recommend that the words "under the sovereignty of the United States" be added to the first sentence of section 101(a).

Section 101(a) also would provide that it shall become effective "upon the enactment of this Act." That phrase would cause Guam to become a Commonwealth when this bill is approved by the President, but before it is approved by the people of Guam, and before the Commonwealth Constitution has become effective. This obviously is undesirable. It is our view that the

¹ Articles IX and X of the Treaty of Paris of Dec. 10, 1898 (30 Stat. 1759-60) provide:

ARTICLE IX

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

ARTICLE X

The inhabitants of the territories over which Spain relinquishes or ceded her sovereignty shall be secured in the free exercise of their religion.

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provisions incident to the status of Guam as a Commonwealth should become effective only after this bill has been approved by the people of Guam, the Constitution of Guam has been adopted by Guam and been approved by Congress, and the Commonwealth has been established. The only provisions of this bill that should become effective upon its enactment should be those sections that govern the procedures for establishing the Commonwealth, such as those relating to the submission of this bill to the voters of Guam, the mandatory provisions of the Constitution, the approval of the Constitution by Congress, and the final establishment of the Commonwealth. The effective dates of the several sections of the bill, therefore, should be set forth in Title XII of the bill. Any reference to the effective date of a section in the rest of the bill should be deleted.

3. It also should be made clear that the qualifier "applicable to Guam" extends not only to laws of the United States but also its Constitution and treaties.

We would recommend that section 101(a) be amended to read as follows:

The Island of Guam, and its adjacent islands, shall become a self-governing Commonwealth under the sovereignty of the United States, known as the "Commonwealth of Guam." This Act, together with those provisions of the Constitution, treaties, and laws of the United States that are applicable to Guam, and the Constitution of Guam shall be the supreme law of the Commonwealth.

Section 101(b) would provide that the people of Guam shall have "the right of full self-government," extending to "all rightful subjects of government", and shall govern themselves in accordance with a Constitution of their own adoption, which is required to meet four standards.

We suggest, first, that the various references in the bill to "self-government" ought to be made uniform, lest those later concerned with the construction of the Act ascribe different meanings to different references. We presume that differences were not intended. For example, the Preamble refers to "a greater measure of self-government"; section 101(a) refers to "a self-governing Commonwealth"; section 101(b) and the title of section 101 refer to "full self-government"; and section 1201 refers to "complete internal self-government." We cannot perceive that any loss would result from the elimination of the adjective in section 101(b), and we thus suggest that section 101(b) and the title of the section refer to "the right of self-government", without a modifier.

The subsection would provide that the rights of self-government shall extend to all rightful subjects of government

"not inconsistent with this Act and the laws of the United States applicable to Guam." It will be noted that this clause is similar but somewhat narrower than the comparable phrase in the second sentence of subsection (a). We believe the two should be made consistent -- lest a later construer find different meaning in the different phrases. We think none was intended. Accordingly, we suggest that the following be substituted: "not inconsistent . . . with those provisions of the Constitution, treaties, and laws of the United States that are applicable to Guam."

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With respect to the standards that the Guam Constitution is to meet we would recommend, for the reasons set forth in our comments on section 101(a), that the first paragraph be amended to insure that the qualifier "applicable to Guam" applies not only to the laws of the United States but also to its Constitution and to treaties.

Neither section 101 nor any other provision of the bill provides for the federal approval of the Guam Constitution. We believe that such approval is important, if only to guarantee compliance with the standards set forth in section 101(b). Moreover such federal approval was required for the approval of the Constitutions of Puerto Rico and the Northern Mariana Islands, and for the Constitutions of Guam and the Virgin Islands authorized by Pub. L. No. 94-584, 90 Stat. 2899 (1976). The details of the federal approval need not burden section 101, but should be set forth in Title XII dealing with the mechanics of putting this Act into effect.

We do not believe it is necessary that amendments to the Constitution be subject to federal approval; they should, however, be subject to judicial review for their consistency with the Act and those provisions of the Constitution, treaties and laws of the United States that are applicable to Guam.

We therefore recommend that section 101(b) be modified as follows:

(b) The people of Guam shall have the right of self-government, which shall extend to all rightful subjects of government not inconsistent with this Act and with those provisions of the Constitution, treaties and laws of the United States that are applicable to Guam, and shall govern themselves in accordance with this Act through a Constitution of their own adoption. Such Constitution shall

(1) recognize, and be consistent with the sovereignty of the United States over Guam, and the supremacy of those provisions of the Constitution, treaties, and laws of the United States that are applicable to Guam;

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(2) provide for a republican form of government;

(3) provide for three branches of government;

(4) contain a bill of rights.

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The Constitution of the Commonwealth of Guam shall be approved by the Congress of the United States at the time and in the manner provided for in Title XII of this Act. Amendments to the Constitution may be made by the people of Guam without approval by the Government of the United States, but the courts established by the Constitution or laws of the United States shall be competent to determine in a properly presented case or controversy whether the Constitution and subsequent amendments thereto are consistent with this Act and with those provisions of the Constitution, treaties, and laws of the United States that are applicable to Guam.

Section 101(c) would authorize the Government of Guam to waive sovereign immunity in certain cases. We suggest that the authority granted be broadened, so that Guam's authority on this subject is unlimited, and propose the following revision of the subsection:

The Government of the Commonwealth shall have the power to sue in its own name, and it may be sued with the consent of the Legislature, evidenced by enacted law.

The last four words do not appear in section 101(c), but they do appear in existing law (48 U.S.C. § 1421a). We suggest that they be added, so that a waiver of sovereign immunity would be based on a duly enacted law, and not, arguably, upon action by the legislative branch only.

Section 101(d) would require the "Government" of the Commonwealth to establish and operate a public education system, "to the same extent as the several States." Except for the final phrase, the subsection substantially parallels existing law, as amended in 1986 (48 U.S.C. § 1421g(b)). (Before that date, the authority was reposed in the "Governor", which gave rise to an executive-legislative dispute that was settled by an amendment substituting "Government.") We have no objection to the portion of subsection (d) that would require the Government of Guam to establish and operate a public education system, although we doubt it is necessary.

The meaning of the phrase "to the same extent as the several States" is uncertain to us. We understand that it was included because of Guam's general aspiration for "State-like" treatment in the Commonwealth Act. We fear, however, that those words may have unexpected effects on federal grant formulas, some of which

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treat Guam not as a State but provide for benefits to the Territories on a different basis. We therefore recommend the elimination of the terminal phrase.

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Section 102(a). This subsection would provide for the Congressional recognition of the inalienable right of self-determination of the indigenous Chamorro people, defined as those born on Guam before August 1, 1950, and their descendants, and mandates that the Guam Constitution shall provide for the exercise of that right of self-determination.

The Department of Justice must oppose this subsection on constitutional grounds.

Section 1 of the Fifteenth Amendment to the Constitution of the United States provides:

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

It is true that section 102(a) does not contain any express words of exclusion from the right to vote on the act of self-determination envisaged by section 102(a) that are based on race or ethnicity. However, the selection of the date, August 1, 1950, a time when Guam was a closed area administered by the Navy and when, consequently, virtually all its residents were of Chamorro descent, makes it clear that section 102(a) would in effect impose a racial test and that it was intended to have that result. Guinn v. United States, 238 U.S. 347, 364-65 (1915).

The selection of the date of August 1, 1950, therefore establishes an intent to deny the right to vote to persons not of Chamorro descent. Section 101(a) consequently violates the Fifteenth Amendment. Hunter v. Underwood, 471 U.S. 222, 233 (1985). In view of that racial motivation it is immaterial that the formulation of section 102(a) would not achieve that result perfectly. Under section 102(a) a small number of persons of non-Chamorro descent who resided in Guam on August 1, 1950, and their descendants would be permitted to vote, and persons of Chamorro descent who were not residents of Guam on August 1, 1950, and their descendants would be denied the suffrage. This marginal discrepancy between the eligible voters and the Chamorros is at best de minimis and does not "trump[]" the impermissible motive of racial discrimination. Hunter v. Underwood, 471 U.S. at 231-32.

It will be noted that the prohibitions of the Fifteenth Amendment are directed at the United States and the States. The United States, therefore, cannot direct or authorize the limitation of the right to vote on the question of self-

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determination to the indigenous people of Guam. Neither can Guam include those limitations on the right to vote in its Constitution, because the Fifteenth Amendment has been made applicable to Guam as if it were a State (48 U.S.C. § 1421b(u)). Moreover, the provisions of the Constitution of the United States protecting voting rights are among the fundamental provisions of the Constitution that would apply to the unincorporated territories of their own force, even if the Fifteenth Amendment had not been specifically extended to Guam. Rodriguez v. Popular Democratic Party, 457 U.S. 1, 7-8 (1982).

