The Application of Federal Laws in . . .

American Samoa
Guam
The Northern Mariana Islands
The U.S. Virgin Islands

VOLUME 3 — U.S. Code Titles 40-50

Department of the Interior
Office of the Solicitor
Washington, D.C.

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Department of the Interior
Bruce Babbitt, Secretary

Office of the Solicitor
Ruth G. Van Cleve
Washington, D.C.

October 1993

Title 40 - PUBLIC BUILDINGS, PROPERTY, AND WORKS

- \- Contains nothing of substantial interest to the territories or the Trust Territory.
- * Contain matters of particular interest to the territories and the Trust Territory, but no legislative recommendations.
- ** Contain recommendations for changes in the law.
- (**) Contain recommendations for changes in the law, but the need for them is not urgent.

Memorandum Number		Subject	40 U.S.C. sections
40-1	-	(a) Public Buildings, Grounds, Parks, and Wharves in District of Columbia	13a-136
	-	(b) Capitol Building and Grounds	161-223
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	(**)	(a) Declaration of Taking Act	258a-258e
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40-5	-	(a) Construction, Alteration, and Acquisition of Public Buildings	601-616
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Memorandum No. 40-1
November 1984

Subject: (a) Public Buildings, Grounds, Parks, and Wharves in District of Columbia
Title 40, Chapter 1 (40 U.S.C. 13a-136)

(b) Capitol Building and Grounds
Title 40, Chapter 2 (40 U.S.C. 161-223)

Comment: The statutes codified in Chapters 1 and 2 of Title 40 contain no matters of special consequence to the territories or the Trust Territory, and require no modification.

Discussion: (a) The large number of statutes codified under the heading Public Buildings, Grounds, Parks, and Wharves in District of Columbia (40 U.S.C. 13a-136), constituting Chapter 1 of Title 40, are true to their title, and their impact is thus largely confined to the District of Columbia. They concern matters that are sometimes surprising:

-- how many know, for example, that it is not only unlawful to "discharge any firework" or to "set fire to any combustible" in the Supreme Court Building or its grounds, but also to "make any harangue or oration" there (40 U.S.C. 13j)--surely an unreasonable inhibition upon members of the Supreme Court Bar;

sometimes momentous:

-- when dealing with parking spaces for Members of the Congress (40 U.S.C. 60a);

sometimes mysterious:

-- did the Congress really need to legislate in 1853 against ailanthus trees (10 Stat. 207, 40 U.S.C. 102), providing that "no more" of them "shall be purchased for or planted in the public grounds"--even if they do smell?;

and sometimes should go without saying:

-- the Chief of Engineers is required to obey regulations "prescribed by the President" (40 U.S.C. 48). He'd better.

But with the possible exception of the ailanthus bar, which could affect the landscaping on limited areas in the territories--doubtless for the better--the chapter is without consequence for the purpose of this study. One provision alone is expressly applicable to the territories: given the definitions at 40 U.S.C. 13n(d) that expressly include "any territory or possession", the Marshall of the Supreme Court may protect members, guests, and employees of the Court throughout the States and territories, and may invoke territorial law to do so. That is clearly as it should be.

In sum, the laws here collected are of no real consequence for purposes of this study.

(b) The Chapter entitled Capitol Building and Grounds (40 U.S.C. 161-223) contains statutes on the subject of the Architect of the Capitol, his functions, salary, and staff; Capitol Hill buildings, including the office buildings, garages, and the page school; the Capitol Police, their numbers and duties; and other laws pertaining to the structures and their oversight on the Hill. With two exceptions, they have no special application to the territories.

Of the exceptions, the 1864 law creating the National Statutory Hall (40 U.S.C. 187) permits only the States to be invited to provide statutes--no more than two each--of deceased citizens of special renown or distinguished service. This deprivation would seem to be one that the territories have little alternative but to accept. Secondly, Capitol Police are authorized to provide protection "in any area of the United States" for Members or officers of the Congress and their families, by detailing officers to any such area. The

"United States" includes the "territories and possessions" 40 U.S.C. 212a-2(f)', which appears wholly appropriate.

Conclusion: The statutes considered herein require no modification to accommodate the territories and the Trust Territory.

Federal agency comments: None are regarded as needed.

Memorandum No. 40-2
December 1984

<u>Subject</u>: Public Buildings and Works Generally
Title 40, Chapter 3 (40 U.S.C. 253-298d), including the
(a) Declaration of Taking Act (40 U.S.C. 258a-258e)
(b) Miller Act (40 U.S.C. 270a-270f)
(c) Davis-Bacon Act (40 U.S.C. 276a-276a-5)

<u>Purpose</u>: The statutes here collected concern principally the acquisition of land by the United States, the need for performance and payment bonds from contractors on Federal construction projects, and the level of wages paid to employees on Federal construction projects.

<u>Territorial application</u>: The principal statutes here considered apply unevenly in the territories and probably not at all to the Trust Territory.

(a) The Declaration of Taking Act and a related condemnation statute (40 U.S.C. 257) apply to Guam, the Virgin Islands, and the Northern Marianas, and probably to Samoa as well, but the absence of a Federal District Court in Samoa raises a difficulty there. The law pertaining to the nature of Federal jurisdiction (40 U.S.C. 255) is appropriately inapplicable to the territories.

(b) The Miller Act also applies in Guam, the Virgin Islands, and the Northern Marianas, and to Samoa as well, but is probably unenforceable in Samoa by those it is designed to protect.

(c) The Davis-Bacon Act applies as such to the Northern Marianas, but not in any other off-shore area. It applies to all them when particular Federally-assisted construction is undertaken.

<u>Recommendation</u>: The jurisdictional and enforcement difficulties pertaining to Samoa ought to be corrected by amendments to the laws identified more particularly below, in the event that Federal construction contracts are undertaken in that territory. The illogical application of the Davis-Bacon Act

ought to be the subject of legislation, in order to rationalize the treatment accorded the territories under it.

Discussion: Most of the laws contained in Chapter 3 of Title 40 are discussed below, in the order in which they appear in the Chapter. Those not included in the discussion that follows are of no particular consequence for purposes of this study, relating in large part to particular authority in the Administrator of General Services, without mention being made (or importance apparently attached) to geographical application.

(a) Federal land acquisition, including the Declaration of Taking Act:

Section 255 of Title 40, which requires a title opinion from the Attorney General (or his delegate) before property may be acquired by the United States, and which defines the nature of Federal jurisdiction over the acquired property, derives from a statute of ancient (1841) origin, but is much alive, having been amended as recently as 1970. It refers throughout to the "States", unadorned, and that usage is almost certainly restrictive, for the Attorney General of the United States held in 1906 that for purposes of the predecessor statute, "State" meant precisely that and no more (26 Op. Atty Gen. 12). (The Attorney General then observed, rather quaintly, that the term "State" as used in the predecessor statute "signifies, as it often does, a State of the Union" (at p. 14)).

This limited construction is not hurtful to the territories. (The exclusion of the Trust Territory is wholly appropriate, inasmuch as the United States has never held title to land in the Trust Territory, and could be expected to avoid doing so in the remaining life of the trusteeship.) The first purpose of the statute, i.e., of requiring an opinion as to the sufficiency of title to the land to be acquired, is for the protection of the United States--and confers no benefit upon the government of the jurisdiction in which the land is located. The second purpose, pertaining to the nature of the jurisdiction obtained by the United States over the property acquired, could not logically be applied to the territories (nor the Trust Territory), given their status. Under the statute (40 U.S.C. 255), the United States acquires exclusive or concurrent jurisdiction over the property only if the State consents and the United States accepts that jurisdiction; otherwise the United States acquires proprietary jurisdiction only, i.e., the jurisdiction of any other land owner. Inasmuch as the territories, unlike the States, are creatures of the Federal Government, they could not independently consent; and if the United States were to need to have either exclusive or concurrent jurisdiction over land owned by it in one of the territories, it could constitutionally acquire it (because of the United States plenary power in the territories) by unilateral action. It appears, however, that at this time the United States does not exercise more than proprietary jurisdiction over any land to which it holds title in any of the territories. Federal land holdings are extensive in Guam; negligible in the Virgin Islands; and nonexistent in Samoa, the Northern Marianas, and the Trust Territory.

The 1888 law appearing at 40 U.S.C. 257 contains basic authority for the acquisition of property by the United States by condemnation. (In order to exercise the power of eminent domain, however, the United States must find authority elsewhere as well--generally in an authorizing statute for the project proposed.) The section is without geographical limitation, and itself provides no guidance as to where it applies; but because Federal District Courts are elsewhere given jurisdiction in condemnation proceedings (28 U.S.C. 1358), those in the territories (of Guam, the Virgin Islands, and the Northern Marianas) would have that jurisdiction--in the absence of unusual provisions. There is an unusual provision in the Northern Marianas Covenant, but it is not one that would deprive the United States District Court for the Northern Marianas of jurisdiction in condemnation cases involving the United States. Section 806 of the Covenant requires:

> -- that in light of the scarcity of land in the Northern Marianas, the United States will seek to acquire there only the minimum amount of land necessary for its purpose, and the minimum interest in real property that

will meet its needs, and will look first to public lands rather than private, for its acquisition (section 806(a);

-- that upon notice to the Commonwealth Government, the United States may acquire property interests in the Northern Marianas by voluntary negotiation, but only if the acquisition is otherwise authorized by the United States Congress (section 806(b);

-- but if the United States cannot acquire the property it needs by voluntary means, it may exercise the power of eminent domain in the same manner as in the States (section 806(c)).

As for Samoa, where there is no United States District Court, there is no statutory guidance as to how the United States is to proceed to exercise the power of eminent domain, but inasmuch as the United States unquestionably has the power of eminent domain in Samoa as elsewhere in the United States, because it is a normal incident of sovereignty, it would seem that the High Court of American Samoa could not resist accepting jurisdiction if the United States were to bring its condemnation proceedings there.

The Declaration of Taking Act (40 U.S.C. 258a-258e), enacted in 1931, contains no explicit language of territorial application, and there appear to be no decided cases on the point, but one internal reference indicates that the statute is applicable to the territories (but not to the Trust Territory). The purpose of the Act is to permit the United States to obtain immediate possession of property that it needs for public purposes, without awaiting the result of litigation to determine the compensation due the landowner. Under it, the United States may file "in any court of the United States" a declaration describing the property it requires and the nature of the interest in the property that it proposes to acquire, along with the United States' estimate of the "just compensation" due the owner (40 U.S.C. 258a). When the declaration is filed, along with the amount of compensation estimated by the United States to be due the owner, the United States acquires title (or whatever lesser interest it seeks) to the property in question. The owner obtains the amount estimated as just compensation. Thereafter the level of compensation is determined by the court, and if a further amount is due, the United States is required to pay that amount, with 6% interest. (If the United States has overestimated the compensation due, a refund is required.)

The single, pertinent internal reference is contained at 40 U.S.C. 258d, which provides that the right conferred upon the United States by the Act is in addition to others conferred by Federal law, or by the laws of "any State or Territory". The rule of Puerto Rico v. Shell Co., (302 U.S. 253 (1937)), by which "Territory" may be converted to "territory" if that seems a legitimate reading of the Congress' purpose, is appropriately applied here. And that reference, together with the reference to "any court of the United States", would make the Declaration of Taking Act applicable to Guam, the Virgin Islands, and the Northern Marianas. (Those references would not carry the Act to the Trust Territory, but that is a proper result, given the United States policy of not acquiring title to land there.)

As for Samoa, were the United States to seek to use the statute there--an unlikely prospect at least currently, for it is hard to perceive a Federal interest that would require it, and additionally, the United States has sought to respect the Samoans' unusual concern for their land interests--it seems almost certain that it could do so. There would be no "court of the United States" with jurisdiction in the matter, but it seems probable that the High Court of American Samoa could and would accept jurisdiction. The internal reference to "Territory" indicates almost certain application of the statute to Samoa. (Puerto Rico v. Shell was followed in a similar anti-trust case concerning Samoa in U.S. v. Standard Oil of California, 404 U.S. 558 (1972).) Additionally, the exercise of Federal power under the Declaration of Taking Act represents an exercise by the United States of its power of eminent domain as a sovereign, and because there is no question that United States sovereignty extends to Samoa, there is probably also no question as to the application of the Declaration of Taking Act there.

(b) The Miller Act (40 U.S.C. 270a-270f) requires that each contract "for the construction, alteration, or repair of any public building or public work of the United States", if it exceeds $25,000, must be the subject of two bonds from the contractor:

> -- a performance bond for the protection of the United States, to guarantee that the contractor will perform under the contract, and
>
> -- a payment bond, for the benefit of those employed by the contractor and those supplying material for purposes of the contract, in order that they may be protected in the event of the contractor's failure to pay, inasmuch as liens by workers or materialmen cannot be taken upon the public property of the United States. (40 U.S.C. 270a)

One who has not been paid for services or material within 90 days of the time of performance or delivery may bring suit, but the suit must be "brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ." (40 U.S.C. 270b(b)). The requirement for the bonds may be waived by the contracting officer "for so much of the work under such contract as is to be performed in a foreign country . . ." (40 U.S.C. 270a(b)); the Secretaries of the military departments may waive them for cost-type contracts and for military equipment (40 U.S.C. 270e); and the Secretary of Transportation may do so in connection with the construction or repair of vessels (40 U.S.C. 270f).

The statute provides no certain guidance as to its geographical application, but the use of Federal District Courts for enforcement of payment bonds, and the potential waiver of bonding requirements for work performed "in a foreign country", lead to the conclusion that the Miller Act is applicable to Federal construction contracts in the territories--but not in the Trust Territory (which is "foreign"). The lack of a Federal District Court in Samoa, or of one having jurisdiction in the territory, creates a barrier, perhaps insurmountable, to its use by unpaid workers or suppliers there. (Samoa is, once again, caught in a kind of never-never land: It has no district court, so is not fully comprehended by the Act; but it is not "foreign", being within the sovereignty of the United States, so a waiver cannot extend to it.) Given the relative absence of Federal buildings or Federal public works in Samoa (as opposed to public buildings and works of the Government of American Samoa, even though often funded by means of Federal grants), the barrier is not likely to present a practical problem there. Should it do so, the problem could easily be corrected by a grant of jurisdiction (under 40 U.S.C. 270b(b) to the High Court of American Samoa.

(c) The Davis-Bacon Act (40 U.S.C. 276a-276a-5) is a statute of continuing controversy, notwithstanding its age (which is considerable, having been enacted in 1931); and a statute of peculiar, and in fact irrational, application to the territories--because it does not apply as such in Guam, Samoa, or the Virgin Islands (nor in the Trust Territory), but it does apply in the Northern Marianas. The Davis-Bacon Act does, however, apply to all of these areas, including the Trust Territory, when certain kinds of construction with Federal financial assistance is undertaken in them, because a considerable number of Federal grant statutes require compliance with Davis-Bacon wage standards. The application of the Act to the territories is considered below (i) first, in connection with Federal construction projects generally, and (ii) second, in connection with Federally-assisted projects.

(i) As to Federal projects, the Davis-Bacon Act requires that every contract in excess of $2,000 to which the United States is a party, involving the construction or repair of public buildings or public works of the United States, must contain a provision requiring the payment to laborers and mechanics employed on the contract of wages that are

> determined by the Secretary of Labor to be prevailing for the corresponding

> classes of laborers and mechanics employed on [similar] projects . . . in the city, town, village, or other civil subdivision . . . in which the work is to be performed . . . (40 U.S.C. 276a).

The purpose of the law is to provide a floor for wages on Federal contracts, so that construction workers will be protected from substandard earnings, and so that the hiring of local laborers will be promoted. It should be noted that this law does not preclude the hiring of alien laborers, but does have the effect of requiring that they, too, be paid the prevailing wage. The objection that has been heard over the years and from various parts of the United States, however, is that the "prevailing" wage level determined for Davis-Bacon Act purposes has tended to be the highest local wage--thereby, it is alleged, skewing the local labor market and forcing wages on private contracts upward.

The Act is, however, unarguably clear as to where it applies: to contracts for public buildings or public works "within the geographical limits of the States of the Union, or the District of Columbia" (40 U.S.C. 276a(a)). Guam, American Samoa, and the Virgin Islands are obviously excluded; and the Northern Marianas would of course be excluded under that language as well, but for section 502(b) of the Northern Marianas Covenant. That section provides in pertinent part:

> The laws of the United States regarding . . . the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

Although the extensive legislative history of the Covenant makes no express reference to the Davis-Bacon Act, the words of section 502(b) describe the Act with precision, for the Act is concerned with "the wages . . . of employees" of United States Government "contractors in the Northern Marianas

Islands". The Staff of the Northern Marianas Commission on Federal Laws has reached the conclusion, at least preliminarily, that the Act applies to that area, and as to that result has stated:

> The drafters of the Covenant sought to ensure that the Federal Government (and its contractors) did not pay less than the "prevailing wage rates," in the Marianas. Throughout the United States there is some criticism that this has come to mean the highest rate. With construction costs already inflated in the Northern Mariana Islands this is a legitimate concern. However, the benefits of increased income to the Northern Mariana Islands in higher wage rates is also clear and is the policy expressed in the Covenant. (June 1984 Draft Report, p. 1057; quoted portion not yet acted upon by the Commission.)

The treatment of offshore areas under the Davis-Bacon Act over several decades is of interest:

-- In 1940 the Act was extended to the then incorporated territories of Alaska and Hawaii (54 Stat. 399); but the express references to those areas were eliminated in 1960 (74 Stat. 418), by which time each had achieved Statehood.

-- The Labor Department reported informally to the Staff of the 1950-51 Commission on the Application of Federal Laws to Guam that that Department was then (1951) sponsoring legislation to extend the Davis-Bacon Act to Puerto Rico, and it recommended the same result in the case of Guam. But the legislation was not enacted, and Puerto Rico remains outside the scope of the Davis-Bacon Act.

-- The Staff of the 1950-51 Guam Commission recommended the extension of the Act to Guam, but the Commission itself rejected the proposal, stating that

> Although the Commission is of the opinion that the application of the Davis-Bacon Act is ultimately desirable, it concluded that under present circumstances its extension to Guam would result essentially in higher costs to the Federal Government without conferring a corresponding benefit upon Guamanian workers. (H. Doc. 212, 82d Cong., p. 32.)

-- The 1956 Report of the Commission on the Application of Federal Laws to the Virgin Islands listed the Davis-Bacon Act as among those "Statutes Now Inapplicable, Which Should Remain Inapplicable", but offered no further comment (Comm. Print No. 7, House Interior Committee, 84th Cong., p. 27.).

-- So far as can be established, there has been no legislative effort at any time to extend the Act to any of the territories not now comprehended by it (i.e., Guam, the Virgin Islands, and American Samoa), nor any interest expressed in any quarter toward doing so. (There have, however, been expressions of approval from business groups in Guam as to Guam's continued exclusion.)

There is no apparent, logical explanation--other than historic accident--for the uneven application of the Davis-Bacon Act as such to the offshore areas, and particularly for the different results in Guam and the nearby Northern Marianas. A logical treatment argues for the inclusion of the areas not now comprehended by it, or for the exclusion of the Northern Marianas--something that could be achieved by Federal legislation under section 105 of the Covenant, without doing violence to the Covenant's bilateral quality. The choice between these alternatives is clearly a policy one, to be decided on the basis of whether worker protection under the Act or the potential inflationary impact of the Act is to be given precedence. Current indications are that the territories not now covered would prefer continued exclusion, and that there would be resistance from territorial private sectors to an effort to extend the Davis-Bacon Act to those territories. Additionally, the Davis-Bacon Act is not easily amended, because points of view concerning its virtues and its disadvantages are strongly held. Any effort, thus, to rationalize its application to the off-shore areas, regardless of how the law is proposed to be changed, is likely to encounter strong opposition from some quarters.

(ii) While it is correct to conclude, as the foregoing discussion does, that the Davis-Bacon Act as such does not apply to the Virgin Islands, Guam, and Samoa, in effect it does apply in a limited way to each of them--and to the Northern Marianas and the Trust Territory as well--when there are undertaken in those territories construction projects (most often by the territorial government) that receive Federal financial assistance under particular Federal grant statutes. Federal grant legislation over about the last 20 years has often required that construction projects that receive Federal financial aid be subject to Davis-Bacon wage standards. (Some such are discussed in this study in Memorandum 16-6(c), pertaining to the Commercial Fisheries Research and Development Act of 1964; Memorandum 49-5 concerning Urban Mass Transportation; and many in Title 42, the Public Health and Welfare.) The Federal grant laws that contain the Davis-Bacon provisions are listed at 29 CFR 5.1 (1984 ed.), and they number close to 60. The Labor Department advises informally that Davis-Bacon wage rates have, in fact, been issued for all of the areas here in question: the Virgin Islands, Guam, Samoa, the Northern Marianas, and all of the Trust Territory.

This treatment has been the subject of at least one complaint from the territories. In a 1982 report from the Bureau of Planning of the Government of Guam, entitled "Federal Laws and Regulations Which Constrain Guam's Development", it is said:

> The Davis-Bacon Act was never made directly applicable to Guam. It was extended in 1967 to other federally-

> assisted programs, such as grants, loans, and guarantee programs which Guam participated in. In this fashion, the Act became applicable to Guam.

As has been demonstrated above, the statements are inaccurate, because the Act as such has not been "extended" to Guam, and is not "applicable" there. There was no action in 1967 or at any other time that had that effect. But it does apply, ad hoc, in the territories as well as elsewhere in the United States, to particular Federally-assisted projects. It would doubtless be extremely difficult politically to achieve an exemption for the territories from these ad hoc applications, inasmuch as they represent a Congressional policy of uniformity as to all areas of Federal responsibility.

Conclusion: The uncertainties discussed above concerning the application to and enforcement in Samoa of the Declaration of Taking Act, the Miller Act, and the basic condemnation law (40 U.S.C. 257) should be resolved, no later than whenever substantial Federal construction contracts are performed in that area. There is more timeliness--but greater practical difficulty--in achieving legislation to rationalize the general application to the territories of the Davis-Bacon Act, so as to accord to all of the territories, including the Northern Marianas, the same treatment.

Federal agency comments: Comments were requested from the Departments of Labor, Justice, and Defense, and the General Services Administration. All comments received have been reflected above.

Memorandum No. 40-3
January 1985

Subject: (a) The Public Property
Title 40, Chapter 4 (40 U.S.C. 301-319c)

(b) The Contract Work Hours and Safety Standards Act
Title 40, Chapter 5 (40 U.S.C. 327-333)

(c) Acquisition of Sites For and Construction of Public Buildings
Title 40, Chapter 6, (40 U.S.C. 345b-357)

(d) Emergency Public Works and Construction Projects
Title 40, Chapter 8 (40 U.S.C. 421-435)

(e) Non-Federal Public Works
Title 40, Chapter 9 (40 U.S.C. 460-462)

Comment: The statutes of probable importance to the territories and the Trust Territory that are discussed herein for the most part apply to them, but the absence of Federal courts in Samoa and the Trust Territory could pose enforcement problems in those areas. The matter does not appear, however, to be of current importance.

Discussion: (a) The assorted statutes codified in Chapter 4, entitled The Public Property (40 U.S.C. 301-319c), are largely without geographical limitation, and for the most part vest authority in the Administrator of General Services in connection with property acquired by the United States through unusual means: property conveyed to the United States in payment of debts (40 U.S.C. 301); lands acquired by devise (40 U.S.C. 304); lands acquired by judicial process (40 U.S.C. 304a); property voluntarily abandoned to the United States, or forfeited to it (40 U.S.C. 304g, 304h, 310). Other sections permit the Administrator of General Services to appoint special policemen for the protection of Federal property (40 U.S.C. 318-318d). The authority conveyed by these sections would extend to the described Federal property in the territories as well, for there are no geographically exclusionary provisions.

Two particular statutes that appear here, however, could be of interest to the territories, and in each case the territories are comprehended. First, sections 308 and 309 of Title 40, which derive from an 1864 statute, provide that if property owned by the United States, or in which the United States has an interest, is attached "in any judicial proceeding under the laws of any State, district, or territory", the Attorney General of the United States may cause the attachment to be discharged (40 U.S.C. 308); but the right of the claimant, if held to be valid, is not extinguished, and a monetary award can be obtained from the United States (40 U.S.C. 309). The purpose of the law is to balance the need of the sovereign to hold its property free of attachment, without prejudicing the rights of a legitimate claimant. A reference to "the United States Attorney for the district in which the property is located" could create a difficulty in Samoa, where there is none, but in the unlikely event that action under these laws were to be attempted in Samoa, it seems probable that it would be effective--because the reference to "territory" suggests a clear legislative purpose to have the statute apply in such an area.

Secondly, a 1962 statute permits the States and territories to obtain easements over real property of the United States, at the discretion of the head of the agency having control of the property (40 U.S.C. 319-319c). The privilege is granted to States and to "the possessions of the United States" (40 U.S.C. 319c(a))--a term that comprehends the Virgin Islands, Guam, Samoa, and the Northern Marianas. Not all Federal lands are comprehended. The most important exclusions from the territories' standpoint are national park lands and lands held for fish and wildlife conservation purposes (40 U.S.C. 319(d).

(b) The <u>Contract Work Hours and Safety Standards Act</u>, constituting Chapter 5 of Title 40 (40 U.S.C. 327-333), most of which was enacted in 1962, is in part a successor to the Eight Hour Laws that date from the 19th century; a new section was added to it in 1969 (40 U.S.C. 333) that imposes worker-safety requirements as well. The eight-hour provisions apply to Federal construction contracts in all of the territories, and very probably in the Trust Territory as well. They also apply to construction contracts to which any of the territorial governments is a party, and almost certainly also to construction contracts to which the Trust Territory Government and its entities (the Governments of the Marshalls, Palau, and the Federated States of Micronesia) are parties.[1/] The newer worker-safety section applies to those areas having United States District Courts (i.e., the Virgin Islands, Guam, and the Northern Marianas), but not those that do not--American Samoa and the Trust Territory.

Turning first to the Eight Hour requirements, the Act provides that wages paid to "every laborer and mechanic" employed by a contractor or subcontractor on specified contracts are to be computed on the basis of an eight hour workday and a forty-hour week, and work in excess of those hours is to be compensated at no less than one and a half times the hourly rate (40 U.S.C. 328(a)). The contracts covered by the law are defined as

> any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States, any agency or instrumentality thereof, any territory, or the District of Columbia . . . (40 U.S.C. 329(a)).[2/]

1/ As later observed, regulations of the Secretary of Labor effectively exempt the Governments of the Federated States and Palau, as well as the Government of the Marshalls, except for contracts in Kwajalein and Enewetak.

2/ The quoted section continues on, to cover as well any contract

(continued...)

It is certain from the foregoing words that Federal construction contracts performed in the territories of the Virgin Islands, Guam, Samoa, and the Northern Marianas are covered by the Eight Hour provisions. It is equally clear that construction contracts of those four governments are also covered--a somewhat unusual exercise of the Congress' power over and in the territories, but one that is unarguably permissible as a matter of law.

(The Northern Marianas Covenant contains, at section 502(b), a provision consistent with the foregoing construction. That section provides in pertinent part:

> The laws of the United States regarding . . . the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

Section 502(b) does not itself have the effect of extending the Eight Hour requirements to contracts of the Government of the Northern Marianas, but that result follows either from

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[2](...continued)

> (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any statute of the United States providing wage standards for such work . . .

Because any territorial government contracts would be comprehended by (1) or (2), it is probably unnecessary to focus on (3), although some of the territories have received Federal aid under statutes of the sort described. There is a listing of them in the legislative history of the Contract Work Hours Act (1962 U.S. Code Cong. and Admin. News 2121, 2123), and of particular relevance would be various housing and highway laws.

viewing the Northern Marianas as a "territory" under 40 U.S.C. 329(a), quoted above--which it will not wholly become until trusteeship termination--or by operation of section 502(a)(3) of the Covenant, which extends to the Northern Marianas Federal laws applicable to the Trust Territory. As explained below, the Eight Hour provisions now apply to the Trust Territory.)[3/]

The application of the Eight Hour provisions to the Trust Territory, while not compelled by the statutory language, is compelled by the Supreme Court's construction of the predecessor Eight Hour Law in Foley Bros. v. Filardo (336 U.S. 281 (1949)). The Court concluded that the law did not apply to United States Government construction projects in Iraq and Iran, but in so concluding, stated that the Congress' purpose was not to extend coverage

> beyond places over which the United States has sovereignty or some measure of legislative control. (At p. 285)

[3/] Note added in 1993: This paragraph within parentheses was written before termination of the Trusteeship Agreement, and none of the Federal commentators then took issue with it. In light of the termination of the trusteeship agreement, however, section 502(a)(3) is no longer of use because by its terms it ceases to be effective "upon termination of the Trusteeship Agreement." As to the other point, that upon termination the Northern Marianas would then become a "territory," that point has lately become at least arguable. It was in most quarters regarded as indisputable during the early years of the Commonwealth, as evidenced by repeated restatements of that conclusion in the 1985 report of the Northern Marianas Commission on Federal Laws. It remains the strongly held view of the Executive Branch of the U.S. Government. But recent litigation has raised some doubt. It may, therefore, be that construction contracts by the Government of the Northern Marianas, unless they are funded or otherwise supported from Federal sources and thus within the terms of 40 U.S.C. 329(a)(3), are not covered by the Eight hour Law. As a practical matter, however, the Government of the Northern Marianas relies so heavily upon Federal financial assistance that its construction contracts funded wholly from local funds are insignificant at this time.

And further, that

> the statute was intended to apply only to those places where the labor conditions of both citizen and alien employees are a probable concern of Congress. (At p. 286)

The Trust Territory is an area over which the United States has full powers ‘‘ legislation (under Article 3 of the Trusteeship Agreement), and it has legislated with respect to labor conditions there (see Memorandum No. 29-5 on the Fair Labor Standards Act). The conclusion necessarily follows that the Eight Hour provisions of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332) apply to Federal construction contracts in the Trust Territory.

Given the purpose imputed to the Congress in Foley Bros. v. Filardo, the Trust Territory must be regarded as a "territory" for purposes of the language quoted above from 40 U.S.C. 329(a)[4/]. At this time the Government of the Trust Territory engages in no construction on its own--so the point is academic. But the three governments that have emerged within the Trust Territory--the Governments of the Marshalls, the Federated States of Micronesia, and Palau--do enter construction contracts and will surely continue to do so. Subsequent to trusteeship termination, when under Compact section 171 most Federal laws will cease to apply there, the issue will no longer exist. Prior to that moment, it is hard to escape the conclusion that the Eight Hour requirements apply to construction contracts of these three governments.

[4/] It is interesting to note that the legislative history states with clarity that Puerto Rico is not to be regarded as a "territory" for purposes of the Act, but should instead, in view of its commonwealth status, be equated with the States (1962 U.S. Code Cong. and Admin. News 2127). Neither the Trust Territory nor the Commonwealth of the Northern Marianas is mentioned in the legislative history.

In fact, however, most parts of the Trust Territory have been made exempt by action of the Secretary of Labor. The Secretary is authorized to allow exemptions "to prevent injustice or undue hardship or to avoid serious impairment of the conduct of Government business" (40 U.S.C. 331). The effect of the Secretary's exemptions, under 41 CFR 1-12.302(d) (1984 ed.), is that within the Trust Territory, only Kwajalein and Enewetak are comprehended by the requirements. Hence, it is only the Government of the Marshall Islands that is potentially affected.

The section of the Contract Work Hours and Safety Standards Act that was added in 1969, and that relates to health and safety standards for laborers and mechanics on certain contracts (40 U.S.C. 333), appears to have a different and narrower application. The Secretary of Labor is required to promulgate standards so that no worker on certain contracts will be subjected to "working conditions which are unsanitary, hazardous, or dangerous to his health or safety". The requirement applies to "each contract" that is

-- entered into under legislation subject to Reorganization Plan Numbered 14 of 1950, and

-- "for construction, alteration, and/or repair . . ." (40 U.S.C. 333(a)).

Apart from these provisions, and apart from the enforcement jurisdiction given the Federal District Courts and the United States Courts of Appeals (40 U.S.C. 333(c), (d)), the section contains no aids as to its application. Nor does the readily available legislative history (1969 U.S. Code Cong. and Admin. News 1071).

Among the pieces of legislation cited in Reorganization Plan No. 14 of 1950 are the Eight Hour Laws that preceded the 1962 revision, discussed in the preceding paragraphs. From that fact it might be argued that the safety standards section is intended to be coextensive in application with the contract work hour sections. On the other hand, the Reorganization

Plan itself (appearing at 5 U.S.C. App.) applies by its own terms only to "Federal agencies", and the Secretary's regulations are to "be observed by these agencies". Because Federal legislative control over territorial government contracts, of the sort reflected in the Eight Hour requirements, is unusual, a statutory construction resulting in that kind of control ought to be resisted where it is reasonable to do so. In this instance, given the Reorganization Plan language, it seems reasonable to conclude that the territorial governments (and governments of and within the Trust Territory) are not subject to the worker-safety requirements of 40 U.S.C. 333 in their contracts. Federal agencies would be subject to those requirements, for work performed in some of the territories--but not all of them. The absence of Federal judicial machinery in Samoa and the Trust Territory argues for their exclusion. Equally, because there are Federal District Courts in the Virgin Islands, Guam, and the Northern Marianas, Federal construction contracts there would be subject to the health and safety standards of the Secretary of Labor.

(Note, however, that employees generally in the territories and the Trust Territory are not unprotected by Federal safety legislation. The Occupational Safety and Health Act of 1970 is broadly applicable to all such areas. See Memorandum No. 29-7.)

(c) Of the few sections remaining in the chapter headed Acquisition of Sites For and Construction of Public Buildings (40 U.S.C. 345b-357), two that appear to be of little moment do not apply to the offshore areas, but one that could be of consequence does apply to the territories.

As to the first two,

-- a 1935 law authorizes the Administrator of General Services to dispose of Federal buildings and their sites when they "have been supplanted by new structures", by selling them to "States, counties, municipalities, or other duly constituted political subdivisions of States" (40 U.S.C. 345b); and

-- a later amendment authorizes the heads of Federal agencies to convey, with or without consideration, to "a State or political subdivision of a State", Federally-owned land needed for "an authorized widening of a public highway, street, or alley" (40 U.S.C. 345c).

The territories would not qualify as purchasers or recipients under either, but there are no Federal structures in any of the territories now that have been "supplanted", and no Federal property likely to be of value for road-widening purposes. If there were, in either case the Federal Property Act (Memorandum No. 40-4) could doubtless come to the rescue.

Appearing in this chapter also is the Public Buildings Purchase Contract Act of 1954 (40 U.S.C. 356-357), under which the Administrator of General Services may provide space for Federal activities by lease-purchase contracts, with the United States acquiring title to the property after a specified lease period. The procedure is available in the territories (and it need not be in the Trust Territory, where the United States has eschewed acquiring title to real property), because the statute applies to Federal activities in the States and "the Territories and possessions of the United States (including Guam)" (40 U.S.C. 356(a)). (The particular reference to Guam is somewhat curious, but probably resulted from contemporaneous consciousness-raising, because the Purchase Contract Act of 1954 was enacted rather soon after the Guam Organic Act of 1950.)

(d) The few sections remaining under Emergency Public Works and Construction Projects (40 U.S.C. 421-435) do not apply to the territories (or the Trust Territory), but they may be obsolete, and in any event they are probably irrelevant to all of the off-shore areas. Most of the sections derive from the Act of June 29, 1936 (49 Stat. 2025), and concern low-cost housing and slum-clearance projects of the Depression-era Public Works Administration. It is unlikely that any such projects were ever constructed in the territories. The sections concern State jurisdiction over land acquired by the United States for such projects, payments in lieu of taxes to the States with respect to such projects, and rent levels for tenants.

(e) The chapter concerning Non-Federal Public Works (40 U.S.C. 460-462) contained the authority, before repeal in 1981, for grants by the Secretary of Housing and Urban Development for comprehensive planning assistance; and it continues to contain the authority for advances of Federal funds for planning of public works--so as to hold them in reserve so that they "can rapidly be commenced, particularly when the national or local economic situation makes such action desirable" (40 U.S.C. 462(a)). Both programs, from their initial authorization in 1954, were applicable to "any territory or possession", and each was made available to the Trust Territory by a 1974 amendment (40 U.S.C. 460). Before the authority for grants for comprehensive planning was repealed in 1981, all of the territories and the Trust Territory received financial assistance under it. All remain eligible for "advances" for public works planning, but because these advances must be repaid--and with interest if the public work is not undertaken--and because the fiscal situation of the territories is precarious enough to cause them to avoid borrowing for other than the most essential purposes, it seems probable that this Federal aid will not be sought by any of them.

Conclusion: The statutes considered herein appear to pose no practical problems for the territories and the Trust Territory. For the most part, those of probable importance to the territories apply to them. The lack of courts in Samoa and the Trust Territory with Federal jurisdiction could present enforcement difficulties there, but approval of the Compact in the case of the Trust Territory will end the matter there; and there is no immediate need to accommodate Samoa.

Federal agency comments: Comments were requested from the Departments of Labor, HUD, and Justice, and the General Services Administration. All comments received have been reflected above.

Memorandum No. 40-4
April 1985

<u>Subject</u>: Management and Disposal of Government Property (Constituting a part of the Federal Property and Administrative Services Act of 1949; for other parts of that Act, see Memoranda Nos. 40-5(d) and 41-2(b)) Title 40, Chapter 10 (40 U.S.C. secs. 471-544)

<u>Purpose</u>: The portions of the Federal Property and Administrative Services Act of 1949, as amended, that are the subject of this memorandum are those portions that concern the utilization of Federal property by Federal agencies, and, when the property is no longer needed, its disposal.

<u>Territorial application</u>: The Federal Property Act does not apply to the territorial governments or to the Government of the Trust Territory as the acquirers or users of Federal property, but it does apply to them as the from-time to-time recipients of Federal property. As such, the territories receive treatment under the disposal provisions of the Property Act that is no less favorable than the treatment accorded the States. The Trust Territory receives different but advantageous treatment.

<u>Recommendation</u>: The treatment accorded to the Virgin Islands, Guam, the Northern Marianas, and Samoa under the sections of the Federal Property Act considered here appears to be fair, and no change in the law as to them is required (excepting a nonurgent point as to court jurisdiction in Samoa, discussed below). While the Trust Territory is treated less favorably than the States and territories under the disposal provisions of the Property Act, (1) the differences are marginal, and (2) the probable early effectiveness of the Compact of Free Association, in any event, will soon cause the Property Act to cease to apply as a matter of domestic law within the Trust Territory, so changes in it now for the Trust Territory's purposes would be untimely. Thus, because the treatment accorded the Trust Territory represents a problem that is both minor and fleeting, there is no need to modify the law now to accommodate the Trust Territory.

<u>Discussion</u>: <u>In general</u> the provisions of the Federal Property Act that are codified in Chapter 10 of Title 40 apply to executive

agencies or to Federal agencies of the United States Government, but not to the territorial governments. The term "executive agency" means an agency within the Executive Branch of the United States Government; the term "Federal agency" includes executive agencies, but it includes agencies of the legislative and judicial branches as well (40 U.S.C. 472(b)). The governments of the territories and the Trust Territory are not either executive or Federal agencies for purposes of the Property Act, and have not been regarded as such since enactment of the Property Act in 1949. (Their status for this purpose is considered, with some history discussed, in a 1967 Interior Solicitor's Opinion, 74 I.D. 365.)

The governments of the territories and the Trust Territory are thus unaffected by the provisions of Chapter 10 to the extent that those provisions relate, as they largely do, to the management and utilization of property by Federal agencies, and to the requirements and procedures for disposal of such property when it is no longer needed by the Federal Government. These are the provisions pertaining to the transfer of property to another Federal agency, usually with reimbursement, when the agency holding the property no longer needs it ("excess" property) (40 U.S.C. 483); and the provisions pertaining to the disposal of property when no agency of the Government needs it ("surplus" property) (40 U.S.C. 484). Generally, surplus property is to be disposed of following a public advertisement for bids, but in stipulated circumstances the disposal may be negotiated. One such circumstance is where "the disposal will be to States, Territories, possessions . . . and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation" (40 U.S.C. 484(e)(3) (H)). Note that the Trust Territory is not covered by this language.

<u>The disposal of surplus Federal property to public bodies</u>, including the territorial governments, is a subject of special interest and importance to them, and provisions permitting such donations or transfers either without reimbursement or at less than fair market value are codified at 40 U.S.C. 484. Among the kinds of property that may be donated or transferred are:

-- surplus personal property under the control of the Department of Defense, which the Secretary of Defense determines is usable for educational activities that are of special interest to the armed services (40 U.S.C. 484(j)(2));

-- other surplus personal property for public purposes, "such as conservation, economic development, education, parks and recreation, public health, and public safety" (40 U.S.C. 484(j)(3)(A));

-- surplus real property, by sale or lease, if the property is determined by the Secretary of Education or the Secretary of Health and Human Services to be needed, respectively, for educational purposes or in the protection of public health (40 U.S.C. 484(k)(1); and

-- surplus real property, by sale or lease, determined by the Secretary of the Interior to be needed as a public park or recreational area (40 U.S.C. 484(k)(2)).

Property in these categories may be donated to or transferred to all of the territorial governments--Samoa, Guam, the Northern Marianas, and the Virgin Islands--but not to the Trust Territory. The several definitions supplied in the Act lead to this result, although the definitions themselves vary: The personal property donations are governed by the definition of "State" appearing at 40 U.S.C. 484(j)(5), where "State" is defined to include the "Virgin Islands, Guam, and American Samoa," with the Northern Marianas also being comprehended by operation of section 502(a)(2) of the Covenant. Real property transfers for education and public health purposes are governed by the definition of "States" now appearing at 40 U.S.C. 484(k)(1)(D), where the term is defined to include "the territories and possessions." Real property transfers for parks and public recreation are governed by the definition of "States" appearing at 40 U.S.C. 484(k)(2)(D), where the term is defined to include "the territories and possessions." (The lack of uniformity in the definitions is unremarkable. The Federal Property Act is several decades old and has been frequently amended, so that internal inconsistences have developed over time. The only important point for immediate purposes is that all of the definitions are sufficient to protect the interests of the territories considered herein.)

The exclusion of the Trust Territory from the benefits contained in the sections here considered may or may not have been purposeful, but it is now harmless and probably has always been so. Authority pertaining to real property would be irrelevant in any event, given the United States' consistent policy of acquiring no real property in the Trust Territory. Personal property for the Trust Territory could have been obtained, and has been obtained over the years, under the special authority conferred by the Interior Department Appropriations Act enacted in 1952:

> After June 30, 1952, transfers to the Department of the Interior pursuant to the Federal Property and Administrative Services Act . . . of equipment, material and supplies, excess to the needs of Federal agencies may be made at the request of the Secretary of the Interior without reimbursement or transfer of funds when required by the Interior Department for operations conducted in the administration of the Territories and the Trust Territory of the Pacific Islands. (48 U.S.C. 1685).

That authority has not, so far as can be established, been used to obtain excess personal property for the territorial governments--although the authority remains available for that purpose. (If it were so used, title to the property would remain in the United States, acting through the Department of the Interior, with the property made available by Interior to the territorial government on a use permit basis.) But it has been used to obtain property for the Trust Territory, because the Interior Department has been directly involved in and charged with "administration" of that area. The High Commissioner has been made responsible for the property, which remains property of the United States, subject to return to it--as in the case of ships from the Maritime Administration. Other personal property made available to the Trust Territory under this authority when it was or is expendable, is unlikely to be seen again.

In short, excess or surplus Federal property can be obtained by the territorial governments for particular public purposes on the same terms as it can be obtained by the States. And, although the procedure differs, excess personal property can also be obtained, without reimbursement, when there is a need for it in the Trust Territory.

The disposal of foreign excess property is no longer of particular interest to the territories, but until 1975 it offered unusual treatment for Guam, Samoa, and the Trust Territory. From its enactment in 1949 until 1975, the Federal Property Act defined "foreign excess property" as property located outside the States, Puerto Rico, and the Virgin Islands. That meant that excess property of a Federal agency, real or personal, located in Samoa, Guam, or the Trust Territory (including the Northern Marianas) could be disposed of without having first to be found surplus to the needs of Federal agencies generally (as would be true of excess property located in the States, Puerto Rico, and the Virgin Islands), and under statutory terms that are generally less restrictive than those that apply to the disposal of domestic surplus property. The provisions of the Property Act pertaining to the disposal of foreign excess property (40 U.S.C. 511-514) afford wide latitude to the executive agency holding the property, both as to the procedure for disposal and the extent of reimbursement to the United States. Public advertisement for bids is not required. It had been believed that the Pacific areas profited from being categorized as "foreign excess property" areas, and, in fact, transfers were made to the Governments of the areas on terms generous to them.

In 1975, the definition was amended so that "foreign excess property" has since meant property outside the States, Puerto Rico, and the Virgin Islands--and also outside of "American Samoa, Guam, the Trust Territory of the Pacific Islands" (and the Northern Marianas, by operation of section 502(a)(2), and for a time, section 502(a)(3), of the Covenant). That 1975 definition, appearing at 40 U.S.C. 472(f), contains the only reference in the Property Act to the Trust Territory. It is interesting to note that the legislative history represents that 1975 amendment as one prompted by a need to accord to the territories of Guam and Samoa and to the Trust Territory the same ability to obtain surplus property under favorable terms (outlined above in connection with the disposal of surplus property to public bodies) as the States, Puerto Rico, and the Virgin Islands possessed. (1974 U.S. Code Cong. and Admin. News 7047-7050.) (The legislative history is in error in suggesting that the Trust Territory could benefit from the change, inasmuch as the Trust Territory could not then and cannot now benefit from the provisions outlined above at 40 U.S.C. 484 because, being neither a territory nor a possession, it could not be a donee or transferee under those provisions.) It is difficult to imagine that the three Pacific areas achieved any benefits as a result of the 1975 amendment that they did not have before it; and in fact they probably experienced a reduction.

Additional provisions entitled Urban Land Utilization (40 U.S.C. 531-535), were added as a new title to the Property Act in 1968, by the Intergovernmental Cooperation Act of 1968 (largely repealed in 1982). The Urban Land Utilization provisions remain, and they require generally that in the disposal of urban lands, the General Services Administrator is to give notice to and cooperate with local agencies with respect to zoning or land use regulation; and in acquiring real property or changing its use, the Administrator is also to notify and cooperate with the pertinent local zoning or land use agency. Although the use of the term "State" suggests that the territories are excluded (40 U.S.C. 535(a)), the term was defined for purposes of the Intergovernmental Cooperation Act (prior to the general repeal in 1982) to include "any territory or possession of the United States" (sec. 102, 82 Stat. 1099), so Samoa, Guam, the Northern Marianas, and the Virgin Islands should be construed as comprehended by its terms. That was the clear legislative intent.

An assortment of miscellaneous, and largely unimportant (to the territories) provisions elsewhere in the Federal Property

Act are for the most part sufficient to meet whatever needs the territories might have with respect to them. For example,

- -- At 40 U.S.C. 489, where civil penalties are imposed for improprieties in connection with the procurement, transfer, or disposal of Federal property, jurisdiction is granted to the district courts of the United States and to "the several district courts of the Territories and possessions" language that comprehends the district courts in the Virgin Islands, Guam, and the Northern Marianas, but it would include no court in Samoa; and

- -- The lengthy detailing of duties of the Administrator of General Services with respect to public buildings (40 U.S.C. 490) provides for the installation and repair of sidewalks around Federal buildings and property, and permits this to be accomplished by reimbursement to the State or "possession of the United States" (40 U.S.C. 490 (i)(1)) which does the work.

The provision at 40 U.S.C. 489 ought to be corrected to include Samoa, when it is legislatively convenient to do so. Otherwise these miscellaneous provisions present no problem to the territories.

Conclusion: The utilization and disposal provisions of the Federal Property and Administrative Services Act of 1949, considered herein, require no change to meet the needs of the territories or the Trust Territory. Although the Trust Territory is treated differently under the law than are the territories, it would be untimely now to modify that treatment. When it is convenient to do so, it would be well to amend the section pertaining to court jurisdiction, 40 U.S.C. 489, to accommodate Samoa, but there is no pressing need to do so.

Federal agency comments: Comments were requested from the General Services Administration and the Department of Justice. All comments received have been reflected above.

Memorandum No. 40-5
April 1985

<u>Subject</u>: (a) Construction, Alteration, and Acquisition of Public Buildings
Title 40, Chapter 12 (40 U.S.C. 601-616)

(b) Safety Standards for Motor Vehicles
Title 40, Chapter 14 (40 U.S.C. 701-703)

(c) Government Losses in Shipment
Title 40, Chapter 15 (40 U.S.C. 721-729)

(d) General Services Administration
Title 40, Chapter 16 (40 U.S.C. 751-761)

(e) Alaska Communications Disposal
Title 40, Chapter 17 (40 U.S.C. 771-792)

(f) Alaska Federal-Civilian Energy Efficiency Swap
Title 40, Chapter 17A (40 U.S.C. 795-795d)

(g) National Visitor Center Facilities, Union Station Redevelopment
Title 40, Chapter 18 (40 U.S.C. 801-851)

(h) Capitol and White House Pennsylvania Avenue Development
Title 40, Chapter 19 (40 U.S.C. 871-885)

(i) Appalachian Regional Development Act of 1965
Title 40 Appendix (40 U.S.C. App. 1-405)

<u>Comment</u>: The provisions of Title 40 considered herein are largely of no relevance to the territories or the Trust Territory, and those of some application to them pose no problems.

<u>Discussion</u>: (a) The laws pertaining to the <u>Construction, Alteration, and Acquisition of Public Buildings</u> (40 U.S.C. 601-616) grant authority to the Administrator of the General Services Administration for these purposes, and they apply to the Virgin Islands, Guam, Samoa, and the Northern Marianas as fully as to the States. Note, for example, that the Administrator is admonished to "provide for the construction and acquisition of public buildings equitably throughout the United States" (40 U.S.C. 611(d)), and that the term "United

States" includes "the possessions of the United States" (40 U.S.C. 612(7)).

Two provisions are contained in this Chapter that are geographically limiting, but neither creates a problem for the territories. First, in connection with the Administrator's use of lease-purchase agreements, the "interest in real property acquired . . . shall be subject to State and local taxes" until title passes to the Uni'ed States (40 U.S.C. 602a(d))--a phrase that would probably exclude taxes imposed by territorial law. But the lease-purchase authority has expired (40 U.S.C. 602a(g)), and because that acquisition technique was not used in the territories, the problem no longer exists. Second, a "unit of general local government", with which the Administrator is occasionally required to consult, is defined to mean "the political subdivision of a State" (40 U.S.C. 612a(3)), but the territories do not have political subdivisions in the States' sense, so their exclusion here is untroublesome.

(b) The sections pertaining to <u>Safety Standards for Motor Vehicles</u> (40 U.S.C. 701-703) require the Administrator of General Services to establish standards for passenger safety devices for motor vehicles purchased for use by the Federal Government. (Certain vehicles to be used by the armed forces are excluded.) The sections have no special application to the territories, but they would apply to vehicles purchased by the Federal Government for use in the territories, and in the Trust Territory as well.

(c) The chapter entitled <u>Government Losses in Shipment</u> (40 U.S.C. 721-729) concerns the shipment of "valuables" by Federal agencies, and the means of replacing such valuables when they are lost, destroyed, or damaged. The provisions in question have no particular relevance to the territories or the Trust Territory.

(d) Sections of the Federal Property and Administrative Services Act appear here under the title <u>General Services Administration</u> (40 U.S.C. 751-761), and pertain to the internal administration of the agency of that name. The chapter also contains provisions creating the General Supply Fund, the Federal telecommunications fund, the automatic data processing fund, and the Consumer Information Center Fund, but none contain language that would create a problem to the areas that are the subjects of this study.

(e) The sections pertaining to Alaska Communications Disposal (40 U.S.C. 771-792) authorize the transfer by the Secretary of Defense of long-line communication facilities in or to Alaska, and have no relevance to this study.

(f) Similarly, the 1980 Alaska Federal-Civilian Energy Efficiency Swap Act (40 U.S.C. 795-795d), authorizing Federal agencies to sell surplus energy generated in Alaska to "non-Federal" persons, is not relevant to this study.

(g) This Chapter, concerning National Visitor Center Facilities and Union Station Redevelopment (40 U.S.C. 801-851), contains the 1968 law that contemplated the much-plagued conversion of Union Station to a Visitor Center, and the 1981 law providing for the station's redevelopment. The territories are, mercifully, unaffected.

(h) Capitol and White House Pennsylvania Avenue Development (40 U.S.C. 871-885) is of only remote and long-distance interest to the areas that are the subjects of this study.

(i) The Appalachian Regional Development Act of 1965 (40 U.S.C. App. 1-405) has in large part terminated, but is in any event irrelevant for the purposes of this study.

Conclusion: The chapters of Title 40 considered herein pose no problems for the territories or the Trust Territory.

Federal agency comments: None have been sought because none are deemed necessary.

Title 41 - PUBLIC CONTRACTS

\- Contains nothing of substantial interest to the territories or the Trust Territory.

* Contains matters of particular interest to the territories and the Trust Territory, but no legislative recommendations.

** Contains recommendations for change in the law.

Memorandum Number		Subject	41 U.S.C. sections
41-1		General Provisions Pertaining to Public Contracts	5-54
	**	(a) The Buy American Act	10a-10d
	-	(b) Section 3709 of the Revised Statutes	5
	*	(c) Anti-Deficiency Acts	11, 12
	*	(d) The Public Contracts Act (Walsh-Healey Act)	35-45
	-	(e) Blind-made Products	46-48c
	-	(f) Anti-Kickback Act	51-54
41-2	-	(a) Termination of War Contracts	101-125
	*	(b) Procurement Procedures	251-260
	-	(c) Judicial Review of Administrative Decisions	321-322
	-	(d) Service Contract Labor Standards	351-358
	-	(e) Office of Federal Procurement Policy	401-419
	-	(f) Contract Disputes	601-613

Memorandum No. 41-1
June 1985

Subject: General Provisions Pertaining to Public Contracts Title 41, Chapter 1 (41 U.S.C. 5-54)

Purpose: To regulate procedures for entering public contracts by agencies of the United States Government, and in some instances by the governments of the territories, and to impose particular requirements on the content of such contracts.

Territorial application: Most of the provisions of Chapter 1 of Title 41 apply only to contracts entered into by agencies of the United States Government, but they often apply to such U.S. contracts when they are performed in the territories. One statute here codified, the Buy American Act, applies also to purchases by the territorial governments of the Virgin Islands and American Samoa, but not to the Governments of Guam, the Northern Marianas, or the Trust Territory.

Recommendation: Most of the laws here codified are of marginal significance to the territories and require no modification to meet their needs. The Buy American Act differs: Its application to purchases by territorial governments in the Virgin Islands and American Samoa has almost certainly increased costs to those governments from time to time; and in addition, its uneven application among the territories (given the exclusion of purchases by the Governments of Guam and the Northern Marianas) is logically unsupportable. The history of the Buy American Act, however, suggests that it is virtually unamendable as a practical matter, and thus its modification either to exclude those territorial governments now covered, or to include those not now covered, is likely to prove impossible to achieve.

Discussion: Of the statutes codified in Chapter 1 of Title 41, (a) the Buy American Act (41 U.S.C. 10a-10d) is of greatest significance to the territories, and it is considered first below. There then follows a discussion of (b) the public advertising requirements of section 3709 of the Revised Statutes (41 U.S.C. 5); (c) the anti-deficiency acts (41 U.S.C. 11 and 12); (d) the Public Contracts Act, sometimes called the Walsh-Healey Act (41 U.S.C. 35-45); (e) the purchase of blind-made products (41 U.S.C. 46-48c); and (f) the Anti-Kickback Act (41 U.S.C. 51-54).

(a) The Buy American Act (41 U.S.C. 10a-10d)

The Buy American Act was enacted early in the Depression (March 1933) to protect American industry and American workers. In general, it requires that articles, materials, and supplies acquired for public use in the United States must be of U.S. origin, and contracts for public buildings and public works in the United States must use only United States articles, materials, and supplies--with limited exceptions. The Act has not been amended since its enactment, except to exclude the Philippines upon its independence, and Alaska and Hawaii, upon their achieving Statehood.

More particularly, the Act first requires that

> only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States . . . from articles, materials, or supplies mined, produced, or manufactured . . . in the United States, shall be acquired for public use. (41 U.S.C. 10a)

This requirement does not apply if the head of the agency finds it inconsistent with the public interest or finds the price unreasonable, or if domestic components are not reasonably available.

The Act, secondly, requires that every

> contract for the construction, alteration, or repair of any public

> building or public work in the United States growing out of an appropriation . . . shall contain a provision that in the performance of the work the contractor . . . shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States . . . (41 U.S.C. 10b)

The above exception applies to this second requirement as well, and in addition, the head of the agency may determine that the domestic requirement is "impracticable" as to a particular component, or its price unreasonable, in which case that determination is to be noted in the specifications and a public record made on the matter (41 U.S.C. 10b(a)). Finally, the definitions provide that

> the "United States", means "when used in a geographical sense", the United States "and any place subject to the jurisdiction thereof"; and

> "public use", "public building", and "public work" means "use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa . . . and the Virgin Islands". (41 U.S.C. 10c)

To implement the Buy American Act, Executive Order No. 10582 of December 17, 1954, and extensive regulations pertaining to both military and civilian agencies have been issued (32 CFR 6-000, _et seq._, (1984 ed.); 41 CFR 1-6.100, _et seq._, (1984 ed.); 48 CFR 225.000, _et seq._, (49 Fed. Reg. 38550, Oct. 1, 1984)). By their terms, they apply to Federal agencies, and not to the territorial governments as purchasers. In general effect, current regulations provide that the domestic bid is unreasonably high if its exceeds the foreign bid, when the foreign bid is adjusted by the addition of a 6% differential, or by a 12% differential if the domestic bidder either is a small business or will produce the materials in an area of substantial unemployment. Neither the Virgin Islands nor Samoa has any local law or regulation to implement the Buy American Act, but it is understood that each applies the 6% and 12% differentials.

From the foregoing statutory language, it is clear that the Buy American Act has three different effects on the territories:

(1) Because of the definition of public use, public building, and public work, the Act applies to some of them when they enter their own contracts for supplies and construction.

(2) Because of the definition of United States when used in a geographical sense, the Act has an effect upon the territories and the Trust Territory as sources of domestic components, for purposes of satisfying the requirements of the Buy American Act.

(3) Again because of the definition of United States when used in a geographical sense, the Act has an effect upon the territories and the Trust Territory as sites for use of Federally-acquired supplies and public buildings or works.

These effects require separate examination.

(1) The definition quoted above of "public use", "public building", and "public work" (41 U.S.C. 10c(b)) specifies the governments to whose contracts for supplies and construction the Buy American Act applies. Those governments include the Government of American Samoa and the Government of

the Virgin Islands, but the Government of Guam is not included. Applying the rule of expressio unius est exclusio alterius, the Solicitor of the Interior Department held in 1967 (74 I.D. 365) that the statute meant what it said: contracts of the Government of Guam were not intended by the Congress to be comprehended by the Buy American Act requirements. The Solicitor rightly implied (but did not state) that this was a Congressional oversight--for Samoa had been acquired at about the same turn-of-the century time, and in 1933 it occupied the same status (as an unorganized, unincorporated territory), as Guam. But the statutory language is clear, and Guam is not mentioned. (Moreover, the legislative history of the Buy American Act is silent as to the rationale for naming particular areas.) As a result, public contracts for supplies and construction of the Governments of the Virgin Island and American Samoa are covered by the Act; those of Guam are not. And by extension, because the Act in this particular is not applicable to Guam or to the Trust Territory, section 502(a) of the Northern Marianas Covenant has the effect of causing it to be inapplicable to the Government of the Northern Marianas. The Act also does not apply to the Trust Territory or to any of its component governments, when they act as purchasers.[1/]

The result is financially beneficial to Guam and the Northern Marianas, (and the Trust Territory), and detrimental to the Virgin Islands and American Samoa--who are foreclosed from accepting lower foreign bids (or domestic bids with foreign

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[1/] It should, however, be noted that in marking up the Compact of Free Association on June 5, 1985, the House Subcommittee on Public Lands added language that has the effect of imposing Buy American (or Buy Micronesian) requirements upon purchases by the Freely Associated States. Purchases of services or supplies and contracts for public buildings, if an expenditure of $50,000 or more is involved, would be so constrained if the funds to be used for payments of the contract are derived from Federal grants under the Compact. Whether such a provision will remain in the Compact through the remainder of the legislative process is unknown at this writing. (Note added in 1993: The provision did not survive. A shadow of it appears in section 106(b) of the Compact Act, but that section has not been implemented.)

components) unless they are enough lower to remain lowest when appropriately adjusted.

(2) When the Buy American Act refers to articles, materials, and supplies that have been "mined or produced in the United States" or "manufactured in the United States", it includes articles, materials, and supplies that have been produced or manufactured in all of the areas subject to this study--the Virgin Islands, Guam, Samoa, the Northern Marianas, and the Trust Territory (so long as it remains as such). All of these are areas "subject to the jurisdiction" of the United States, as that phrase is used in the Act's definition of "United States", when used in a geographical sense (41 U.S.C. 10c(a)).[2/] This effect is clearly of benefit to the

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2/ On this point, the Armed Services Procurement Regulations, and now the Federal Acquisition Regulations, appear to be in error. Each defines "United States" for purposes of the Buy American Act as including the States, the District of Columbia, Puerto Rico, and "possessions", but not "leased bases or trust territories" (32 CFR 6-001.5(e) (1984 ed.); 48 CFR 225.001, 49 Fed. Reg. 38551, Oct. 1, 1984).

(But note that the Federal Procurement Regulations differed, and did not contain this error. At 41 CFR 1-6.101(c) (1984 ed.), the "United States" is defined in a manner consistent with the Buy American Act, to mean the States, the District of Columbia, Puerto Rico, American Samoa, the Virgin Islands "and any other place subject to its jurisdiction".)

The exclusion of "leased bases" is probably a wise precaution in light of Vermilya-Brown v. Connell (335 U.S. 377 (1948)), but the exclusion of "trust territories" is probably an error. Only one trust territory remains, and it is the Trust Territory of the Pacific Islands, over which the United States has "full powers of . . . jurisdiction" under Article 3 of the Trusteeship Agreement. That phrase has been consistently construed in Federal statutes to comprehend the Trust Territory. But the matter may be academic, for the Trust Territory produces almost no articles, materials, or supplies of likely value to governmental purchasers. Moreover, the (continued...)

territories and the Trust Territory.

(3) The Act applies only to the acquisition of articles, materials, and supplies for use in the United States, and not to "articles, materials, and supplies for use outside the United States" (41 U.S. 10a); and it applies only to public buildings and public works "in the United States" (41 U.S.C. 10b). The term is here used in the geographical sense, so that Federal contracts for goods to be used in the territories and the Trust Territory, or for construction in the territories and the Trust Territory, are subject to Buy American constraints. This effect cannot be harmful to the territories, and could be of benefit to them, in the event that a territorial bidder who offers a domestic product is competing with one offering a foreign product.

In sum, the Buy American Act applies to the territories--and, for now, to the Trust Territory--in the same manner as it applies to the States, except that it also applies to purchases by the Governments of the Virgin Islands and American Samoa. That is to the disadvantage of those two Governments. Because of a clear reluctance on Congress' part to modify the Act, this disadvantage is likely to remain. Otherwise, because the Act represents a major national policy, and because the territories are treated no less well than other areas of the United States, they would appear to have no

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[2/](...continued)
applicability of the Buy American Act to the Trust Territory will cease when the Compact of Free Association becomes effective, under section 171 thereof--unless the Compact is modified in the manner described in the immediately preceding footnote. If it is, then the cited Federal Acquisition Regulation ought to be modified to remove an inconsistency that is also unfair: the Micronesian States would be required to Buy American or Buy Micronesian, but Federal agencies could not regard products of the Micronesian entities as "domestic" for Buy American Act purposes in Federal contracts. In these circumstances, the regulation should be modified to include within the definition of "United States" the new governments, as appropriate--probably the Federated States of Micronesia and the Republic of the Marshalls.

valid basis for objecting to the treatment accorded them by it.[3]

(b) Section 3709 of the Revised Statutes (41 U.S.C. 5)

Section 3709 of the Revised Statutes, derived from an act of 1861 but amended as recently as 1974, constitutes the basic Federal requirement for public advertising in the purchase of supplies or services by "the Government" (41 U.S.C. 5). The "Government", however, while it includes the District of Columbia and departments and agencies of the United States (5 U.S.C. 5a), does not include territorial governments, because they are not Federal agencies (Harris v. Municipality of St. Thomas and St. John, 111 F. Supp. 63 (1953); Porter v. U.S., 496 F.2d 583(1974)). As a consequence, Section 3709 does not apply to contracts of any of the territories that are the subjects of this study.

(c) Anti-Deficiency Acts (41 U.S.C. 11, 12)

Among the Federal anti-deficiency acts are those codified at 41 U.S.C. 11 and 12, which bar any "contract or purchase on behalf of the United States" unless there exists "an appropriation adequate to its fulfillment", or any public building contract that binds "the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose". In this case as well, "the United States" and "the Government" do not include the governments of the territories or the Trust Territory--even when their

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[3] Related to the Buy American Act, but entirely separate from it, is a recently enacted (August 1984) Federal law, sometimes referred to as the American Preference Act, which grants a preference of 20% to United States contractors over foreign contractors in connection with military construction in "United States territories and possessions in the Pacific and on Kwajalein Island" (Public Law 98-396, 98 Stat. 1369, 1398). The preference applies when the contract is estimated to exceed $5 million. The provision was enacted largely at the urging of representatives from Guam.

contracts for supplies or for construction are to be financed from Federal grant funds. The Comptroller General has long recognized that Federal grants become the property of the territorial government to which they are transferred, with the funds losing their Federal identity and being no longer subject to the restrictions applicable to appropriated funds (B-131569, June 11, 1957). That being so, the Comptroller has expressly concluded that the anti-deficiency laws here in question do not apply to American Samoa, when its contracts are supported by Federal grants (B-173589, September 30, 1971). They would, even more certainly, thus not apply when local funds are involved, and these results would follow with respect to all of the territories and the Trust Territory.

(d) The Public Contracts Act (Walsh-Healey Act) (41 U.S.C. 35-45)

Any supply contract entered into by an "agency or instrumentality of the United States", or by the District of Columbia, must contain certain provisions concerning minimum wages, maximum hours, child labor, and reasonable working conditions (41 U.S.C. 35). Because the governments of the territories and the Trust Territory are not Federal agencies and instrumentalities (see authorities cited above at (b)), these requirements from the Public Contracts Act do not apply to them. The requirements would apply, however, to Federal contracts that are performed in the territories, but probably not to those performed in the Trust Territory. The Public Contracts Act itself contains no provision as to its geographical application, but in its enforcement sections the Secretary of Labor is authorized to make inquiries "in any part of the United States" (41 U.S.C. 38), and certain enforcement jurisdiction is granted to Federal District Courts in "any Territory or possession" (41 U.S.C. 39). It would logically follow that the requirements apply to contracts performed in the territories subject to this study. That result is certain in the case of the Northern Marianas, in light of section 502(b) of the Covenant, which provides that the

> laws of the United States regarding . . . the conditions of employment, including the wages

> and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

Under the discretionary authority granted to the Secretary of Labor by the Act (41 U.S.C. 40), the Secretary has issued regulations that have the effect of stating that the only areas to which the Act applies, when contracts are performed there, are the States, the District of Columbia, Puerto Rico, and the Virgin Islands (41 CFR 50-201.603(b) (1984 ed.)) This exemption would serve to exclude Guam and Samoa from the effect of the Public Contracts Act as to Federal contracts performed in those territories, but it would probably not serve to overcome the express language of the Covenant. Accordingly, Federal contracts performed in the Northern Marianas are almost certainly subject to the requirements of this Act, notwithstanding the regulation cited. Moreover, although the exemption for Guam and American Samoa has continued validity, it is probably based on the thinking at the time the pertinent regulation was drafted many years ago--when Puerto Rico and the Virgin Islands tended to be the only offshore areas in the minds of Federal drafters--so a reexamination of the regulation in the future might lead, and arguably should lead, to the elimination of their exemption.

(e) Blind-made Products (41 U.S.C. 46-48c)

In purchasing "commodities produced and offered for sale" by nonprofit agencies for the blind or for other severely handicapped persons, Federal agencies are required to accord "priority" to commodities so produced and offered for sale (41 U.S.C. 47(d)(2)(A)). The requirement does not apply to purchases by the governments of the territories or the Trust Territory, but it should be noted that nonprofit agencies for the purposes here involved may include agencies organized under the laws of the "Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands" (41 U.S.C. 48b(8)). The Northern Marianas is included as well, by operation of section 502(a)(2) of the Covenant.

(f) Anti-Kickback Act (41 U.S.C. 51-54)

The Anti-Kickback Act bars kickbacks (i.e., fees, gifts, gratuities) by a subcontractor to a prime contractor (and others similarly situated) in connection with negotiated contracts of Federal departments and agencies (41 U.S.C. 51). The Act does not apply to contracts of the governments of the territories and the Trust Territory, but given the purpose of the statute, kickbacks in those areas--when related to Federal negotiated contracts--would be comprehended.

* * *

Other sections of Chapter 1 of Title 41, not examined above, are of no consequence to the territories and the Trust Territory, being confined to Federal agencies generally or to particular agencies only.

Conclusion: The statutes considered herein apply for the most part to Federal Government, and not territorial government, contracts. They create no problems for the territories or the Trust Territory that require legislative modification. The exception is the Buy American Act, which restricts contracts of the governments of the Virgin Islands and American Samoa, to their potential disadvantage. The Act should be modified to treat all of the insular areas in the same manner, preferably by excluding their contracts from the application of the Buy American Act.

Federal agency comments: Comments were requested from the Departments of Defense, Labor, Justice, and the General Services Administration. All comments received have been reflected above.

Memorandum No. 41-2
June 1985

Subject: (a) Termination of War Contracts
Title 41, Chapter 2 (41 U.S.C. 101-125)

(b) Procurement Procedures
Title 41, Chapter 4 (41 U.S.C. 251-260)

(c) Judicial Review of Administrative Decisions
Title 41, Chapter 5 (41 U.S.C. 321-322)

(d) Service Contract Labor Standards
Title 41, Chapter 6 (41 U.S.C. 351-358)

(e) Office of Federal Procurement Policy
Title 41 Chapter 7 (41 U.S.C. 401-419)

(f) Contract Disputes
Title 41, Chapter 9 (41 U.S.C. 601-613)

Comment: The laws considered herein apply to contracts of the Federal Government, and not to contracts of the governments of the territories or the Trust Territory. Some, however, as discussed below, apply to Federal contracts made in or to be performed in the territories or the Trust Territory.

Discussion: (a) The statute appearing in Chapter 2, Termination of War Contracts (41 U.S.C. 101-125), is the Contract Settlement Act of 1944, whose purpose was to provide for the speedy and final settlement of claims arising from the termination of contracts associated with World War II. The law has been largely superseded in the years since, but it is not wholly obsolete, having been amended as recently as 1982. The Act is without geographical limitation, so it could be applicable to contracts made or performed in the territories or the Trust Territory--although exemptions may be provided for contracts made or performed outside the continental United States and Alaska (41 U.S.C. 125). It is probable that by this time none remains of significance to the offshore areas here involved.

(b) Chapter 4 of Title 41, on Procurement Procedures (41 U.S.C. 251-260), contains the procurement provisions of the Federal Property and Administrative Services Act of 1949, as often amended since--notably in 1984 by the Competition in

Contracting Act and the Small Business and Federal Procurement Competition Enhancement Act. These laws specify the manner in which property and services are to be procured by "executive agencies", meaning departments and agencies of the executive branch of the Federal Government (40 U.S.C. 472(a), but excluding military agencies and the National Aeronautics and Space Administration (41 U.S.C. 252(a)). Public advertising and sealed bids are generally required, unless exceptions that are described at length are met.

The Federal procurement laws do not apply to the territorial governments, nor to the Government of the Trust Territory, when they act as contractors. The Solicitor of the Interior Department so held in 1967 in the case of Guam (74 I.D. 365, 371); and the Comptroller General reached the same conclusion with respect to American Samoa (B-169707, August 31, 1970). The same result necessarily follows in the case of the Virgin Islands, the Northern Marianas, and the Trust Territory.

It is probable, however, that the Federal procurement laws do apply to Federal departments and agencies when they contract for goods and services in the territories or the Trust Territory or for use in those areas. The geographic reach of the Federal procurement laws is not explicitly stated in the Federal Property Act or its pertinent amendments, and the term "United States" is used in a geographical sense only once in the procurement sections of the Act as it stands today.[1/] That reference appears at 41 U.S.C. 252(c)(1)--a contract "to be performed outside the United States". Inasmuch as the term "United States" is not defined in the Federal Property Act

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[1/] As originally enacted, section 302 of the Federal Property Act (63 State. 377, 393) made reference to "outside the limits of the United States and its possessions" (formerly codified at 41 U.S.C. 252(c)(6)), and to "the continental United States" (formerly codified at 41 U.S.C. 252(e)). Both references were dropped when the subsections in which they appeared were superseded by the new language now appearing at 41 U.S.C. 252(c)(1), discussed above in the text. This fact tends to support the conclusion that "the United States" when used in a geographical sense now includes the continental United States and the possessions, as well as the Trust Territory.