Since the Fifteenth Amendment specifically and absolutely prohibits limitations on the right to vote based on race or color, there is no need to go into the question of whether section 102(a) also constitutes a durational residence requirement prohibited by the Equal Protection element of the Due Process Clause of the Fifth Amendment, and whether a provision of the Constitution of Guam implementing section 102(a) would violate either the Equal Protection element of the Due Process Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment. See Dunn v. Blumstein, 405 U.S. 330 (1972), and Rodriguez v. Popular Democratic Party, 457 U.S. at 7-8 n.6 (explaining that, while the inhabitants of an unincorporated territory enjoy the guaranty of the Equal Protection of the Laws, the Supreme Court has never found it necessary to resolve the precise question of whether that guaranty is provided under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment).

It is therefore recommended that section 102(a) be deleted from the bill.

Those supporting the Chamorro-only vote have suggested that the Congress has authority under the Territory Clause (U.S. Const. art. IV, § 3, cl. 2) to permit a departure from the constitutional precepts, discussed above, concerning the deprivation of the right to vote for racial or ethnic reasons. The Territory Clause, however, does not supersede the Constitution. To the contrary, the power of Congress under that Clause, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 186 (1824); District of Columbia v. John R. Thompson Co., 346 U.S. 100, 104 (1953).

Section 102(b) would provide that the Government of Guam will insure that nothing in the Act will be interpreted "as depriving any qualified resident of Guam of the right to participate as a voter" in the ratification process provided for in section 1204. In other words, section 102(b) would exempt the plebiscites to be conducted in the approval processes of this bill and of the Constitution from the Chamorro-only vote

requirement of subsection (a), indicating, however, that persons who are not native Chamorros may be excluded from further acts of self-determination. Subsection (b) thus suffers from the same infirmities as subsection (a) and should be deleted.

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Section 102(c) would provide that the United States Government shall and the Commonwealth of Guam may promote the following activities:

(1) the maintenance and preservation of the Chamorro language, culture, and traditions;

(2) the enhancement of economic, social, and educational opportunities for Chamorros; and

(3) training of Chamorros for employment as professionals, skilled workers, and leaders in business and industry.

This subsection would provide constitutional problems if it established racial or ethnic classification for the recipients of its benefits. It does not appear, however, that this provision would have that effect. It does not expressly establish programs that are reserved for Chamorros, nor does it expressly provide that Chamorros are to be granted preferences on the basis of their ethnicity in connection with programs funded by the federal Government or the Commonwealth. Thus, the promotion of Chamorro language, culture, and traditions that is described in paragraph (1) does not necessarily entail the establishment of programs in which individual Chamorros benefit on the basis of ethnic criteria; rather, paragraph (1) simply may involve the creation of educational programs -- open to all, and in which no ethnic preferences are awarded -- that further the preservation of Chamorro culture.

Again, on their face, paragraphs (2) and (3) entail outreach and recruitment efforts to attract Chamorros to the socioeconomic, educational, and employment training programs described in those paragraphs, but stop short of actually allocating benefits, positions, or jobs to Chamorros on the basis of ethnicity. Such efforts generally do not trigger the application of the legal standards governing the use of racial or ethnic classifications, because they are considered race/ethnic neutral with respect to allocation of a benefit. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989); id. at 526 (Scalia, J., concurring). Analogous legislative precedents may be found in 20 U.S.C. §§ 1059c, 1133b(b)(11) & (e)(2), 7901-7912.

Section 102(d) would provide that the establishment of the programs envisaged in section 102(c) shall not affect the continued eligibility to existing programs by minority groups now

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qualified to receive the benefits of those existing programs. We perceive no objection to this subsection at this time.

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Section 102(e) seems to mean that nothing in the Act or in the Constitution of the Commonwealth of Guam shall impair: (a) the United States citizenship of the residents of Guam and their descendants, or (b) the rights and privileges under the first sentence of the Fourteenth Amendment of aliens legally admitted for permanent residence who are residing in Guam.

The first clause of this subsection appears to be unnecessary, considering that section 201 would extend to Guam the first sentence of the Fourteenth Amendment pursuant to which all persons born or naturalized in the United States are citizens of the United States. This Act or the Constitution of Guam thus could not "impair" the constitutionally guaranteed citizenship for all persons born or naturalized in the United States.

The meaning of the second clause of the subsection is uncertain. When it speaks of "legally admitted aliens permanently residing in Guam", it is not clear whether it refers to aliens admitted under Federal law or under Guamanian law under Title VII, infra. Moreover, the first sentence of the Fourteenth Amendment refers to citizenship and not to rights and privileges. The second sentence of the first section of the Fourteenth Amendment prohibits the abridgement of the privileges and immunities of citizens of the United States. Only the Due Process and Equal Protection Clauses, also located in the second sentence of the first section of the Fourteenth Amendment, apply to "any person" regardless of their citizenship. Assuming that section 102(e) is intended to refer to the first section, rather than the first sentence of the Fourteenth Amendment, it should be noted that the second sentence of that section was introduced to Guam by statute in 1968, and that much, if not all of it, has been in effect in Guam even before that time by its own force. Hence, neither the Guam Commonwealth Act nor the Constitution of the Commonwealth of Guam would be capable of impairing those rights and privileges to which alien residents of Guam who have been lawfully admitted for permanent residence in the United States are entitled under the first section of the Fourteenth Amendment. We therefore recommend that section 102(e) be eliminated, unless a satisfactory explanation of the purpose it is designed to accomplish is provided. We want to add that the Guam Commission on Self-Determination at one time agreed to the deletion of this subsection.

Section 102(f) would provide for the establishment by the Commonwealth of Guam of a Chamorro Land Trust for the benefit of the indigenous Chamorro people of Guam. The trust would be composed of "certain lands" returned by the United States to the Commonwealth of Guam. The subsection does not specify what the "certain lands" are, nor does it specify the purposes and terms

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of the trust. In those circumstances it is difficult, if not indeed premature, to evaluate the constitutionality of this subsection. We therefore limit ourselves to the following observations.

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If the principal or the income of the trust are to be used to fund the Commonwealth's programs provided for under section 102(c), considerations similar to those discussed in connection with that subsection would apply. Different tests would apply, if the trust were required to sell or lease the lands conveyed to it only to indigenous Chamorros. If that were the true import of section 103(f), the provision would authorize Guam to use a racial or ethnic classification. Racial or ethnic classifications intended to benefit minorities that are adopted by federal agencies, pursuant to Congressional authorization, are subject to intermediate scrutiny. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990). It would seem that such a classification, if adopted by state or territorial governments pursuant to and within the limits of a Congressional authorization, would also be subject to intermediate scrutiny. See City of Richmond v. J.A. Croson Co., 488 U.S. at 491 (plurality opinion).

Under that standard, a benign racial classification is constitutional if it serves an important governmental objective and is narrowly tailored to the achievement of that objective. Metro Broadcasting, Inc., 497 U.S. at 563-65. The Supreme Court has indicated that there are at least two objectives that are important enough to justify racial and ethnic classifications: remedying the effects of society-wide discrimination, and the promotion of diversity in particular sectors and industries. See id. at 564-65; Fullilove v. Klutznick, 448 U.S. 448 (1980); see also J.A. Croson Co., 488 U.S. at 490 (plurality opinion) ("Congress may identify and redress the effects of society-wide discrimination" through race-based remedial measures). Even so, a Congressional authorization of racial and ethnic classifications requires an evidentiary record supporting the need for the classification, the consideration of available alternatives, and the adoption of flexible means toward the achievement of that goal. Fullilove v. Klutznick, 448 U.S. at 463-67, 480; Metro Broadcasting, Inc., 497 U.S. at 584, 594. We believe that section 102(f) in its present vague form would not pass judicial scrutiny, if it were designed to benefit individual Chamorros rather than the programs referred to in section 102(c). On the other hand, it may well be possible to craft pertinent legislation if the language is sufficiently precise and if it is supported by adequate Congressional findings.

Section 102(g). This subsection would provide that the Constitution of Guam shall establish reasonable residency requirements for voting purposes. We question the need for this subsection. It does not appear necessary to burden the

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Constitution of Guam with a provision to that effect. The power to attach reasonable residency requirements to the electoral franchise flows from the Fourteenth Amendment and does not have to be spelled out. On the one hand, the residency requirements may not be any longer than "reasonable", as defined in Dunn v. Blumstein, 405 U.S. 330 (1972). We therefore believe that it should be left to the discretion of the Constitutional Convention whether or not to include in that document a provision dealing with a residency requirement complying with the federal durational mandate. Even in the absence of a pertinent provision in the Guam Constitution, the Guam legislature would have the power to enact a residency requirement for voting, as long as it is compatible with the federal standard.