(see 40 U.S.C. 472), it seems appropriate to look to the Act's definition of "foreign excess property" for guidance, and that term is defined to mean property outside of the States, the Virgin Islands, Guam, Samoa, the Northern Marianas, and the Trust Territory (40 U.S.C. 472(f); see Memorandum No. 40-4)). Because these territories and the Trust Territory are defined as other than "foreign" areas, it is reasonable to suppose they are domestic areas, and thus part of the "United States". Hence, it seems proper to conclude that Federal agencies that are bound by the Federal procurement laws here codified are also bound by them when they enter contracts in the territories and--for now--the Trust Territory.

(c) These sections, concerning Judicial Review of Administrative Decisions (41 U.S.C. 321-322), popularly known as the Wunderlich Act, concern contracts "by the United States", and do not apply to contracts entered into by the governments of the territories or the Trust Territory. They permit the judicial review of administrative decisions--those commonly rendered by agency boards of contract appeals--when they are alleged to be fraudulent, capricious, arbitrary, so grossly erroneous as to imply bad faith, or not supported by substantial evidence (41 U.S.C. 321). Additionally, Federal Government contracts cannot provide that administrative decisions on questions of law are final (41 U.S.C. 322). Although these sections do not apply to contracts of the governments of the territories or the Trust Territory, they do apply--because there are no geographically limiting provisions --to Federal contracts made in or to be performed in those areas.

(d) The Service Contract Labor Standards Act (41 U.S.C. 351-358) provides that contracts of the Federal Government and of the District of Columbia for the provision of services must contain certain provisions for the payment of minimum wages and fringe benefits, if the contract provides for the furnishing of "services in the United States" (41 U.S.C. 351(a)). The term "United States" when used in a geographical sense is defined to include the Virgin Islands, American Samoa, Guam, Enewetak and Kwajalein (41 U.S.C. 357(d)). Although not expressly named in this 1965 statute, the Northern Marianas are comprehended as well, as a result of section 502(a)(2) of the Covenant (which makes applicable to the Northern Marianas those laws applicable to Guam which are also generally applicable to the States), and section 502(b) (which makes applicable to "the activities of the United States Government and its contractors in the Northern Mariana Islands" those laws of the United States regarding "the wages and hours of employees"). Hence, this Act applies to Federal Government contracts for services performed in all of the territories subject to this study, but within the Trust Territory, only to such contracts to be performed in Enewetak and Kwajalein. (The definition of "United States" that appears in the Service Contract Labor Standards Act has been drafted with particular care, stating to which offshore areas the Act does apply, and further stating that it does not apply to "any other territory under the jurisdiction of the United States or any United States base or possession within a foreign country". That language fortifies the conclusion that contracts for services in the Trust Territory in general are excluded from coverage.)

Because the Act applies to contracts of the United States Government and the District of Columbia, it does not apply to contracts entered into by the governments of the territories or the Trust Territory.

(e) The Office of Federal Procurement Policy (41 U.S.C. 401-419) was created in 1974 as a part of the Office of Management and Budget, and is charged with promoting economy, efficiency, and effectiveness in the procurement of property and services "by the executive agencies" of the Federal Government (41 U.S.C. 402, 403(1)). The laws pertaining to that Office, thus, concern housekeeping within the United States Government, and do not apply to contracting by the governments of the territories or the Trust Territory.

(f) Chapter 9 concerning Contract Disputes (41 U.S.C. 601-613) also pertains only to contracts to which agencies of the United States Government are a party, and not to contracts of the territorial governments or the Government of the Trust Territory (41 U.S.C. 601(2)). These laws concern decisions by contracting officers and appeals from those decisions to agency boards of contract appeals and the courts.

<u>Conclusion</u>: The laws considered herein are not applicable to contracts entered into by the governments of the territories or the Trust Territory, and require no modification to meet their needs.

<u>Federal Agency comments</u>: Comments were requested from the Departments of Justice and Labor and the General Services Administration. All comments received have been reflected above.

Title 42 - PUBLIC HEALTH AND WELFARE

- Contains nothing of substantial interest to the territories.

* Contains matters of particular interest to the territories, but no legislative recommendations.

** Contains recommendations for changes in the law.

(**) Contains recommendations for changes in the law, but the need for them is not urgent.

Memorandum Number		Subject	42 U.S.C. sections
42-1	-	(a) Public Health Service	26-27
	-	(b) Sanitation and Quarantine	88-112
	-	(c) Children's Bureau	191-194
42-2	**	Public Health Service	201-300cc-15
42-3	*	Social Security	301-1397e
42-4	*	(a) Low-Income Housing	1404a-1440
	(**)	(b) Slum Clearance, Urban Renewal, and Farm Housing	1441-1490o
	-	(c) Housing of Persons Engaged in National Defense	1501-1594f
42-5	*	(a) Compensation for Disability or Death to Persons Employed at Military, Air, and Naval Bases Outside United States (the Defense Base Act)	1651-1654
	*	(b) Compensation for Injury, Death, or Detention of Employees of Contractors with United States Outside United States	1701-1717
42-6	*	(a) School Lunch Programs	1751-1769e
	*	(b) Child Nutrition	1771-1789
42-7	-	(a) Reciprocal Fire Protection Agreements	1856-1856d
	(**)	(b) National Science Foundation	1861-1887

Memorandum No. 42-1
March 1989

Subject: (a) Public Health Service
Title 42, Chapter 1 (42 U.S.C. 26-27)

(b) Sanitation and Quarantine
Title 42,Chapter 2 (42 U.S.C. 88-112)

(c) Children's Bureau
Title 42, Chapter 6 (42 U.S.C. 191-194)

Comments: Two of the three chapters herein (Chapters 1 and 2 of Title 42) are largely obsolete and require no attention from the territories' standpoint. The third (Chapter 6 on the Children's Bureau) is sufficient to comprehend the territories.

Discussion: (a) The only sections remaining of Chapter 1 of Title 42, which is (along with Chapter 6A) titled Public Health Service (42 U.S.C. 26-27), are those permitting the service secretaries to assist the "States" in isolating civilians to protect service personnel from venereal diseases. The term "State" is defined to "include" the District of Columbia, which does not necessarily result in the exclusion of the territories; but the Guam Commission was informed in 1951 that the provisions were probably obsolete then (Resource Material Used in the Preparation of the Report of the Guam Commission on Application of Federal Laws, House Interior Committee Print, 1952, p. 212), so it seems unnecessary to give further consideration to the matter at this time.

(b) The few remaining sections of Chapter 2, Sanitation and Quarantine (42 U.S.C. 88-112) are probably also of no current importance. A predecessor of the Department of Health and Human Services, the Federal Security Agency, advised the Guam Commission in 1951 that it had recommended that most of the sections be repealed (42 U.S.C. 88-91) and that other sections (42 U.S.C. 98, 112) could be ignored, apparently as obsolete. (Resource Material, House Interior Committee Print, 1952, p. 212). The sections pertain to the quarantine of vessels and the disposition of their cargoes, to deference due "State" health laws, and to related matters. Most derive from the Revised Statutes, and their use of such terms as "States" and "ports of the United States" suggest that application to offshore areas was not contemplated. In any event, the Guam Commission concluded that these laws did not (in 1951) apply to Guam and need not (Report, H. Doc. No. 212, 82d Cong., p. 32). The Virgin Islands Commission concluded that they were "of doubtful applicability" to the Virgin Islands, and recommended that they be made "expressly applicable" (Report, House Interior Committee Print No. 7, 84th Cong., p. 13)--but regrettably its rationale is lost in history. No legislative proposal followed. The Guam Commission's conclusion seems sounder.

(c) The Children's Bureau (42 U.S.C. 191-194), is authorized by this 1912 law to investigate "all matters pertaining to the welfare of children and child life among all classes of our people . . . in the several States and Territories" (42 U.S.C. 192). The Children's Bureau is currently located within the Administration for Children and Families of the Department of Health and Human Services. In 1951, when it was a part of the Federal Security Agency, the Children's Bureau advised the Guam Commission on Federal Laws that it believed it had authority to perform its functions in unincorporated territories, on the rationale of Puerto Rico v. Shell Co. (302 U.S. 253 (1937)). On that basis, the Guam Commission concluded that the law was applicable to Guam and should remain so (Report, House Doc. 212, 82d Cong., p. 22). The Virgin Islands Commission, for undisclosed reasons, found the law of "doubtful applicability" to the Virgin Islands and recommended that it be made "expressly applicable" (House Interior Comm. Print No. 7, 84th Cong., p. 13). No legislative action followed. The Guam Commission's reasoning seems sufficient.

Conclusion: The three chapters of Title 42 considered herein require no modification to meet the needs of the territories.

Federal agency comments: Comments were requested from the Departments of Health and Human Services and Justice. All comments received are reflected above.

Memorandum No. 42-2
April 1989

Subject: Public Health Service
Title 42, Chapter 6A (42 U.S.C. 201-300cc-15)

Purpose: To create the Public Health Service within the Department of Health and Human Services, to create other health agencies such as the National Institutes, to provide a variety of Federal programs of financial assistance in matters of public health, and to provide certain Federal regulatory authority.

Territorial application: The Public Health Service Act, which constitutes Chapter 6A of Title 42, is for the most part applicable to the Virgin Islands, Guam, Samoa, and the Northern Marianas--and on the same terms as it applies to the States. The few exceptions are discussed below.

Recommendation: Because the Public Health Service Act is the product of legislative additions and subtractions over many decades, it is not--so far as the territories are concerned--always internally consistent. But its imperfections are few and largely de minimis. Of the possible shortcomings identified below, only one of significance emerges: the absence of restrictions concerning electronic product radiation control on imports into the territories. That problem could be corrected by the addition of a definition of the "United States" to include the territories, a definition that would have other value in the law as well.

Discussion: The analysis of the Public Health Service Act that follows is divided into the following parts:

(A) Territorial application of the Act in general.

(B) Provisions bearing on territorial application.

(C) Application of the Act to the Northern Marianas under the Covenant.

(D) Exceptions from the definition of "State".

(E) Distinctive treatment of the territories.

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(F) Possible shortcomings.

The few suggestions that are offered for modification of the Act are confined to part (F).

(A) Territorial application of the Act in general. The Public Health Service Act commences with a broad and explicit definition of the term "State", and that term very largely determines the application of particular programs of the Public Health Service that follow. That is, most programs and most authority of the Public Health Service run to the "States", and accordingly the definition provided means that such programs and authority run to the non-State areas that are defined as States, as well. The term is defined at 42 U.S.C. 201(f) to include the Virgin Islands, Guam, Samoa, and the Northern Marianas--all explicitly named--so that they are (with the limited exceptions discussed below) treated in the same manner as the States for purposes of the Public Health Service Act.

The definition at 42 U.S.C. 201(f), however, lists nine sections of Chapter in which these territories are not "States", and these exclusions are examined below, at (D). With two possible exceptions, these nine exclusions pose no problem to the territories. Owing, however, to internal definitions of the term "State" that turn up from time to time within Chapter 6A, certain other provisions and programs of the Act also do not apply to the territories. These also are discussed below, at (E). Again, none appears to pose a difficulty in the territories.

(B) Provisions bearing on territorial application. Other language relevant to the matter of territorial application is used in the Public Health Service Act on various occasions. Given the clear definition of "State", just discussed, this other language creates no legal difficulty, but it will here be mentioned in the interest of completeness. (It is probably a consequence of the growth of the Public Health Service Act over many decades, from a relatively modest beginning. Internal consistency is difficult to maintain in those circumstances.)

The Act defines the term "possession" as including "among other possessions, Puerto Rico and the Virgin Islands" (42 U.S.C. 201(g)). That definition, and the appearance of the term "possession" in the Act, is probably unnecessary at this time, inasmuch as the term is always used (our research suggests) in conjunction with "State" (e.g., 42 U.S.C. 248(a), 262(a), (c), and (d), and 263a(a)(2)). Since the four territories here involved are all "States" for purposes of the Act, the term "possession" adds nothing.

Similarly, within the Chapter there appear special definitions of the term "State" for purposes of particular parts of the Act. Since these definitions (except in the instances discussed in Part (E) below) define the term to include, expressly, the Virgin Islands, Guam, Samoa, and the Northern Marianas (see 42 U.S.C. 291o(a), which defines the term "State" for purposes of the Subchapter on Construction and Modernization of Hospitals and Other Medical Facilities[1/] (42 U.S.C. 291 <u>et seq.</u>); and 42 U.S.C. 298b(1), which defines the term for purposes of the Subchapter on Nurse Education (42 U.S.C. 296k <u>et seq.</u>)), they do no more for the four territories than the general definition at 42 U.S.C. 201(f). They are thus duplicative as to those areas, but of course redundancy in the law is neither unusual nor seriously objectionable.

It might be noted in passing that one reference to a "Territorial" institution remains in the Act (at 42 U.S.C. 259(a), which refers to inmates convicted of Federal crimes who are drug addicts, and "confined in State or Territorial prisons . . ."), but the reference is untroublesome--again because it is used in conjunction with the term "State". The term "Territory" is not now defined, and need not be, but the reference reminds the reader of the venerable quality of the Public Health Service Act.

[1/] The definition at 42 U.S.C. 291c(a) refers to the Trust Territory and not expressly to the Northern Marianas, but under numerous theories arising from section 502(a) of the Northern Marianas Covenant, and particularly paragraph (1) thereof, the Northern Marianas is indisputably a "State" under the section.

None of the foregoing creates a problem. Slightly problematic, however, are the occasional references to the "United States" in a geographical sense, a term that is also undefined. The "United States" is referred to in 42 U.S.C. 242(a), in connection with the medical and scientific requirements "of the United States" for narcotic and other drugs; in various sections that follow pertaining to research and investigations (42 U.S.C. 242k(b), 242l, 242p); in 42 U.S.C. 262(h), in connection with the exportation of biological products; and in 42 U.S.C. 265, pertaining to the exclusion of persons and property from a foreign country where a communicable disease exists. The term also appears at 42 U.S.C. 263h(a) in connection with electronic product radiation control, but it is there used in a word-of-art, and not geographical, sense--as discussed in part (F) below. It seems probable that if the question were to arise, the term "United States" when used in a geographical sense would be construed to include the Virgin Islands, Guam, Samoa, and the Northern Marianas--inasmuch as they are generally "States" for purposes of the Public Health Service Act. But the Act could profit, as could the territories, from a new definition to that effect.

(C) Application of the Act to the Northern Marianas under the Covenant. Reference should here be made to the treatment of the Public Health Service Act in the Northern Marianas Covenant. Section 502 of the Covenant provides for the extension to the Northern Marianas of a great number of Federal laws--with most Federal laws applying to the Northern Marianas under section 502(a)(2) if such law was in effect on January 9, 1978 (the effective date of section 502) and if it then applied to Guam and also to the several States. Laws extended to the Northern Marianas by operation of section 502(a)(2) apply there "as they are applicable to the several States".

The Public Health Service Act, however, is treated separately under section 502(a)(1), which provides that that Act applies to the Northern Marianas "as it applies to the Virgin Islands". The section-by-section analysis of the Covenant supplied by the Marianas Political Status Commission (reprinted in the 1975 Congressional Hearings on the Covenant) offers the following explanation of this curious provision:

> It appears likely that the Public Health Service Act applies in full in Guam, and therefore might have been covered as a law providing a federal service and financial assistance program under this subsection. However, there has in the past been some confusion about this and in view of the importance of many of the laws' provisions, including those relating to health maintenance organizations, it appeared the safest course to provide that the Public Health Service Act would apply as it applies in the Virgin Islands, where it is clearly applicable in its entirety.

The legislative history of the provision discloses nothing further as to its rationale, nor do individuals associated with the negotiation of the Covenant now remember what "confusion" as to Guam gave rise to the reference to the Virgin Islands. It seems possible that it was based on a law enacted in 1956 in the Guam Omnibus Act, Public Law 896 of the 84th Congress (which implemented many of the recommendations of the Guam Federal Laws Commission of 1950-51). The Guam Omnibus Act provided in its section 18 (70 Stat. 910) for special treatment of Guam in connection with grants to "States" for particular disease programs. As a kind of precursor of grant consolidation, Guam was permitted (with Samoa being added in 1962), to direct all of its grant funds to such disease programs as it chose, from among the several authorized. In any event, that provision was repealed in 1966. Or possibly nervousness arose among Covenant negotiators simply because the term "possession", defined at 42 U.S.C. 201(g), does not mention "Guam". There is no doubt now that Guam is as fully covered by the Public Health Service Act as is the Virgin Islands. And the Health Maintenance Organizations provisions (42 U.S.C. 300e et seq.), which were apparently of special concern to the Northern Marianas negotiators, apply as fully there and to the other territories as they apply to the States.

(D) Exceptions from the definition of "State". As noted at the outset above, the definition of the term "State" for purposes of the Public Health Service Act contains, as now written, nine exceptions. Specifically, 42 U.S.C. 201(f) provides that

> Except as provided in sections 246(g)(4)(B), 247c(c)(1), 254d(h)(3), 263(5), 264(d), 292a(9), 300a(c), 300f(13), and 300n(1) of this title, the term "State" includes, in addition to the several States, . . . Guam, . . . the Northern Mariana Islands, the Virgin Islands, America Samoa . . . .

Each of these references requires separate examination:

42 U.S.C. 246(g)(4)(B) was repealed in 1980.

42 U.S.C. 247c(c)(1) permits project grants to "States" for sexually transmitted diseases surveillance activities, including the reporting, screening, and follow-up of diagnostic tests for, and diagnosed cases of, sexually transmitted diseases.

The readily available legislative history of this provision does not disclose the reason for the territories' exclusion. It seems possible that the reference to section 247c(c)(1) in 42 U.S.C. 201(f), and the territories' consequent exclusion, related to an earlier section of the Public Health Service Act bearing the same section number and codification. In any event, the exclusion does not appear seriously damaging to the territories. They are otherwise eligible for program assistance under the other provisions of the Act pertaining to sexually transmitted diseases.

42 U.S.C. 254d(h)(3), which was amended in 1987 to become 42 U.S.C. 254d(i)(4), defines "State" to include the four territories by name, for purposes of the National Health Service Corps (42 U.S.C. 254d et seq.). (The same result would be achieved if 42 U.S.C. 254d(i)(4) were eliminated, and if the reference to it in 42 U.S.C. 201(f) were also eliminated.)

42 U.S.C. 263(5) does not exist,and the reference was probably intended to be to 42 U.S.C. 263c(5). That section defines the term "State" to include the four territories by name, for purposes of a regulatory program concerning electronic product radiation control (42 U.S.C. 263b et seq.) That regulatory program is largely applicable to the territories, and it may have been intended to be fully applicable to them--in light of the clear definition of "State". It does not, however, apply in all particulars to the territories, and that matter is discussed below in part (F) as a possible shortcoming.

42 U.S.C. 264(d) represents a genuine exclusion of the territories from the definition of "State" under 42 U.S.C. 201(f). The Public Health Service Act contains provisions concerning quarantine and inspection in connection with communicable diseases (42 U.S.C. 264-272), and these provisions of the Act--except for 264(d) --apply to the territories. As to 42 U.S.C. 264(d), that section permits the Surgeon General to prescribe regulations for the apprehension and examination of individuals infected with a communicable disease who move "from a State to another State", with the term "State" meaning only the States and the District of Columbia. Obviously the territories are excluded, but why they are excluded is not clear. The readily available legislative history of the 1976 amendment that added the District of Columbia is silent as to why the authority was not then extended further (1976 U. S. Code Cong. and Admin. News 1234). From the Guam Commission report of 1951, it appears that offshore areas have historically been excluded, for at that time the authority under 42 U.S.C. 264(d) extended to Alaska but not to Hawaii, Puerto Rico, or other offshore areas. (Resource Material, House Interior Committee Print, 1952, p. 202). (Hawaii has, of

course, been comprehended since Statehood in 1959.) It seems reasonable to presume that these exclusions of off-shore areas have posed no problem to either the United States Government or the territories. The Guam Commission recommended no change. The Virgin Islands Commission recommended that the Virgin Islands be included in the section (Virgin Islands Commission Report, House Interior Committee Print No. 7, 1956, p. 10), but no implementation action was taken. In the circumstances, it does not seem necessary to provide for the territories' inclusion in 42 U.S.C. 264(d).

42 U.S.C. 292a(9) has become 42 U.S.C. 292a(11), where the term "State" is defined to include the territories by name for purposes of the part of the Public Health Service Act that concerns Health Research and Teaching Facilities.

42 U.S.C. 300a(c) also defines "State" to include the four territories by name, this for purposes of the program for family planning services.

42 U.S.C. 300f(13) also defines "State" to include the four territories by name, this for purposes of the program concerning safety of public water systems. The laws concerning this program are further discussed below.

42 U.S.C. 300n(1), relating to planning by State health agencies, was repealed in 1986.

In sum, the exceptions stated in 42 U.S.C. 201(f) to the treatment of the territories as "States" are without effect upon them, possibly excluding 42 U.S.C. 247c(c)(1) (surveillance on sexually transmitted diseases) and 42 U.S.C. 264(d) (apprehension of individuals with communicable diseases). But neither is known to create a genuine problem for any of the territories, so modification appears to be unnecessary.

(E) Distinctive treatment of the territories. The analysis of the Public Health Service Act (Chapter 6a of Title 42) reveals--rather surprisingly--that the territories are substantially covered by the Act, and are the equals of the States, with only the exceptions discussed below in this part of this memorandum. (Other exceptions discussed above have been dismissed as of no realistic importance.) The Act contains a vast number of programs of Federal financial assistance--upwards of 90 are listed in the most recent Catalog of Federal Domestic Assistance--and with only one exception (a program for the homeless), the territories are by law eligible to participate in them all.[2/] Because the Federal programs under this law are so numerous, and because the territories are so fully covered by them, no effort will be made here to describe the program for which they are eligible. Rather, there will here be discussed those programs under the Act where they are not treated as "States".

Federal financial assistance is provided for community mental health services for the homeless, under a law enacted in 1987 (42 U.S.C. 290cc-21 et seq.). The territories are not eligible, because "State" means only the States, the District of Columbia, and Puerto Rico (42 U.S.C. 290cc-36(3)). Although the territories all have the problem of homeless people, it seems correct to conclude that their problems are, quantitatively, relatively minor, compared with those of heavily populated urban areas of the States. The Federal program is directed to "urbanized areas" (42 U.S.C. 290cc-28(b)), which is a concept hard to apply in the territories. And the commitments for rather elaborate mental health services that are required of recipient States (42 U.S.C.

[2/] A user of the Catalog of Federal Domestic Assistance might conclude otherwise, because the Applicant Eligibility Index in the early pages of the Catalog lists the "U.S. Territories" as eligible for rather few. An examination of the pertinent statutes shows these indications of ineligibility to be in error. Perhaps those compiling the list deferred to programs in which the territories actually participated. In any event, the Interior Department's own most recent (1979) study, based on information from Federal agencies who then focussed on territorial eligibility, supports the conclusion of this memorandum that the territories are covered by virtually all programs under the Public Health Service Act.

290cc-24) are almost certainly beyond the capacities of the territories to provide. Accordingly, it seems appropriate for the territories to be excluded from this program.

A further Federal program--but it is regulatory in nature, and not a program of financial assistance--relates to requirements for group health plans for State and local government employees (42 U.S.C. 3)bb-1, et seq.). The law, enacted in 1986, imposes requirements on group health plans for such employees, relating essentially to loss of coverage by beneficiaries in certain circumstances, but it does not apply to group health plans for employees maintained by "the government of the District of Columbia or any territory or possession of the United States" (42 U.S.C. 300bb-1(b)). The territories probably welcome this absence of Federal oversight; and because the Congress so recently made a conscious decision to exclude them, no recommendation for a change is offered here.

Distinctive treatment of the territories also appears in connection with the allocation formulae for two financial assistance programs under the Public Health Service Act. The first of these relates to "public water system supervision programs" under 42 U.S.C. 300j-2(a)(1), which is part of the Federal program for the safety of public water systems, administered by the Environmental Protection Agency (42 U.S.C. 300f et seq.). The territories are explicitly covered by the provisions of the Act pertaining to the safety of public water systems (42 U.S.C. 300f(13), which is one of the sections discussed above that is mentioned as an exception from 42 U.S.C. 201(f)), so they are generally eligible as "States" under the law, and specifically for grants for public water system supervision programs. The allocation formula for such supervision programs, set out at 42 U.S.C. 300j-2(a)(4), directs the Administrator of the Environmental Protection Agency to allocate the sums appropriated among the States on the basis of "population, geographical area, number of public water systems, and other relevant factors". No "State" may receive less than 1 percent, but the Administrator may reduce that percentage "in accordance with the criteria specified"; and the 1 percent floor "shall not apply to grants allotted to Guam, American Samoa, or the Virgin Islands". Such a provision does not seem unfair. Each of the territories has obviously a much smaller population and geographical area then any State, so their exclusion from the minimum initially allotted to each State is not inappropriate.

(It will be observed that the Northern Marianas, although explicitly defined as a "State" generally for purposes of the laws pertaining to the safety of public water systems (42 U.S.C. 300f(13)), is not mentioned in the allotment proviso just quoted from 42 U.S.C. 300j-2(a)(4). But the Northern Marianas would be covered in the same manner as the Virgin Islands, by operation of section 502(a)(1) of the Covenant.)

The second formula that provides distinctive treatment for the territories appears at 42 U.S.C. 300x-1a(a)(1)(B), where it relates to block grants for alcohol and drug abuse and mental health services. A State's allocation is based on its population and its relative per capita income, and that relative per capita income is found by dividing the per capita income of the United States by the per capita income of the State. In the Virgin Islands, Guam, Samoa, and the Northern Marianas, however, "the quotient shall be considered to be one". That formula almost certainly results in a lesser allocation to at least some of the territories--those with low per capita incomes--than they would receive in the absence of an arbitrary quotient. Yet the drafters may have feared that per capita income figures in some territories are unreliable, which may be true; and they may have believed that there ought to be uniformity among the territories. While the figure may thus be unfair to some, it would be difficult to improve upon it.

(F) Possible shortcomings.

(1) Definition of "United States". As mentioned in part (B) above, the term "United States" is used in a geographical sense occasionally in the Public Health Service Act, but it is not defined. While no problem is known to have arisen from the absence of such a definition, it would be orderly to provide one, and future questions might thereby be avoided. Such a definition would, additionally, overcome the

problem identified at (4) below concerning imports of electronic products.

(2) References to "citizens". Only two references in Chapter 6A to "citizens of the United States" have been found. The term, which can sometimes pose real problems of exclusion for noncitizen nationals of the U.S. in Samoa, does not appear to do so here. Commissioned officers of the Public Health Service must be citizens (42 U.S.C. 204), but a Samoan otherwise qualified for such an appointment could almost certainly achieve quick naturalization, based on his residence in Samoa (see Memorandum No. 8-1). Under 42 U.S.C. 260(d), a person with a drug abuse problem, hospitalized in a Public Health Service facility, does not forfeit "his rights as a citizen of the United States". A national would not have such rights to forfeit, but would doubtless, in any event, retain such Constitutional protections as are his.

(3) "Court of the United States" and related references. As has often been observed in this study, American Samoa has no Federal district court; no Federal district court has jurisdiction generally over matters arising in Samoa; and Samoa is not within the circuit of any U.S. Court of Appeals. Its own High Court is not, given the usual definition, a "court of the United States". In numerous instances, Federal courts have jurisdiction under the Public Health Service Act in relation to various of the programs and activities provided by it and without additional language, persons in Samoa are, or probably would be, without a forum. The problem arises from at least the following sections: 42 U.S.C. 259(e), relating to treatment of drug abusers; 42 U.S.C. 263a(g)(1), 263f(d), and 263k, relating to electronic product radiation control; 42 U.S.C. 300g-3(b), 300h-2(b), 300w-7(c), and others relating to the safety of public water systems; and 42 U.S.C. 300aa-31, relating to vaccine injuries. The problem can be met easily, perhaps by language giving to the United States District Court of Hawaii jurisdiction over matters arising in Samoa, for purposes of the Act generally. But it may be that given Samoa's stage of development, the matter is more academic than real and does not now require attention. It is, in any event, nonurgent.

(4) Electronic Product Radiation Control. In 1968 the Congress acted to protect the public health and welfare "from the dangers of electronic product radiation" (42 U.S.C. 263b). In so doing, it defined the term "State" to include the Virgin Islands, Guam, and Samoa, and in 1976 it amended the definition to include the Northern Marianas (42 U.S.C. 263c(5)). The program created by the law is one involving research and research grants, the promulgation of performance standards, and the enforcement of such standards for electronic products in commerce (including commerce with the territories). Given their inclusion as "States", the territories are comprehended by the law--except for that portion that deals with "importation into the United States" (42 U.S.C. 263h(a)). That phrase in Federal law usually means a shipment from a foreign source into the United States customs territory, and it has been so defined by regulations pursuant to the Radiation Control Act (19 CFR 12.91(a)). Because the territories are outside the U.S. customs territory, they are therefore not covered by the import provisions of the Act. The Customs Service, which enforces these import restrictions (21 CFR 1005.1 et seq.) does not function in the territories, except in the Virgin Islands.

Yet it is electronic products from foreign sources that constitute the principal source of supply for at least the Pacific territories, and their exclusion from the protection afforded under the Radiation Control Act seems unjustified. The problem could be corrected in various ways--one being the general definition of "United States" to include the territories, as suggested above. The problem of administration and enforcement in territories without U.S. Customs Service personnel could be met by the authority already in the law, which permits the Secretary of Health and Human Service to accept "State" (defined to mean a territory) assistance in enforcement "on a reimbursable basis or otherwise" (42 U.S.C. 263m).

Conclusion: Although the Public Health Service Act contains some imperfections with respect to its application to the territories--all identified above--most are either minor or of academic significance only. In two particulars, however, it would be well if the Act were amended to accommodate the territories: (1) by adding a definition of the term "United

States", and (2) by extending the restrictions upon the importation of certain electronic products to importations into the territories.

Federal agency comments: Comments were requested from the Department of Health and Human Service, the Environmental Protection Agency, and the Department of Justice. All comments are reflected above.

Memorandum No. 42-3
October 1989
Revised May 1991

Subject: Social Security
Title 42, Chapter 7 (42 U.S.C. 301-1397e)

Purpose: To provide for the Social Security System, for the programs of Medicare and Medicaid, and for various programs of public assistance including adult assistance, aid to families with dependent children, and Supplementary Security Income.

Territorial application: The many titles of the Social Security Act apply differently to the Virgin Islands, Guam, Samoa, and the Northern Marianas, with some applying to all but with many applying to a lesser number. A chart on the next pages shows the application to each area of each title of the Social Security Act, and the presence for purposes of that title of a ceiling, or cap, on Federal expenditures in the territories under that title. There follows a narrative discussion of each title of the Act, explaining the basis for the conclusions represented on the chart and describing provisions in that title of particular interest to some or all of the territories.

Recommendations: The major policy questions presented by the Social Security Act--the use of territorial caps, the presence of formulae for the distribution of Federal funds that are less favorable to the territories than to the States, and the exclusion of most of the territories from the Title XVI Supplemental Security Income program--are not the subject of recommendations here. Any offered, either way, would be without material significance to the ultimate decisionmakers, who are likely to continue to reach conclusions on these questions based on matters of national policy more far-reaching than issues pertinent to the Social Security Act alone.

Other recommendations on lesser matters are offered, however, and appear in the narrative that relates to the pertinent title. Such recommendations are for the most part technical or perfecting.

Social Security Act Program	Applies to Vir. Is.	Guam	Samoa	No. Mar.	Terr. Cap?
Title I. Grants to States for Old-Age Assistance (an "adult assistance program")*/	Yes	Yes	No	No	Yes
Title II. Federal Old-Age, Survivors, and Disability Insurance Ben its (the "Social Security System")	Yes	Yes	Yes	Yes	No
Title III. Grants to States for Unemployment Compensation Administration	Yes	No	No	No	No
Title IV. Grants to States for Aid and Services to Needy Families with Children and for Child-Welfare Services					
Part A. Aid to Families with Dependent Children (AFDC)	Yes	Yes	Yes	Yes	Yes
Part B. Child-Welfare Services	Yes	Yes	Yes	Yes	No
Part C. Work Incentive Program for Recipients of Aid Under State Plan Approved Under Part A (repealed)	Yes	Yes	Yes	Yes	No
Part D. Child Support and Establishment of Paternity	Yes	Yes	Yes	Yes	No

Social Security Act Program	Applies to Vir. Is.	Guam	Samoa	No. Mar.	Terr. Cap?
Part E. Federal Payments for Foster Care and Adoption Assistance	Yes	Yes	Yes	Yes	Yes
Part F. Job Opportunities and Basic Skills Training Program	Yes	Yes	Yes	Yes	No
Title V. Maternal and Child Health Services Block Grant	Yes	Yes	Yes	Yes	No
Title VII. Administration (Grants for training public welfare personnel)	Yes	Yes	No	Yes	No
Title IX. Employment Security Administrative Financing (Grants for training unemployment compensation administration personnel)	Yes	No	No	No	No
Title X. Grants to States for Aid to Blind*/	Yes	Yes	No	No	Yes
Title XI. General Provisions and Professional Standards Review					
Part A. General Provisions (Grants for research and demonstration projects)	Yes	Yes	No	Yes	No

Social Security Act Program	Applies to Vir. Is.	Guam	Samoa	No. Mar.	Terr. Cap?
Part B. Peer Review of Utilization and Quality of Health Care Services	Yes	Yes	Yes	Yes	N/A
Title XII. Advances to State Unemployment Funds	Yes	No	No	No	N/A
Title XIV. Grants to States for Aid to Permanently and Totally Disabled*/	Yes	Yes	No	No	Yes
Title XVI. Assistance to Aged, Blind, and Disabled (in pre-1974 form)	Yes	Yes	No	No	Yes
Title XVI. (Currently) Supplemental Security Income for Aged, Blind, and Disabled (SSI)	No	No	No	Yes	No
Title XVII. Grants for Planning Comprehensive Action to Combat Mental Retardation	Yes	Yes	Yes	Yes	No
Title XVIII. Health Insurance for Aged and Disabled (Medicare)	Yes	Yes	Yes	Yes	No

*/ Under existing law, the Virgin Islands and Guam are permitted to choose whether they will receive grants under Titles I, X, and XIV, or instead under Title XVI (Assistance to Aged, Blind, and Disabled, in its pre-1974 form).

Social Security Act Program	Applies to Vir. Is.	Guam	Samoa	No. Mar.	Terr. Cap?
Title XIX. Grants to States for Medical Assistance Programs (Medicaid)	Yes	Yes	Yes	Yes	Yes
Title XX. Block Grants to States for Social Services	Yes	Yes	Yes	Yes	Yes

Discussion:

Title I. Grants to States for Old-Age Assistance (42 U.S.C. 301-306).

Title I of the Social Security Act authorizes grants to the States to enable them to provide "financial assistance to aged needy individuals" (42 U.S.C. 301), and it now applies to the Virgin Islands and Guam only (along with Puerto Rico). It does not apply to Samoa or the Northern Marianas (but as to the latter, the possibility of an argument exists and this matter is discussed further below.) Federal grants are made to the Virgin Islands and Guam on the basis of territorial plans, approved by the Secretary of Health and Human Services, and on the basis of a formula set forth at 42 U.S.C. 303(a)(2). These programs of old-age assistance in the Virgin Islands and Guam (and Puerto Rico) are subject to a cap (42 U.S.C. 1308(a)), but the statutory cap applies to several Social Security Act programs collectively--Titles I, X, XIV, and the "old" XVI, and parts A and E of Title IV. So there is no cap on the Title I program of old-age assistance standing alone.

Old-age assistance under Title I, along with aid to the blind under Title X and aid to the permanently and totally disabled under Title XIV, are commonly referred to as the "adult assistance programs". Before the effectiveness of the Supplemental Security Income (SSI) provisions of Title XVI, cn January 1, 1974, these adult assistance programs applied co the States, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. The SSI program was made applicable only to the States and the District of Columbia, and upon its effectiveness the Title I old-age assistance program was repealed as to the States and the District (see note preceding 42 U.S.C. 301). But the SSI program was not made applicable to Guam or the Virgin Islands (or Puerto Rico), and Title I has been continued for those three areas as a partial substitute.

When Title I applied to the States as well as the territories, the formula for determining grants for the territories was less favorable than that for the States

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(compare 303(a)(1) and (2) of Title 42 U.S.C., 1976 ed.). The formula for the Virgin Islands and Guam has now been much simplified (42 U.S.C., 1982 ed., Supp. IV, 303(a)), and of course there no longer exists a State formula to compare with it.

As to the Northern Marianas, its Covenant in section 502(a)(1) provides expressly for the application to it of the SSI program. The SSI program has been implemented in the Northern Marianas, and consistent with the treatment of the States and the District, Title I and the other adult assistance programs have not been applied there. This is appropriate, since SSI was visualized as a substitute for and successor to the "old" adult assistance programs. Yet section 502(a)(1) of the Covenant also provides for the application to the Northern Marianas of "those laws which provide . . . financial assistance programs . . . as they apply to Guam". Those words literally define the Title I old-age assistance program, which unarguably applies to Guam. It would be sound to obtain legislation expressly excluding the Northern Marianas from Title I (as well as from Titles X and XIV, and perhaps the "old" Title XVI) of the Social Security Act, before an argument arises as to the Commonwealth's entitlement to Title I assistance.[1]

As noted, Title I does not apply to Samoa. It may be surmised that as a policy matter it has been thought to be unnecessary, in light of Samoan customs and practices which result in reverence for and care for the aged.