Section 103. This section would provide that the provisions of this, the Guam Commonwealth Act, may be modified only with the mutual consent of the Government of the United States and the Government of Guam.

The Department of Justice is opposed to this section for constitutional reasons. We realize that the 1989 report, while rejecting this section as a whole, proposed a mutual consent provision analogous to section 105 of the Covenant with the Northern Mariana Islands that would subject four fundamental provisions of the Guam Commonwealth Act, viz. sections 101, 103, 201 and 301, to a mutual consent requirement. Since then the Department of Justice has reexamined the question whether and in what circumstances one Congress may prevent the modification of its laws by a subsequent Congress. We have concluded that one Congress cannot immunize legislation such as the proposed Guam Commonwealth Act from subsequent Congressional amendments for the following reasons:

1. Legislation enacted under the Territory Clause delegating congressional governmental authority or any part of it to a Territory is "necessarily" subject to the power of Congress to revise, alter, or revoke that delegation. District of Columbia v. John R. Thompson Co., 346 U.S. 100, 106, 109 (1953), and the authorities there cited.

2. It is true that Congress can immunize legislation from subsequent amendments where it creates vested rights in "persons" that are protected against subsequent legislative impairment by the Due Process Clause of the Fifth Amendment, especially where Congress agrees in unmistakable terms to forego its right to amend or repeal. This exception, however, applies to only conventional property rights within the meaning of the Fifth Amendment, and does not extend to regulatory or political relations. Bowen v. Public Agencies Opposed to Social Sec. Entrapment, 477 U.S. 41, 55 (1986); Peterson v. U.S. Dept. of Interior, 899 F.2d 799, 807 (9th Cir.), cert. denied, 498 U.S. 1003 (1990); Parkridge Investors Ltd. v. Farmers Home Admin., 13

F.3d 1192, 1198 (8th Cir.), cert. denied, 114 S. Ct. 2153 (1994).² In other words, Congress cannot bargain away sovereign governmental powers by creating vested rights in them. America Commercial Co. v. United States, 171 U.S. 110, 137 (1898); see also United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977) relating to the analogous problems of States under the Contract Clause (U.S. Const. art. I, § 10, cl. 1).³ Moreover, governmental entities are not "persons" within the meaning of the Fifth Amendment. South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966).

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In the second half of 1994 the Special Representative for Guam Status Negotiations and the Governor of Guam agreed on the following language on the question of mutual consent:

The Congress, acting to the extent constitutionally permissible, in the exercise of its plenary authority under Article IV, Section 3, Clause 2 of the Constitution, and the people of Guam agree that no provision of this covenant may be altered, amended, or repealed without the mutual consent of the Government of Guam and the United States Congress.

The Department of Justice acquiesced in the language in the belief that the clause "to the extent constitutionally permissible" constituted a forceful, if not indeed a peremptory, warning as to the legal infirmity of the mutual consent provision. The Department of Justice adheres to its position that Congress lacks authority to bind a future Congress to the terms of the mutual consent provision. Because we are concerned that section 103 may be misleading to the Guamanians, we recommend that it be deleted.

Section 201. This section would continue the application to Guam of those provisions of the Constitution of the United States that now apply to Guam, unless specifically modified by the

² Our earlier view that Congress could provide that the fundamental provisions of a territorial relations act could be subject to a mutual consent requirement was based on the assumption that a Territory could acquire a vested interest in a status that would be protected by the Due Process Clause of the Fifth Amendment. The Bowen case and the rulings following it, however, establish that the Due Process Clause protects only conventional property rights and not a political status.

³ Transohio Sav. Bank v. Director, OTS, 967 F.2d 598, 621 (D.C. Cir. 1992) does not hold to the contrary. That case merely stands for the proposition that, absent an undertaking in unmistakable terms not to amend or repeal, there was no need for the court to go into the question whether the United States could surrender an essential aspect of its sovereignty.

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Commonwealth Act, and would provide that certain additional provisions of the Constitution shall have the same force and effect on Guam as in the United States or in any State of the United States.

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The Department of Justice has the following comments:

The provisions of the Constitution now applicable to Guam fall into several groups:

1. The Territory Clause (U.S. Const. art. IV, § 3, cl. 2).
2. The fundamental provisions of the Constitution that apply of their own force which include at least Freedom of Speech, the prohibition against unreasonable searches and seizures, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Due Process Clause of the Fifth Amendment, including its Equal Protection component, and the Fifteenth Amendment.
3. The provisions of the Constitution that were expressly extended to Guam by section 5 of the Elective Governors Act of September 11, 1968, 48 U.S.C. § 1421b(u), viz. Article I, Section 9, Clauses 2 and 3; Article IV, Section 1 and Section 2, Clause 1, the First to the Ninth Amendments inclusive, the Thirteenth Amendment, the second sentence of the first section of the Fourteenth Amendment, the Fifteenth Amendment, and the Nineteenth Amendment.

We are concerned about the clause "unless specifically modified by this Act." We have been advised that the Guam Commission on Self-Determination reads this clause not as "expressly modified" but as "modified by necessary implication." Thus the extension of the Tenth Amendment to Guam would supersede the Territory Clause, and the Chamorro-only voting provision would supersede the Fifteenth Amendment and the constitutional guaranties of Due Process and Equal Protection.

In addition, the following provisions of the Act are in the view of the Guam Commission designed to supersede the U.S. Constitution:

-- Title VII on immigration, as it relates to the power of Congress under Article I, Section 8;

-- Section 1001 on eminent domain, as it relates to the Fifth Amendment;

-- Section 202 (and perhaps others) on the effect of Federal law, as it relates to the power of Congress under the last paragraph of Article I, Section 8, to make "necessary and proper" laws;

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-- Section 303 on agreements with foreign entities, as it relates to the bar to conclude treaties by a State in Article I, Section 10; and

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-- Section 303 on agreements with foreign entities, as it relates to the President's treaty-making power under Article II, Section 2.

The "unless specifically modified by this Act" clause is objectionable for two reasons. First, the clause is in our view ineffective, because it cannot affect the application of the Constitution to any area under the sovereignty of the United States and, second, because it would inject an impermissible degree of uncertainty into the operation of the Act.

Section 201 would newly introduce into Guam Article IV, Section 2, Clause 2 and Section 4, of the U.S. Constitution, the first sentence [of the first section] of the Fourteenth Amendment, and the Tenth Amendment.

a. Article IV, Section 2, Clause 2, the Interstate Rendition Clause, and the first sentence of the first section of the Fourteenth Amendment, providing for citizenship at birth, are both already applicable to Guam on a statutory basis, see 18 U.S.C. § 3182 and 8 U.S.C. § 1407. The apparent purpose of including those provisions in section 201 is to immunize them, in particular the citizenship at birth provision, from changes in the federal law. The Department of Justice has no objection. We must point out, however, that there is no assurance that the statutory introduction of constitutional provisions in Guam cannot be repealed by a subsequent statute or by the loss of U.S. sovereignty over Guam. We are aware of two isolated statements by Brown, J., in Downes v. Bidwell, 182 U.S. 244, 261, 270-71 (1901), and in Rassmussen v. United States, 197 U.S. 516, 536 (1905), that the introduction of the Constitution or a part thereof into a Territory is irrevocable. In the absence of further Supreme Court precedent supporting that proposition, we cannot say that its validity has been established beyond a doubt.

b. Article IV, Section 4, provides that the United States shall guarantee every State in the Union a republican form of government and protect them from invasion. We assume that this clause has been occasioned by the inability of the United States to defend Guam at the beginning of World War II, and the resulting 3 1/2 years of Japanese occupation. We have no objection to this provision.

c. We must object, however, to the proposed application of the Tenth Amendment to Guam.

The purpose of rendering the Tenth Amendment of the Constitution applicable to Guam is, in the words of the Guam

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Commission, to limit the power of Congress over the internal affairs of Guam in the same way that Congress' authority over state government is limited. Such limitation of the power of Congress over Guam would be inconsistent with the Constitution.

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According to the Constitution, all areas under the sovereignty of the United States are divided in two, and only two, categories: States, with respect to which the legislative power of Congress is limited by the Constitution, and areas that are not States. The latter areas "must necessarily be governed by or under the authority of Congress." National Bank v. County of Yankton, 101 U.S. 129, 132-33 (1880). Or in the words of Chief Justice Marshall, "[i]n legislating for them [the Territories] Congress exercises the combined powers of the general, and of a state government." American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828). Thus, as long as Guam remains under the sovereignty of the United States, the power of Congress to legislate over Guam cannot be limited, unless Guam becomes a State on equal footing with the other States. In other words, the Tenth Amendment cannot be extended to an area under the sovereignty of the United States that is not a State.