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[1] In unpublished research prepared for (but not acted upon by) the Northern Marianas Commission on Federal laws, the Commission staff noted that an argument "could be made" to this effect, but stated that because SSI is intended to supersede Title I, among others, "for most of the United States this theoretical applicability is academic". Perhaps. But academic arguments can give rise to difficult and contentious issues, so legislative clarification could have value.

Title II. Federal Old-Age, Survivors, and Disability Insurance Benefits (42 U.S.C. 401-433).

Title II of the Social Security Act creates what is commonly termed the "Social Security System"--the social insurance program under which U.S. employees, employers, and the self-employed contribute during their working years to a trust fund, and from which employees and their dependents draw benefits at the time of retirement, disability, or death.

Persons covered by the system in all four of the areas subject to this study--the Virgin Islands, Guam, Samoa, and the Northern Marianas--are beneficiaries of the Title, as fully as are covered persons in the States (with exceptions discussed below that appear to be inconsequential). This is the consequence of several definitions appearing at 42 U.S.C. 410:

-- "employment" means, subject to extensive elaboration and exclusions, "service performed . . . by an employee . . . within the United States";

-- the "United States" means the States, the District, Puerto Rico, the Virgin Islands, Guam, and Samoa; and

-- The term "State" includes all of the foregoing;.

The Northern Marianas, while not included explicitly in the foregoing definitions (although specified in other parts of the Act, as discussed below), are nevertheless included in the Social Security System in light of section 606(b) of the Covenant, which (as amended by section 9 of P.L. 98-213 (1983), provides in pertinent part that the

> . . . laws of the United States . . .
> which provide benefits from the United

> States Social Security System will on January 1 of the first calendar year following the termination of the Trusteeship Agreement or upon such earlier date as may be agreed to by the Government of the Northern Mariana Islands and the Government of the United States become applicable to the Northern Mariana Islands as they apply to Guam.

The Trusteeship Agreement ceased to be in effect in the Northern Marianas as of November 3, 1986, under Presidential Proclamation 5564 of that date.

The pertinent Federal tax law, known as the Federal Insurance Contributions Act (26 U.S.C. 3101-3127), provides for parallel coverage (see Memorandum No. 26-3(a)).

The territories are occasionally the subject of special provisions in Title II, but as noted above, the results appear to be inconsequential, and there is no apparent reason for modifying them. The provisions that make mention of the territories are these:

(1) A provision of the Act permits a "State" agency to use Social Security numbers for identification purposes for certain programs, such as drivers' licenses, and for that purpose the term "State" is defined not only to include the Virgin Islands, Guam, and the Northern Marianas (with the last expressly named), but also the Trust Territory (42 U.S.C. 405(c)(2)(C)(iv)). Similarly, authorized blood donation facilities may use Social Security numbers for the purpose of identifying blood donors, and the term "State" is again defined to include the Virgin Islands,Guam, and the Northern Marianas, plus the Trust Territory (42 U.S.C. 405(c)(2)(D)(iii)(II)). The addition of "American Samoa" to these two sections would be appropriate, although no actual need has been made known to require it.

(2) The Act permits voluntary agreements between States and the Secretary of Health and Human Services for the coverage of employees of State and local governments. For this purpose the term "State" excludes Guam and Samoa (and the District of Columbia) (42 U.S.C. 418(b)(1)). The Northern Marianas would also be excluded, given the provision of section 606(b) of the Covenant, quoted above, which provides that the Social Security System applies there as it applies "to Guam". (The exclusion of Guam dates from before 1960, so it was in effect on all of the dates that the Covenant became effective under Covenant section 1003.) It has been reported that employees of the Government of Guam prefer their own retirement system, which is said to be more generous than the Social Security System.

(3) The definition of "employment" contains provisions that correspond to the exclusion just discussed at 42 U.S.C. 418. Particular provisions including employees of Guam and Samoa appear at 42 U.S.C. 410(a)(7)(C), and for Guam additionally at 42 U.S.C. 410(a)(7)(E). The references to Guam in these two provisions would, given section 606(b) of the Covenant, include the Northern Marianas as well.

(4) Also excluded from "employment" is service performed in Guam by a resident of the Philippines while in Guam as a temporary worker under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H) (ii) (42 U.S.C. 410(a)(18)). This exemption has been extended to Korea as well, by treaty, as explained in Memorandum No. 26-3(a); and the problem of its application to the Northern Marianas is also discussed there.

Finally, mention should be made of the "Prouty Amendment" that is contained in Title II, because it is expressly mentioned in section 502(a)(1) of the Northern Marianas Covenant (where it is referred to as "section 228 of Title II" of the Social Security Act, which is codified at 42 U.SC. 228) as well as in the proposed Guam Commonwealth Act. The section in question provides transitional social security benefits to individuals who were 72 years of age or more before 1968, if their Social Security or certain other pension payments were very low. To be a beneficiary today means that the recipient would have to be at least 91 years old, so the program is without long-term effect. In any event, it does not apply in the Virgin Islands, Guam, or Samoa (42 U.S.C. 428(e)), but it does apply in the Northern Marianas in light of the reference to it in section 502(a)(1) of the Covenant.

Title III. Grants to States for Unemployment Compensation Administration (42 U.S.C. 501-504).

Title III of the Social Security Act provides for payments to the "States" to assist them in the administration of their own unemployment compensation laws, if such laws meet specified Federal standards and are administered in a manner that complies with specified statutory requirements (42 U.S.C. 503). The Secretary of Labor administers the program. The Virgin Islands, alone among the areas that are subject to this study, is covered by Title III (42 U.S.C. 1301(a)(1))--and the coverage of the Virgin Islands, which began in 1976, is a result of the Virgin Islands' seeking extension of the law (See Memorandum No. 29-2 concerning the United States Employment Service). No other territory has sought to be included. The payment program under Title III of the Social Security Act is supported by the Federal Unemployment Tax Act, which imposes a tax on employers based on wages paid, and that Act appropriately applies to the Virgin Islands also, but not to Guam, Samoa, or the Northern Marianas (see Memorandum No. 26-3(c)).

There are no provisions of Title III of peculiar application to the Virgin Islands, and accordingly, that territory receives under it the same treatment as the States.

Title IV. Grants to states for Aid and Services to Needy Families with Children and for Child-Welfare Services (42 U.S.C. 601-687).

Part A - Aid to Families with Dependent Children (AFDC) (42 U.S.C. 601-617).

The AFDC program involves payments to "States" that have plans for that purpose, approved by the Secretary of

Health and Human Services. The plans must meet extensive statutory tests (42 U.S.C. 602), and the objective of the program is "to furnish financial assistance and rehabilitation . . . to needy dependent children and their parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence . . . " (42 U.S.C. 601).

The Virgin Islands, Guam, Samoa, and the Northern Marianas are all eligible to participate in the program—Samoa having been added in 1988. The first three are expressly defined as "States" for purposes of Title IV-A by the general definition appearing in 42 U.S.C. 1301(a)(1), and they are often referred to expressly either in Part A or elsewhere in the Act for the purposes of Part A. The Northern Marianas is not expressly referred to, but by operation of section 502(a)(1) of the Covenant, it too is eligible for Title IV-A assistance. Section 502(a)(1) of the Covenant makes applicable to the Northern Marianas Federal laws enacted before January 9, 1978 (as the AFDC law was) that "provide federal services and financial assistance programs . . . as they apply to Guam".

With the very major exception of the extent of the dollar assistance provided, the AFDC program applies to the four areas on the same terms as it applies to the States. The amount of Federal assistance to them, however, is different, and usually less generous, than that provided the States.

-- First, caps are imposed on the amount of AFDC assistance to the Virgin Islands (42 U.S.. 1308(a)(2)), to Guam (42 U.S.C. 1308(a)(3)), and to Samoa (42 U.S.C. 1308(d)). No cap of peculiar application to the Northern Marianas is specified, but given the language of section 502(a)(1) of the Covenant (that such programs as AFDC apply to the Northern Marianas "as they apply to Guam"), the Guam cap would also apply to the Northern Marianas. It should be noted that the Guam level would be, in terms of the territorial populations, inequitably high for the Northern Marianas, given its population which is less than 1/5 that of Guam. The caps imposed (at 42 U.S.C. 1308) apply to several Social Security

Act programs collectively, and not just to Title IV-A standing alone.

-- Second, the formula for computing payments due is more generous for the States than for the Virgin Islands, Guam, Samoa, and (by operation of section 502(a)(1) of the Covenant) the Northern Marianas. Compare paragraphs (1) and (2) of 42 U.S.C. 603(a).

Under the AFDC statute, Puerto Rico receives the same treatment as the Virgin Islands and Guam. That is, its grants too are subject to a cap (42 U.S.C. 1308(a)(1)), and the matching rate applicable to it (75%) is also less generous than the rate applicable to some of the States (42 U.S.C. 603(a), but see also 42 U.S.C. 1318, the alternative Federal payment). But this disparate treatment has been held not to be in violation of the equal protection guarantee of the Constitution, on the ground that the Congress may treat Puerto Rico differently under the Territories Clause of the Constitution "so long as there is a rational basis for its actions" (Harris v.Rosario, 446 U.S. 651 (1980)). The same rationale would justify the disparate treatment of the Virgin Islands, Guam, Samoa, and the Northern Marianas, as compared with the States.

Part B - Child-Welfare Services (42 U.S.C. 620-628).

Part B authorizes payments to the "States" for the improvement of their child welfare services, under State plans approved by the Secretary of Health and Human Services. All four of the territories are covered by the program, the Virgin Islands, Guam, and Samoa because 42 U.S.C. 1301(a)(1) defines them as "States" for this purpose, and the Northern Marianas by operation of section 502(a)(1) of the Covenant. (As in the case of Part A, here too there is involved a Federal program of "financial assistance".) Under this program the four areas are treated more generously than the States, potentially, in light of the provision that bases allotments in part upon an "allotment percentage". The allotment percentage takes into account the per capita income of the State, and the figure for a State may range from 30% to 70%. But the allotment percentage for the Virgin Islands, Guam, Samoa, and the Northern Marianas (which is accorded Guam's treatment under section 502(a)(1) of the Covenant)--most, and perhaps all of which have per capita incomes below any of the States--is stipulated in the law at 70% (42 U.S.C. 621(b)). Some of the territories, however, may receive a lesser sum. A later provision (42 U.S.C. 1308(e)) states that notwithstanding the provisions of the section just referred to--42 U.S.C. 621--the Secretary of Health and Human Services may allot to "Guam, American Samoa, and the Trust Territory of the Pacific Islands" "such smaller amounts as he may deem appropriate". Because of the reference to Guam, the Northern Marianas would be covered by this lesser-allotment authority. But because the Virgin Islands are unmentioned, their allotment could not be reduced.

Appropriations for this program are allotted among States on a formula based on population and (inversely) on State per capita income, with the Virgin Islands, Guam, and Samoa specifically entitled to the most generous "allotment percentage" available (42 U.S.C. 621(b)). In addition, in an apparent effort to simplify administration in these small areas, a 1980 law permits the Virgin Islands, Guam, and the Northern Marianas (all by name) to avoid the requirement for "a single organizational unit" for administration (sec. 103(c), Pub. L. 96-272, note following 42 U.S.C. 622). With the 1988 extension of Title IV to Samoa, it would seem that this permission should be expanded to include it, as well.

<u>Part C - Work Incentive Program for Recipients of Aid Under State Plan Approved Under Part A</u> (42 U.S.C. 630-645).

This program has been repealed effective October 1, 1990. (It has been replaced by Part F.) All four areas here involved were eligible to participate in it, given the provisions of 42 U.S.C. 1301(a)(1) and section 502(a)(1) of the Northern Marianas Covenant.

<u>Part D - Child Support and Establishment of Paternity</u> (42 U.S.C. 651-669).

Part D establishes a Federal program, and encourages the States to establish programs, for

> "enforcing the support obligations owed by absent parents to their children and the spouse (or former spouse) with whom such children are living, locating absent parents, establishing paternity, obtaining child and spousal support, and assuring that assistance in obtaining support will be available under this part to all children . . ." (42 U.S.C. 651).

The Federal program requires State plans on these subjects (42 U.S.C. 654, 667), which, when approved by the Secretary of Health and Human Services, are the basis for Federal payments to the States (42 U.S.C. 655).

The Virgin Islands, Guam, and Samoa are eligible to participate as "States", given the language of 42 U.S.C. 1301(a)(1); and because the program dates from 1975, the Northern Marianas are also eligible to participate, by operation of section 502(a)(1) of the Covenant.

There are no provisions of peculiar application to any of these four areas, and no cap, so any that does participate does so on the same basis as a State. A provision giving Federal district courts jurisdiction in particular (and very limited) instances (42 U.S.C. 660) creates a theoretical problem in the case of American Samoa, where no U.S. District Court has jurisdiction, but given the limited nature of the jurisdiction conferred (42 U.S.C. 652(a)(8)), the matter does not appear to require correction.

One other provision is worthy of mention, because it is unusual--but it does not seem inappropriate. At 42 U.S.C. 659(a), wages and salaries payable to individuals by "the United States" are subject to "legal process" (i.e., garnishment and the like) for enforcement of child support and alimony obligations. At 42 U.S.C. 622(a), the term "United States" is defined to include all branches of the Federal government, various agencies whose status as Federal agencies is sometimes uncertain (such as government corporations), and "the governments of the territories and possessions of the United States". There can be no dispute that the Congress has authority to legislate for the governments of the Virgin Islands, Guam, Samoa, and the Northern Marianas in this manner, but it has so rarely done so that the point is worth making. Some, particularly in the Government of the Northern Marianas, might find this result objectionable on policy grounds, but because the Northern Marianas is included in Title IV of the Social Security Act by operation of section 502(a)(1) of the Covenant, and because when that is so the financial assistance program in question applies to it as it applies "to Guam", there seems no room to question the conclusion that the Northern Marianas joins the Virgin Islands, Guam, and Samoa in being subject to the legal process described in 42 U.S.C. 659(a).

Part E - Federal Payments for Foster Care and Adoption Assistance (42 U.S.C. 670-679a).

Federal payments are provided under Part E to the "States" that adopt plans, approved by the Secretary of Health and Human Services, if such plans meet specified standards (42 U.S.C. 671) pertaining to maintenance payments for those providing foster care and to assistance to parents who adopt a child with special needs. Under the definition provided at 42 U.S.C. 1301(a)(1), the Virgin Islands, Guam, and Samoa are "States" for purposes of Part E. The Northern Marianas is eligible to participate as well, because Part E constitutes a Federal financial assistance program and section 502(a)(1) of the Covenant operates to make it applicable there.[2/]

[2/] Part E was not enacted until 1980, and it might thus be (continued...)

Part E payments to the territories are subject to a cap. The cap for the Virgin Islands and Guam applies to Part E plus various other programs under the Social Security Act (42 U.S.C. 1308(a)(2) and (3)); the cap for Samoa applies to payments under Parts A and E of Title IV together (42 U.S.C. 1308(d)). The law provides no specified cap for the Northern Marianas, so in the case of Part E, as well as Part A as discussed above, the Northern Marianas would be subject to the Guam cap--in light of the language of section 502(a)(1) of the Covenant, which states that programs of the Part E sort apply to the Northern Marianas "as they apply to Guam". As was noted in the above discussion on Part A, the result is an inequitably high ceiling for the Northern Marianas, as compared with the caps for other territories.

Part F - Job Opportunities and Basic Skills Training Program (42 U.S.C. 681-687).

Part F was added to the Social Security Act in October 1988, to become effective on October 1, 1990 (or earlier, at the option of a State, as explained in the note following 42 U.S. C. 681). Its purpose is "to assure that needy families with children obtain the education, training, and employment that will help them avoid long-term welfare dependence" (42 U.S.C. 681(a)). To achieve this purpose, Part F describes at great length the content of the "State plan" that is required of each State for the establishment and operation of a job opportunities and basic skills training program (42 U.S.C.

[2/](...continued)
argued that it does not apply under section 502(a) because it was not "in existence on the effective date" of section 502(a), which effective date was January 9, 1978. But Part E was enacted as an addition to the Social Security Act, which was enacted in 1935, and section 502(a) refers to "laws of the United States in existence on the effective date of this Section [January 9, 1978] and subsequent amendments to such laws". The correct view would seem to be that Part E constitutes an amendment to a 1935 law, and thus that section 502(a)(1), which refers to "laws which provide federal . . . financial assistance", serves to extend it to the Northern Marianas.

682). Such a "State plan" approved by the Secretary of Health and Human Services is made a condition of the State's participation in Part A of Title IV, the program of Aid to Families with Dependent Children.

Part F contains no provisions peculiar to the territories. The Part applies to them all, given the definition at 42 U.S.C. 1301(a)(1) that covers the Virgin Islands, Guam, and Samoa, and section 502(a)(1) of the Covenant, which serves to extend the program to the Northern Marianas. The provisions for Federal financial assistance in carrying out Part F, which are contained in Part A (42 U.S.C. 603(k), see note following that section) equally contain no special provisions for the territories, and no financial cap as to them in particular.

It seems possible that the "State plan" required by Part F may be unduly sophisticated in terms of the situation in at least some of the territories. Yet the AFDC program is of importance in most of them, so that compliance with the Part F requirements would be necessary in those areas. It may develop over time that amendments to Part F may be required to meet territorial needs. It may also develop that the grant consolidation authority for the insular areas, at 48 U.S.C. 1469a, may be of use in resolving any difficulties that do arise.

Title V. Maternal and Child Health Services Block Grant (42 U.S.C. 701-709).

The grants to "States" for maternal and child health services are available to the Virgin Islands, Guam, Samoa, and the Northern Marianas, and on the same terms as they are available to the States. The definition of "State" at 42 U.S.C. 1301(a)(1) names each of the four (as well as Puerto Rico and the Trust Territory) for purposes of Title V--so it is not necessary to rely upon section 502(a) of the Northern Marianas Covenant to conclude that this title of the Social Security Act applies there. To qualify for the grant, the jurisdiction must file a "description of intended activities and statement of assurances" (42 U.S.C. 705), and the Federal payments are to be used for such purposes as reducing infant mortality, providing rehabilitation services for blind and disabled children under 16, and providing services for children with special health care needs (42 U.S.C. 701).

Title V contains no provisions of special application to the territories. They are treated for all purposes under the Title in the same manner as the States, and they are thus eligible for special project grants (42 U.S.C. 702(a) and (c)) where there is customarily competition, and the territories generally do not fare well in competing with the States for project grants--and for formula grants (42 U.S.C. 702(b)), to which most of the funds appropriated under the Title are devoted. The same formula applies to the territories as to the States. There is no special territorial cap, but the program in general is among those termed "closed-ended", in that a specified sum is authorized to be appropriated ($561 million for fiscal year 1989 and thereafter, under 42 U.S.C. 701(a)), and from within this amount sums are allocated to participating States and territories on the basis of the statutory formula.

Title VI (formerly 42 U.S.C. 801-805), which had provided for grants for services to the aged, blind, and disabled, was repealed in 1975.

Title VII. Administration (42 U.S.C. 902-911).

The sections of Title VII, with one exception, relate to housekeeping by the Secretary of Health and Human Services, and they contain no provisions of special application to, or interest to, the territories.

At 42 U.S.C. 906, however, there appears a Federal financial assistance program to "States", enacted in 1956 and most recently amended in 1962, by which the Secretary is authorized to make payments for the training of public welfare personnel. Because the term "State" is defined at 42 U.S.C. 1301(a)(1) to include explicitly the Virgin Islands and Guam for purposes of Title VII, and because section 502(a)(1) of the Covenant then operates to extend the program to the Northern Marianas as well, those three areas are eligible for assistance under the program. There is no special territorial cap.

The exclusion of Samoa is probably not a point of concern, for the program appears as a practical matter to have expired, the authorization for appropriations having not been modified since 1962. The program does not appear to be mentioned in the latest Catalog of Federal Domestic Assistance.

Title VIII (formerly 42 U.S.C. 1001-1011) pertained to employment taxes, provisions for which now appear in the Internal Revenue Code at 26 U.S.C. 3101-3127 (see Memorandum No. 26-3(a)).

Title IX. Employment Security Administration Financing (42 U.S.C. 1101-1109).

Title IX contains accounting procedures and other administrative provisions concerning unemployment taxes and compensation. Because only the Virgin Islands among the areas that are the subjects of this study is covered by the Federal unemployment compensation program (see the discussion under Title III above), the Title has application to the Virgin Islands alone. A Federal financial assistance program appears at 42 U.S.C. 1107, which authorizes the Secretary of Labor to provide funds to the "States" for the training of personnel in unemployment compensation administration. The Virgin Islands, alone among the territories, is a "State" for the purposes of this training assistance (42 U.S.C. 1301(a)(1)), a result that appears to be appropriate given the apparent preference of Guam, Samoa, and the Northern Marianas to remain outside of the Federal unemployment compensation program (see Memorandum No. 29-2).

<u>Title X. Grants to States for Aid to Blind</u> (42 U.S.C. 1201-1206).

Title X provides Federal grants to enable the "States" to "furnish financial assistance . . . to needy individuals who are blind" (42 U.S.C. 1201). It is one of the "adult assistance programs", and is similar to the old-age assistance program described above under Title I: It too ceased to apply to the States on January 1, 1974, when the Supplemental Security Income program became effective in the States; it has been perpetuated with respect to the Virgin Islands and Guam (and also Puerto Rico), but is subject to the special territorial cap that appears at 42 U.S.C. 1308(a)(2) (for the Virgin Islands) and 1308(a)(3) (for Guam); and it provides for payments to these territories by the Secretary of Health and Human Services, if there exists a plan, approved by the Secretary, that meets certain statutory requirements (42 U.S.C. 1202).

This program does not apply to American Samoa. It may have been concluded (as was surmised above in the case of Title I grants) that the Samoan cultural system provides the appropriate level of assistance, without Federal help. But it may also be that Samoa's possible need has not been scrutinized. In any event, the issue deserves focussed attention.

As to the Northern Marianas, because the Supplemental Security Income program applies there under section 502(a)(1) of the Covenant, it would be inappropriate for Title X also to apply, since SSI was intended to supplant this adult assistance program, among others. But because, as in the case of Title I, it could reasonably be argued that this program is one of Federal "financial assistance", applicable to Guam, it too applies to the Northern Marianas under other language of section 502(a)(1). To avoid that argument, it would be well to provide expressly that Title X does not apply to the Northern Marianas. The same suggestion is made with respect to Title I above.

Title XI. General Provisions and Professional Standards Review

Part A - General Provisions (42 U.S.C. 1301-1320b-11).

The general provisions of greatest importance to this study and contained in Part A are those often referred to above: 42 U.S.C. 1301(a)(1), which defines "State", and in so doing provides to which area particular titles of the Social Security Act apply (but also, as stated from time to time above, reference to the Northern Marianas Covenant is also required to answer this question); and 42 U.S.C. 1308, where the special territorial caps on certain expenditures under the Act appear.

Many other provisions of Part A are of no special concern to the territories, relating as they do to housekeeping details within the Department of Health and Human Services, e.g., the disclosure of information, payments to legal representatives, reports, and the like.

But other provisions found in this Part are relevant to the territories, and at least in some instances they appear to .e inapplicable to American Samoa. Consideration ought to be given to extending Part A generally to Samoa. Part A of Title XI is explicitly applicable to the Virgin Islands and Guam (42 U.SC. 1301(a)(1)), and by operation of section 502(a)(1) of the Covenant, is applicable to the Northern Marianas as well. Additionally, Part B of Title XI, discussed below, is explicitly applicable to both Samoa and the Northern Marianas (42 U.S.C. 1301(a)(1)), as well as to the Virgin Islands and Guam. But Samoa is not subject to any provision that has the effect of extending Part A to that territory. This may be a result of a conscious decision that such an extension is unnecessary, or it may be an oversight--but the latter is unlikely, partly because the Social Security Act has clearly been the product of careful attention by legislative draftsman, and partly because at least one provision includes all other areas by name but excludes Samoa (the blood donor locator provision, which so defines "State", 42 U.S.C. 1320b-11(h)(3)). Samoa seems suitably comprehended by those sections in Part A that provide procedures pertinent to Titles of the Act that apply to Samoa (e.g., 42 U.S.C. 1315, 1320b-1, 1320b-2, 1320b-6); and the reference to U.S. "citizen or national" at 42 U.S.C. 1320b-7(d)(2) makes quite clear that Samoa and Samoans are covered there. If Samoa is expressly mentioned, as it is in 42 U.S.C. 1318 (pertaining to alternative Federal payments for certain public assistance) then there is obviously no question as to its inclusion.

There are left, however, a number of sections in Part A that pertain to "States" and that contain nothing that can serve to extend them to Samoa. Among these is one section providing Federal grants for research and demonstration projects (42 U.S.C. 1310), medical care guides (42 U.S.C. 1312), and Federal assistance to citizens returning from foreign countries to "the United States" (42 U.S.C. 1313). There could be value in extending these sections, and others in Part A of uncertain application, to Samoa. If that were done, then attention must also be given to the status of most Samoans as nationals but not citizens of the U.S. (for purposes, for example, of 42 U.S.C. 1313), and to the absence in Samoa of a Federal court having jurisdiction there (e.g. 42 U.S.C. 1316(a)(3), 1320a-4(b), 1320a-7a(e)).

<u>Part B - Peer Review of Utilization and Quality of Health Care Services</u> (42 U.S.C. 1320c-1320c-13)

These sections require the Secretary of Health and Human Services, in connection with Title XVIII of the Act (Medicare), and with some implications for Title XIX (Medicaid) as well, to enter into contracts with "utilization and quality control peer review" organizations for their review and appraisal of professional activities under these programs. Such organizations are to be "composed of a substantial number" of local, licensed doctors of medicine and osteopathy (42 U.S.C. 1320c-1). The Virgin Islands, Guam, Samoa, and the Northern Marianas are all expressly covered by Part B (42 U.S.C. 1301(a)(1)). There are no provisions of peculiar application to them, other than that at 42 U.S.C. 1320c-12 which provides that "individuals licensed to practice medicine" in Samoa and the Northern Marianas constitute "physicians and doctors of medicine". Because medical professionals in those areas, commonly termed "medical practitioners", are sometimes graduates not of U.S. medical schools but instead of such institutions as the medical school created by the British in Fiji, such special provision is desirable.

Title XII. Advances to State Unemployment Funds (42 U.S.C. 1321-1324)

These sections provide for advances from and repayments to the Federal Unemployment Trust Fund to and from the "States", with only the Virgin Islands qualifying as a "State" for this purpose (42 U.S.C. 1301(a)(1)). This is appropriate, since only the Virgin Islands among the insular areas is covered by the Federal unemployment compensation program (see the discussion under Title III above).

Title XIII (formerly 42 U.S.C. 1331-1336), which had pertained to reconversion unemployment benefits for seamen, was repealed in 1984.

Title XIV. Grants to States for Aid to Permanently and Totally Disabled (42 U.S.C. 1351-1355).

Title XIV provides Federal grants to enable the "States" to furnish financial assistance "to needy individuals eighteen years of age or older who are permanently and totally disabled" (42 U.S.C. 1351). It too is an "adult assistance program", similar to those described above under Title I (old-age assistance) and Title X (aid to the blind). And what is said as to those titles applies equally here: Title XIV too ceased to apply to the States on January 1, 1974, when the Supplemental Security Income program became effective in the States; it has been continued with respect to the Virgin Islands and Guam (and also Puerto Rico), but is subject to the special territorial cap that appears at 42 U.S.C. 1308(a)(2) (for the Virgin Islands) and 1308(a)(3) (for Guam); and it provides for payments to these territories by the Secretary of Health and Human Services, if there exists a plan, approved by the Secretary, that meets certain statutory requirements (42 U.S.C. 1352).

The program does not apply to American Samoa, a result that warrants scrutiny because there are doubtless potential beneficiaries there.

As to the Northern Marianas, because the Supplemental Security Income program applies there under section 502(a)(1) of the Covenant, it would be inappropriate for Title XIV also to apply, since SSI was intended to supplant the adult assistance programs. But because, as in the case of Titles I and X, it could reasonably be argued that this program is one of Federal "financial assistance", applicable to Guam, it too applies to the Northern Marianas under other language of section 502(a)(1). To avoid this argument, it would be well to provide expressly that Title XIV, along with Titles I and X, does not apply to the Northern Marianas.

Title XV (formerly 42 U.S.C. 1361-1364), which had pertained to unemployment compensation for Federal employees, was repealed in 1966.

Title XVI formerly provided for payments to the States and certain insular areas to assist them in furnishing financial assistance to needy individuals who are aged 65 or more, or are blind, or are 18 or over and are permanently and totally disabled. The title was, consistent with the treatment of other adult assistance programs, repealed as to the States effective January 1, 1974. But it was preserved in the case of the Virgin Islands and Guam (and also Puerto Rico) (see note following 42 U.S.C. 1382 and subsequent sections), and it remains in effect in those areas today. This program is an alternative to assistance under Titles I, X, and XIV. A careful distinction is made in 42 U.S.C. 1301(a)(1) between this former Title XVI and the new Title XVI, pertaining to Supplemental Security Income, and the territorial caps appearing in 42 U.S.C. 1308 apply to the former Title XVI, as well as to Titles I, X, and XIV. As in the case of the other adult assistance programs, here too payments are made on the basis of "State" plans approved by the Secretary of Health and

Human Services; American Samoa is excluded from coverage; and the Northern Marianas ought also to be excluded, given their inclusion in the "new" Title XVI--the Supplemental Security Income program--but this is not explicit and might well be made so.

Current Title XVI. Supplemental Security Income for Aged, Blind, and Disabled (42 U.S.C. 1381-1383c).

The "new" Title XVI, enacted in 1972 and effective on January 1, 1974, provides for direct Federal payments of Supplemental Security Income (SSI) to eligible beneficiaries who are 65 years of age or more, or are blind, or are disabled. It applies to the States and the District of Columbia, but to none of the insular areas other than the Northern Marianas. The inclusion of the Northern Marianas stems from section 502(a)(1) of the Covenant, which explicitly so provides. (Although the official legislative history does not so state, it is understood that this was the result of the insistence during Covenant negotiations of the late Congressman Philip Burton.)

The SSI program was intended to supplant the former adult assistance programs--Titles I, X, XIV, and the pre-1974 Title XVI--so that such Titles ceased to apply to the States and the District when SSI became effective on January 1, 1974. The former adult assistance programs remain in effect in the Virgin Islands and Guam (as well as Puerto Rico) subject to a cap (42 U.S.C. 1301(a)(1), 1308). They do not now apply and have never applied in Samoa. The desirability of their being made expressly inapplicable to the Northern Marianas, as a result of the uncertain effect of the language of section 502(a)(1) of the Covenant, is discussed above under Title I and other pertinent Titles.

The disparate treatment under the SSI program of U.S. citizens resident in the States, on the one hand, and those in most of the territories, on the other, presents an important and fundamental question of policy. The disparity was held not to be constitutionally objectionable in Califano v. Torres (435 U.S. 1 (1978)), because (1) citizen-residents of the insular area there involved (Puerto Rico, but the principle applies equally to the other insular areas here involved) do not pay Federal income taxes, (2) costs of inclusion would be very high, and (3) larger benefits could be disruptive to the insular economy. But some territorial governments and residents have continued to seek the extension of SSI, basing their arguments essentially upon both equity and need. They argue that U.S. citizens should not be treated less favorably because they live in a territory rather than a State--particularly when such citizens do receive SSI benefits if they live in one such area, namely the Northern Marianas--and that territorial residents probably have a financial need that exceeds that of State beneficiaries generally. Among the arguments to the contrary are the heavy costs to the U.S., and the disruptive effect that such Federal SSI payments would have on local economies. As an example of the latter point, the Department of Health and Human Services calculated in 1989 in connection with the proposed Guam Commonwealth Act that if SSI were extended to Guam, SSI benefits would represent roughly 55% of the per capita income on Guam.[3/] No effort will be made here to resolve these arguments, on the ground that any conclusion reached here would be without significance in any event.

The SSI program applies to the Northern Marianas on the same terms as it applies to the States. No statutory distinctions are made among the areas covered.

[3/] The disruptive-to-local-economy argument caused Justice Marshall, in his dissent from the per curiam decision in Harris v. Rosario, 446 U.S. 651 (1980)--a decision pertinent to Aid to Families with Dependent Children and cited above under Title IV, Part A--to offer the following observation:

> [The argument] suggests that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset. (at pp. 655-656)

One section may warrant comment, because at first glance it appears that it could pose a problem to Samoans or in the Northern Marianas. (But on second glance, it does not.) In defining which "aged, blind, or disabled" persons can be beneficiaries of SSI, a provision at 42 U.S.C. 1382c(a)(1)(B) requires that they be residents of the United States (which in effect means of the States, the District of Columbia, or the Northern Marianas), and that they also be either citizens or aliens admitted for permanent residence, or "otherwise permanently residing in the United States under color of law . . . ". Most Samoans are noncitizen nationals, and as such they cannot be aliens, but those who have moved to the States--usually to Hawaii or the West Coast, where large Samoan communities exist--apparently qualify as permanent residents "under color of law". In addition, HHS advises informally that its regulations and guidelines treat "nationals" as "citizens", so that Samoans in the States would thereby be eligible. This section, however, has the effect of excluding the large alien population in the Northern Marianas, where such aliens, who have entered the Northern Marianas for a temporary period for employment, are believed now to outnumber local citizen-residents. Because under the Covenant the Federal immigration laws do not apply to the Northern Marianas, these workers are not aliens "lawfully admitted for permanent residence" as that phrase is used in Federal law. They thus do not meet the statutory requirement, and alien temporary workers in the Northern Marianas are therefore ineligible for SSI benefits.[4/]

[4/] In further elaboration of this point, HHS states:

> . . . in order to be eligible for SSI, a noncitizen (or non-national) must be either (1) "lawfully admitted . . . for permanent residence" or (2) "permanently residing . . . under color of law" (otherwise known as PRUCOL). However, [any] suggestion that admission of guest workers under the laws of NMI would meet the first test is incorrect: lawful admission for a temporary period, no matter how long, does <u>not</u> satisfy this test.

(continued...)

Title XVII. Grants for Planning Comprehensive Action to Combat Mental Retardation (42 U.S.C. 1391-1394).

Title XVII, added in 1963, provides for grants for the purpose stated in the title, to the States and to the Virgin Islands, Guam, and Samoa (42 U.S.C. 1391). The authorizations for appropriations have long since expired, but were they to be revived, the Northern Marianas would also be comprehended by operation of section 502(a)(1) of the Covenant.

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[4](...continued)

Nor, under HHS regulations, can an alien permanently residing in NMI meet the PRUCOL test, since that test depends on the failure of the Immigration and Naturalization Service (INS) to take official action. 20 CFR 416.1618(a) declares in part:

> "We will consider you to be permanently residing in the United States under color of law and you may be eligible for SSI benefits if you are an alien residing in the United States with the knowledge and permission of the Immigration and Naturalization Service and that agency does not contemplate enforcing your departure."

INS has no jurisdiction over NMI, but the HHS regulations do not treat a comparable failure to act by the Commonwealth government as sufficient to establish PRUCOL status.

HHS further advises that the Social Security Administration, which administers the SSI program, is unaware of any problems created by the lack of an option in the Northern Marianas to establish SSI eligibility on the basis of PRUCOL status.

<u>Title XVIII, Health Insurance for Aged and Disabled,</u> "Medicare" (42 U.S.C. 1395-1395ccc).

Title XVIII provides for the Medicare program. Its geographic application is the same as that of the Social Security System under Title II (see 42 U.S.C. 1395x(x)), and accordingly Medicare applies to and within the Virgin Islands, Guam, Samoa, and the Northern Marianas. (For purposes of Medicare, "State" has the meaning accorded it at 42 U.S.C. 410, where it includes expressly the Virgin Islands, Guam, and Samoa. Medicare applies to and within the Northern Marianas under either section 606 of the Northern Marianas Covenant, which extends to the Northern Marianas "benefits from the United States Social Security System", or section 502(a)(1), which makes applicable to the Northern Marianas "laws which provide federal services and financial benefits . . . as they apply to Guam".)

These four areas are treated under the Medicare law precisely in the manner of the States, with one exception. In the States and the District of Columbia, payments for inpatient hospital services may be made on the basis of prospective rates (42 U.S.C. 1395ww(d)(1)(A)(iii)), but this is not possible for the territories (42 U.S.C. 1395ww(d)(1)(B)). It seems probable that this exclusion results from the difficulty--perhaps the impossibility--of applying to these small and isolated territories the complex formula used for establishing prospective payment rates. Part of the formula is based on a "diagnosis-related group prospective payment rate" for the region, and such a rate would be hard to come by, or to compute, for a small territory. Apart from that provision, however, the four territories are accorded the same statutory treatment as the States.

Two points warrant comment. First, in a few instances Puerto Rico receives special treatment. It does so for purposes of the payment on the basis of prospective rates for inpatient hospital services--the point just referred to above --with Puerto Rico being the subject or a long and complex provision for itself alone (42 U.S.C. 1395ww(d)(9), and the related 42 U.S.C. 1395g(e)(1)). Puerto Rico's comparatively large size and population doubtless make such rates feasible there. Puerto Rico is also differently treated for purposes of automatic enrollment under Part B of Medicare, the part pertaining to Supplementary Medical Insurance Benefits for Aged and Disabled. (Part A pertains to Hospital Insurance Benefits.) Individuals are "deemed to have enrolled" in Part B if they meet certain statutory tests, including that of "residing in the United States, exclusive of Puerto Rico" (42 U.S.C. 1395p(f)(3)).

Second, two provisions of the Medicare law make reference to "citizens", in contexts that would appear to be potentially disadvantageous to noncitizen nationals in or from Samoa--but because HHS regulations and guidelines treat "nationals" as "citizens", there is in fact no practical problem. At 42 U.S.C. 1395i-2, provision is made for the enrollment under Part A of certain individuals not otherwise comprehended. Among the qualifications required for such enrollment is that the individual be a resident of the U.S. and either a citizen or an alien lawfully admitted for permanent residence (42 U.S.C. 1395i-2(a)(3)). Similarly, individuals covered by Part A may enroll in Part B if they are 65, residents of the U.S., and either citizens or aliens lawfully admitted for permanent residence (42 U.S.C. 1395o(2)). As stated, HHS's willingness to treat nationals as citizens eliminates any need to modify these statutory provisions.

Title XIX. Grants to States for Medical Assistance Programs, "Medicaid" (42 U.S.C. 1396-1396s).

Title XIX provides for the Medicaid program, a program under which the United States provides funds to the "States" for medical care for low income persons who are 65 or over, blind, disabled, or members of families with dependent children. Grants are paid to States that have plans that meet Federal standards, but the State has leeway to determine eligibility and the level of aid.

The territories are all eligible for Medicaid grants, with the Virgin Islands, Guam, Samoa, and the Northern

Marianas all defined as "States" for purposes of Title XIX (42 U.S.C. 1301(a)(1)). They receive less generous grants than the States, however, owing to a different formula and a special cap on their grants.

-- A key ingredient in determining the size of Medicaid grants to the States, as such, is the "Federal medical assistance percentage". Under 42 U.S.C. 1396d(b), that percentage takes into account the per capita income of the State, so that poorer States receive a greater percentage of their total costs from the Federal Government than do the more affluent States. For the States, however, the percentage can be no less than 50% nor more than 83%, while for the Virgin Islands, Guam, Samoa, and the Northern Marianas (as well as Puerto Rico), the percentage "shall be 50 percentum". (If per capita income were the sole guide, it is probable that most territories would be entitled to 83%.)

-- In addition, a separate cap is imposed for each area. Under 42 U.S.C. 1308(c), the caps for fiscal year 1990 and thereafter are for the Virgin Islands, $2.6 million; for Guam, $2.5 million; for Samoa, $1,450,000, and for the Northern Marianas, $750,000. These sums correspond roughly with population figures.

This disadvantageous treatment of the territories is well known to them and much criticized. It will be noted that it is prompted perhaps entirely by budgetary considerations, because treating the territories fully as "States" for Medicaid purposes would be costly. (In its 1987 report on fully extending the benefits of this program, among others, to the insular areas, including Puerto Rico, GAO estimated that Medicaid costs to the U.S. would have risen $333 million in 1984, but GAO cast doubt on that figure by pointing out the numerous variables that make an estimate close to impossible.) In any event, the argument based on fragile territorial economies (used, for example, in connection with SSI under Title XVI) would seem to have no application here. No recommendation is offered here for change, on the ground that a recommendation would be without value.

The Medicaid law contains a number of other provisions of particular application to insular areas, however, all of which are at least potentially of value to them.

-- At 42 U.S.C. 1396a(j), the Secretary of Health and Human Services is authorized to waive with respect to Samoa or the Northern Marianas "any requirement" of Title XIX--except for the Federal percentage, the territorial cap, and the requirement that expenditures be made by the insular government for health services covered by the program. Such a waiver was enacted for Samoa when the program was extended there in 1982, and the Northern Marianas Commission on Federal Laws recommended its extension to that area, on the ground that medical services in both areas were similar, with the government serving as the principal provider of health services. The waiver authority was extended to the Northern Marianas in 1987.[5/]

-- At 42 U.S.C. 1396a(a)(23), persons receiving Medicaid assistance must be free to choose their own health provider, but the Virgin Islands and Guam (and Puerto Rico) are expressly exempt from this provision. The Northern Marianas would also be exempt, by operation of section 502(a)(1) of the Covenant, and Samoa could be made exempt under the waiver authority of 42 U.S.C. 1396a(j), discussed above. The function of the territorial exclusion is to permit the insular areas to focus on their own public health care systems, which are used by most of the insular residents.

-- At 42 U.S.C. 1396b(r) requirements are imposed on the "States" for the use of mechanized claims processing and information retrieval systems, but any "Commonwealth, or territory or possession, of the United States" may obtain an exemption (42 U.S.C. 1396b(r)(7)(A)(ii)).

[5/] In its report of August 1985, the Northern Marianas Commission on Federal Laws gave extended consideration to the Medicaid program (pp 160-172), but its sole recommendation for change in the law was that the waiver authority for Samoa be extended to the Northern Marianas. As noted, that was accomplished in 1987.

-- At 42 U.S.C. 1396(u), provision is made for reduced Federal payments in connection with erroneous excess payments by a State, but the provision does not apply to the insular areas (42 U.SC. 1396b(u)(3)(A)(4)).

-- At 42 U.S.C. 1396r-6, requirements are imposed with respect to the extension of eligibility for medical assistance in connection with families receiving aid under Part A of Title IV (the AFDC program). These requirements apply only to the States as such and the District of Columbia (42 U.S.C. 1396r-6(c)(2)).

Title XX. Block Grants to States for Social Services (42 U.S.C. 1397-1397e).

The Virgin Islands, Guam, Samoa, and the Northern Marianas are all entitled to receive block grants under Title XX (42 U.S.C. 1301(a)(1)). Grants are for the purpose of services directed toward such goals as eliminating dependency, achieving self-sufficiency, preventing neglect or abuse of children or adults, preventing inappropriate institutional care and arranging for it when appropriate (42 U.S.C. 1397).

The States receive grants, within the amounts authorized, based on their respective populations (42 U.S.C. 1397b(b)), while the Virgin Islands, Guam, the Northern Marianas, and Samoa are in effect subject to a special set-aside, based upon amounts received by them under prior law for the fiscal year 1981 (42 U.S.C. 1397b(a)). For purposes of the chart at the beginning of this memorandum that shows the application to the territories of each title of the Social Security Act, and the presence of a territorial cap, this Title XX set-aside is treated as a cap. (Samoa was not then covered by this Title, but Title XX was extended to it in 1987, and the law provides that Samoa's grant is the same as that to the Northern Marianas, adjusted to reflect their relative populations.) It is not possible to determine on the basis of the pertinent laws themselves whether the insular areas receive grants under Title XX that are less generous, comparatively, than those received by the States. It does appear, however, that the insular areas experienced in fiscal years 1982 through 1988 a comparative increase in their entitlements, inasmuch as such entitlements are required to be calculated on the basis of a total program amount of $2.9 billion, while the amounts authorized for the States under Title XX for those fiscal years 1982 through 1988 are calculated on the basis of amounts under $2.9 billion (42 U.S.C. 1397b(c)).

The Title contains no other provisions of special application to the insular areas.

<u>Conclusion</u>: The Social Security Act presents fundamental policy questions concerning the treatment of the territories, and these questions are likely to continue to give rise to complaints from the territories until "State-like" treatment is accorded them:

-- by eliminating the caps on Federal expenditures for purposes of the adult assistance programs (Titles I, X, XIV, and the "old" Title XVI), the program of Aid to Families with Dependent Children (Title IV-A), and Medicaid (Title XIX);

-- by removing the unfavorable allotment formula for the territories under Titles IV-A and XIX; and

-- by extending to the Virgin Islands, Guam, and Samoa the Supplemental Security Income program of Title XVI (and at the same time eliminating the adult assistance programs in those areas). The problem of State-like treatment for the territories, which these changes would create, is made vastly the more difficult because Puerto Rico is for the most part subject to the same treatment under the Social Security Act as are the territories generally--so that the fiscal consequences to the U.S. are potentially very great.

Suggestions of a lesser sort are contained in the preceding title-by-title discussion:

The desirability of making clear that the adult assistance programs of Titles I, X, and XIV, and of the "old" Title XVI, do not apply to the Northern Marianas, inasmuch as the SSI program is applicable there;

-- The desirability of extending to Samoa these adult assistance programs, while recognizing that Samoa's own cultural system may make them less important there;

-- The desirability of establishing a special cap for the Northern Marianas for purposes of Titles IV-A and IV-E, to avoid a possible windfall if the Guam cap is applied to the Northern Marianas; and

-- The desirability of certain perfecting amendments as to Samoa, identified in the discussions under Titles II, IV-B, and XI-A; and as to the Northern Marianas under SSI (Title XVI).

Federal agency comments: Comments were requested from the Department of Health and Human Services and the Department of Justice. All comments received have been reflected above.

Memorandum No. 42-4
November 1989

Subject: (a) Low-Income Housing
Title 42, Chapter 8 (42 U.S.C. 1404a-1440)

(b) Slum Clearance, Urban Renewal, and Farm Housing
Title 42, Chapter 8A (42 U.S.C. 1441-1490o)

(c) Housing of Persons Engaged in National Defense
Title 42, Chapter 9 (42 U.S.C. 1501-1594f)

Comment: Chapters 8 and 8A now apply to the territories, with the latter of special importance to them because it contains laws administered b" the Farmers Home Administration. The application of Chapter 9 is less certain but probably sufficient, and academic, at this time.

Discussion:

(a) Low-Income Housing (42 U.S.C. 1404a-1440).

The housing laws appearing in Chapter 8 of Title 42, which constitute a part of the Housing Act of 1937, provide various forms of Federal assistance--grants, loans, "commitments", and contributions--to "State" public housing agencies to assist in remedying "the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of lower income . . ." (42 U.S.C. 1437). Each time the term "State" is defined, it includes the territories and possessions (42 U.S.C. 1437a(b)(7), 1440(b)(2)(B)), so that the Virgin Islands, Guam, Samoa, and the Northern Marianas are covered by the provisions of this chapter. Most such provisions derive from a 1974 enactment, so section 502(a)(2) of the Covenant operates to include the Northern Marianas.

There are no provisions of particular application to the territories, and none that would appear to impede the implementation of the provisions of this chapter in any of them. Given housing practices in some of the territories that differ from those in the States, and given the local land laws in some that depart markedly from usual U.S. practice, it is possible that some tailoring might be required to meet territorial needs. This is particularly true in Samoa and the Northern Marianas. But no such provision is known to have been identified, and it therefore appears that the current State-like treatment for them all serves them sufficiently.

It is worth noting that the chapter takes account of the status of most Samoans as noncitizen nationals (42 U.S.C. 1436a(c), (d)), and that Davis-Bacon wage rates must be paid in connection with Federally-assisted projects (42 U.S.C. 1437j, 1440(g)).

(b) Slum Clearance, Urban Renewal, and Farm Housing (42 U.S.C. 1441-1490o).

Chapter 8A of Title 42 contains much of the Housing Act of 1949 and acts supplementary and amendatory to it. Loans and grants under the slum clearance and urban renewal provisions (42 U.S.C. 1450-1469c) ceased to be authorized after January 1, 1975 (42 U.S.C. 5316(a)), but they were before that available to "territories and possessions" (see former 42 U.S.C. 1460(h)).

The important provisions on farm housing, however, and the provision of Federal financial assistance through the Farmers Home Administration, remain (42 U.S.C. 1471-1490o). The Farmers Home Administration is authorized to extend assistance in "the Virgin Islands, the territories and possessions of the United States" and certain other areas (42 U.S.C. 1471(a)), and it has functioned in them all, to the great benefit of territorial populations. The Northern Marianas are covered by operation of section 502(a)(2) of the Covenant.

There are no provisions in the farm housing sections that are peculiar to any of the territories, and those that could create difficulties seem to be drafted so as to avoid them. For example, 42 U.S.C. 1480(d) authorizes the use of U.S. Attorneys in the collection of claims, and there is no U.S. Attorney with jurisdiction in Samoa; but the section also permits use of "any other attorney" on a contract basis, so that difficulty can be overcome. Similarly, the security required for a loan need not involve the borrower's real property, which could run afoul of restrictive land laws in Samoa or the Northern Marianas (42 U.S.C. 1472(a), (b)). In sum, the farm housing provisions in this chapter appear adequate to meet peculiar territorial requirements, and as noted, the farm housing program functions with success in them all.

There is no definition of "State", although the term is often used throughout the farm housing sections. (Two examples of many that could be cited are 42 U.S.C. 1490e on technical assistance, and 42 U.S.C. 1490m on preservation grants.) The problem is made the greater by the explicit reference to territories and possessions, as well as States, in 42 U.S.C. 1490h, concerning taxation. It is probable that the reference to the territories in 42 U.S.C. 1471(a) is sufficient to carry through the remainder of the chapter's provisions, but to insure that it does, it would be well to add an appropriate definition when a convenient legislative vehicle is at hand.

(c) Housing of Persons Engaged in National Defense (42 U.S.C. 1501-1594f).

Many of the housing laws formerly contained in Chapter 9 of Title 42 have been repealed, others have been omitted as executed, and there seems to be rather little life in those that remain. Many were enacted in 1940 and most of the remainder no later than the early 1950's; and most of these have not been amended (except for nonsubstantive changes in nomenclature) for about 40 years. They do not, therefore, require extensive attention.

Nevertheless, although these laws contain few tidy provisions concerning their territorial application, they all contain language that would point toward their application to the territories, if other statutory circumstances were met.

Subchapter I, 42 U.S.C. 1501-1506 (entitled "Projects Generally", which dates from 1940 and which authorizes the heads of the military departments and the housing department to cooperate in connection with housing for enlisted personnel, junior officers, and defense workers) contains internal references to the Housing Act of 1937 (42 U.S.C. 1502, 1503, 1504), and as explained above at (a), that Act applies to the "territories and possessions".

Subchapter II, 42 U.S.C. 15221524 (entitled "Defense Housing", which also dates from 1940, but only disposal provisions remain) contains no extant provisions on geographical application. But there remains at 42 U.S.C. 1547 (which is applicable to Subchapters II-VII) a section that preserves the civil and criminal jurisdiction of a "State", "including any Territory or possession", over Federal defense housing areas. The intent was doubtless to include the territories in the affected subchapters of Chapter 9.

Subchapter VII, 42 U.S. C. 1581-1590 (entitled "Disposal of War and Veterans' Housing", dating from 1948) does contain a tidy definition. At 42 U.S.C. 1590(e), the term "State" is defined to include any "Territory, dependency, or possession".

Subchapter VIII, 42 U.S.C. 1591-1591d (entitled "Critical Defense Housing Areas", dating from 1951) has substantially expired (42 U.S.C. 1591c).

Subchapter IX, 42 U.S. C. 1592-1592o (entitled "Defense Housing and Community Facilities and Services" dates from 1951 and authorizes the Secretary of Housing and Urban Development to provide housing for defense and military personnel) applies to the "Territories, and possessions" (42 U.S.C. 1592n).

Subchapter XI, 42 U.S. C. 1594-1594f (entitled "Housing for Military Personnel", dating from 1955) is silent as to its geographical application, except that it applies in part to the construction of housing on U.S. land "on or near a military reservation" (42 U.S.C. 1594(a)). That would probably suffice, but it is more likely that the laws in this subchapter are moribund, to judge from internal dates (42 U.S.C. 1594a). The inclusion of the territories appears wholly academic at this time.

Conclusion: The laws discussed above, contained in Chapters 8, 8A, and 9 of Title 42, do not appear to require modification to meet territorial needs at this time, although a perfecting addition to Chapter 8A (to provide a definition of "State") could have value.

Federal agency comments: None have been requested because none appear necessary.

Memorandum No. 42-5
November 1989

Subject: (a) Compensation for Disability or Death to Persons Employed at Military, Air, and Naval Bases Outside United States
The Defense Base Act
Title 42, Chapter 11 (42 U.S.C. 1651-1654)

(b) Compensation for Injury, Death, or Detention of Employees of Contractors with United States Outside United States
The War Hazards Compensation Act
Title 42, Chapter 12 (42 U.S.C. 1701-1717)

Comment: The Defense Base Act and the War Hazards Act both apply to the Virgin Islands, Guam, Samoa, and the Northern Marianas--although Guam has received a broad waiver under the Defense Base Act with respect to contracts of the Department of Defense. No other territory is known to have experienced any difficulties with respect to the application of the Defense Base Act, and none with respect to the War Hazards Act.

Discussion: (a) The Chapter entitled Compensation for Disability or Death to Persons Employed at Military, Air, and Naval Bases Outside United States (42 U.S.C. 1651-1654) contains the Defense Base Act, which was until recent years a cause for consternation in Guam. That problem has apparently now been eliminated.

The Defense Base Act, enacted in 1941 and often amended in the 20 years that followed (but not since), extends coverage of the Longshore and Harbor Workers Compensation Act (see Memorandum No. 33-4) to employees who suffer death or injury in the course of their employment, if that employment is

-- "upon any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States . . ." (42 U.S.C. 1651(a)(2)); or

-- "upon any public work in any Territory or possession outside the continental United States . . . if such employee is engaged in employment at such place under the contract of a contractor . . . with the United States . . ." (42 U.S.C. 1651(a)(3).

The Act makes other kinds of "employment" subject to the Longshore and Harbor Workers Compensation Act as well (see 42 U.S.C. 1651(a) generally), but they are not now relevant. The term "continental United States" is defined to mean the States and the District of Columbia (42 U.S.C. 1651(b)(4)). In light of that definition, the two provisions quoted above make clear that the Defense Base Act applies to the Virgin Islands, Guam, and American Samoa.

Inasmuch as the Act applies differently to the States and the territories, section 502(a)(2) of the Covenant does not serve to extend the Act to the Northern Marianas. But it may reasonably be argued that section 105 of the Covenant does so, inasmuch as the Defense Base Act could "be made applicable to the several States" if the Congress were to choose to do so. Accordingly, it is not necessary that the Northern Marianas be expressly named in order for the Defense Base Act to apply to it; it applies without express mention pursuant to section 105.

The remedy of the Longshore and Harbor Workers Compensation Act is exclusive, and "in place" of whatever liability the employee might otherwise experience under local worker's compensation laws (42 U.S.C. 1651(c)). Additionally, the beneficiaries are "employees", with no distinction made as to citizenship, nationality, or residence. In sum, aliens employed on U.S. contracts in a territory are as fully covered as U.S. citizen employees.

The application of the Defense Base Act to Guam became an issue of moment to employers there in the 1970's, when insurance premiums for insurance contracts written on Guam suddenly rose dramatically and multiplied several-fold, allegedly placing Guam's local contractors at a competitive disadvantage in bidding on Defense Department contracts.

Whatever the premiums, they became in most cases part of the contract cost that was ultimately borne by the United States. In this state of affairs, the Department of Labor in a letter of April 14, 1982, to the Department of Defense issued a waiver of the Defense Base Act with respect to all contracts of the Department of Defense on Guam. The Secretary of Labor is given authority to issue waivers under the Act (42 U.S.C. 1651(e)). The Department of Labor reports informally that the 1982 Guam waiver was unusual, and apparently unique, in that it extended to all Defense Department contracts, without limitation as to the duration of the waiver, and the waiver applies to all employees, including U.S. citizens. It is reportedly highly unusual for the Labor Department to waive the application of the Act with respect to U.S. citizens, and most waivers in the past have been for particular contracts in particular foreign countries. No other area, whether it be a U.S. territory or a foreign country, has received so broad a waiver.

The Defense Base Act continues to apply to Guam with respect to "employment" of the kind described above under 42 U.S.C. 1651(a)(2) and (3) by a Federal department of agency other than Defense, and it applies fully to the Virgin Islands, Samoa, and the Northern Marianas. None is the subject of any waiver under the Act--but a waiver could be obtained if a case were made, as in the case pressed by Guam in the 1970's and early 1980's.

Mention should be made of the court jurisdiction provision at 42 U.S.C. 1653(b), a provision that is unusual because it would appear not to create a problem for Samoa, which has no Federal District Court. The subsection provides in part that judicial proceedings in respect to a compensation order under the Defense Base Act can be instituted "in the judicial district nearest the base at which the injury or death occurs". The U.S. District Court in Hawaii, thus, would be available for a death or injury order arising in Samoa.

(b) The Chapter entitled Compensation for Injury, Death, or Detention of Employees of Contractors with United States Outside United States (42 U.S.C. 1701-1717) contains the War Hazards Compensation Act, enacted in 1942 but still live. Like the Defense Base Act, it too treats the territories differently from the States, but in a manner unlikely to be objectionable to them.

The War Hazards Compensation Act provides compensation for injury or for death resulting from injury if the injury "proximately results from a war-risk hazard" (42 U.S.C. 1701(a)); and a war-risk hazard means one arising not only from a war in which the U.S. is engaged, or an armed conflict in which the U.S. is engaged without a declaration of war, but also "a war or armed conflict between military forces of any origin, occurring within any country" (42 U.S.C. 1711(b)). The Act thus has potential application at almost any time.

The Act provides that certain persons who suffer injury or death from a war-risk hazard are to be compensated under the Federal Employees Compensation Act, as though they are civil employees of the U.S. (see Memorandum No. 5-1, Part III(3)). The persons so covered include the following now pertinent:

-- a person "engaged by the United States under a contract for his personal services outside the continental United States",

-- a person employed in a nonappropriated fund activity by the Department of Defense (post exchanges, ships' stores, and the like) "outside the continental United States", and

-- a person employed to provide welfare or similar services for service personnel "outside the continental United States" (42 U.S.C. 1701(a)(2), (3), and (5)).

The "continental United States" means the States and the District of Columbia (42 U.S.C. 1711(f)). That definition of "continental United States" makes clear that the Act applies to the Virgin Islands, Guam, and American Samoa. The reasoning set out in part (a) of this memorandum, pertaining to the application of the Defense Base Act to the Northern Marianas, applies equally here. It should, thus, be concluded that the War Hazards Compensation Act also applies to the Northern Marianas, and that this result follows from section 105 of the Covenant, notwithstanding the fact that the Northern Marianas is not specifically named.

Obviously the States and the territories receive different treatment under the War Hazards Compensation Act, and that fact often triggers in this study a recommendation for a suggested change in the law. But none is warranted in this case. The territories suffer no burden, and in fact may derive an indirect benefit from their treatment, because compensation payments in the circumstances stated are not their responsibility.

Conclusion: The Defense Base Act and the War Hazards Compensation Act require no change to meet the needs of the territories. Waiver authority contained in the former, and used in connection with Guam, is available through administrative action should the application of the former become onerous in any area.

Federal agency comments: Comments were requested from the Department of Labor and the Department of Justice. All comments received are reflected above.

Memorandum No. 42-6
November 1989
Revised December 1991

Subject: (a) School Lunch Programs
Title 42, Chapter 13 (42 U.S.C. 1751-1769e)

(b) Child Nutrition
Title 42, Chapter 13A (42 U.S.C. 1771-1789)

Comment: These Federal feeding programs are fully applicable to the territories subject to this study, and accord them treatment at least as favorable as that accorded to the States.

Discussion: (a) Chapter 13 entitled School Lunch Programs (42 U.S.C. 1751-1769e) contains the National School Lunch Act. The Act applies in full to the territories that are the subjects of this study, and its benefits are available to them (with one exception, discussed below, which is probably of value to them) on the same basis as they are available to the States. It involves the distribution of assistance payments and of agricultural commodities and other food to the States for the operation of several nonprofit lunch programs, among them a school lunch program, a summer food service program, and a program to provide nonprofit food service to children in institutions providing child or adult day care. (Breakfasts and suppers also are covered in the child and adult day care, and the summer food service programs). The Act also includes a program to provide meal supplements for children in afterschool care.

The term "State" has included the Virgin Islands from the date of enactment of the statute in 1946. It was expanded to include Guam in 1952, Samoa in 1962, and the Trust Territory in 1975 (42 U.S.C. 1760(d)(1). The Northern Marianas are comprehended by operation of section 502(a)(2) of the Covenant, and are referred to explicitly in several recent amendments to the Act (42 U.S.C. 1760(f), 1761(a)(1)), so there can be no doubt that that area is included. The formulae for the distribution of Federal aid does not distinguish between States and territories (42 U.S.C. 1753, 1759a)), and those formulae confer greater benefits on poorer children (42 U.S.C. 1753(b)(2), 1759a(a)(1), which would result in relatively greater assistance for the territories.

As a point of historical interest, it is worth noting that in its early years, the National School Lunch Act treated the territories to which it then applied--Alaska, Hawaii, Puerto Rico, and the Virgin Islands--by means of a set-aside. No more than 3 percent of the amounts appropriated, or of food purchased, could be distributed to them under the Act (42 U.S.C., 1946 ed., 1753, 1754). Since set-asides for them could disfavor the territories, and in any event accord them treatment that differs from that of the States, the abandonment of the set-aside here can reasonably be viewed as representing progress.

As noted above one provision of the Act treats the territories differently, but almost certainly to their benefit. Under 42 U.S.C. 1760(f), the Secretary of Agriculture may "establish appropriate adjustments" to the formulae cited above in the case of the Virgin Islands, Guam, Samoa, and the Northern Marianas--and also in the case of the States of Alaska and Hawaii and the Commonwealth of Puerto Rico--in order "to reflect the differences between the costs of providing lunches and breakfasts in those States and the costs of providing lunches and breakfasts in all other States". This provision was added in 1978. While the readily available legislative history is silent as to the rationale for the provision (1978 U.S. Code Cong. and Admin. News 9227, 9254), the inclusion of two States among the areas that can be affected by it means that the authority could not be used to reduce benefits. Its purpose is, the Department of Agriculture advises, to allow the Department of Agriculture to increase its per meal payments to these noncontiguous areas when they can demonstrate higher per capita meal costs than in the United States as a whole. Such higher costs often result from the high costs of transportation of food and nonfood items which must be imported to those areas.

The only other special reference to a territory is now obsolete: 42 U.S.C. 1760(d)(4) provides that per capita income data for Samoa "for periods ending before July 1, 1967" may be disregarded in certain computations--almost certainly owing to the unavailability or unreliability of such data.

The territories, thus, fare well under this important law.

(b) Chapter 13A entitled Child Nutrition (42 U.S.C. 1771-1789) contains the Child Nutrition Act of 1966, as amended, a statute that builds upon the National School Lunch Act (42 U.S.C. 1771). It provides additional programs relating to food and other assistance, among them a program to encourage milk consumption in schools, a breakfast program, a preschool feeding program, a supplementary food program for mothers and infants and young children, and a program of nutrition education. The territories are in all connections covered (42 U.S.C. 1772(a)(3), 1784(1)), with the Virgin Islands, Guam, and Samoa being expressly named, and with the Northern Marianas comprehended by operation of section 502(a)(2) of the Covenant. No other provision makes special reference to the territories; they are in all particulars treated as are the States. No provision appears that would create special difficulties for them, so they are adequately accommodated under this law.

Conclusion: Neither the National School Lunch Act nor the Child Nutrition Act of 1966 require change to meet territorial needs.

Federal agency comments: Comments were requested from the Department of Agriculture and the Department of Justice. All comments received are reflected above.

Memorandum No. 42-7
November 1989

Subject: (a) Reciprocal Fire Protection Agreements
Title 42, Chapter 15A (42 U.S.C. 1856-1856d)

(b) National Science Foundation
Title 42, Chapter 16 (42 U.S.C. 1861-1887)

(c) Contracts for Scientific and Technological Research
Title 42, Chapter 16B (42 u.S.C. 1900-1900b)

(d) Youth Medals
Title 42, Chapter 18 (42 U.SC. 1921-1926)

(e) Water Resources Planning
Title 42 Chapter 19B (42 U.S.C. 1962-1962d-20)

Comment: Some of the laws concerning the National Science Foundation would profit from amendments clarifying their territorial application, but this is nonurgent because in most important respects the Foundation's authority with respect to the territories is now clear and sufficient. The law concerning youth medals should be amended to extend its provisions beyond "citizens" to "nationals". In all other respects these chapters of Title 42 are now adequate to meet territorial needs.

Discussion: (a) The chapter entitled Reciprocal Fire Protection Agreements (42 U.S.C. 1856-1856d) authorizes Federal agencies that provide fire protection for U.S. property to enter into reciprocal agreements for mutual aid in furnishing fire protection with any "fire organization" that maintains nearby fire protection facilities. The term "fire organization" includes any entity maintaining fire protection facilities "within the United States, its Territories and possessions" (42 U.S.C. 1856(c)), so the territories that are subjects of this study are all included--the Northern Marianas under section 502(a)(2) of the Covenant, because the law was enacted (and it applied to Guam) in 1955.

(b) The National Science Foundation (42 U.S.C. 1861-1887), created in 1950 and now a component of the Department of Education, exists to encourage and support basic scientific research, which it does in significant part by awarding scholarships and graduate fellowships for study and research in the sciences and engineering. The territories and their people are in all important respects covered by the law. Some imperfections of drafting appear with respect to the territories, but they do not appear to require early correction.

The term "United States" is defined at 42 U.S.C. 1873(g) to include "all territories and possessions of the United States" (a definition added in 1968, so that the Northern Marianas are covered through section 502(a)(2) of the Covenant), and a later (1988) amendment pertaining to awards for teaching excellence refers explicitly to the Northern Marianas and to "other commonwealths, territories, and possessions of the United States" (42 U.S.C. 1881b(a)(1)(B)). Significantly, too, awards of scholarships, graduate fellowships, and science medals may be made not only to citizens but also to U.S. nationals (42 U.S.C. 1869, 1881(c)).

The drafting imperfections referred to above relate to the use occasionally of "Nation" (42 U.S.C. 1862a, 1863(c)) and "State" (42 U.S.C. 1862c(d)(1), 1862a(a)(4), 1862g), both of which terms are undefined. But the former is used in sections that are essentially exhortatory, and the latter in contexts that are not likely to be of material importance to the territories--perhaps excluding 42 U.S.C. 1862g, which pertains to special Federally-operated Experimental Programs to Stimulate Competitive Research in "States" that have demonstrated a commitment to improving scientific and engineering research in their institutions of higher education. Even if eligible, territorial institutions would be hard-pressed to compete for such a Federal program at this time, but any doubt as to eligibility should be eliminated when a convenient legislative vehicle is available, so that a territorial college could be a beneficiary of the Federal program if it otherwise qualifies.

(c) The chapter entitled Contracts for Scientific and Technological Research (42 U.S.C 1900-1900b) authorizes the Secretary of the Interior to enter into research contracts with institutions or individuals on "any aspect of the problems related to the programs of the Department of the

Interior which are authorized by statute" (42 U.S.C. 1900(a)). There is nothing to exclude the territories, and they would be included if the pertinent authorizing statute--all of which are examined elsewhere in this study--comprehends them. Virtually all Interior laws do so.

(d) Youth Medals (42 U.S.C. 1921-1926) authorizes the award of two kinds of medals to persons 18 years of age or younger: a Medal for Bravery, to "any child residing in the United States" who has demonstrated unusual courage in attempting to save another's life (42 U.S.C. 1921); and a Medal for Service for "American boy or girl citizens" for character and service (42 U.S.C. 1922). While the "United States" (undefined in this 1950 law) might easily be read to include the territories, it would be unusual if "citizen" were construed to include a "national". The readily available legislative history is silent on these points (1950 U.S. Code Cong. Service 2878-2881). A young Samoan should be eligible for the Medal for Service, so this small law should be amended to define a citizen as including a national, and to make clear that the "United States" includes the territories.

(e) Water Resources Planning (42 U.S.C. 1962-1962d-20) contains the Water Resources Planning Act, enacted in July of 1965, plus a number of sections derived from various other laws on related subjects. For the most part, the general laws here codified contain few indications of their geographical application, but it does not appear that any require clarifying amendments.

Much of what appears in this Chapter 19B is either obsolete or restricted to particular water project developments, unrelated to the territories. In the former category is much of the 1965 Water Resources Planning Act itself, because its provisions concerning river basin commissions in effect ceased with the 1981 Executive order terminating the commissions; and the provision for Federal financial assistance to "States" (defined at 42 U.S.C. 1962c-5 to include the Virgin Islands and Guam) for comprehensive planning terminated after fiscal year 1979 (42 U.S.C. 1962c(a)).

Four sections in the chapter, however, are of possible interest, and only one is clearly applicable to the territories. That one appears at 42 U.S.C. 1962d-16, where the Corps of Engineers is authorized to cooperate with the "States" in the development of comprehensive plans for water resource development, for which purpose the term "States" includes expressly the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 1962d-16(c)). The other three sections contain nothing to assist in determining their application. These are

42 U.S.C. 1962d-5, authorizing the Corps of Engineers to undertake resource projects under certain terms if the estimated "Federal first cost" is less than $5 million;

42 U.S.C. 1962d-5a, authorizing reimbursement to "States" when they contribute towards Corps of Engineers projects; and

42 U.S.C. 1962d-5d, authorizing the Corps to contract with "States" for increased law enforcement services at Corps' projects.

Neither these sections nor the laws from which they were originally derived contain helpful provisions to suggest whether the territories are or are not comprehended.[1/] In the usual case, that situation would give rise to a recommendation here that the laws be amended so as to make clear their application to the territories. That recommendation is not made here, on the ground that the Corps of Engineers already conducts extensive water resource project activity in all of the territories, and that it has extensive authority to do so under a multitude of Federal laws. (Some of its authority in the territories is discussed in Memoranda Nos.

[1/] The three sections stem from the Flood Control Act of 1965, Pub. L. 89-298, 79 Stat. 1073 (42 U.S.C. 1962d-5); the Rivers and Harbors Act of 1968, Pub. L. 90-483, 82 Stat. 731 (42 U.S.C. 1962d-5a); and the Waters Resources Development Act of 1976, Pub. L. 94-587, 90 Stat. 2917 (42 U.S.C. 1962d-5d).

33-1(a), 33-2, and 33-3(c) and (f).) In the absence of a showing that uncertainty with respect to the three sections in Chapter 19B handicap either the Corps or the territories in connection with such projects, it seems proper to conclude that changes in these sections are unnecessary.

Conclusion: The laws concerning the National Science Foundation could profit from perfecting amendments, while those concerning youth medals should be expanded to include U.S. nationals.

Federal agency comments: None have been sought because none appear to be necessary.

Memorandum No. 42-8
December 1989
Revised December 1991

Subject: Elective Franchise
Title 42, Chapter 20 (42 U.S.C.1921-1974e)

Purpose: To prohibit discrimination against voters and to facilitate voting in Federal elections.

Territorial application: The election and voting laws codified in Chapter 20 of Title 42 are arranged in several subchapters, discussed separately herein, and the application of these subchapters differs among the territories. As explained in detail below,

Subchapter I on voting rights generally, and derived initially from a federal law of 1870, applies in part to the territories but not in its entirety.

Subchapter I-A on enforcement of voting rights, derived from the Voting Rights Act of 1965, appears largely not to apply to the territories, although some sections suggest the contrary.

Subchapter I-B contains later-enacted provisions supplementary to Subchapter IA and does not apply to the territories.

Subchapter I-C concerning the 18-year old vote does not apply to the territories.

Subchapter I-D and I-E have been repealed.

Subchapter I-F requiring voting accessibility by the elderly and the handicapped applies to the Virgin Islands, Guam, and Samoa, but not to the Northern Marianas.

Subchapter I-G concerning voting by service personnel and overseas voters also applies to the Virgin Islands, Guam, and Samoa, but not to the Northern Marianas.

Subchapter II imposing requirements for Federal election records does not apply to the territories.

Recommendation: Although the territories are generally free of problems arising from the deprivation of voting rights, or of discrimination against voters based on race, the protections afforded to voters in the States ought generally to be provided to those in the territories as well. Accordingly, the application of Subchapter I ought at least in part to be clarified, and the protections provided in Subchapters I-A and I-B could, in the interest of symmetry, be extended to them--but there does not now appear to be a demonstrated need. Subchapter I-C raises an additional question. Subchapter II could reasonably also be extended.