We therefore object to the inclusion of the Tenth Amendment in section 201. On the other hand, in order to avoid misunderstandings of the kind that occurred in the Northern Mariana Islands we urge that the Territory Clause (U.S. Const. art. IV, § 3, cl. 2) be specifically included in the constitutional provisions applicable to Guam.

Section 202. This section would provide that no federal laws, rules and regulations passed after the date of this Act shall apply to Guam, unless mutually consented to by the Government of the United States and the Government of Guam. The Department of Justice objects to this section for the reasons set forth in its objection to the extension of the Tenth Amendment to Guam. The section is inconsistent with the sovereignty of the United States and the plenary powers of Congress over an area under the sovereignty of the United States that is not a State.

We have the further formal objection to the clause "after the date of this Act." It is not clear to which stage of the ratification process it refers.

We realize that Guam is 10,000 miles away from Washington, and that its geographic, climatic, demographic, and cultural conditions differ largely from those prevailing on the mainland. We therefore suggest the development of a fast track legislative process to grant Guam exemption from federal laws that are obviously not suited to it. Similar provisions may be considered for administrative rulings.

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Section 203. This section would establish a Joint Commission on the Applicability of Federal Law consisting of three members appointed by the President of the United States and four members appointed by the Governor of Guam. The Commission would have far-reaching powers and functions, including the determinations of what federal real property is surplus (section 1002) and of which federal recreational facilities and which easements over federal property shall be open to the Government of Guam and the general public on Guam (section 1003(c)).

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We object to the provision, if only on the ground that a Commission that has such broad powers, especially those relating to the disposal and the use of federal property, should not have a controlling majority of Guamanian members. In addition, this provision would appear to raise problems under the Appointments Clause (U.S. Const. art. II, § 2, cl. 2). We also note that under subsection (c) the costs of the Commission would be borne exclusively by the U.S. Treasury.

Section 204. This section would authorize the President or his designee to delegate to the Governor of Guam total or partial performance of functions vested in administrative agencies of the Federal Government.

We fully appreciate that the administration of federal statutes 10,000 miles away from the seat of the Government presents difficult problems for the agencies as well as for the citizens, especially in connection with the many agencies whose responsibilities on Guam are limited and therefore do not warrant the maintenance of a field office on Guam.

For technical reasons we would substitute the term "appoint" for "delegate" and suggest that section 204 be amended to read:

(a) The President alone may appoint the Governor of Guam or, after consultation with the Governor of Guam, an officer of the Government of Guam to perform in Guam any function vested in any executive agency of the Federal Government.

(b) The head of an executive agency of the United States that has program responsibilities in Guam may appoint the Governor of Guam or, after consultation with the Governor of Guam, an officer of the Government of Guam to perform in Guam any functions vested in that agency.

Sections 301 through 303. With respect to those sections the Department of Justice defers to the views of the Department of State and the Department of Defense.

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We recommend, however, that section 301 be rephrased as follows:

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The United States will have complete responsibility for and authority with respect to matters relating to foreign affairs and defense that affect the Commonwealth of Guam.

Section 304. This section would (a) prohibit the United States Government from using the island of Guam and its internal and surrounding waters, including the U.S. exclusive economic zone, as a nuclear waste storage or disposal site; (b) prevent the Federal Government from storing or disposing of hazardous chemicals on Guam and require a cleanup of any hazardous waste disposal sites created by the Department of Defense; and (c) authorize the District Court of Guam to require the United States Government to compensate anyone injured as a result of the use, storage, or disposal of chemical, nuclear or other hazardous substance by the Federal Government on Guam. We object to section 304 in its present form for the following reasons.

Subsections (a) and (b) deal with topics that are covered in considerable detail by federal statutes and by relevant treaties. The principal federal statutes that bear on the objectives covered by these subsections are: the Clean Water Act (CWA); the Solid Waste Disposal Act (as amended by the Resource Conservation and Recovery Act - RCRA); the Marine Protection, Research and Sanctuaries Act (MPRSA); the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund - CERCLA); the Toxic Substances Control Act (TSCA); the Nuclear Waste Policy Act of 1982 (NWPA); Atomic Energy Act (AEA). The London Dumping Convention (LDC) and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region are also relevant to this section.

Subsections (a) and (b) would either duplicate these statutes and treaties or create a new set of requirements and liabilities that, for lack of the details required in this complex area of the law, would result in uncertainties and doubts inconsistent with the efficient achievement of the purposes of those subsections.

In particular, we wish to point out that RCRA and CERCLA control the treatment, storage, and disposal of solid and hazardous waste, and provide for the cleanup of contamination at federal facilities. These two statutes provide well-established requirements enforceable by regulators and by citizen suits, under which the United States is addressing contamination nationwide. The language of section 304(b) and (c) would create a wholly new set of requirements that would duplicate these existing laws, and that would interfere with ongoing cleanups being carried out under existing law.

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If these subsections are to be retained at all they should be rephrased so as to be consistent with the applicable provisions of the existing federal law.

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Subsection (c) would provide that any person injured as the result of chemical, nuclear or other hazardous materials stored, used, or disposed of by agencies of the United States in Guam shall be compensated by the United States in a manner to be decided by the District Court of Guam.

We object to this provision, which would subject the United States to tort liability in a manner to be determined by the District Court of Guam without any statutory guidance. The assumption of tort liability by the United States constitutes a waiver of sovereignty. The Federal Tort Claims Act was enacted after a careful weighing of the conflicting considerations militating for and against this waiver. That Act strikes a delicate balance between the legitimate need to provide an avenue for persons seeking compensation for torts of government agencies and officials, and the fiscal and other policy concerns reflected in the exemptions, exclusions, and conditions set forth in the Act. Thus, the Act does not permit liability to be predicated upon a strict liability theory (28 U.S.C. § 1346(b)), does not apply to acts or omissions of any contractor with the United States (28 U.S.C. § 2671), and does not provide jurisdiction to resolve claims founded upon any of the numerous exceptions set forth in 28 U.S.C. § 2680, of which exception (a) (discretionary function) and (j) (combatant activities during war) are particularly pertinent here. It is important that the tort liability of the United States be subject to the well considered contours of the Federal Tort Claims Act and that this liability be uniform throughout the United States. We are not aware of any reason why the liability under section 304(c) should not be one provided for in the Federal Tort Claims Act, in particular where this liability would be governed by the vague, and to our knowledge unprecedented, standard of "in a manner to be decided by the District Court of Guam."

Title IV - Courts

This title deals mostly with federal courts; it is based largely on sections 22 through 22D of the Guam Organic Act, 48 U.S.C. §§ 1424 - 1424-4. There are, however, a number of differences, to which the Department of Justice must object.

Section 401. This section corresponds to section 22B of the Organic Act of Guam, 48 U.S.C. § 1424-2, which provides generally that the relations between the local court on Guam and the federal courts shall be governed by the law governing the relationship between the federal courts and the state courts. Section 401, however, omits the proviso in section 22B, pursuant to which for the first fifteen years after the establishment of

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an appellate court in Guam, its decision should be reviewed by the Court of Appeals for the Ninth Circuit by writ of certiorari.

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The proviso is derived from the Act of October 5, 1984, Pub. L. No. 98-454, 98 Stat. 1732, 1742, revising the organization of the territorial courts. Congress explained the reason underlying it as follows:

The transitional period of fifteen years is the same as the one provided for in § 4 of the Act of November 8, 1977, 48 U.S.C. § 1694c, relating to the Northern Mariana Islands. It is based on the consideration that, during the formative years of the new appellate court and while it establishes its institutional traditions, all decisions of that court should be reviewable by a court of appeals which is familiar with the local conditions rather than on a discretionary basis by the Supreme Court.

130 Cong. Rec. 23,790 (Senate) and id. at 25,476 (House of Representatives) (1984). These reasons persist. We therefore recommend that the proviso be restored. Thought might be given to limiting the jurisdiction of the Ninth Circuit to cases involving federal questions, and in turn to provide for mandatory review by way of appeal.

Section 402. This section corresponds in many respects to section 22 of the Organic Act of Guam, 48 U.S.C. § 1424. It omits subsection (a) on the theory that the local courts are not the proper subject of the Commonwealth Act, and subsection (c) which has become obsolete. The following clause should be added to the description of the District Court's jurisdiction "and such additional jurisdiction as may be expressly provided by this Act, and any additional, special jurisdiction given it by Congress." This clause envisages the possible need to vest in the District Court special jurisdiction prompted by circumstances uniquely applicable to Guam, such as the Act of October 15, 1977, Pub. L. No. 95-134, 91 Stat. 1159, 1162 conferring on the District Court of Guam jurisdiction to review certain land claims. Section 402(a) would continue the District Court of Guam. This subsection is unnecessary and should be deleted.

Section 403. This section corresponds to section 22D of the Guam Organic Act, 48 U.S.C. § 1424-4. We have no comment on this section.

Section 404. This section corresponds to section 24 of the Organic Act of Guam, 48 U.S.C. § 1424b. We have the following comments. On page 16, line 16 we would substitute "35 and 37" for "31 and 33." We would also omit as unnecessary subsection (c), which would continue the District Judge, the United States Attorney and the United States Marshal. We have the following additional comments on Title IV:

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(i) Title IV would not make any reference to the local courts. In view of the Supreme Court decision in Territory of Guam v. Olsen, 431 U.S. 195 (1977) and the precedent established in section 203(d) of the Covenant with the Northern Mariana Islands, we consider it desirable to make reference to the authority of Guam to provide for in its Constitution or vest in its legislature the authority to establish an appellate court and trial courts.

(ii) Existing law provides that, prior to the establishment of an appellate court by the legislature of Guam, the decisions of the local courts are subject to appellate review in the Appellate Division of the federal District Court (section 22C of the Organic Act of Guam, 48 U.S.C. § 1424-3). Section 1203(c) of the bill would abolish this appellate jurisdiction of the District Court, upon the adoption of the Constitution of Guam, even if no appellate court has been established by then. In our view the appellate jurisdiction of the Federal District Court should continue until a local appellate court has become operational. Moreover, the technical transitional provisions of section 22C(d) of the Organic Act of Guam (48 U.S.C. § 1424-3(d)), should be retained in order to preserve the jurisdiction of the federal courts over appeals pending in them at the time the appellate court of Guam becomes operational.

Title V - Trade

We defer to the views of the Departments and Agencies primarily concerned with this subject matter.

Title VI - Taxation

On this title we defer primarily to the views of the Department of the Treasury. We have, however, the following formal observations.

Section 601 contains several references to the "Internal Revenue Code of 1954." The internal revenue laws of the United States are currently contained in the "Internal Revenue Code of 1986." It is important that the legislation refer to the current version of the tax law rather than to an obsolete version. Moreover, we doubt that the references to the Internal Revenue Code of 1939 made in H.R. 1056 are needed at all.

Finally, the provisions of Title VI are inconsistent with and should be coordinated with section 1271 of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2591.

Title VII - Immigration

Section 701. This section would in effect transfer the control of immigration from the Federal Government to the

Government of Guam. This section is not acceptable to us, because the entry of aliens into Guam presents serious security problems for the United States in view of the exposed strategic position of the island and the military installations on it. We cannot, therefore, support this section, especially in view of the unfortunate experience in the Northern Mariana Islands.

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Section 701 appears to be based on two grievances. First, because of the proximity of Guam to Southeast Asia, many immigrants from that region have chosen to make Guam their home, thereby overtaking Guam's fragile island economy and infrastructure. In addition, the temporary worker definition in section 101(a)(15)(H)(ii) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(15)(H)(ii)), being limited to temporary positions, is too narrow to satisfy Guam's specific needs for temporary workers for permanent jobs.

Guam is an unincorporated Territory to which under the Insular cases, supra, the requirement that the naturalization laws be uniform (U.S. Const. art. I, § 8, cl. 4) does not apply. Therefore it should be feasible to develop procedures that would prevent the inundation of Guam by immigration from the Far East. Thus immigrants other than close relatives of residents of Guam and of U.S. civilian or military personnel stationed on Guam could be precluded from making their first entry into the United States on Guam. Immigrants who have entered the United States at other ports of entry could be discouraged from moving to Guam (e.g., by providing that their residence in Guam would not count toward the period of residence required for naturalization).

The second problem (i.e., whether as the result of the unique conditions prevailing on Guam, temporary workers should be admitted to work in permanent positions), raises questions that are within the expertise of the Department of Labor. We defer to the pertinent views of that Department.

Section 702. This section would provide for the issuance of visitors' visas limited for travel only to Guam. The need for this section appears to be superseded by section 212(b), 8 U.S.C. § 1182(l) of the Immigration and Nationality Act, which provides for the visa free entry to Guam for the citizens of certain countries, and thus gives a relief analogous to the one intended to be given by section 702.

Title VIII - Labor

We defer to the views of the Department of Labor.

Title IX - Transportation and Telecommunications

We defer to the views of the Departments and Agencies concerned.

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Title X - Land, Natural Resources and Utilities

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Section 1001(a) would grant the Government of Guam eminent domain powers "over property within the Commonwealth in accord with the Constitution of Guam." The power of eminent domain over land within its rightful jurisdiction is an inherent power of government; therefore, we believe the Commonwealth would have this power (as does the current Government of Guam) whether or not it is covered in the Commonwealth Act. The Constitution of Guam is indeed the proper vehicle for establishing this power for a self-governing Commonwealth. We do not object to this provision, subject to the understanding that the Commonwealth's power of eminent domain cannot apply to federal property; nor would the Commonwealth's eminent domain power in any way diminish Federal powers of eminent domain. We, therefore, suggest adding a second sentence to section 1001(a) as follows: "The Commonwealth of Guam's eminent domain power does not extend to Federal property and does not diminish Federal powers of eminent domain."

Section 1001(b) would provide:

The Commonwealth of Guam shall have jurisdiction over all living and nonliving natural resources of the seabed, subsoil, tidelands, and adjacent territorial waters, as defined by the United States law, of the Island of Guam. The Commonwealth shall exercise rights to determine the conditions, including pollution control, and terms of all scientific research, management, exploration, and exploitation of all ocean resources and all sources of energy and prevention of pollution within the 200-mile Exclusive Economic Zone, including pollution originating outside the zone that poses a threat within the zone.

We object to this provision in its entirety.

The first sentence of section 1001(b) relates to matters already resolved by the Territorial Submerged Lands Act. 48 U.S.C. § 1705. Inclusion of this text will serve no purpose other than to create confusion and possible litigation over the scope of the Commonwealth's jurisdiction.

The second sentence of section 1001(b) is problematic because the 200-mile Exclusive Economic Zone has always been a federal zone, not a state or territorial zone. As written, the authority of the United States in the 200-mile region around Guam apparently would be shifted entirely to the Commonwealth. No other state or territory -- including Puerto Rico and the Virgin Islands -- has such authority. Particularly in combination with the first sentence of section 1001(b), this second sentence could be interpreted to give away valuable mineral and other rights that properly belong to the United States, or to exempt this area

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from federal marine pollution and marine resource management laws.

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Accordingly, section 1001(b) should be revised to read:

The Commonwealth of Guam shall have jurisdiction over natural resources in the waters and tidelands adjacent to the Island of Guam in accordance with and to the same extent as previously granted to Guam pursuant to 48 U.S.C. § 1705.

Sections 1001(c) and 1001(d) would govern land acquisitions by the United States in the Commonwealth of Guam. Both of these provisions are extraordinarily restrictive of the rights and powers of the United States. We recommend against enactment of these two subsections as inimical to the interests of the United States.

Subsection (c) would provide that the "United States may, upon written notice to the Government of the Commonwealth of Guam, acquire for public purposes in accordance with Federal laws and procedures, any interest in real property in the Commonwealth only by voluntary means" (emphasis added).

Subsection (d) would provide that the United States agrees not to exercise within the Commonwealth the power of eminent domain except in time of war and then only to the extent necessary and in compliance with applicable United States and Commonwealth of Guam laws, and with full recognition of due process required by the Constitutions of Guam and the United States" (emphasis added).

Under these provisions, the power of the United States to acquire real property interests in the Commonwealth would be limited to voluntary means, except in time of war. This is a limitation on the power of the United States that the fifty states do not enjoy. Such a limitation creates a grave risk that an acquisition of property on Guam that is necessary for the public good or national defense may fail because of an owner's unwillingness to sell the needed property or because of an exorbitant price demand that exceeds the government's willingness or ability to pay. The government at least would have to pay above-market "hold-up" values demanded by sellers, many of whom undoubtedly would attempt to take advantage of the United States' lack of eminent domain powers. The Supreme Court has expressed the danger such a provision would create:

It has not been seriously contended during the argument that the United States government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be

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preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the general government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be.

Kohl v. United States, 91 U.S. 367, 371 (1875).

We also object to the requirement in section 1001(d) that the Government's eminent domain power be exercised "only . . . in compliance with applicable . . . Commonwealth of Guam laws . . . with full recognition of due process required by the Constitutions of Guam and the United States." The exercise of the United States' sovereign power of eminent domain, which is already subject to federal laws including the Due Process Clause of the Fifth Amendment, should not be subject to local law. When the United States exercises its eminent domain power in the fifty states, federal law governs as to both substantive and procedural matters. United States v. Miller, 317 U.S. 369, 379-80 (1943); United States v. 93.970 Acres of Land, 360 U.S. 328, 333, n.7 (1959). In takings by the United States by eminent domain, the rights of the citizens of the fifty states are protected by the Constitution of the United States, not by the constitutions of the citizens' states. The same should be true with respect to the Commonwealth of Guam.