Discussion: Subchapter I, concerning the elective franchise Generally (42 U.S.C. 1971-1972), is derived from Revised Statutes enacted in 1870 and 1865, respectively. It is therefore unsurprising that the principal section, 42 U.S.C. 1971, uses the term "Territory" without definition, and it is quite certain that the term would be construed today to include the Virgin Islands, Guam, Samoa, and the Northern Marianas on the rationale of Puerto Rico v. Shell Co. (302 U.S. 253 (1937)). Thus the voters of the territories would be protected by 42 U.S.C. 1971(a)(1), which provides that U.S. citizens otherwise qualified to vote in an election "in any State, Territory, district, county" or other political subdivision may do so "without distinction of race, color, or previous condition of servitude"any "constitution, law, custom, usage, or regulation of any State or Territory . . . to the contrary notwithstanding".

Further, a provision at 42 U.S.C. 1971(b) makes clear that the draftsmen of that subsection (added in 1957) then had the territories in mind. That subsection prohibits acts of intimidation, threats, or coercion against persons voting in an election

> for the office of President, Vice President, presidential elector, Member of the Senate, or Member of the House of Representatives, Delegates or Commissioners from the Territories or possessions.

Voters in the Virgin Islands, Guam, and Samoa vote for territorial "Delegates", although they vote for no others among those listed. (The Northern Marianas Resident Representative to the United States, provided for in section 901 of the Northern Marianas Covenant, is not comprehended by the foregoing quoted language, and accordingly Northern Marianas voters would not be protected by 42 U.S.C. 1971(b). That position of Resident Representative may be converted into a territorial Delegate who sits in the Congress, and if and when that occurs, care should be taken to be sure 42 U.S.C. 1971(b) applies in the Northern Marianas, because that result might not inevitably follow, given the provisions of section 502 of the Covenant.)

Except for the foregoing reference to "Territory" in 42 U.S.C. 1971(a)(1), and the reference to territorial Delegates in 42 U.S.C. 1971(b), this rather long section refers exclusively to "States"[1/], and thus its application to the territories is arguable. (See, for example, 42 U.S.C. 1971(a)(2), (c), and (e).) In commenting on this memorandum, the Department of Justice has stated informally:

> In considering section 1971 one needs to distinguish the general directives or

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[1/] One further reference to "territory" does appear, but it is of no aid in establishing the geographical application of the section. In 42 U.S. 1971(c), in connection with the creation of a presumption of literacy, reference is made to "a public school in, or a private school accredited by, any State or territory". But the subsection otherwise refers only to a "State". The reference to "territory" thus appears to be an afterthought, and a useless one for current purposes.

> prohibitions (see, for example, section 1971(a)(1)) from the elaborate and specialized machinery created by the Civil Rights Acts of 1960 and 1964 to effect black enfranchisement in the South (see, for example, section 1971(e)). The general provisions remain vital, while the specialized machinery, while theoretically still available, as a practical matter became obsolete with the enactment of the Voting Rights Act of 1965.

As a practical matter, therefore, it may be unnecessary to expand "State" to include the territories throughout 42 U.S.C. 1971. At least subsection (e) could be excluded from repair work, and the important subsections (a) and (b) appear not to require it.

It should be noted, however, that even these subsections are not free of difficulties. The question of the inclusion of the Northern Marianas warrants attention, in light of the current non-Federal status of its Representative in Washington, and Samoa presents two difficulties: its voting laws permit noncitizen nationals in Samoa to vote (American Samoa Code, sec. 6.0214(a)(8)), as they must since a majority of Samoa's voters are U.S. nationals but not U.S. citizens; and Samoa has no Federal court. But Samoa does hold a "Federal" election, for its Delegate. So, while the obsolescence factor probably argues against modifying 42 U.S.C. 1971 to accommodate the territories fully, in the event that corrective legislation is undertaken, special attention needs also to be given to these peculiarities of the Northern Marianas and Samoa.

The 1865 statute appearing at 42 U.S.C. 1972 applies by its terms only to a "State". It prohibits an officer in the armed forces from interfering in a "State" election. The only cases under it were decided soon after the Civil War, and it does not appear necessary as a practical matter to make explicit its application to the territories.

Subchapter I-A, entitled Enforcement of Voting Rights (42 U.S.C. 1973-1973p), contains a part of the Voting Rights Act of 1965. It prohibits a "State" from imposing or applying a voting qualification that results in denying a vote to "any citizen of the United States" on the basis of race or color or because the voter is "a member of a language minority group" (42 U.S.C. 1973(a), 1973b(f)(2)). Among other things, the Subchapter prescribes the method of enforcement, using the Federal courts.

Again, most of the sections of the Subchapter refer solely to the "States" (see, for example, 42 U.S.C. 1973a, 1973b(a), 1973c, 1973l), and the term is undefined. (It is undefined generally in the Voting Rights Act of 1965, 79 Stat. 437.) But curiously, references to the territories do occur from time to time: 42 U.S.C. 1973b(e)(2), in connection with schools in "any State or territory"; 42 U.S.C. 1973g(c), in connection with jurisdiction for a narrow purpose pertaining to eligibility listings in "any district court of the United States or the United States court of any territory or possession"; 42 U.S.C. 1973i(c), which imposes criminal penalties for false registration information in an election for "Delegate from . . . Guam, or the Virgin Islands"; and 42 U.S.C. 1973i(e)(1), which imposes criminal penalties for multiple voting in an election for "Delegate from . . . Guam, or the Virgin Islands".

Obviously the application of Subchapter I-A generally to the territories is doubtful. Except for the two criminal provisions just cited, which certainly apply to the Virgin Islands and Guam, the application of all others is unlikely. Yet the provisions of the Subchapter were enacted to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments (42 U.S.C. 1973a(a)), and those provisions of the Constitution have been expressly extended by statute to the Virgin Islands, Guam, and the Northern Marianas (48 U.S.C. 1561 (Virgin Islands); 48 U.S.C. 1421b(u)(Guam); and section 501(a) of the Northern Marianas Covenant). As a matter of law, it has been argued that voting rights are among the fundamental protections of the Constitution, applicable to the people of the unincorporated territories under the Insular

Cases, and on that rationale, such rights are guaranteed to the people of Samoa as well.[2]

In the circumstances, it appears at first blush that Subchapter I-A should be extended to all of the territories. The definition of the term "State" to include them would largely suffice, but additional provisions would be necessary to accomplish the purpose fully. The subchapter is directed toward "State" elections generally, and not merely to those for Federal offices, so the Northern Marianas ought to be comprehended as fully as the Virgin Islands and Guam. There seems no reason to refrain from protecting the voting rights of noncitizen nationals in Samoa, and the problem of court jurisdiction there can be met in a number of ways--perhaps most easily by placing jurisdiction of Samoa cases in the District Court of Hawaii.

On the other hand, the Justice Department offers the following comments on the foregoing discussion of Subchapter I-A:

> It should be noted that the application of 42 U.S.C. 1973b to the territories and possessions would require the Attorney General and the Director of the Census to make factual and legal determinations with respect to events and circumstances in 1964, 1968, and 1972. If there is a desire to make section 1973b applicable to the territories and possessions, consideration should be given to adding a coverage formula that would be relevant to present circumstances. The application of 42 U.S.C. 1973c, 1973d-1973g, and 1973k is dependent on section 1973b coverage. It should be further noted, moreover, that the enactment of the Voting Rights Act was a response to a very severe

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[2] This argument is spelled out in detail in the Task Force Report of the Executive Branch to the House Committee on Interior and Insular Affairs on H.R. 98, 101st Congress, the Guam Commonwealth legislation.

> but localized problem: the continued disenfranchisement of blacks in large parts of the South, in clear violation of the 15th Amendment and of federal legislation. While the general provisions of the Act (for example section 1973) apply in all 50 states and could reasonably protect the rights of those in the territories and possessions, there is unlikely to be a need in the territories and possessions for the specialized provisions designed for the historical situation in the South in 1965 (see sections 1973b-1973g).

In the circumstances and particularly in the absence of evidence that voters in the territories have been disenfranchised on the basis of race, color, or language, it may not be necessary to extend the protections of these provisions to them. But if such an extension of the law is undertaken, obviously careful drafting would be required to avoid the pitfalls and to meet the special problems described above.

Subchapter I-B, entitled Supplemental Provisions (42 U.S.C. 1973aa-1973aa-6), contains laws after the Voting Rights Act of 1965 that augment it. While one section is concerned solely with voting in Presidential elections (42 U.S.C. 1973aa-1), and is therefore rightly limited in its application to those areas where voters may do so (i.e., the States and the District of Columbia, 42 U.S.C. 1973aa-1(h)), other sections are not so limited. Most apply generally to protecting voters in the "States" and their political subdivisions. (Such sections prohibit the use of literacy and other discriminatory tests, for example.) Such sections ought probably to apply to voters in the territories as well, and this could for the most part be achieved by defining the term "State" to include the territories--although again the matters of voting by noncitizen nationals in Samoa, and the absence of a Federal court there, require special attention. If, on the other hand, there is no significant minority language problem associated with voting in the territories, as appears to be true at this time, then extension of this Subchapter to them is not necessary.

<u>Subchapter I-C</u>, <u>Eighteen-Year-Old Voting Age</u> (42 U.S.C. 1973bb-1973bb-1) was enacted in 1970, and amended in 1975, to implement the Twenty-Sixth Amendment. That Amendment guarantees the right to vote to U.S. citizens 18 years old or older. The Subchapter authorizes the U.S. Attorney General to take enforcement action in Federal district courts, and by its own terms, it applies only to the States and the District of Columbia (42 U.S.C. 1973bb-1).

Congress has by statute made the Twenty-Sixth Amendment applicable to the Northern Marianas, by section 501(a) of the Covenant. The Amendment has not yet been extended by statute to any other territory--although it has been proposed for Guam by the Executive Branch, in its report on H.R. 98, 101st Congress, the Guam Commonwealth legislation. Whether the right of an 18-year old to vote is "fundamental", and thus within the protections afforded U.S. citizens in the territories under the <u>Insular Cases</u>, is arguable. The point has not been tested.

In the meantime, the laws of each of the territories now permit those who are 18 or older to vote. (Virgin Islands, 18 V.I.C. 99(a); Guam, Government Code, sec. 2056; Samoa, American Samoa Code, sec. 6.0211; Northern Marianas, 1 CMC 6201.) Given the premise of this Subchapter (i.e., the Twenty-Sixth Amendment), it seems illogical for the implementing law to apply to areas where the Amendment does not. Because, in addition, there is no visible problem of voter deprivation based on age in the territories, it appears to be appropriate to refrain from making this Subchapter applicable to them.

<u>Subchapter I-F</u>, <u>Voting Accessibility for the Elderly and Handicapped</u> (42 U.S.C. 1973ee-1973ee-6), was enacted in 1984, and it requires that polling places be accessible to handicapped and elderly voters for "Federal elections". Enforcement jurisdiction is in the Federal district courts (42 U.S.C. 1973ee-4). A "Federal" election includes an election for Delegate to the Congress, and the term "State" includes "any territory or possession of the United States" (42 U.S.C. 1973ee-6).

Because the Virgin Islands, Guam, and Samoa all hold elections for Delegates, each is covered by Subchapter I-F--but enforcement in Samoa would be dubious owing to the absence of a Federal District Court with jurisdiction in Samoa. The matter could be corrected by vesting appropriate jurisdiction in the District Court of Hawaii. The Northern Marianas, which does not now have a Delegate to the Congress, would not be comprehended. If the Northern Marianas' current Resident Representative is converted into a Delegate, it seems probable that the application of Subchapter I-F to the Northern Marianas would follow as a matter of law, given the terms of the first sentence of section 105 of the Northern Marianas Covenant.

Subchapter I-G, Registration and Voting by Absent Uniformed Services Voters and Overseas Voters in Elections for Federal Office (42 U.S.C. 1973ff-1973ff-6), contains the Uniformed and Overseas Citizens Absentee Voting Act, enacted in 1986. The Act requires each "State"--defined to include by name Guam, the Virgin Islands, and American Samoa (42 U.S.C. 1973ff-d6(6))--to

> permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, and runoff elections for Federal office. (42 U.S.C. 1973ff-(1)

A "Federal office" includes a Delegate to Congress (42 U.S.C. 1973ff-6(3)). A "Federal write-in absentee ballot" is prescribed for uniformed and overseas voters who apply for but do not receive a State absentee ballot--but such Federal absentee ballots are not counted if they are submitted from a location in the "United States" (42 U.S.C. 1973 ff-2(b)(1)), with the "United States" defined for this purpose to include Guam, the Virgin Islands, and Samoa (42 U.S.C. 1973ff-6(8)).

Hence, these three territories are precisely the equivalent of the States for purposes of the Overseas Citizens

Absentee Voting Act, and this is as it should be. Their uniformed or overseas voters are protected to the same extent as such voters are elsewhere in the United States. The same is not true in the Northern Marianas, which has no Federal election as defined in the Act, and which area is not included as a State or as within the United States for purposes of the Act. The conversion of the Northern Marianas' Resident Representative into a Delegate in Congress would not be sufficient to bring the Northern Marianas within the terms of Subchapter I-G, given the specificity of its definitions, so that particular amendments would be required at such time as the conversion occurs.

In commenting on this memorandum as to Subchapter I-G, the Justice Department points out the following:

> One question that might be raised with respect to the application of the Uniformed and Overseas Citizens Absentee Voting Act in the territories and possessions is whether, as is now the case, a registered voter of one of the 50 states or the District of Columbia who is temporarily in a distant territory of possession (Guam or American Samoa) should receive no protection under the act while such a voter who is in a foreign but more accessible country, such as Canada, is covered.

The suggestion for such additional coverage appears to be entirely reasonable, even though it is somewhat outside the scope of this study.

Subchapter II, Federal Election Records (42 U.S.C. 1974-1974e) is a part of the Civil Rights Act of 1960. The Act requires the retention of records pertaining to elections for Federal offices--the President, Vice President, the Senate, and the House, including the Resident Commissioner from Puerto Rico--(42 U.S.C. 1974)--and requires that such records be made available for inspection by the U.S. Attorney General (42 U.S.C. 1974b). The Subchapter is clearly applicable to Puerto Rico (42 U.S.C. 1974e), but just as clearly not applicable to any of the territories. The explanation doubtless lies in the date of its enactment (1960), which preceded the creation of the offices of Delegates from the Virgin Islands and Guam (1972) and Samoa (1978). (Puerto Rico's office of Resident Commissioner has existed since 1917.)

The problem to which Subchapter II is directed, i.e., the protection of civil rights with particular attention to poll taxes (42 U.S.C. 1974), is not a problem in any of the territories. The extension of this law to them is therefore not needed realistically, but a purist would take comfort in the extension, and it could not be hurtful.

<u>Conclusion</u>: Subchapters I, I-A, and I-B could profit from carefully drafted amendments tailored to territorial peculiarities--although they are directed to problems from which the territories are largely free.

Subchapters I-C- I-F, and I-G do not require amendment, except that the overseas absentee voting law (Subchapter I-G) could usefully be extended to State voters temporarily present in the territories, as suggested above by the Department of Justice. Subchapter II is not required in the territories, but it could not be harmful.

<u>Federal agency comments</u>: Comments were requested from the Department of Justice. Its extensive comments are reflected above.

Memorandum No. 42-9
January 1990

Subject: Civil Rights Commission
Title 42, Chapter 20A (42 U.S.C. 1975-1975f)

Purpose: To establish the Commission on Civil Rights and provide for its functions.

Territorial application: Although the law establishing the Commission does not clearly specify its geographic reach, the Commission believes it has authority to perform its duties in insular areas.

Recommendation: The law establishing the Civil Rights Commission does not require modification to meet the needs of the territories.

Discussion: The eight-member Civil Rights Commission, created in 1957 and often modified since, is currently subject to termination on September 30, 1991. Its duties are investigatory--and it has neither regulatory nor enforcement authority--being charged with, among other things, investigating complaints that U.S. citizens are being deprived of their right to vote because of their color, race, religion, sex, age, handicap, or national origin; studying matters of discrimination on such bases; and appraising Federal laws and policies with respect to discrimination (42 U.S.C. 1975c).

The law contains no statement of the geographic areas that are within the Commission's jurisdiction. Such hints as can be found are in conflict: at 42 U.S.C. 1975d(c), provision is made for advisory committees in "each State"; but at 42 U.S.C. 1975d(g), jurisdiction in cases involving contumacy or refusal to obey a subpoena is vested in "any district court of the United States or the United States court of any territory or possession . . .". No explicit geographic limitation on the Commission appears.

The Commission's General Counsel's Office advises informally that it believes it does have jurisdiction in the territories, and that it in fact conducted an investigation in Puerto Rico during the 1970's.

The existing law does not fit the Samoa situation, where most residents are U.S. nationals but not citizens (and the law is directed toward "citizens", 42 U.S.C. 1975c(a)(1), (5)), and with respect to which no Federal district court has jurisdiction. But discrimination on any of the bases set out in the law is not a known problem in Samoa, so modification of the law to accommodate Samoa's situation does not seem necessary.

Conclusion: The law creating the Civil Rights Commission does not require modification to meet the needs of the territories.

Federal agency comments: The content of this memorandum has been discussed with the Office of the General Counsel, Civil Rights Commission, which does not disagree.

Memorandum No. 42-10
January-April 1990
Revised December 1991

Subject: Civil Rights
Title 42, Chapter 21 (42 U.S.C. 1981-2000h-6)

Purpose: To provide protections for the civil rights of persons in the United States and to accord to them the equal protection of the laws.

Territorial application: The civil rights laws in Chapter 21 are derived from various statutes enacted over more than a century, and they are arrayed in numerous subchapters, the application of which differs with respect to the territories. As more fully explained in the Discussion that follows:

Subchapter I ("Generally", 42 U.S.C. 1981-1996), containing immediate post-Civil War laws that are sometimes referred to as the Civil Rights Laws, applies geographically in the territories, but the manner of application is uncertain.

Subchapter I-A ("Institutionalized Persons", 42 U.S.C. 1997-1997j) applies to the territories.

Subchapter II ("Public Accommodations", 42 U.S.C. 2000a-2000a-6), Subchapter III ("Public Facilities", 42 U.S.C. 2000b-2000b-3), Subchapter IV ("Public Education", 42 U.S.C. 2000c-2000c-9), and Subchapter V ("Federally Assisted Programs", 42 U.S.C. 2000d-2000d-7) are of uncertain application to the territories, but Subchapters II and V contain bases for arguing in favor of their application to some of the territories.

Subchapter VI ("Equal Employment Opportunities", 42 U.S.C. 2000e-2000e-17), usually referred to as "Title VII" of the Civil Rights Act of 1964, applies fully in the territories.

<u>Subchapter VII</u> ("Registration and Voting Statistics", 42 U.S.C. 2000f), <u>Subchapter VIII</u> ("Community Relations Service", 42 U.S.C. 2000g-2000g-3), and <u>Subchapter IX</u> ("Miscellaneous Provisions", largely of a procedural sort, 42 U.S.C. 2000h-2000h-6) are of uncertain application in the territories.

<u>Recommendation</u>: Given the unusual delicacy and complexity of most of the laws contained in Chapter 21, and given the absence for the most part in the territories of the kinds of problems to which these laws are directed (although this is untrue, as discussed below, of 42 U.S.C. 1983, which has been the basis in recent years of considerable litigation in the territories), amendments to clarify the application of these laws to the territories does not appear necessary or appropriate.

<u>Discussion</u>: <u>Subchapter I, Civil Rights Generally</u> (42 U.S.C. 1981-1996). The laws contained in Subchapter I of Chapter 21 were all (except for those at 42 U.S.C. 1995 and 1996) enacted shortly after the Civil War, some as part of the Civil Rights Act of 1866, some as part of the Ku Klux Klan Act of 1871. They appeared in the Revised Statutes of 1874, and none has been substantively amended since--except for the 1979 amendment to 42 U.S.C. 1983, to make it applicable to the District of Columbia. They are sometimes referred to collectively as the Civil Rights Laws. These laws provide the foundation for an enormous amount of litigation, much of it occurring in the last quarter century.

The most significant provisions are these:

<u>42 U.S.C. 1981</u>, which provides that all "persons within the jurisdiction of the United States shall have the same right in every State and Territory" to make contracts, to sue, and to enjoy the equal benefit of laws "for the security of persons and property as is enjoyed by white citizens".

<u>42 U.S.C. 1982</u>, which provides that all "citizens of the United States" shall have the same right "in every State

and Territory" to acquire, hold, and dispose of property that "is enjoyed by white citizens".

42 U.S.C. 1983, which provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

42 U.S.C. 1985, which provides a cause of action for damages arising from a conspiracy to deprive a person "in any State or Territory" of certain civil rights.

42 U.S.C. 1994, which abolishes peonage "in any Territory or State of the United States".

The remaining sections contained in the Subchapter are for the most part procedural, and except for language concerning the jurisdiction of Federal courts, and placing certain responsibilities on Federal court officers, the provisions are of no special importance for current purposes.

There seems to be no room for doubt that the foregoing laws apply within the Virgin Islands, Guam and the Northern Marianas. Section 1983 has been the basis for decisions involving them all: Frett v. Government of the Virgin Islands, 839 F.2d 968 (1988); Bunyan v. Camacho, 770 F.2d 773 (1985), cert. denied 477 U.S. 903 (1986) (Guam); Fleming v. Department of Public Safety, 837 F.2d 401, cert. denied, 109

S. Ct. 222 (1988) (Northern Marianas). The rationale for these decisions means that 42 U.S.C. 1983 applies to American Samoa as well. The courts have had no difficulty in reading "Territory" to mean "territory" under 42 U.S.C. 1983, and it is reasonable to suppose that the term would be given the same meaning when it appears elsewhere in these civil rights laws.

That does not, however, end the matter, for these laws give rise to myriad, rather abstruse additional questions, a major one of which is what or who is a "person" for purposes of liability under 42 U.S.C. 1983, and for purposes of related sections that use the term. As an example, the University of Puerto Rico has been held to be a "person" under 42 U.S.C. 1983 (Marin v. University of Puerto Rico, 377 F. Supp. 613 (1974)), while the not strikingly dissimilar College of the Virgin Islands has been held not to be (Dennis v. College of the Virgin Islands, 398 F. Supp. 1317 (1975)). More important, in its recent decision in Ngiraingas v. Sanchez, 109 L. Ed. 163 (1990), the Supreme Court concluded that the territory of Guam is not a "person" that could be liable under section 1983. This decision calls into question the earlier Frett and Fleming decisions, but it does not cast doubt upon the geographic application of 42 U.S.C. 1983 to the territories involved. These refinements and others like them will not be discussed further here. The matters are both delicate and dynamic, and the cases both abundant and ever-changing. In the circumstances, even if there were a compelling local need for a modification of the law--and none is known to exist--an unusual expertise, accompanied by clairvoyance, would be needed to deal with the matter properly.

As is so often the case, Samoa's situation differs from that of the other areas here involved. While it is almost certainly as fully a "Territory" as any of the others, its lack of a Federal court might interfere with effective enforcement there. (But then again, it might not, given the subtleties of these old laws. The proceeding before the Supreme Court in the recent 42 U.S.C. 1983 case, Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989), commenced in a State court.) The need for civil rights protection is not a known problem in Samoa. If it were to become so, careful tailoring of these laws to meet Samoa's special situation would be needed.

Subchapter I-A, Institutionalized Persons (42 U.S.C. 1997-1997j). This subchapter contains the Civil Rights of Institutionalized Persons Act, enacted in 1980. It provides for the institution by the U.S. Attorney General in "any appropriate United States district court" of a civil action to protect the civil rights of a person in a public institution, such as a hospital for the mentally ill, a jail or prison, or a nursing home (42 U.S.C. 1997(1), 1997a(a)). The Act applies to covered institutions in "any of the territories and possessions of the United States" (42 U.S.C. 1997(4)), so that the Virgin Islands, Guam, and Samoa are unarguably covered. While section 502(a)(2) of the Covenant would not serve to extend the law to the Northern Marianas, given its enactment in 1980, section 105 of the Covenant would do so, because the law is also fully applicable to the States so that express mention of the Northern Marianas is not necessary. Because Samoa lacks a United States District Court, enforcement could pose a problem there. A means might be found to institute an action in the District Court for the District of Columbia, were the need to arise.

Subchapter II, Public Accommodation (42 U.S.C. 2000a-2000a-6). This Subchapter constitutes Title II of the Civil Rights Act of 1964. That Act contains no general definition or other provision making clear its geographic reach (78 Stat. 241), but a provision of Title II defining "commerce" serves to make it applicable to the territories. This Subchapter (or Title) prohibits discrimination or segregation on the basis of race, color, religion, or national origin in "any place of public accommodation" (42 U.S.C. 2000a(a)), if "its operations affect commerce" (42 U.S.C. 2000a(b)). The kinds of establishments that are comprehended are further defined, and "commerce" is stated to include travel, commerce, transportation, or communication among the States "or between . . . any territory or possession and any State" (42 U.S.C. 2000a(c)). Accordingly, places of public accommodation in the territories, if their operations affect commerce, are comprehended by Subchapter II. (The 1964 date of enactment causes section 502(a)(2) of the Covenant to extend the provisions to the Northern Marianas.)

Enforcement may be effected either by the person aggrieved or by the U.S. Attorney General, but in either event jurisdiction is in U.S. District Courts (42 U.S.C. 2000a-6). Samoa is again disadvantaged, because no District Court has jurisdiction with respect to Samoa. Because Samoa is understood to be free of discriminatory practices in public accommodations, this shortcoming can probably be overlooked. Alternatively, if a problem exists or needs to be anticipated, the Samoa High Court could be given jurisdiction, by way of an amendment to the basic law.

Subchapter III, Public Facilities (42 U.S.C. 2000b-2000b-3). This Subchapter constitutes Title III of the Civil Rights Act of 1964. It authorizes the United States Attorney General to institute a civil action in a U.S. District Court based upon a complaint by an individual that he has been "denied equal utilization of any public facility which is owned, operated, or managed by or on behalf of any State or subdivision thereof . . ." on account of race, color, religion, or national origin (42 U.S.C. 2000b(a)). The term "State" is not defined, either for purposes of the Act generally or for purposes of this Subchapter, and no language appears elsewhere in the Subchapter to suggest that jurisdictions other than States are affected. Accordingly, it must be inferred that Subchapter III does not apply to public facilities in the territories.

Subchapter IV, Public Education (42 U.S.C. 2000c-2000c-9). Subchapter IV, which is derived from Title IV of the Civil Rights Act of 1964, is directed toward "the orderly achievement of desegregation in public education" (42 U.S.C. 2000c-6(a)) but disclaimers in the Subchapter make clear that it is not to constitute the basis for student busing or other techniques for achieving racial balance (42 U.S.C. 2000c(b), 2000c-6(a)). If he believes that the goal of orderly desegregation will thereby by furthered, the U.S. Attorney General may bring a civil action in a U.S. District Court, based on a complaint that minor children are being deprived of the equal protection of the laws, or that individuals have been denied admission to a public college on the basis of race, color, religion, sex, or national origin (42 U.S.C. 2000c-6(a)).

The Subchapter applies to public schools and public colleges operated by a "State", a term that appears in the Subchapter (42 U.S.C. 2000c(c), 2000c-2) but is nowhere defined. In the circumstances, it must be supposed that the term does not include the territories. Inasmuch as none maintains, or has maintained for many decades, segregated schools, no loss to the people of the territories from the inapplication of the Subchapter would seem to arise.

Subchapter V, Federally Assisted Programs (42 U.S.C. 2000d-2000d-7). This Subchapter, derived from Title VI of the Civil Rights Act of 1964, provides that

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (42 U.S.C. 2000d)

The term "United States" is not defined, nor is the term "State", which appears elsewhere in the Subchapter (42 U.S.C. 2000d-2, 2000d-6). But the territories are the beneficiaries of numerous Federal financial assistance programs, and the Congressional intent was almost certainly to protect territorial as well as State recipients. Enforcement is through rules and regulations issued by the granting Federal agency, and a violation of the language above quoted can result in the termination of Federal financial assistance (42 U.S.C. 2000d-1). The regulations of the Department of the Interior extend to all of the territories (43 CFR 17.12(d)), and this appears to be a proper reading of the law. Accordingly, it may be concluded that Subchapter V applies to the territories.

Subchapter VI, Equal Employment Opportunities (42 U.S.C. 2000e 2000e-17). This portion of the Civil Rights Act of 1964--commonly referred to as Title VII of the Act--is of greatest importance, at least as measured by the amount of litigation it has spawned. The purpose of Title VII is to eliminate discrimination in employment based on race, color, religion, sex, or national origin (42 U.S.C. 2000e-2), and it creates the Equal Employment Opportunities Commission for administration and enforcement (42 U.S.C. 2000e-4). Subchapter VI (or Title VII of the Act) unquestionably applies to the territories, with the Virgin Islands, Samoa, and Guam expressly named (42 U.S.C. 2000e(i)), and with section 502(a)(2) of the Covenant operating to extend it to the Northern Marianas as well.

The absence of a Federal District Court with jurisdiction in Samoa could hamper enforcement there (42 U.S.C. 2000e-5(f), 2000e-6), and an amendment to the law to make provision for court jurisdiction ought to be achieved, if employment discrimination becomes a problem in Samoa. It is not known to be at this time.

Subchapter VII, Registration and Voting Statistics (42 U.S.C. 2000f). The sole section of this Subchapter directs the Secretary of Commerce to collect registration and voting statistics, focussing on race, color, and national origin. The section contains no hint of the areas to be covered, but because the first information was to be part of the next Decennial Census, and because the territories are generally covered by the census laws (see Memorandum No. 13-1), they are probably comprehended here as well.

Subchapter VIII, Community Relations Service (42 U.S.C. 2000g-2000g-3). This Subchapter, derived from Title X of the Civil Rights Act of 1964, creates the Community Relations Service, now within the Department of Justice. It is charged in pertinent part with assisting "communities and persons therein" in resolving disputes relating to discriminatory practices "which impair the rights of persons in such communities under the Constitution or laws of the United States" (42 U.S.C. 2000g-1). Although the term "State" (undefined) appears in some sections (42 U.S.C. 2000g-1, 2000g-2), the references are not necessarily geographically limiting. Key provisions of the Constitution, particularly the Fourteenth Amendment, apply in the territories. Were the territories to present disputes relating to discrimination--

which they are unlikely to do, as a factual matter--it seems probable that the Community Relations Service could provide assistance.

<u>Subchapter IX, Miscellaneous Provisions</u> (42 U.S.C. 2000h-2000h-6). These provisions, derived from Title XI of the Civil Rights Act of 1964, are procedural and they thus have no geographical application as such. They would apply if the pertinent provision of the 1964 Act applies. One section makes clear that Congress did not intend to preempt the subject matter, to the exclusion of "State" laws on the subject (42 U.S.C. 2000h-4). While there appear [illegible] no cases on the point, it seems probable that the section would be read so as not to foreclose territorial laws on the subject, either.

<u>Conclusion</u>: The relationship of many of the civil rights laws contained in Chapter 21 of Title 42 to the territories is ragged and arguable. But given the delicacy of the subject matter, particularly in connection with the old post-Civil War laws, and given the general absence in the territories of the kind of discrimination to which these laws were largely directed (i.e., discrimination based on race), it is probable that the decision-makers in both the Executive Branch and the Congress would be reluctant to amend them. The same considerations apply, but to a lesser extent, to the Civil Rights Act of 1964, in connection with which the draftsmen were largely oblivious to the territories. At least at such time as these later laws undergo revision and updating, they ought to be modified to clarify their application to the territories. Before that, should the territories become the sites of the kind of discrimination to which the Act is directed--which they do not now appear to be--the 1964 Act should be amended to make appropriate provision for them.

<u>Federal agency comments</u>: Comments were requested from the Department of Justice, which after consideration, offered none.

Memorandum No. 42-11
February 1990
Revised December 1991

Subject: (a) Privacy Protection
Title 42, Chapter 21A (42 U.S.C. 2000aa-2000aa-12)

(b) Indian Hospitals and Health Facilities
Title 42, Chapter 22 (42 U.S.C. 2001-2005f)

(c) Development and Control of Atomic Energy
Title 42, Chapter 23 (42 U.S.C. 2011-2296)

(d) Disposal of Atomic Energy Communities
Title 42, Chapter 24 (42 U.S.C. 2301-2394)

(e) Federal Flood Insurance
Title 42, Chapter 25 (42 U.S.C. 2414(e))

(f) National Space Program
Title 42, Chapter 26 (42 U.S.C. 2451-2484)

(g) National Space Grant College and Fellowship Program
Title 42, Chapter 26A (42 U.S.C. 2486-2486 l)

(h) Loan Service of Captioned Films and Educational Media for Handicapped
Title 42, Chapter 27 (42 U.S.C. 2495)

(i) Public Works Acceleration Program
Title 42, Chapter 31 (42 U.S.C. 2641-2643)

(j) Third Party Liability for Hospital and Medical Care
Title 42, Chapter 32 (42 U.S.C. 2651-2653)

(k) Economic Opportunity Program
Title 42, Chapter 34

Work-Study Programs (42 U.S.C. 2751-2756a)
Native American Programs (42 U.S.C. 2991-2992d)
Legal Services Corporation (42 U.S.C. 2996-2996l)

(l) Programs for Older Americans
Title 42, Chapter 35 (42 U.S.C. 3001-3058d)

(m) Community Facilities and Advance Land Acquisition
Title 42, Chapter 37 (42 U.S.C. 3101-3108)

(n) Public Works and Economic Development
Title 42, Chapter 38 (42 U.S.C. 3121-3245)

(o) Soil Information Assistance for Community Planning and Resource Development
Title 42, Chapter 40 (42 U.S.C. 3271-3274)

(p) Demonstration Cities and Metropolitan Development Program
Title 42, Chapter 41 (42 U.S.C. 3331-3339, 3371-3374)

Comment: The several chapters of Title 42 considered in this memorandum relate to a wide variety of subjects, many of which are of little interest in or to the territories. The important Federal financial assistance program discussed herein--the Older Americans Act ((l) below)--applies fully to the territories and contains comparatively generous allotment provisions for them.

Discussion: (a) Privacy Protection (42 U.S.C. 2000aa-2000aa-12) contains the 1980 law, the Privacy Protection Act, which makes it unlawful for "a government officer or employee" in the course of a criminal investigation or prosecution to search for or seize documentary materials possessed by a person not suspected of criminal activity (42 U.S.C. 2000aa(a)). The Act followed a Supreme Court decision that Congress viewed as an invasion of the personal privacy of innocent third parties, and it is intended "to limit governmental search and seizure of documentary materials possessed by persons engaged in first amendment activities" (1980 U.S. Code Cong. and Admin. News 3950).

A person aggrieved by a search or seizure that is barred by the Act has a civil cause of action

> (1) "against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a

> violation [of the Act], or against any other governmental unit . . ."; and
>
> (2) "against an officer or employee of a State who has violated [this Act] . . ., if such State has not waived its sovereign immunity". (42 U.S.C. 2000aa-6(a)).

The term "governmental unit" includes Puerto Rico, "any territory or possession of the United States", any local governmental unit, or any unit of State government (42 U.S.C. 2000aa-7(c)). The Federal district courts have jurisdiction of actions under the Act (42 U.S.C. 2000aa-6(h)).

The effects of the foregoing are not entirely clear. The Act would apply fully to constrain Federal or territorial officers in the Virgin Islands and Guam--and also in American Samoa, but the absence of a Federal district court there would deprive an aggrieved person in Samoa of the route to a remedy. But the Act may not apply at all to the Northern Marianas, because the two Covenant provisions that customarily serve as vehicles for extension appear not to apply in this case. Section 502(a)(2) cannot operate to extend the law to the Northern Marianas, because it was enacted after the January 9, 1978, effective date of that section; and section 105 applies only if the law names the Northern Marianas expressly (which this Act does not) or if it is one that could "also be made applicable to the several States". The references in the provisions quoted above to the waiver or nonwaiver by a State of sovereign immunity suggest that Congress may be constitutionally constrained from providing for actions against a State government for violations of the Act by its officers or employees. In the circumstances, the application of the Act to the Northern Marianas is at least arguable. If the matter is of sufficient moment in the Northern Marianas to warrant doing so, as seems likely, then the definition of "governmental unit" ought to be amended to refer expressly to the Northern Marianas. And the deficiency as to court jurisdiction in Samoa could at the same time be corrected--perhaps by placing jurisdiction in the Samoan High Court.

(b) The chapter on <u>Indian Hospitals and Health Facilities</u> (42 U.S.C. 2001-2005f) deals with the 1954 transfer of Indian Health Services from the Bureau of Indian Affairs and the Department of the Interior to the Public Health Service. The subject matter is irrelevant for purposes of this study. Several internal references to "States and Territories" are explained by the then current status of Alaska as a Territory, and the presence there of many beneficiaries of Indian health services.

(c) The chapter entitled <u>Development and Control of Atomic Energy</u> (42 U.S.C. 2011-2296) contains the Atomic Energy Act of 1954, as amended, together with extensive amendatory and supplementary legislation. The authority originally conferred on the Atomic Energy Commission is now, with modifications over the years, placed in the Nuclear Regulatory Commission and the Secretary of the Department of Energy. The chapter is long and complex, as befits its subject matter.

With few exceptions--all of which may be of academic interest only, as discussed below--the laws in this chapter apply in the same manner to the Virgin Islands, Guam, Samoa, and the Northern Marianas as they do to the States. For purposes of the Chapter, the term "United States" when used in a geographical sense includes "all Territories and possessions of the United States" and Puerto Rico (42 U.S.C. 2014(bb)). And in an important section dealing with cooperation with the States and with, in general, Federal-State relations under the Atomic Energy Act (42 U.S.C. 2021), the term "State" is defined to include any Territory or possession (42 U.S.C. 2021(n)). That is probably sufficient to meet the current needs of the territories.

There are some sections, however, that refer to "States" without a definition, or that contain one that excludes the territories. These probably create no problems at this time, but a general definition of the term "State" to include the territories (perhaps with exceptions that may be appropriate) might be of value for the future. The sections in question are

-- 42 U.S.C. 2014(s), (w), and (gg), which contain definitions of "person", "public utility", and "precautionary evacuation", respectively, and in so doing use the term "State" without definition;

-- 42 U.S.C. 2018, referring to the authority of a "State" agency over electric power produced by nuclear facilities;

-- 42 U.S.C. 2021a, referring to facilities for nuclear storage or disposal;

-- 42 U.S.C. 2021b, which at 2021b(14) defines a "State" to include only the States, the District, and Puerto Rico for purposes of sections concerning low-level radioactive waste policy (42 U.S.C. 2021b-2021j), but because the program relates to waste disposal on a regional basis, it would appear to be irrelevant as a practical matter to the territories;

-- 42 U.S.C. 2098, but the section relates to public lands, of which there are none in the territories (see Memorandum No. 43-1);

-- 42 U.S.C. 2113 (concerning provisions of Commission licenses resulting in the production of uranium or thorium mill tailings) and 2114 (concerning Commission authority with respect to uranium and thorium mill tailings) refer to States, undefined, but they are at least now as a practical matter irrelevant, for there are no nuclear activities in the territories that would be affected;

-- 42 U.S.C. 2201, relating to the duties of the Commission, which at subsection (f) refers to the use of "State" personnel, and at (q) to easements to a "State", but the latter reference is to public lands; and further language in (q) contains a useful reference to Territories and possessions (pertaining to corporations);

-- 42 U.S.C. 2208, permitting payments in lieu of taxes to "States" where the Commission holds property, but it has none in the territories; and

-- 42 U.S.C. 2238 and 2239, relating to procedures in connection with licenses issued by the Commission for nuclear facilities, of which there are none in the territories.

It seems appropriate to conclude that the foregoing create no problems at this time, but when a convenient legislative vehicle is at hand, it would be well to define "State" to include the territories.

(d) The Disposal of Atomic Energy Communities (42 U.S.C. 2301-2394) contains the law, first enacted in 1955, that authorized the sale and other disposition of property in the communities created by the Atomic Energy Commission at Oak Ridge, Tennessee, Richland, Washington, and Los Alamos, New Mexico. The chapter has no relevance to the territories or to this study.

(e) The chapter entitled Federal Flood Insurance consists now of but one subsection (42 U.S.C. 2414(e)), and it concerns the issuance of notes to the Treasury Department by the Federal Emergency Management Agency. The provision is as a practical matter a part now of Chapter 50 of Title 42, National Flood Insurance (42 U.S.C. 4001-4128), considered in Memorandum No. 42-12(g).

(f) The National Space Program (42 U.S.C. 2451-2484) provides for the National Aeronautics and Space Administration, the National Space Council, and the breathtaking activities of each--plus such lesser matters as how prices are set for the use of the Space Shuttle (42 U.S.C. 2466-2466c). Nothing in these laws has application, as such, to the territories, and nothing in them results in any different treatment for the territories than for any other areas of the United States. In just one instance the term "State" creeps in, undefined--this in connection with the removal from a "State" court to a Federal court of tort claims for negligence by medical professionals employed by NASA (42 U.S.C. 2458a(c))--but this presents no genuine problem. The territories and their people are beneficiaries of this program as fully as are the people of the States.

(g) The National Space Grant College and Fellowship Program (42 U.S.C. 2486-2486l) contains the 1987 law that provides Federal funds for grants and contracts to individuals and institutions, and fellowships to graduate students, for work in fields related to space. The term "State" is defined to include explicitly the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 2486b(12)), so that public institutions in all of them are, if otherwise qualified, eligible for the financial assistance authorized. The Act applies to the territories as fully as it applies to the States.

(h) The chapter entitled Loan Service of Captioned Films and Educational Media for Handicapped now consists of one section only (42 U.S.C. 2495), and that section provides for the National Advisory Committee on Education of the Deaf. Its function is, as its name makes clear, to advise the Secretary of Education on programs relating to the education of the deaf. No language excludes the territories nor affects them in any unusual manner.

(i) The Public Works Acceleration Program (42 U.S.C. 2641-2643) contains the Public Works Acceleration Act, enacted in 1962, which provided Federal grants-in-aid to facilitate public works projects in areas of substantial unemployment or areas designated as redevelopment areas. Because the 1962 Executive order that implemented the Act (Executive Order No. 11049 of September 14, 1962) was revoked by Executive Order No. 12553 of February 25, 1986, the law may now be regarded as obsolete.

(j) The chapter entitled Third Party Liability for Hospital and Medical Care (42 U.S.C. 2651-2653) permits the United States to recover its costs of hospital, medical, surgical, or dental care when the United States is required by law to provide for such care, if the costs arise from injury inflicted upon the patient by the negligence of a third party. Certain care and treatment furnished by the Veterans' Administration is excluded. The chapter contains no provision concerning its geographic scope, but because no geographic limitation is imposed, the law would apply in any area--including the territories--where jurisdiction over the third party could be obtained.

(k) The Economic Opportunity Program, which is Chapter 34 of Title 42, formerly contained the extensive Economic Opportunity Act of 1964, a law that has now largely been repealed or become obsolete, except for three programs that will be considered separately.

-- The Work-Study Programs (42 U.S.C. 2751-2756a) provides Federal assistance to institutions of higher education, to permit them to provide financial aid through work-study arrangements for needy students at the under-graduate or graduate levels, or in professional schools. The cited sections contain no provision as to geographical application (although the former 42 U.S.C. 2752(a) did so, by stipulating a 2% set-aside for the territories, plus Puerto Rico and the Trust Territory), but the special authority granted to the Secretary of Education under the Higher Education Act of 1965, as amended, with respect to the territories, applies to the Work-Study Programs as well. (These programs were originally enacted as part of the Economic Opportunity Act of 1965, but they were later made part of the Higher Education Act.) That special authority, codified at 20 U.S.C. 1144a and discussed in Memorandum No 20-4, gives broad authority to the Secretary of Education to act to "take into account the unique circumstances in" and "adapt programs under this Act to the needs of" Guam, the Virgin Islands, Samoa, and the Northern Marianas.

-- Native American Programs (42 U.S.C. 2991-2992d) contain the Native American Programs Act of 1974, a program of

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Federal financial assistance to American Indians, Alaskan Natives, Native Hawaiians, and by an amendment in 1987,

> Native American Pacific Islanders (including American Samoan Natives). (42 U.S.C. 2991a)

An extensive report from the Senate Select Committee on Indian Affairs makes clear that "Native American Pacific Islanders" means the natives of Guam, Samoa, and the Northern Marianas (1987 U.S. Code Cong. and Admin. News 896-908). The purpose of the program is to provide financial assistance to "public and nonprofit agencies serving" such Native American Pacific Islanders, but they appear to have a lesser priority than the other groups who are beneficiaries of the program, because the Secretary of Health and Human Services is authorized to provide for them "subject to the availability of funds" (42 U.S.C. 2991b(a)). Funds for the program are authorized to be granted "to promote the goal of economic and social self-sufficiency" (42 U.S.C. 2991a).

As of the spring of 1991, four awards had been made, to agencies in American Samoa, the Northern Marianas, Seattle, and San Francisco. The Senate Committee's comments in 1987 suggested that among the earliest beneficiaries would be agencies in Hawaii, California, and Washington, all of which have substantial Samoan populations (1987 U.S. Code Cong. and Admin. News 898). The presence in communities in the States of sizeable groups of disadvantaged Samoans may account for the special and redundant parenthetical reference to "American Samoan Natives" following the use of "Native American Pacific Islanders". But the report makes clear that assistance to agencies serving such Native American Pacific Islanders in their own territories is intended also to be authorized.

A question necessarily arises as to the exclusion of natives of the Virgin Islands. The legislative history of the 1987 amendments suggests that the Congress was then focusing on discrete ethnic groups, and it might be difficult to define such a group of native Virgin Islanders, given the movement into and out of the U.S. Virgin Islands historically of Caribbean natives generally. Nevertheless, equity requires that the inclusion of native Virgin Islanders be given thoughtful consideration, if the program continues and if Pacific natives become significant beneficiaries of it.

-- The Legal Services Corporation (42 U.S.C. 2996-2996-l), derived from the Act of that name enacted in 1974, is a private, nonprofit organization that provides Federal financial support for legal assistance in noncriminal proceedings to persons financially unable to afford legal assistance. It does so through grants to and contracts with individuals, partnerships, corporations, and nonprofit organizations, and with State and local governments (42 U.S.C. 2996e(a)(1)). The term "State" is defined to include expressly the Virgin Islands, Guam, and Samoa, as well as "any other territory or possession of the United States" (42 U.S.C. 2996a(8)). The Northern Marianas are comprehended by operation of section 502(a)(2) of the Covenant, so all of the areas that are subjects of this study are fully covered in the same manner as the States.

(l) The chapter entitled Programs for Older Americans (42 U.S.C. 3001 et seq.) contains the Older Americans Act of 1965, as amended. The Act provides a great number of Federal grant programs--some formula grants, some project grants--to assist the elderly, relating for example to senior centers, coordinate nutrition services, home delivered nutrition services, in-home needs, transportation, and many others. Because the Virgin Islands, Guam, Samoa, and the Northern Marianas are all defined as "States" (42 U.S.C. 3002(3)), and because they are treated no differently from the States except in connection with allotments, discussed below, the territories are fully covered by the Act and are entitled to all the benefits the States receive. No provision appears to be disadvantageous to them, nor does any appear to create particular difficulties for them. The Act is administered by the Department of Health and Human Services, except for the provisions concerning community service employment for older Americans (42 U.S.C. 3056-3056g), which is the responsibility of the Department of Labor. The administrative arrangements within a State, and the State plans that are required as a basis for grants under the Act (42 U.S.C. 3025, 3026), are enormously complex, but the territories have received grants under the Act so these requirements have evidently not been found to be insurmountable.

As to the allotment percentages, the Act contains three, and in all of them the territories fare somewhat better, relatively, than do the states:

-- 42 U.S.C. 3024(a) provides allotments for purposes of many of the programs authorized by the Act. The States (expressly excluding the Virgin Islands, Guam, Samoa, and the Northern Marianas) receive allotments based on their over-60 populations, with a minimum for each State stipulated at 1/2 of one percent of the sum appropriated. Guam and the Virgin Islands are to receive not less than 1/4 of one percent of the sum appropriated, and Samoa and the Northern Marianas are to receive not less than 1/16 of one percent. Based on their respective populations, contrasted with those of the States, the territories receive generous treatment.

-- 42 U.S.C. 3028(b) provides a formula for allotting funds for the costs of administration of the State plan, and associated administrative costs. The formula for the Virgin Islands, Guam, Samoa, and the Northern Marianas again appears to guarantee them each a sum greater than that of the States, in relation to respective populations.

-- 42 U.S.C. 3056d(a), relating to allotments for the community service employment program for older Americans, provides that the territories receive an allotment percentage of 75 percent (while the States can vary under their formula from 33 1/3 percent to 75 percent), and they are thus guaranteed a minimum which again, on a population basis, is more generous than the minimum for the States.

In sum, the Older Americans Act appears in general to treat the territories fairly, by according them the same program treatment as the States, and to provide for them somewhat more generously, relative to the States, in the allotment of funds.

(m) The provisions under the title Community Facilities and Advance Land Acquisition (42 U.S.C. 3101-3108) may relate to a grant program that has expired. The appropriation authorization at 42 U.S.C. 3108 suggests this, but the law was amended as recently as 1982 (42 U.S.C. 3105(b)), so the program may continue in some manner. In any event, current law authorizes Federal assistance to "States" and their local public bodies in the form of grants for the advance acquisition of land for public purposes (42 U.S.C. 3104), with the term "State" defined to include the "territories and possessions"--so defined in 1965 (42 U.S.C. 3106(a)). Accordingly, the Virgin Islands, Guam, Samoa, and the Northern Marianas all qualify, the latter through operation of section 502(a)(2) of the Covenant.

(n) The chapter entitled Public Works and Economic Development (42 U.S.C. 3121-3245) is derived from the Public Works and Economic Development Act of 1965, as amended. It provides for numerous Federal programs of project grants and loan guarantees to the "States" for a wide variety of economic development undertakings, including health projects, navigation projects, and a great number of others. Some portions of the Act have been repealed, and the appropriations authorizations for the rest have expired, but programs under the Act continue to this writing under other means, although the Catalog of Federal Domestic Assistance indicates that several such programs are "proposed" for termination no later than September 30, 1990 (CFDA 11. 300-11.312). For immediate purposes it may be sufficient to note that the territories all qualify, as fully and on the same terms as the States, for the Federal programs provided. The term "State" is defined to include expressly the Virgin Islands, Guam, and Samoa (42 U.S.C. 3216), and because the definition dates from 1965, it comprehends the Northern Marianas as well, by operation of section 502(a)(2) of the Covenant. A portion of the Act pertaining to economic recovery for disaster areas (42 U.S.C. 3231-3235), amended as recently as 1988, continues, and the territories are eligible for its benefits.

Of academic interest--but only that--is a portion of the 1965 Act (now repealed) that made special and necessary provision for the Virgin Islands, but not for the Pacific territories. The Act originally provided for the creation of regional planning commissions (formerly 42 U.S.C. 3181-3196), with the regions "within contiguous States", except for Alaska, Hawaii, Puerto Rico, the Virgin Islands, California, and Texas (formerly 42 U.S.C. 3181(a)), each of which could have regional planning commissions wholly within their own borders. The failure to name the Pacific territories in that exception obviously effectively foreclosed their participation in that program. But as noted, the matter is academic at this time, the regional commission authority having been repealed in 1981.

(o) The chapter entitled Soil Information Assistance for Community Planning and Resource Development (42 U.S.C 3271-3274) contains a short, 1966 statute that authorized the Secretary of Agriculture to enter cooperative agreements "to make available soil surveys to meet . . . needs of the States and other public agencies in connection with community planning and resource development" (42 U.S.C. 3271). The appropriation authorization is open-ended (42 U.S.C. 3274). Although the States (and other "public agencies") alone are mentioned in the statute, the territories would all be eligible for its benefits if the Secretary of Agriculture were, in his discretion, to choose to implement the law in any of those areas. He could do so under the authority contained in the 1980 law that permits the extension of "programs administered by the Department of Agriculture to Guam, the Northern Mariana Islands, . . . the Virgin Islands, and American Samoa" (48 U.S.C. 1469(c)). Under that authority the Secretary may waive or modify statutory requirements if "he deems it necessary in order to adapt the programs to the needs of the respective territory".

(p) Demonstration Cities and Metropolitan Development Program (42 U.S.C. 3331-3339, 3371-3374) contains what remains of the 1966 legislation commonly referred to as the Model Cities program. The sections concerning planned area-wide development (42 U.S.C. 3331-3339) provide for coordination of Federal programs directed toward particular area-wide developments--developments that are themselves the recipients of Federal benefits flowing to sometimes a multiplicity of State and local agencies involved in the same development, from a multiplicity of Federal agencies. It is improbable that the territories have been or will be involved in any such area-wide developments, but if they are, they like the States and their public agencies are eligible for planning grants (42 U.S.C. 3335, 3338(3)), and are otherwise within the terms of the law.

The remaining section (excluding 42 U.S.C. 3371 which pertains only to Alaska) authorizes the Secretary of Defense to acquire housing from the home owner, if the closing of a military installation has resulted in there being no market for the property (42 U.S.C. 3374). The authority of the Secretary of Defense applies only to closures in the States and the District of Columbia (42 U.S.C. 3374(m)), but the limited circumstances under which the authority can be exercised suggest that it could not realistically be applied in the only territory--Guam--where a military closure could under present circumstances occur. For example, the home owner must be a Federal employee or serviceman employed at the closed facility, whose services are terminated by the closure (42 U.S.C. 3374(a)), and there would be few, if any in Guam, who would meet those requirements. But if there were any, their property would almost certainly gain in value, so they could then not meet the further statutory test of "no present market" (42 U.S.C. 3374(a) (3)). The inapplicability of this law to the territories, thus, does not appear to require modification.

Conclusion: The laws discussed herein apply for the most part to the territories, and on terms that appear to be fair to them. In two instances, however, technical problems are present that ought, nonurgently, to be corrected: in connection with Privacy Protection ((a) above) and the Development and Control of Atomic Energy ((c) above). In addition, consideration should be given to whether natives of the Virgin Islands ought to be entitled to the same benefits as are afforded "Native American Pacific Islanders" under the Native American Programs provided for by the Economic Opportunity Act, as amended ((k) above).

Federal agency comments: Comments were not sought with respect to many of the foregoing provisions of Title 42, because they do not seem required. In several instances, however, comments were invited: from the Justice Department on (a), Privacy Protection; from the Department of Health and Human Services with respect to (k), the Native American Programs under the Economic Opportunity Act, and (l), Programs for Older Americans; and from the Nuclear Regulatory Commission with respect to (c), Atomic Energy, and related chapters. All comments received are reflected above.

Memorandum No. 42-12
April 1990
Revised December 1991

Subject: (a) Narcotic Addict Rehabilitation
Title 42, Chapter 42 (42 U.S.C. 3401-3441)

(b) Department of Health and Human Services
Title 42, Chapter 43 (42 U.S.C. 3501-3514)

(c) Department of Housing and Urban Development
Title 42, Chapter 44 (42 U.S.C. 3531-3545)

(d) Fair Housing
Title 42, Chapter 45 (42 U.S.C. 3601-3631)

(e) Justice System Improvement
Title 42, Chapter 46 (42 U.S.C. 3711-3797)

(f) National Housing Partnerships
Title 42, Chapter 49 (42 U.S.C. 3931-3941)

(g) National Flood Insurance
Title 42, Chapter 50 (42 U.S.C. 4001-4128)

(h) Design and Construction of Public Buildings to Accommodate Physically Handicapped
Title 42, Chapter 51 (42 U.S.C. 4151-4157)

(i) Advisory Commission on Intergovernmental Relations
Title 42, Chapter 53 (42 U.S.C. 4271-4279)

(j) National Environmental Policy
Title 42, Chapter 55 (42 U.S.C. 4321-4370b)

(k) Environmental Quality Improvement
Title 42, Chapter 56 (42 U.S.C. 4371-4375)

(l) Environmental Pollution Study
Title 42, Chapter 57 (42 U.S.C. 4391-4395)

(m) National Urban Policy and New Community Development
Title 42, Chapter 59 (42 U.S.C. 4501-4503)

(n) Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Program
Title 42, Chapter 60 (42 U.S.C. 4541-4594)

(o) Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs
Title 42, Chapter 61 (42 U.S.C. 4601-4655)

(p) Intergovernmental Personnel Program
Title 42, Chapter 62 (42 U.S.C. 4701-4772)

(q) Lead Based Paint Poisoning Prevention
Title 42, Chapter 63 (42 U.S.C. 4821-4846)

(r) Noise Control
Title 42, Chapter 65 (42 U.S.C. 4901-4918)

(s) Domestic Volunteer Service
Title 42, Chapter 66 (42 U.S.C. 4951-5085)

Comment: The chapters of Title 42 considered herein do not appear to have major importance in or to the territories. These laws for the most part apply to them, and with only minor exceptions, do not appear to require modification.

Discussion: (a) The chapter entitled Narcotic Addict Rehabilitation (42 U.S.C. 3401-3441) contains the Narcotic Addict Rehabilitation Act of 1966--a law that has not been amended in an important way since its enactment (the only amendments having been made to the definitions at 42 U.S.C. 3411, and those amendments having occurred no later than 1972), notwithstanding the increasing importance of the subject matter. The Act does not apply to the territories. It applies only to the States, the District of Columbia, and Puerto Rico (42 U.S.C. 3411(g), (h)).

The purpose of the Act is to provide treatment under the aegis of the Surgeon General, usually in facilities of the Public Health Service, of narcotic addicts in two categories: those who have been charged with or convicted of a Federal crime, if such persons are "likely to be rehabilitated" if confined and treated, instead of being prosecuted and sentenced to serve; and those who, not charged with committing an offense, "may be rehabilitated and returned to society as useful members" (42 U.S.C. 3401). Proceedings to achieve confinement and treatment are conducted by the U.S. Attorney in Federal District Courts, and the details of the process are set forth in detail in the law (42 U.S.C. 3413-3420). The foreseen result is hospitalization in a "facility of the Public Health Service especially equipped for the accommodation of addicts", or "any other appropriate public or private hospital or facility available to the Surgeon General for the care and treatment of addicts" (42 U.S.C. 3411(d), 3424).

It is reasonable to infer that this 1966 law has not spawned an active program, such inference being drawn from the absence of amendments to the law for most of its life, and from the paucity of litigation that has arisen under it (to judge from the U.S. Code Annotated). That being so, the exclusion of the territories from its application does not seem to warrant correction. Further, not only are there no Public Health Service hospitals in any of the territories, but in addition the care and treatment of narcotic addicts that may now be afforded by hospitals in the territories are not likely to be sufficiently sophisticated to meet whatever standards the Surgeon General may apply. In these circumstances, even though drug problems in the territories rank very high for governmental attention, this Act does not appear to be a useful candidate for meeting them.

(b) The chapter entitled the Department of Health and Human Services (42 U.S.C. 3501-3514), contains organic laws for that Department, relating to its organization and some of its functions. Nothing in it is of concern to this study, and nothing appears that is troublesome to the territories.

(c) Similarly, the laws codified under Department of Housing and Urban Development (42 U.S.C. 3531-3545) concern the creation and some of the functions of that Department. They contain nothing pertinent to this study and nothing that appears troublesome to the territories.

(d) Fair Housing (42 U.S.C. 3601-3631) contains the Fair Housing Act, a law that prohibits discrimination in the sale or rental of certain housing, based on race, color, religion, sex, or national origin--and, as added in 1988, discrimination based on physical or mental handicap or familial status. The Act applies to the territories, with the term "State" defined to include "any of the territories and possessions of the United States" (42 U.S.C. 3602(g)). As explained below, however, the effect of the Act in Samoa and the Northern Marianas is reduced by the locally-applicable laws restricting land alienation.

In commenting on this memorandum, the Department of Housing and Urban Development points out that the prohibitions apply to all housing, and not just to Federally-assisted housing. The prohibitions do not apply generally to "any single-family house sold or rented by an owner" (42 U.S.C. 3603(b)). Enforcement is provided through conciliation agreements negotiated by the Secretary of Housing and Urban Development, by administrative proceedings before an administrative law judge of that Department, or by suit filed in a Federal District Court (42 U.S.C. 3610-3614). The absence of a Federal District Court in Samoa would limit a complainant's remedies there, but a conciliation agreement or an administrative proceeding would be available for a Samoan, although court enforcement of the latter would not.

The laws of the Northern Marianas and of Samoa restrict land alienation based on race or national origin. The Northern Marianas restriction appears in section 805 of the Covenant, a Federal law (Public Law 84-241, approved March 24, 1976). The Court of Appeals for the Ninth Circuit recently concluded that section 805 does not violate the equal protection requirements of the U.S. Constitution (Wabol v. Villacrusis, No. 87-1736, February 20, 1990). The Samoa restriction is authorized by Article I, section 3 of the Samoan Constitution and by laws enacted in Samoa to implement that provision. The Samoan Constitution was locally drafted, but has Federal recognition as of 1983 (48 U.S.C. 1662a). It is not, however, a Federal law and the constitutionality of the restrictions on land alienation in Samoa's Constitution and laws, based upon race, has not been tested in Federal court. The constitutionality of these race-based land alienation laws was before the U.S. Court of Appeals for the District of Columbia in Corporation of the Presiding Bishop v. Hodel (830 F.2d 374 (1987), cert. denied 108 S. Ct. 1752

(1988)), but the court found it "unnecessary" to consider the constitutional question (at p. 383). The court did, however, allude to the alienation restraints with a hint of approval, based on historic and cultural considerations (at p. 386-387). The Wabol decision would doubtless assist a court, were the Samoa question to arise, in concluding that Samoa's restrictive alienation laws also are not constitutionally vulnerable.

A provision of the Fair Housing Act invalidates a "State's" own "discriminatory housing law" (42 U.S.C. 3615). But this provision would be superseded in the case of the Northern Marianas and Samoa--in the Northern Marianas by the Federal law agreeing to restraints (in 1976, in section 805 of the Covenant), and in Samoa by the Federal law recognizing the Samoa Constitution (in 1983), which the D.C. Circuit has stated to "some extent . . . ratified . . . in principle" the restraints in the Samoa Constitution (Presiding Bishop, at 386).

It seems reasonable to conclude, therefore, that the Fair Housing Act is not applicable to Samoa and the Northern Marianas to the extent that land alienation laws in those areas are in conflict with it. That does not mean, however, that the Fair Housing Act is otherwise inapplicable to Samoa and the Northern Marianas--it is applicable in its entirety to the Virgin Islands and Guam--inasmuch as it prohibits discrimination in sales or leases on the several grounds recited above in addition to "race" and "national origin". Those prohibitions would apply to covered property in Samoa and the Northern Marianas.

(e) The chapter entitled Justice System Improvement (42 U.S.C. 3711-3797) contains the numerous laws enacted in the last twenty years that have replaced the original Omnibus Crime Control and Safe Streets Act of 1968, which originally constituted this chapter. The current provisions of the chapter apply fully to the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 3791(a)(2)), with these areas in all instances accorded the same treatment as the States--except for a single provision referred to below that relates to the allocation of funds under the Act's formula grant program. These laws do not require change to accommodate territorial needs.

Under the provisions of this chapter, the Office of Justice Programs is created in the Department of Justice, along with its components which include the National Institute of Justice, the Bureau of Justice Statistics, and the Bureau of Justice Assistance. Each is authorized to make grants for which the territories and their agencies are eligible. The most important of the grants are probably the formula grants "for the purpose of enforcing State and local laws that establish offenses similar to offenses established in the Controlled Substances Act . . . and to improve the functioning of the criminal justice system with emphasis on violent crime and serious offenders" (42 U.S.C. 3751(b)); and discretionary grants for, among other things, educational programs for criminal justice personnel and technical assistance to States (and territories) and local units of government (42 U.S.C. 3760). The exception referred to above pertains to the allocation of funds for the formula grant program. To receive a formula grant, a "State" (including each of the territories) must apply to the Bureau of Justice Assistance for it, and its application must be approved. Thereafter each participating "State" is entitled to .4 percent of the Federal funds available for the program, and after those allocations are made, the remainder is allocated to the States (and territories) on the basis of population (42 U.S.C. 3756(a)). The law provides, however, that in the case of Samoa and the Northern Marianas, they will together be treated as one "State", with the .4 percent divided so that Samoa is allocated 67 percent of that .4 percent, and the Northern Marianas, 33 percent (42 U.S.C. 3791(a)(2)). Given their populations in relation to the populations of the States, it can readily be observed that these floors are extremely generous. The same is, of course, also true of the .4 percent floor accorded the Virgin Islands and Guam, each separately.

One other definition makes explicit provision for the territories. The term "public agency" includes them all, for purposes of the law providing death benefits for public safety officers (42 U.S.C. 3796b(5)). In the circumstances, no need appears to modify the laws in this chapter to meet territorial requirements.

(f) National Housing Partnerships (42 U.S.C. 3931-3941) contains the 1968 law, as amended (most recently in 1984), that authorizes the creation of a private corporation or corporations "to encourage maximum participation by private investors in programs and projects to provide low and moderate income housing" (42 U.S.C. 3931). The corporations so organized are not agencies of the Federal Government, and are subject to the Business Corporation Act of the District of Columbia (42 U.S.C. 3932(a)). The laws in question contain no geographic limitations on the operations of the corporation or corporations.

(g) National Flood Insurance (42 U.S.C. 4001-4128) refers to the Act of that name passed in 1968, as amended, in recognition of the difficulty property owners encounter in obtaining flood insurance from the private sector. The Federal program, which is administered by the Federal Emergency Management Agency, applies fully to the territories (42 U.S.C. 4121(a)(2)), and the Act has value to them because the term "flood" means not only the phenomena that that word usually denotes, but also "tidal surges, abnormally high tidal water, tidal waves . . . hurricanes" and tidal erosion (42 U.S.C. 4121(a)(1), (c)). The statute authorizes an industry program with Federal financial assistance (42 U.S.C. 4051), a Federal program with industry assistance (42 U.S.C. 4081), and a program of direct insurance (42 U.S.C. 4011) with priority in the last of these given to private residences, churches, and small businesses (42 U.S.C. 4012(a)). But flood insurance coverage cannot be provided in any area "unless an appropriate public body shall have adopted adequate land use and control measures (with effective enforcement provisions)" which the Director of FEMA finds to be consistent with the "comprehensive criteria for land management and use" that he has developed under authority elsewhere in the Act (42 U.S.C. 4022, 4102). It will be noted that a cut-off date for eligibility for flood insurance of December 31, 1971--by which time the "State's" land use and control measures had to be in place (42 U.S.C. 4012(a)(c)(2))--has in effect been eliminated under a 1983 amendment (42 U.S.C. 4022), so that a State or territory that missed the earlier date may still qualify.

(h) The chapter entitled Design and Construction of Public Buildings to Accommodate Physically Handicapped (42 U.S.C. 4151-4157) requires that certain public buildings--generally those constructed by the United States, or leased by it, or financed with Federal financial assistance--must be accessible to the physically handicapped. Design standards are prescribed by the Administrator of General Services, except that the Departments of Housing and Urban Development and Defense, and the Postal Service, have authority to prescribe standards for construction of facilities relevant to them. The Act, passed in 1968, contains no provision as to geographic application, but GSA regulations provide that the GSA design standards apply to "construction and alteration of public buildings in the United States" (41 CFR 101-19.000), with the "United States" defined to include "the territories and possessions" (41 CFR 101-19.003-7). Waivers may be granted on a case-by-case basis (42 U.S.C. 4156).

(i) The Advisory Commission on Intergovernmental Relations (42 U.S.C. 4271-4279) of 26 members, appointed by the President and the heads of each house of the Congress, was created in 1959 to foster cooperation "between the levels of government" (42 U.S.C. 4272). The law creating it refers several times to the "States" without definition--e.g., a function of the Commission is to "bring together representatives of the Federal, State, and local governments for the consideration of common problems" (42 U.S.C. 4272(1)) --and it appears that the term "State" means just that. It also appears, based on informal advice from the Commission, that "local governments" have not been understood to include the territories. So far as can be established, the Commission has not given consideration to territorial problems, it has not undertaken special studies concerning them, and territorial personnel have not served on the Commission. The likelihood is, therefore, that if a territory were interested in the work of the Commission, the function of which is the study of intergovernmental problems and reporting the results, an expansion of the law would be required. It does not seem likely, however, that the Advisory Commission would constitute a particularly useful forum for the resolution of territorial problems of governmental relationships. The Commission is structured to deal with the problems of States, whose legal relationship to the Federal Government, whose size and populations, and whose locations probably distinguish them fundamentally for purposes of the studies conducted by the Advisory Commission. Unless a territory presents an argument for the expansion of the responsibilities of this Commission, it seems appropriate to refrain from recommending any change in the status quo.

(j) The National Environmental Policy Act (42 U.S.C 4321-4370b), approved on January 1, 1970, represents a major and relatively new statement of fundamental Federal policy concerning protection of the environment. It requires analysis of the environmental effects of Federal agency proposals to help insure informed decisionmaking. The Act creates the Council on Environmental Quality; and soon after its enactment the Environmental Protection Agency was established. Perhaps the most significant provision of the Act is the requirement that Federal departments and agencies must prepare detailed environmental impact statements in connection with "major Federal actions significantly affecting the quality of the human environment" (42 U.S.C. 4332(a)(C)).

The requirement is placed upon Federal agencies, and not upon State or territorial agencies. But the question arose soon after enactment as to whether an environmental impact statement was required of a Federal agency if the "major Federal action" was to occur outside the States. Neither the term "United States" nor "State" is defined in the Act. The U.S. District Court in Hawaii concluded in 1973 that the Act applied to the Trust Territory (People of Enewetak v. Laird, 353 F. Supp. 811), based on the legislative history of the Act and the "expansive" use in it of the term "Nation" at pp. 814-819). In a Northern Marianas case that arose soon thereafter, the Ninth Circuit reached the same conclusion (People of Saipan v. United States Dept. of Interior, 502 F.2d 90 (1974)). The reasoning of these courts makes clear that the Virgin Islands, Guam, Samoa, and now the Commonwealth of the Northern Marianas are fully comprehended as well. The Act therefore does not require amendment to make explicit that major Federal actions in the territories affecting the environment require environmental impact statements.

There are, however, many sections of the Act that use the term "States" that could profit from clarification.

These sections, which relate to such matters as program coordination, the sharing of information, and the eliciting of views (e.g., 42 U.S.C. 4331(a), 4332(2)(D) and (G), 4334, 4341) are generally regarded by pertinent Federal agencies as comprehending the territories, in light of the above court decisions. The Council on Environmental Quality so advises informally. Consistent with this reasoning is the language of Executive Order No. 12114 of January 4, 1979, which deals with "environmental effects abroad" and which applies to actions "outside the geographical borders of the United States and its territories and possessions" (section 2-1). But there appear to be no regulations making clear that "States" include the territories for purposes of the Act, and a statutory definition so stating would give comfort. More important are two sections of the Act more recently added that provide for discretionary grants: grants to "qualified citizens groups in States and regions" for certain environmental work (42 U.S.C. 4368), added in 1978; and grants to programs that use "the talents of older Americans" in certain projects of "Federal, State, and local environmental agencies" (42 U.S.C. 4368a), added in 1984. The territories are not known to have expressed an interest in these grant programs, but when a convenient legislative vehicle is at hand, the term "State" might well be defined to include them, to foreclose possible argument and to make explicit their status under the Act.

(k) Environmental Quality Improvement (42 U.S.C. 4371-4375) refers to the law passed in 1970 soon after the National Environmental Policy Act, and which created the Office of Environmental Quality, to provide a professional staff to support the work of the Council on Environmental Quality and to assure compliance by Federal agencies with Federal environmental laws. This law too uses the term "States", undefined, but informal advice from the Office of Environmental Quality is that the term is not viewed as excluding the territories. The Office and the Council have in fact concerned themselves with environmental matters arising from Federal activities in the territories.

(l) The Environmental Pollution Study (42 U.S.C. 4391-4395) required by this 1970 law was required to be submitted by the President in 1971, with the potential for annual supplements thereafter. The content of the report did not exclude the territories (42 U.S.C. 4391).

(m) National Urban Policy and New Community Development (42 U.S.C. 4501-4503) refers to a law first passed in 1970, significantly amended in 1977, and in substantial part repealed in 1983. What remains is a series of exhortations toward a "rational", "orderly", "balanced" national urban policy (42 U.S.C. 4501, 4502), and a requirement for a report to the Congress biennially on such policy (42 U.S.C. 4503). It is unclear from the language of the law whether the territories are included, but references to "the Nation" (e.g., 42 U.S.C. 4502(a)) suggest that they are. This result is fortified by the fact that the program that was repealed in 1983--a program of Federal assistance in the form of loans, loan guarantees, and grants for public services to support community development--did apply expressly to "any territory or possession" as well as to the States (former 42 U.S.C. 4512(d)).

(n) The chapter entitled Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Program (42 U.S.C. 4541-4594) provides for discretionary grants for projects and programs on that subject to public agencies and nonprofit private entities, with coordination provided by the "State" in which they are located (42 U.S.C. 4577(c)(1)). The term "State" is undefined, but since the program is administered by the Secretary of Health and Human Services through the Public Health Service, and since the Public Health Service Act applies almost in its entirety to the territories (see Memorandum No. 42-2), the term almost certainly includes the territories. Additionally, the Secretary is directed to give "special consideration" to grant applications directed to serving "Native American Pacific Islanders" (42 U.S.C. 4577 (c)(4)), and that direction would confirm the inclusion of the territories. All of the foregoing is academic, however, because the program has not been funded for many years.