Section 1001(e) would provide that "[a]ll excess real properties of the United States on the Island of Guam released after establishment of the Commonwealth will be conveyed . . . without any condition, limitation or reversion clause in such conveyance." Similarly, section 1001(f) provides that "[a]ll land heretofore transferred to the Government of Guam by the United States are [sic] released from any and all provisions limiting the use of such land, and are conveyed in fee simple." These provisions give no consideration to the United States' national concerns, including national security and public safety.

Section 1002, "Transfer of Excess Federal Real Property", would provide, in part:

All real property . . . controlled or owned by [the United States] on Guam and not necessary for direct and continuous operational, logistical, or security use as a military facility or other Federal function shall be transferred as excess Federal real property to the Government of Guam

COPY

.....

This section would make inapplicable in Guam a body of existing legislation that relates to GSA transfer of excess federal land. Instead, federal lands deemed excess would be transferred to the Government of Guam. Section 1002 further would provide that:

Such transfers will be, whenever possible, at no cost to the people of Guam, or, when appropriate, at cost no higher than the valuation of the property at the time of original acquisition by the Federal authority, regardless of any subsequent alterations or additions to the property.

Whatever the wisdom of exempting Guam from the operation of existing excess lands laws, this "no cost . . . or . . . at cost" provision is wholly inappropriate. Much of the Guam land being excessed either has benefitted from federally-funded improvements on the property or has benefitted indirectly from federally-funded improvements to the infrastructure in the vicinity of the property. Furthermore, much of the potentially excess land at issue was acquired by means of condemnation actions which were the focus of ten years of litigation against the United States under 48 U.S.C. § 1424c. The United States settled these claims with additional compensation payments of approximately \$40 million. As a consequence, there should be no legal or equitable grounds to provide additional compensation in the form of free or below-market land transfers.

Section 1002 also would provide:

Final determination of which Federal real property is excess to Federal needs, and the authority to mandate prompt and fair transfer to the Government of Guam by the Federal proprietor, shall be with the Joint Commission after consultations with the proprietor.

This provision appears to grant the Joint Commission -- a majority of which is appointed by the Governor of Guam rather than by the United States -- the absolute authority to declare Federal property excess, and to mandate its transfer to the Government of Guam at no cost, or below-market cost. Under section 203(b)(7), a primary charge of the Joint Commission is to "seek to obtain the maximum economic development and political autonomy for the Commonwealth of Guam without impairing United States national security interests." These provisions create a serious risk that excess property dispositions will be made in a

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manner that does not adequately protect (or reflect) the interests of the United States.

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Section 1003. Under section 1003(c), the Joint Commission would be authorized to "determine, after consultation with the general proprietor, which Federal recreational facilities and which easements over Federal property shall be open to the Government of Guam and to the general public on Guam and the manner of access." Access issues on Guam are matters of significant controversy on Guam, including one pending takings claim which is the litigation responsibility of this Department and regards access to two parcels in the north of Guam. Thus, section 1003 raises a concern that future access decisions will be made by a Commission on which the United States is in the minority.

We also wish to point to the failure of Title X to clarify the questions whether and to what extent the United States is reserving legislative jurisdiction (exclusive, partial or concurrent) over property to which it is retaining title; the extent of legislative jurisdiction it will exercise over property it acquires in the future; or the procedures that are required to obtain legislative jurisdiction over future acquisitions. Cf. U.S. Const. art. I, § 8, cl. 17; 40 U.S.C. § 255.

Sec. 1004. Authority over Utilities. The subject matter of this section appears to have been dealt with in an agreement between Department of the Navy and the Guam Power Authority.

Title XI - United States Financial Assistance

We defer to the views of the Departments and Agencies directly concerned with this issue.

Title XII - Technical Amendments and Interpretation

Section 1201(a) would express the intention of Congress that the Act provide "complete internal self-government" for the Commonwealth of Guam, and that the Act be interpreted liberally to accomplish that purpose. We must object to this subsection in its present form, at least until the meaning of the term "complete internal self-government" is defined. The subsection invites claims by the Commonwealth that, except in the field of foreign relations and defense, the Federal Government has no jurisdiction over any matter that would be within the competence of an independent country.

Section 1201(b) would provide that "[w]hen ruling upon the laws of the Commonwealth, the courts of the United States shall give the same deference to the laws of the Commonwealth as they give to the laws of the several States." We believe that this subsection is designed to make applicable to Guam the Rules of

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Decisions Act, 28 U.S.C. § 1652, pursuant to which the laws of the several states shall be regarded as the rules of decision in civil actions in the courts of the United States, and to overcome the decision in Territory of Guam v. Yang, 850 F.2d 507 (9th Cir. 1988), which held that the Court of Appeals for the Ninth Circuit would review cases coming from Guam de novo, and that where the appeal involves a Guamanian law derived from a California statute reliance on California law is proper. We would recommend the extension of the Rules of Decisions Act to Guam and to move this subsection to Title IV of this bill which deals with judicial matters.

COPY

Section 1202 would continue in effect the laws of Guam in force on the date of the enactment of the Act. We have no objection to this section except for the phrase "in force on the date of enactment" which, as shown in our comments on section 101(a), is ambiguous and should be omitted.

Sections 1203 and 1204 provide for the effective date of the Act and the repeal of most of the provisions of the Organic Act of Guam. We believe that it is premature to discuss these sections before this legislation has reached a more definite stage, in particular before a decision has been made as to the requirement and form of the federal approval of the Guam Constitution. (See our comments on section 101(b).)

For the above reasons the Department of Justice objects to this bill in its present form.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Kent Markus
Acting Assistant Attorney General

cc: Honorable George Miller
Ranking Minority Member

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Withdrawal/Redaction Sheet

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DOCUMENT NO.
AND TYPE

SUBJECT/TITLE

DATE

RESTRICTION

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001. letter

re: CNMI immigration (1 page)

07/07/1999

P5

6061

COLLECTION:

Clinton Presidential Records
Intergovernmental Affairs
Jeffrey Farrow
OA/Box Number: 24089

FOLDER TITLE:

Northern Mariana Islands - Draft Bill

Jamie Mettrailer

2006-0194-F

jm557

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]
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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]

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JUSTICE 2

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6061

original S. 1275. The provision does make sense, else the US proper could use up all H1b & H2b visas, with none available for the CNMI.

-- proposed sec. 6(d)(2)(I) would permit the AG to extend the transition period an additional 5 years, and she can extend it still further (as it relates to EB visas for hotel industry workers -- apparently of special concern is the rule that one who immigrates as an EB LPR must remain in the CNMI 5 years before he or she can permanently move to live and work elsewhere in the US) if she finds, in consultation with the Labor Secretary, that ending the transition period as it relates to hotel industry workers would lead to a labor shortage. If so, the AG must publish a notice in the Fed. Reg. extending it. This doesn't strike me as a bad idea. As I understand it, the reason for this provision is that the CNMI folks are worried that people will immigrate there under the "easier" regime, and then go straightaway to some other part of the US. As part of the compromise needed to get this passed, I could see that it would make the extension of the INA more palatable to some. My only concern is that, if the AG is to have authority to extend, there should be some provision relating to judicial review of her decision. The best would be to say no judicial review. But at least, there should be something that says who can (and by implication, cannot) sue to challenge her decision.

Michael

Additionally, INS' Office of Budget states that if enacted, this would require the commitment of INS resources to the overall reform effort over a period during which the INA would be phased in.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION COPY
001. email	Sharpe D. Brian to Anna M. Briatico. Subject: DOJ comment on DOI's report on Mariana Islands (1 page)	07/19/1999	P5 6002

COLLECTION:

Clinton Presidential Records
Intergovernmental Affairs
Jeffrey Farrow
OA/Box Number: 24089

FOLDER TITLE:

Northern Mariana Islands - Fifth Annual Report - 1999

Jamie Metrailler
2006-0194-F
jm558

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.

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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]

COPY



Sharpe Brian D <Brian.D.Sharpe@usdoj.gov>
07/19/99 01:37:22 PM

JUSTICE
COPY

Record Type: Record

To: Anna M. Briatico/OMB/EOP

cc: Silas Adrien <Adrien.Silas@intmail.usdoj.gov> (Receipt Notification Requested) (IPM Return Requested)

Subject: LRM-AMB90, DOJ comment on DOI's report on Mariana Islands

The following are the views of the Department of Justice on LRM-AMB90, The Department of Interior's report on the Northern Mariana Islands Initiative on Immigration Labor and Law Enforcement.

Proposed section 6(b) of the Covenant Act provides that the numerical limits on H1b & H2b admissions do not apply to admissions in the CNMI. We support this provision because without it, the United States proper could use up the entire allocation of H1b and H2b visas, leaving none for the CNMI.

Proposed section 6(d)(2)(I) would permit the AG to extend the transition period an additional 5 years and she could extend it still further (as it relates to EB visas for hotel industry workers if she finds, in consultation with the Labor Secretary, that ending the transition period as it relates to hotel industry workers would lead to labor shortage. If so, the AG must publish a notice in the Federal Register extending it.

We believe that if the AG is to have authority to extend, there should be some provision relating to judicial review of her decision. We recommend that the bill provide that there be no judicial review. But at the least, there should be something that says who can (and by implication, cannot) sue to challenge her decision.

On page two, the reference in footnote two to "the current use of the Island of Tinian" should be changed to "the use of the Island of Tinian from April to June 1999" and conclude "was temporary" in place of "is temporary."

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001a. email	Jeffrey Farrow to Mfarrow@lisboa.com re: Puerto Rico letters continued. SSN [partial] DOB [partial] Secret Service [partial] Personal [partial] (9 pages)	01/18/2001	P5, P6/b(6), b(7)(C), b(7)(E)
001b. attachment	Memo for the President [partial] (1 page)	07/24/1998	P5 6063

COPY

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
WHO ([Northern Mariana Islands, Economic Development, Tourism])
OA/Box Number: 500000

FOLDER TITLE:

[01/18/2001][2]

Bevin Maloney
2006-0194-F
bm294

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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July 24, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Mickey Ibarra

SUBJECT: Office of Intergovernmental Affairs Weekly Report -- July 20 - July 24, 1998

Patients' Bill of Rights

- We continue to work to prevent the National Governors' Association (NGA) from endorsing the GOP managed care legislation drafted by Senator Nickles (R-OK). We are organizing a conference call next week with Democratic Governors and John Podesta.

Federalism Executive Order

- The Senate passed a "Sense of the Senate" resolution calling upon the Administration to revoke the Federalism Executive Order. Governors Carper (D-DE) and Romer (D-CO) have placed calls to Erskine's office with a similar message. To address these concerns, we have agreed to delay the effective date of the executive order for 90 days so that state and local officials can be consulted. We have offered to begin the consultation process immediately. Charles Ruff, Sally Katzen, and I recommend against revoking the Executive Order even though I have concluded that their charge of inadequate consultation is accurate. Rather, we believe agreement can be reached during the extended consultation. On Tuesday, Congressman McIntosh will hold a hearing on the Federalism Executive Order, and we are working to insure that the elected officials who testify recognize your record and commitment to states rights.

Governors

Automated Records Management System
Hex-Dump Conversion

- The National Governors' Association Annual Meeting will be held next week, August 1-4, in Milwaukee, WI. The primary issues being discussed that affect the Administration are federalism, IMF funding, Patients' Bill of Rights and nitrous oxide emissions. Speakers representing the Administration include Agriculture Secretary Dan Glickman, FEMA Director James Lee Witt, and Deputy Treasury Secretary Larry Summers.
- **The Governors were upset with your announcement on Tuesday regarding new nursing home regulations and the implementation of stronger federal oversight of state nursing home enforcement mechanisms.** They do not believe that HCFA should have the authority to increase its oversight of state surveyors and take action against states that are failing to enforce standards adequately.

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Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION COPY
001a. memo	Grossman, Marc to Lake, Anthony re: Letter from the Governor of the Commonwealth of the Northern Mariana Islands (2 pages)	03/21/1994	P5 6064
001b. letter	[Department of State and Department of Justice Joint Draft Reply to Governor Tenorio from President Clinton] (2 pages)	n.d.	P5
001c. memo	Virtue, Paul W. to Miller, Michael re: Legal Opinion (5 pages)	02/09/1994	P5 6065
002a. memo	Grossman, Marc to Lake, Anthony re: Letter from the Governor of the Commonwealth of the Northern Mariana Islands [duplicate 001a] (2 pages)	03/21/1994	P5 6064 Dup.
002b. letter	[Department of State and Department of Justice Joint Draft Reply to Governor Tenorio from President Clinton] [duplicate of 001b] (2 pages)	n.d.	P5
002c. memo	Virtue, Paul W. to Miller, Michael re: Legal Opinion [duplicate of 001c] (5 pages)	02/09/1994	P5 6065 Dup.

COLLECTION:

Clinton Presidential Records
NSC Records Management
[Mariana Islands]
OA/Box Number: 185

FOLDER TITLE:

9401329

Eric Holzer
2006-0194-F
eh684

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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S/S 9405017

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United States Department of State

Washington, D.C. 20520

March 21, 1994

6004
COPYUNCLASSIFIEDMEMORANDUM FOR ANTHONY LAKE
THE WHITE HOUSE

Subject: Letter from the Governor of the Commonwealth of the
Northern Mariana Islands

The Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States ("Covenant") entered into force on November 3, 1986. In his letter to the President, the Governor of the CNMI has raised questions regarding the acquisition of U.S. citizenship by individuals born in the Northern Mariana Islands to alien parents under Section 303 of the Covenant and the issuance of "green cards" to immediate relatives of U.S. citizens resident in the CNMI under Section 506. The Governor asks for consultation in accordance with the provisions of Section 902 of the Covenant.

In his opinion of February 9, 1994, the Acting General Counsel of the Immigration and Naturalization Service, put to rest the issue of the issuance of "green cards" under Section 506 of the Covenant. It appears, however, that the Governor was not aware of the INS opinion at the time he wrote to the President. A copy of the opinion is attached to the draft letter. No further comment regarding the issue is necessary.

With respect to the citizenship of persons born in the CNMI to alien parents, we do not recommend the appointment of a Special Representative of the President under the formal procedures of the second sentence of Section 902 of the Covenant. Instead we recommend that the Governor's representative consult informally with a qualified person designated by the Department of Justice.

We are recommending that this designation be made by the Department of Justice, rather than the Department of State or the Department of the Interior, because the Department of Justice is responsible for immigration and citizenship matters within the United States. Furthermore, the Department of Justice is uniquely familiar with legal issues arising under the Covenant, having participated in the negotiation of the

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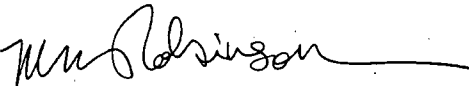
- 2 -

Covenant and in other consultations under Section 902. In addition, the Department of Justice has been involved in litigation concerning the Commonwealth. Even if it is determined that a representative of State or Interior should participate in the consultations, representatives of the Department of Justice should be included to ensure thorough consideration of the legal issues and the historical context of the Covenant.

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This memorandum and the attached draft letter have been prepared jointly by the Department of State and the Department of Justice.

Thank you.

for 
Marc Grossman
Executive Secretary

Attachments:

1. Draft Response.
2. Incoming memorandum.

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Memorandum



HQ 1432-P
HQ 245-N

COPY 6065

Subject **LEGAL OPINION**
Your Memorandum of January 1,
1994: Request for Opinion -
Residence in the Northern Marianas
by U.S. Lawful Permanent Residents

Date

FEB 9 1994

To
R. Michael Miller
Acting Assistant Commissioner
HQADN

From
Office of the
General Counsel

I. QUESTION

In the subject memorandum, you request an opinion concerning the interpretation of section 506(c) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("CNMI Covenant"), approved by the Act of March 24, 1976, Pub. L. No. 94-241, 990 Stat. 263 (1976), as amended, 48 U.S.C. § 1681, note. You present the following question:

Do the provisions of the Immigration and Nationality Act ("INA") which govern acquisition of permanent resident status and naturalization apply to any aliens who are the immediate relatives of United States citizens who live in the CNMI, or only to those aliens who qualified as immediate relatives when the CNMI Covenant took effect?

II. SUMMARY CONCLUSION

Any alien who qualifies as the immediate relative of a United States citizen who lives in the CNMI may acquire permanent resident status and naturalization in accord with the INA. These benefits are not limited to aliens who were immediate relatives when the CNMI Covenant took effect.

III. ANALYSIS

After World War II, the United States assumed responsibility for the administration of the Trust Territory of the Pacific Islands ("TTPI"), on behalf of the United Nations. The purpose of the trusteeship system was to assist the people under a trusteeship mandate in their exercise of the right of self-determination. UN Charter, art. 76(b), 59 Stat. 1031, 1048-49 (1945). The goal was to bring the mandate territory to self-government in accord with the free decision of the territory's population. *Id.* The CNMI Covenant gave effect to the decision of the people of the Northern Mariana Islands, which had been part of the TTPI, to

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form "a self-governing commonwealth . . . in political union with and under the sovereignty of the United States." CNMI Covenant, § 101, 48 U.S.C. § 1681, note. The CNMI Covenant took effect November 4, 1986. Proclamation No. 5564, 51 Fed. Reg. 40399 (1986). Many residents of the CNMI became United States citizens on that day. CNMI Covenant, art. III, 48 U.S.C. § 1681, note.

union with
CNMI
Covenant
COPY

The INA is, for the most part, not in force in the CNMI. Id., § 503(a), 48 U.S.C. § 1681, note. The question that you present concerns section 506(c) of the CNMI Covenant. This section reads, in pertinent part:

With respect to aliens who are "immediate relatives" (as defined in section 201(b) of the [INA]) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to "immediate relative" status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the "immediate relative" relationship denoted herein on the effective date of this Section will be presumed to have been lawfully admitted to the United States as of that date without the requirement of any of the usual procedures set forth in the said Act.

Id., § 506(c), 48 U.S.C. § 1681, note. Donald A. Radcliffe, District Director, Honolulu, maintains that these two sentences are to be read separately so that

(a) if the CNMI Government certifies that an alien was an immediate relative of a United States citizen and resided in the CNMI on November 4, 1986, then the alien is presumed to have been lawfully admitted to the United States for permanent residence on that date, without having to have a visa petition and an adjustment application approved; and

(b) any aliens who become "immediate relatives" after November 4, 1986, may attain permanent resident status through the ordinary visa petition and adjustment or immigrant visa issuance procedures.

Memorandum from Donald A. Radcliffe to Acting Executive Associate Commissioner, Operations (December 16, 1993). You argue that the second sentence is to be read as narrowing the scope of the first sentence. Your subject memorandum at 1. According to your interpretation, only alien immediate relatives who were living in the CNMI when the CNMI Covenant took effect are entitled to any benefits under the INA. The result of your interpretation would be that any later arriving alien immediate relatives of United

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States citizens living in the CNMI could not obtain permanent resident status, except by entry into some part of the United States other than the CNMI. A corollary of your interpretation would be that any alien immediate relative who did obtain permanent resident status could lose that status by settling permanently in the CNMI. See Genco opinion No. 89-48, 1989 Legal Opinions of the Office of the General Counsel 195.

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The text of a statute is the best indicator of the statute's meaning. Mallard v. United States Dis. Ct. for South. Dist. Iowa, 490 U.S. 296, 300 (1989); INS v. Phinpathya, 464 U.S. 183, 189 (1984); Richards v. United States, 369 U.S. 1, 9 (1962). Here, however, the text of section 506(c) does not explicitly show whether the second sentence qualifies the first, or is to be read separately. That is, based on the text of section 506(c) alone, neither your interpretation nor Mr. Radcliffe's is certainly incorrect.

When a statute is not clear, it is appropriate to consult the statute's legislative history. See Davis v. Lukhard, 788 F.2d 973, 981 (4th Cir.), cert. denied 479 U.S. 868 (1986); Demby v. Schweiker, 671 F.2d 507, 510 (D.C.Cir. 1981). The legislative history of the CNMI Covenant removes any doubt that when they concluded the agreement creating the CNMI, both the Congress and the people and Government of the CNMI intended section 506(c) to extend the benefits of the INA to alien immediate relatives arriving in the CNMI after the CNMI Covenant took effect. Thus, section 506(c) is not limited to alien immediate relatives who were living in the CNMI before November 4, 1986.

The second sentence of section 506(c) was not in the penultimate draft of the CNMI Covenant. Compare CNMI Covenant, § 506(c), 48 U.S.C. § 1681, note, with Draft CNMI Covenant § 506(c) (Draft of December 19, 1974) reprinted in S. Rep. No. 433, supra, at 307. The second sentence was added after the approval of the penultimate draft, but before the actual signing of the CNMI Covenant. Id. Neither the Senate debates, 122 Cong. Rec. 4187-216, 4217-32 (1976), nor the House debates, 121 Cong. Rec. 23,662-72 (1975), on the legislation approving the CNMI Covenant directly address the application of section 506(c). The Committee Reports, however, do address this issue. S. Rep. No. 433, 94th Cong., 1st Sess. at 65, 79 (1975); H. Rep. No. 364, 94th Cong., 1st Sess. at 5, 9 (1975). Each Committee Report reprints an analysis of section 506(c). According to the analysis in the Senate Report:

Subsection (c) is intended to enable "immediate relatives" of permanent residents of the Northern Mariana Islands to immigrate under the INA and to become naturalized as United States citizens.

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S. Rep. No. 433, supra, at 79 (emphasis added). Since, under this analysis, section 506(c) was intended to facilitate immigration to the CNMI, it would be anomalous to limit section 506(c) to aliens already in the CNMI when the CNMI Covenant took effect. The corresponding analysis in the House Report is:

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Subsection (c) deals with the problem of immediate relatives of citizens of the United States permanently residing in the Northern Marianas. "Immediate relatives" are defined by the Immigration and Nationality Act to be spouses, parents and children. It also provides a method by which the Government of the Northern Marianas may certify that certain persons meet the immediate relative qualification and are lawfully admitted to the Northern Marianas at the time the Trusteeship is terminated.

H. Rep. No. 364, supra, at 9 (emphasis added). These analyses prove that the second sentence of section 506(c) was not intended to limit the first sentence to aliens already in the CNMI before November 4, 1986. The purpose of the second sentence was to extend lawful permanent resident status to alien immediate relatives who were already in the CNMI, without their having to go through the regular immigration procedures.

The negotiating history of the CNMI Covenant before its presentation to Congress reveals the same intent. Before the plebiscite in the Northern Marianas on the approval of the CNMI Covenant, the Marianas Political Status Commission ("MPSC") published a detailed analysis of the CNMI Covenant. This analysis is reprinted in To Approve "The Covenant to Establish a Commonwealth of the Northern Mariana Islands, and for Other Purposes: Hearings on H.J. Res. 549, H.J. Res. 550, and H.J. Res. 547 Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs ("House Hearing") 94th Cong., 1st Sess. at 626-665 (1975). The MPSC published this analysis in English, Chamorro, and Carolinian. Id. at 626 (Statement of Edward G. Pangelinan, Chair, MPSC). Concerning section 506(c), the MPSC analysis says that

under Subsection (c) an immediate relative who wanted to come to the Northern Marianas and become a United States citizen by his residence there would claim immediate relative status under [F]ederal law and follow the procedures established by [F]ederal law to enter the Northern Marianas and eventually become a United States citizen.

Section-by-Section Analysis, reprinted in id. at 644. This analysis makes it clear that section 506(c) was intended to give effect to the INA, after November 4, 1986, with respect to alien

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immediate relatives. The Section-by-Section Analysis also makes it clear that the second sentence of section 506(c) was added

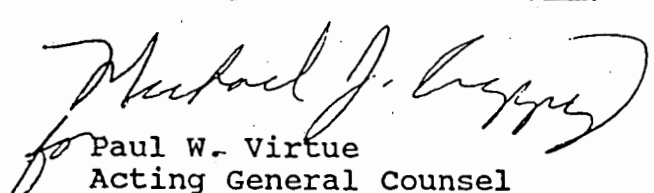
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[b]ecause there may be some persons who, though they are immediate relatives of persons who become United States citizens under Article III of the Covenant, are not citizens of the [TTPI] and did not move to the Northern Marianas in time to be covered by . . . Section 301(c).

Id. at 645. The certification procedure created by the second sentence of section 506(c) was "of a transitory nature only." Id. After the CNMI Covenant took effect, any alien immediate relative who wants to acquire permanent resident status must "invoke the provisions of the [INA]." Id.

It is clear from this history that Mr. Radcliffe's interpretation of section 506(c) is correct. The Service, therefore, may approve immediate relative visa petitions and adjustment of status applications for aliens who qualify as immediate relatives of United States citizens living in the CNMI. A permanent resident alien who is the immediate relative of a United States citizen may settle in the CNMI with the citizen relative, without jeopardizing his or her lawful permanent resident status.

It remains the case that the CNMI Covenant extends no rights under the INA to an alien who is not an immediate relative of a United States citizen. Congress clearly intended to allow the CNMI Government to control immigration into the CNMI by aliens who are not immediate relatives. CNMI Covenant § 503(a), 48 U.S.C. § 1681, note; S. Rep. No. 433, supra, at 16; Marianas Political Status: Hearing Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. at 130 (Statement of Hon. Philip Burton, Subcommittee Chair) (1975). Whether an alien who is not an immediate relative may enter and remain in the CNMI is a matter for the CNMI Government to decide under its own law. An alien who has been admitted to the United States as a lawful permanent resident, but who is not an immediate relative, may not accrue residence for purposes of naturalization by residing in the CNMI. Genco opinion no. 89-48, supra, at 197. Such an alien, in fact, may lose lawful permanent resident status by residing in the CNMI. Id., at 198.


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