(o) The chapter entitled Uniform Relocation Assistance and Real Property Acquisition Policies for Federal and Federally Assisted Programs (42 U.S.C. 4601-4655) contains the

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. It applies fully to Federal actions on these subjects in the territories (42 U.S.C. 4601(2)), with the Northern Marianas being comprehended by operation of section 502(a)(2) of the Covenant. The Act deals with two different but related subjects: the requirement that a Federal agency whose programs displace persons must provide compensation to such persons in the form of moving, relocation, and related expenses (42 U.S.C. 4622-4624); and the requirement that a Federal agency follow certain expressed policies (42 U.S.C. 4651) in the acquisition of real property. The first such stated policy is that the Federal agency must "make every reasonable effort to acquire expeditiously real property by negotiation" (42 U.S.C. 4651(1)), a stricture that parallels one contained in section 806(b) of the Northern Marianas Covenant. None of the remaining acquisition practices stipulated are in conflict with section 806, and as a consequence the Northern Marianas derives protection from both this Federal acquisition law and from its own Covenant.

In commenting on this memorandum, the Department of Housing and Urban Development points out that not only are Federal agencies subject to this Act, but so also are Federally-assisted entities.

(p) The Intergovernmental Personnel Program (42 U.S.C. 4701-4772) is derived from the Intergovernmental Personnel Act of 1970, the purpose of which is, among other things, to encourage "a high caliber of public service in State and local governments" (42 U.S.C. 4701). The term "State" is defined to include "a territory or possession of the United States" (42 U.S.C. 4762(3)), so that, combined with section 502(a)(2) of the Northern Marianas Covenant, all of the insular areas of immediate concern are covered. But the provisions of consequence are no longer live, so the matter is not of great consequence. The Act provides for three grant programs pertaining to personnel administration and training (42 U.S.C. 4722, 4723, 4743), with the territories eligible by law to participate, but the administering agency (the Office of Personnel Management) advises informally that these grant programs ceased to be funded in 1981 and that there is no current expectation that they will be revived. The allocation formula makes special provision for the territories, in light of their lack of political subdivisions of the sort customary in the States (42 U.S.C. 4766(b)(2)); but the provision (which pertains to the division of Federal grants between State and local governments) is not applicable to the Northern Marianas, because section 502(a)(2) of the Covenant does not operate to extend to the Northern Marianas provisions applicable to Guam that do not apply to the States. The point is a minor one, and can be regarded as wholly academic at this time, owing to the moribund status of the grant programs.

(q) Lead Based Paint Poisoning Prevention (42 U.S.C. 4821-4846) contains the 1971 law which authorizes a research program by the Secretary of Housing and Urban Development on the subject of lead-based paint poisoning, provides for the elimination of the hazard under certain programs of that Department, and requires the Secretary of Health and Human Services to prohibit the use of lead-based paints for cooking, eating, or drinking utensils. "State" standards relating to lead-based paint are superseded by this Federal law (42 U.S.C. 4846), and the term "State" includes "the territories and possessions" (42 U.S.C. 4841(1)), so they are all treated in the same manner as the States for purposes of this law.

(r) Noise Control (42 U.S.C. 4901-4918) contains the Noise Control Act of 1972, which provides for research and reporting by the Environmental Protection Agency on the adverse effects of noise, for the development of noise emission standards for products distributed in commerce, including motor carriers, and for the dissemination of information to the public on such matters. The Virgin Islands, Guam, and Samoa are as fully covered as the States (42 U.S.C. 4902(9)), as is the Northern Marianas by operation of section 502(a)(2) of the Covenant--with two exceptions. First, because all are outside of the United States customs territory, regulations pertaining to noise emissions of new products "imported" would not apply to them (42 U.S.C. 4908); and second, because there is no Federal District Court with jurisdiction in Samoa, enforcement there would be in doubt (42 U.S.C. 4910(c), 4911(a)). The former problem is not susceptible to ready correction; the latter could easily be remedied through any number of methods (such as vesting the same jurisdiction in the High Court of American Samoa), if the matter were to be viewed as sufficient to warrant correction. Very likely it is not.

(s) The chapter entitled Domestic Volunteer Service (42 U.S.C. 4951-5085) contains the Domestic Volunteer Service Act of 1973--the Act that creates the ACTION agency which oversees the several volunteer programs established by the Act: the Volunteers in Service to America (VISTA), student volunteers under the title University Year for Action, the retired senior volunteer program, the foster grandparent program, and the senior companion program--with these last three known collectively as the Older American Volunteer Programs. The Act applies fully to the territories, both from the standpoint of their eligibility to receive the services of these volunteer programs, and from the standpoint of the eligibility of persons resident in the territories to serve as volunteers. The terms "United States" and "States" include by name the Virgin Islands, Guam, and Samoa (42 U.S.C. 5061(2)), and section 502(a)(2) of the Covenant would operate to include the Northern Marianas as well. The VISTA provisions, arguably the most important of the programs here authorized, at least from the vantage of the territories, expressly permit the program in the Virgin Islands, Guam, and Samoa (42 U.S.C. 4953(a)(1)), along with the States, and again section 502(a)(2) effectively inserts the Northern Marianas in that section. There is no bar to service as a VISTA volunteer by a noncitizen national, and indeed aliens who are resident in a State or territory may be selected (42 U.S.C. 4954(c)).

A defect appears in connection with the provision for subsistence allowances for VISTA volunteers: the usual allowance payable may be exceeded in "Hawaii, Guam, American Samoa, and Alaska" (42 U.S.C. 4955(b)(2)(B)). Because the Virgin Islands and the Northern Marianas are also high cost areas, they too should be named--but because there are no VISTA programs in any of these areas at this time, the matter is without urgency. Fiscal year 1990 information indicates that only the foster grandparents program, from among those authorized by this Act, is currently in use, and that is solely in the Virgin Islands.

<u>Conclusion</u>: Except for the provisions titled Narcotic Addict Rehabilitation (part (a)) and the Advisory Commission on Intergovernmental Relations (part (i)), the foregoing laws in most important respects apply to the territories. In two instances, however, minor corrections could be helpful, but the need for them is not urgent. These relate to the National Environmental Policy Act ((j) above) and to the Domestic Volunteer Service programs ((s) above).

<u>Federal agency comments</u>: Comments were been requested from the Department of Health and Human Services concerning parts (a), Narcotic Addict Rehabilitation, and (n), Comprehensive Alcohol Abuse Program; and from the Department of Justice concerning part (d), Fair Housing, and (e), Justice Systems Improvement. Informal advice was received from pertinent agencies, as stated above, in connection with the preparation of comments on other parts. The remaining parts do not appear to require expert agency comment. All comments received have been reflected above.

Memorandum No. 42-13
June 1990
Revised December 1991

Subject: (a) Child Abuse Prevention and Treatment and Adoption Reform
Title 42, Chapter 67 (42 U.S.C. 5101-5117d)

(b) Disaster Relief
Title 42, Chapter 68 (42 U.S.C. 5121-5201)

(c) Community Development
Title 42, Chapter 69 (42 U.S.C. 5301-5320)

(d) Manufactured Home Construction and Safety Standards
Title 42, Chapter 70 (42 U.S.C. 5401-5426)

(e) Solar Energy
Title 42, Chapter 71 (42 U.S.C. 5501-5594)

(f) Juvenile Justice and Delinquency Prevention
Title 42, Chapter 72 (42 U.S.C. 5601-5778)

(g) Development of Energy Sources
Title 42, Chapter 73 (42 U.S.C. 5801-5891)

(h) Nonnuclear Energy Research and Development
Title 42, Chapter 74 (42 U.S.C. 5901-5920)

(i) Programs for Persons with Developmental Disabilities
Title 42, Chapter 75 (42 U.S.C. 6000-6083)

(j) Age Discrimination in Federally Assisted Programs
Title 42, Chapter 76 (42 U.S.C. 6101-6107)

(k) Energy Conservation
Title 42, Chapter 77 (42 U.S.C. 6201-6422)

(l) National Petroleum Reserve in Alaska
Title 42, Chapter 78 (42 U.S.C. 6501-6508)

(m) Science and Technology Policy, Organization and Priorities
Title 42, Chapter 79 (42 U.S.C. 6601-6685)

(n) Public Works Employment
Title 42, Chapter 80 (42 U.S.C. 6701-6736)

(o) Energy Conservation and Resource Renewal
Title 42, Chapter 81 (U.S.C. 6801-6892)

(p) Solid Waste Disposal
Title 42, Chapter 82 (42 U.S.C. 6901-6992k)

(q) Energy Extension Service
Title 42, Chapter 83 (42 U.S.C. 7001-7011)

(r) Department of Energy
Title 42, Chapter 84 (42 U.S.C. 7101-7375)

Summary: The chapters examined herein involve for the most part programs administered by the Departments of Health and Human Services and Energy. Many provide for Federal financial grants, and with rare exceptions the territories are not only eligible, but assistance to them is authorized on terms that are particularly generous, relative to the treatment of the States.

Discussion: (a) The chapter entitled Child Abuse Prevention and Treatment and Adoption Reform (42 U.S.C. 5101-5117d) contains the Act of that title enacted in 1974, as substantially amended since. The Act now consists of four components, three of which apply as fully to the territories as to the States, but the fourth of which, somewhat oddly, does not. It should be amended to do so.

With respect to the three that apply, the first, entitled "General Program", provides for the establishment of certain Federal machinery--including the National Center on Child Abuse and Neglect within the Department of Health and Human Services, an Advisory Committee, and an Inter-Agency Task Force--and for a number of discretionary and formula grants to "States" and to public agencies and nonprofit private organizations for projects and programs related to child abuse prevention and treatment (42 U.S.C. 5106, 5106a, 5106a-1, 5106b, 5106c). The Virgin Islands, Guam, Samoa, and the Northern Marianas, each of which is expressly named, are eligible for these grants (42 U.S.C. 5106g(8)), and on the same terms as the States. (The term "State" is also defined at 42 U.S.C. 5103(h) for the purpose of that section, which relates to the Inter-Agency Task Force. In fact the term "State" is not now used in that section, so that particular definition contributes nothing.)

Additionally, two other portions of the Act also apply to the territories, and on the same terms as the States. These are the portions that provide for Federal challenge grants to encourage the States and territories to establish "trust funds or other funding mechanisms . . . to support child abuse and neglect prevention activities" (42 U.S.C. 5116(b)); and Federal grants to the States and territories to provide temporary child care for children with disabilities and to provide crisis nurseries for children who are abused or neglected (42 U.S.C 5117). For purposes of all of the foregoing, the term "State" includes explicitly the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 5116a(2), 5117c(d)(5)).

It is therefore surprising that the provisions of the Act pertaining to "Adoption Opportunities" (42 U.S.C. 5111-5115) contain no similar definition. The definitions referred to above do not apply to the sections on Adoption Opportunities. And the Catalog of Federal Domestic Assistance does not state that territories are eligible for assistance under the Adoption Opportunities program, nor are they shown as being eligible on the Applicant Index of the Catalog (93.652). The absence of a definition of "State" to include the insular areas therefore appears to be controlling--even though, somewhat inconsistently, the statement of Congressional findings and purpose that introduces the adoption opportunities sections states the Congress' purpose to be, in part, to promote "the establishment of model adoption legislation and procedures in the States and territories . . ." (42 U.S.C. 5111(1)). In the circumstances, a definition should be added, so that the four insular areas will be eligible for the same Federal assistance concerning child adoption, including grants, as are the States (42 U.S.C. 5112, 5113).

(b) <u>Disaster Relief</u> (42 U.S.C. 5121-5201) refers to the Disaster Relief Act of 1974, as amended, a law clearly applicable to the territories, and one from which they have often benefited. This is the law administered by the Federal Emergency Management Agency, which is well known in the territories. The terms "United States" and "State" include the Virgin Islands, Guam, and Samoa by name (42 U.S.C. 5122(3)and (4)), and the Northern Marianas are included by operation of section 502(a)(2) of the Covenant.

The law defines the process by which emergencies and major disasters are determined to exist, and "disasters" include hurricanes and tidal waves, which are among the principal natural catastrophes that strike the territories (42 U.S.C. 5122(2)). A Presidential determination triggers Federal assistance of many sorts, including repair and restoration of facilities, debris removal, temporary housing, unemployment assistance, food coupons and food, and emergency communications and transportation.

Only one section appears potentially deficient: penalties are available under 42 U.S.C. 5157 in connection with a person "who knowingly misapplies the proceeds of a loan or other cash benefit" obtained under the Act, and enforcement through a civil action is in the discretion of the U.S. Attorney General. Such enforcement action "may be brought in an appropriate United States district court" (42 U.S.C. 5157(b)). There is no Federal District with jurisdiction over Samoa, but Samoans ought to be subject to no less stringent enforcement techniques than are available elsewhere in the United States. The permissive language used in the law (and quoted from 42 U.S.C. 5157(b)) might permit use of the High Court of American Samoa, but this result is arguable. The wiser course would be to make special provision by amendment to provide a forum for Samoa.

(c) The chapter entitled Community Development (42 U.S.C. 5301-5320) contains the Housing and Community Development Act of 1974, as frequently and extensively amended. The Act provides for grant programs of unusual complexity, several of which are not applicable to the territories, but one program of discretionary grants is directed to them alone. The draftsmen appear to have taken into account the uniqueness of the territories, as contrasted with political subdivisions of States and the demographics usually associated with them. It would be, given the requirements of the law, at least difficult and sometimes impossible to accord to the territories State-like treatment. Accordingly, no recommendation is made here for any change in the law. Equitable treatment of the territories can be achieved under existing law, even though that treatment differs from the treatment of the States and their subdivisions.

The "primary objective" of the Act is

> the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. (42 U.S.C. 5301(c).)

To this end, the Act provides for grants by the Secretary of Housing and Urban Development to a number of grantees that are defined in a way that would exclude the territories: a State (42 U.S.C. 5302(2)), a metropolitan area (5302(3)), a metropolitan city (5302(4)), a city (5302(5)), and an urban country (5302(6)). But the term "unit of general local government" is defined to include, by name, the Virgin Islands, Guam, American Samoa, and the Northern Marianas (42 U.S.C. 5302(2)). In addition, each of the territories could constitute a "nonentitlement area" (42 U.S.C. 5302(7)). And each constitutes a "city" for one particular grant program (42 U.S.C. 5318(n)(2)).

As a result of these definitions,

-- Formula grants to carry out the purposes of the Act, which are available to metropolitan cities and urban counties under 42 U.S.C. 5306(a), and to nonentitlement areas and to units of general local government--but only if they are in "States"--under 42 U.S.C. 5306(d), are not available to the territories. The territories are thus relieved of an infinity of requirements (42 U.S.C. 5304) that they would doubtless have severe difficulty in meeting.

-- The territories are, by name, each eligible for special purpose grants under 42 U.S.C. 5307(b)(1), the requirements for which are relatively simple (42 U.S.C. 5307(e)).

-- The territories are not eligible for loan guarantees and guarantee commitments under 42 U.S.C. 5308, because these forms of assistance are available only to a "unit of general local government" receiving a grant under 42 U.S.C. 5306(a). As explained above, the territories are not eligible for assistance under that section.

-- Owing to the definitions of "city" to include each of the territories by name (42 U.S.C. 5318(n)(1)), they are eligible for urban development action grants, which are available to cities and urban counties "which are experiencing severe economic distress to help stimulate economic development activity needed to aid in economic recovery" (42 U.S.C. 5318(a)). In light of the mandatory selection criteria which the Secretary is required to devise "for a national competition for grants" under this action grant program--which requires sophisticated statistical data probably beyond the easy reach of the territories--and selections based on the awarding of points based on such criteria (42 U.S.C. 5318(d)), it is improbable that any territory could compete successfully to achieve a grant under this program.

The purpose of the Act is as relevant to the territories as for the States, so it is important that they be eligible for the assistance it provides. Realistically, they cannot be accorded the complex treatment provided for the States. But the Act already provides special treatment in recognition of their particular circumstances, and this would appear to be sufficient.

(d) Manufactured Home Construction and Safety Standards (42 U.S.C. 5401-5426) refers to the Act of that title enacted in 1974, which authorizes the Secretary of Housing and Urban Development to establish Federal construction and safety standards for "manufactured homes". The definition of that term indicates that it means, in popular parlance, mobile homes (42 U.S.C. 5402(6)). The stated purpose of the Act is to reduce personal injuries and deaths, and insurance costs, related to mobile homes of poor quality (42 U.S.C. 5401). In general, only mobile homes that meet the Secretary's standards for construction and safety may be manufactured, transported, sold, or leased in interstate commerce (42 U.S.C. 5409(a)(1)).

An effort has clearly been made to cover the territories, and it is in large measure successful. The term "State" includes the Virgin Islands, Guam, and American Samoa (42 U.S.C. 5402(12)), and because the Act with that definition was enacted in 1974, the Northern Marianas would also be included by operation of section 502(a)(2) of the Covenant. There is no definition of "commerce" or "interstate commerce", but in light of the application of the Act to the foregoing territories, it must be supposed that mobile homes transported to them from the States and later sold in the territories would be included in the terms. Rather unusually, the term "United States district courts" is defined to include "the United States courts of" Guam, the Virgin Islands, and American Samoa (42 U.S.C. 5402(13)). The effect of this language, because Federal district courts in the States are also of course included, would be to comprehend the U.S. District Court for the Northern Marianas, under section 502(a)(2) of the Covenant. It also seems probable, though not unarguable, that the High Court of American Samoa would meet that definition. Although the High Court, because it is not an Article III court, is not a "court of the United States" when that term is used as a term of art--that is, it is not a "constitutional court"--the High Court was created pursuant to Federal authority, so it is reasonable to suppose that it constitutes a "United States court". That is almost certainly what the Congress intended, in enacting the definition.

The likely area of inapplicability of this law to the territories relates to imports. A mobile home offered for importation that does not meet the Secretary's standards "shall be refused admission into the United States" under regulations issued by the Secretary jointly with the Secretary of the Treasury (42 U.S.C. 5409(3)). The term "United States" is not defined for purposes of this law, and in those circumstances it is likely to mean only those areas that constitute the United States customs territory. All of the territories here involved are outside the customs territory. Enforcement personnel of the Treasury Department are not available in the territories (except for the Virgin Islands, pursuant to its special customs law at 48 U.S.C. 1406i). The probability, therefore, is that mobile homes of foreign manufacture could be imported into and sold in the territories with impunity--either because the import restrictions do not as a matter of law apply to them, or because, even if they do, there is no one present to enforce them.

The absence of Federal control over imported mobile homes in the territories--as opposed to those shipped to them from the States--is not known to have presented any actual problem to them. For that reason no recommendation for a change in the law--which would be complicated to achieve, owing to the territories' general exclusion from the customs laws--is offered here. But the problem is identified, should circumstances change and a need for Federal protection arise.

Grants to the States, and thus to the territories, are authorized under 42 U.S.C. 5423, to assist grantees in identifying their needs and in developing plans for enforcement. The Federal share may not exceed 90% of the project cost.

(e) The chapter entitled <u>Solar Energy</u> (42 U.S.C. 5501-5594) contains the legislation authorizing research, development, and demonstration projects with respect to solar energy, solar heating and cooling, and solar photovoltaic energy. Principal responsibilities are vested in the Secretaries of Housing and Urban Development and Energy, and the Administration of the National Aeronautics and Space Administration. There are no geographic barriers or exclusions contained in these laws, and the occasional references to the "States" (undefined) would not serve to exclude the territories, given the contexts in which the references appear (42 U.S.C. 5510(a), 5510(c)(3), 5589). No change is needed in these laws.

(f) The chapter entitled Juvenile Justice and Delinquency Prevention (42 U.S.C. 5601-5778) contains the Juvenile Justice and Delinquency Prevention Act of 1974, as amended and supplemented. It provides for numerous Federal grant programs, some formula and some discretionary grants, and for Federal technical assistance, all directed to Federal juvenile delinquency programs "relating to prevention, diversion, training, treatment, rehabilitation, evaluation, research, and improvement of the juvenile justice system in the United States " (42 U.S.C. 5614(a)). The territories are eligible for all grants provided by the law, sometimes under special formulae that appear to accord them especially generous treatment. These laws have been drafted with the territories in view, and no change appears to be needed.

The Virgin Islands, Guam, Samoa, and the Northern Marianas are all named as "States" (42 U.S.C. 5603(7)), and they are thus eligible for the same Federal assistance as is available to the States. The most important grants are those made by the Administrator of the Office of Juvenile Justice and Delinquency Prevention in the Department of Justice for

> the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system. (42 U.S.C. 5631(a))

Under provisions concerning the allocation of funds, a specified minimum amount is to be allocated to each State, with a lesser minimum to each of the four territories here involved, depending on the total amount appropriated (42 U.S.C. 5632(a)(2)). The figures specified are fair, and in some cases extremely generous, to the territories: when the minimum to a State is $325,000, the minimum for each of these four areas is $75,000, and when the State minimum rises to $400,000, the minimum for each territory is $100,000. On the basis of relative populations, each of the territories is thus treated far more generously than almost all of the 50 States.

It may be noted that the "State plan" required to receive the foregoing grant is exceedingly complex, being required to meet a long list of specifications (42 U.S.C. 5633) that would appear to burden any of the territories substantially. But reports to the Interior Department show that all four have received grants under 42 U.S.C. 5631 in fiscal years 1989 and 1990, so the burden obviously can be borne.

Two other grant programs under this Act contain special provisions for territorial funding, with the first pertaining to grants for Special Emphasis Prevention and Treatment Programs (42 U.S.C. 5665). These are discretionary grants, awarded on a competitive basis (42 U.S.C. 5665a)--except that there is a set-aside of 5% of the funds available for the grant program for allocation to the four territories, plus the Trust Territory (42 U.S.C. 5665(e)). (At this time the "Trust Territory" would mean only Palau. The set-aside is thus surprisingly generous.)[1/]

[1/] In commenting on this memorandum, the Department of Justice stated the following in June 1991:

> We would like to comment on the 5% territorial set-aside from Special Emphasis Prevention and Treatment Program funds (42 U.S.C. 5665). Since the addition of this set-aside to the Juvenile Justice Act in 1980, the four territories have received a total of $4,581,417: Northern Marianas $1,130,262; Virgin Islands $1,059,304; Guam $1,419,307, and American Samoa $972,544. For 1990, the four territories received $417,100 of a total Special Emphasis discretionary grant allocation of $8,654,820. This "surprisingly

(continued...)

The second program with a special territorial funding provision is also generous. Under the program of grants for runaway and homeless youth projects (42 U.S.C. 5711(a)), each State is guaranteed a $75,000 minimum, and each territory at least $30,000 (42 U.S.C. 5711(b)(2)).

With respect to the many other grants provided for in the Act--including those for programs relating to juvenile gangs and drug abuse and drug trafficking (42 U.S.C. 5668), to transitional living projects for homeless youth (42 U.S.C. 5714-1), and to missing children (42 U.S.C. 5775)--the territories are eligible on the same bases as the States.

(g) Development of Energy Sources (42 U.S.C. 5801-5891) refers to the Energy Reorganization Act of 1974, an act that created the Energy Research and Development Administration (whose functions have since been transferred to the Department of Energy), and the Nuclear Regulatory Commission (which performs the regulatory functions of the former Atomic Energy Commission). No provisions of geographic consequence appear in this chapter. There are neither

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[1](...continued)
generous" (per the Interior memorandum) set-aside is in addition to the already generous minimum allocation under the Formula Grants program of $75,000 to $100,000 annually versus the fifty states' minimum allocation of $325,000 to $400,000.

It is highly questionable whether, at a time of shrinking Federal grant resources, the continued allocation of these scarce discretionary funds to supplement territorial planning and administration and juvenile justice program activities, particularly on a noncompetitive basis, can be justified. This is an issue which will be further evaluated by OJJDP and may lead to a proposal to modify the set-aside provision of the statute in 1992.

statements of exclusion nor provisions as to application, but that is not a shortcoming inasmuch as this is essentially a law concerning Federal agency structure.

One provision restricts membership on the Nuclear Regulatory Commission to U.S. citizens (42 U.S.C. 5841(a)(1)), but the possibility of appointment of a Samoan who is a noncitizen national seems remote and a recommendation for expansion of the provision is therefore unnecessary. A related, uncodified law that appears as a note following 42 U.S.C. 5841 deserves mention, for it concerns a subject of special interest in the Pacific territories: Public Law 96-295 (1980) in section 301 requires regulations providing for the notification of "the Governor of any State" before nuclear waste, including spent nuclear fuel, is transported to, through, or across the State. That law defines "State" to include expressly the Virgin Islands, Guam, Samoa, and the Northern Marianas. It will be observed, however, that the territories are even more fully protected with respect to the transportation of such material by section 605 of Public Law 96-205, enacted a few weeks earlier (48 U.S.C. 1491).

(h) The chapter entitled Nonnuclear Energy Research and Development (42 U.S.C. 5901-5920) contains the 1974 law of that name, as amended. For the most part the law vests in the Secretary of Energy authority with respect to research, development, and demonstration projects concerning new, nonnuclear energy technologies. No geographic provisions are contained in these sections, although the language used is usually expansive--see, for example, 42 U.S.C. 5904(b)(1) which refers to "all regions of the United States"--so it seems likely that the territories are among the beneficiaries.

Two programs of Federal assistance may, however, be of interest. The first, at 42 U.S.C. 5919, provides Federal loan guarantees for demonstration projects for alternative fuel conversion facilities (42 U.S.C. 5919(b)), and for demonstration projects for the conversion of municipal waste into synthetic fuels (42 U.S.C. 5919(y)). Projects in the Virgin Islands, Guam, and Samoa are expressly covered (42 U.S.C. 5919(o)(2)), and in the Northern Marianas by operation of section 502(a)(2) of the Covenant. The availability of the second program, at 42 U.S.C. 5920, in the territories is less clear. That program is one of Federal financial assistance for programs "to demonstrate municipal waste reprocessing for the production of fuel and energy intensive products" (42 U.S.C. 5920(a)(1)). It is available to "municipalities", meaning a public body created by "State law" (42 U.S.C. 5920(b)(3)), and "State" is undefined. There is thus doubt as to whether this program is available in the territories, and if any is a candidate for a demonstration project for waste reprocessing for the production of energy--probably not likely--this section should be amended to make clear that the law applies to the territories.

(i) Programs for Persons with Developmental Disabilities (42 U.S.C. 6000-6083) consist of several Federal financial assistance programs to benefit the developmentally disabled and to protect their legal and human rights. The territories are all, by name, eligible for the Federal assistance provided (42 U.S.C. 6001(1)), and on generous terms, relative to the States.

The principal Federal payments are made "to assist in the development of a comprehensive system and a coordinated array of services and other assistance for persons with developmental disabilities . . ." (42 U.S.C. 6021). Minimum allotments are provided depending on the level of Federal funds appropriated. When the State minimum is $300,000 per State, the minimum per territory is $160,000; and if the State minimum is $350,000, that for each territory is $200,000 (42 U.S.C. 6025(a)). The territories are obviously well-treated on a population basis. The local administrative machinery and the "plan" which is a prerequisite for a grant are both elaborate (42 U.S.C. 6022), but the territories have met the burden because all have received grants under this program in recent years.

A State (or territory) that disputes the amount of its grant award by the Secretary of Health and Human Services may appeal in the Court of Appeals for the appropriate circuit (42 U.S.C. 6029), a provision without meaning for Samoa, because it is not within any Federal judicial circuit. The matter is identified here, but no solution is offered. It is one often presented by Federal statues, and its resolution could best be afforded by a major modification in Samoa's relationship to the Federal judicial system. If there were likely to be a genuine problem in Samoa, a lesser solution could be devised, but Samoa is unlikely to complain of its award.

Grants are also available to States and territories "to support a system . . . to protect the legal and human rights of persons with developmental disabilities" (42 U.S.C. 6041), and again the minimum allotment to each of the territories compares favorably with that to each of the States: $107,000 to $200,000, and at a lesser Federal appropriation level, $80,000 to $150,000 (42 U.S.C. 6042(b)). A protection and advocacy "system" must be provided (42 U.S.C. 6042(a)), but the territories have done so, and they all receive these grants.

Further grant programs, for which the territories are eligible but under which no special territorial provisions appear, are grants for training programs for university affiliated programs (42 U.S.C. 6062), and grants for projects of "national significance" for persons with developmental disabilities (42 U.S.C. 6081). These are project or discretionary grant programs.

The laws in this chapter do not require modification because the territories are (except for the technical problem associated with Samoa and identified above) accorded fair treatment.

(j) Age Discrimination in Federally Assisted Programs (42 U.S.C. 6101-6107) refers to the Age Discrimination Act of 1975, the purpose of which is "to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance" (42 U.S.C. 6101). General regulations are required to be issued by the Secretary of Health and Human Services, followed by regulations by each Federal department and agency with respect to "any program or activity" which receives Federal financial assistance provided by such department or agency (42 U.S.C. 6103(a)). Compliance may be achieved by the termination by the department or agency of Federal financial assistance to the "program or activity" if it is found that age discrimination has occurred (42 U.S.C. 6104(a)); and in addition, "any interested person" (a term that is undefined, but it doubtless comprehends one who believes he or she has been discriminated against on the basis of age), may bring an action in a U.S. District Court to enjoin a violation of the Act "by any program or activity receiving Federal financial assistance" (42 U.S.C. 6104(e)).

The availability of the Act to persons in the territories who believe themselves to be victims of age discrimination is at best uncertain, and in fact in doubt. A great number of Federal financial assistance programs apply to the territories, as this study demonstrates, but no provision of the Age Discrimination Act makes express reference to the territories. And the phrase that is material to enforcement, i.e., "program or activity", which is used in subsection (a) and (e) of 42 U.S.C. 6104, referred to above, is defined to include State and local governments only--a phrase that does not include the territories. Under 42 U.S.C. 6107(4), the term "program or activity" includes the operations of a department or agency "of a State or local government", or "the entity of such State or local government that distributes" the Federal financial assistance. In light of that definition, a literal-minded court would likely conclude that an "interested person" in a territory could not seek an injunction against a territorial government agency that has allegedly engaged in age discrimination. Additionally, the absence of a Federal court in American Samoa eliminates that enforcement tool so far as Samoans are concerned.

These problems could quite easily be corrected, by defining "State" to include the four offshore areas here involved, and by vesting in a Samoan court the jurisdiction now vested in Federal District Courts. Such amendments appear to be worth seeking, for the territorial elderly deserve as full protection as those in the States.

(k) The chapter entitled <u>Energy Conservation</u> (42 U.S.C. 6201-6422) contains the Energy Policy and Conservation Act, enacted in 1975, as amended. The Act is of considerable length and complexity but, except for the routine problem of court jurisdiction in American Samoa (which dos not appear of sufficient moment here to warrant legislative correction), it very largely treats the territories in the same manner as the States--with a few variations, all of which appear to be reasonable, that are discussed below. For purposes of the Act, the term "State" includes "any territory or possession of the United States" (42 U.S.C. 6202(4)), and because of the 1975 enactment date, the Northern Marianas would be covered by operation of section 502(a)(2) of the Covenant. And the term "United States" includes "all of the States", so defined (42 U.S.C. 6202(5)).

The first three titles of the Act are of interest here:

Title I (42 U.S.C. 6211-6251) concerns the availability of domestic energy sources. It contains no special provisions for the territories, but the authority it grants could have an indirect effect on them all. Title I provides special incentives for the development of underground coal mines, special provisions for Interior leases for energy production, and rules for the establishment of the Strategic Petroleum Reserve. It also permits the President to restrict the export of certain energy supplies (42 U.S.C. 6212), and any such restriction would apply to exports from the territories to foreign points.

Title II (42 U.S.C. 6261-6285), pertaining to standby authority, authorizes the President to prepare energy conservation contingency plans and a rationing contingency plan. He may also require compliance with international oil allocations, accepted by the United States in international agreements. The territories are no less affected by these provisions than are the States.

Title III (42 U.S.C. 6291-6374d) is directed to improving energy efficiency. To this end, the Secretary of Energy is authorized to promulgate energy efficiency standards for a wide variety of consumer products (42 U.S.C. 6292) and for electric motors, pumps, and other industrial equipment (42

U.S.C. 6311). Products must bear suitable efficiency labels, and nonconforming products are refused entry into "the customs territory of the United States" (42 U.S.C. 6301), and cannot be distributed "in commerce" (42 U.S.C. 6302(a)). Although the territories, all of which are outside the U.S. customs areas (see Memorandum No. 19-2) are thereby excluded from the customs enforcement provision, they are covered by the "distribution in commerce" language, given the definitions contained at 42 U.S.C. 6292(16) and (17). The territories are thus effectively comprehended by the energy efficiency standards.

Title III also contains a number of programs of Federal technical assistance and Federal financial assistance to States (and territories) for energy-related programs: for the development of energy conservation plans (42 U.S.C. 6321), for programs to encourage energy conservation in schools and hospitals (42 U.S.C. 6371), and for programs for energy conservation in certain public buildings and public care institutions (42 U.S.C. 6372). In no case does the usual, rather rigid statutory formula appear, but there are local participation requirements, as in the case of 20% for energy conservation plans (42 U.S.C. 6323a), or from 10% to 50% for school and hospital programs (42 U.S.C. 6371e(b)). There are two minimum grant provisions (42 U.S.C. 6371g(b) in the case of schools and hospitals, 42 U.S.C. 6372g in the case of public buildings and care institutions), and the territories are--quite reasonably, given their populations--excluded from these floors.

(A technical defect may appear to exist in connection with the second of these floors--that pertaining to public buildings and institutions at 42 U.S.C. 6372g(b), which does not name the Northern Marianas. The earlier one pertaining to schools and hospitals, at 42 U.S.C. 6371g, names the Northern Marianas as a result of a 1984 amendment. At first blush this would appear to give the Northern Marianas a potential windfall under the program for public buildings and institutions, but it does not, in light of section 502(a)(1) of the Covenant, which provides that Federal financial assistance under laws in effect on January 9, 1978 and their "subsequent amendments" apply to the Northern Marianas as they apply to Guam. The basic Act was enacted in 1975.

Accordingly the floor imposed on Guam at 42 U.S.C. 6372g(b) applies to the Northern Marianas as well).

The remaining provisions of the Act concern housekeeping, and are of no immediate importance except to the extent that they involve enforcement in Federal courts (42 U.S.C. 6395). Other provisions of the Act do so as well, including those at 42 U.S.C. 6303-6306. The subject matter of this law does not seem to compel amending it to reflect Samoa's peculiar judicial arrangements, and indeed, there is some administrative enforcement authority granted to the Secretary of Energy (42 U.S.C. 6303), and that could be available if a need for it were to arise in Samoa. In the circumstances, it does not seem necessary to make special provision for enforcement of this Act in Samoa.

(l) The National Petroleum Reserve in Alaska (42 U.S.C. 6501-6508), administered under this chapter by the Secretary of the Interior, is irrelevant to this study.

(m) The chapter entitled Science and Technology Policy, Organization and Priorities (42 U.S.C. 6601-6685) provides for the establishment in the Executive Office of the President of the Office of Science and Technology Policy. These provisions concern internal arrangements within the Executive Branch. No geographic limitations appear.

(n) The chapter entitled Public Works Employment (42 U.S.C. 6701-6736) contains the Public Works Employment Act of 1976, as amended. This is one of the laws under which the Economic Development Administration of the Department of Commerce provides Federal financial and technical assistance to the States and territories, and all of the latter--the Virgin Islands, Guam, Samoa, and the Northern Marianas--have received such assistance.

Two programs are involved, the first relating to local public works and the second, to antirecession programs. The four insular areas are covered by each, but on terms that differ from those that apply to the States. The first involves Federal grants for 100% of the cost of "public works projects" in the "States", and that term is defined to include the Virgin Islands, Guam, and Samoa (42 U.S.C. 6701(2)). By operation of section 502(a)(2) of the Covenant, the term also includes the Northern Marianas. After certain set-asides, funds appropriated are allocated to the "States" on the basis of their unemployed populations, with a floor for the States of at least three quarters of one percent of the funds appropriated, but with a floor for Guam, the Virgin Islands, Samoa, and the Trust Territory of one-half of one percent in the aggregate (42 U.S.C. 6707(a)(3). On a population basis, the figure does not seem inequitable, particularly since Palau alone now constitutes "the Trust Territory".

Financial assistance under the antirecession provisions--directed to "stimulate economic recovery" (42 U.S.C. 6722(a))--are confined to the States as such (42 U.S.C. 6723(b) (3)(A)), and they receive allocations under a formula derived from unemployment figures. But insular areas are dealt with separately, so that they too are eligible for antirecession grants. Under 42 U.S.C. 6736, one percent of the amounts authorized is to be directed to Puerto Rico, Guam, Samoa, and the Virgin Islands. (This provision, added in May 1977, in effect includes the Northern Marianas as well, in light of section 502(a)(1) of the Covenant, which equalizes Federal financial assistance to the Northern Marianas with that of Guam.) The inclusion of Puerto Rico in this provision, given Puerto Rico's population that is about six times that of the least populous State, suggests that this one percent figure is unfair to the smaller insular areas. But the program in question appears not now to be implemented (it is not contained in the current Catalog of Federal Domestic Assistance, 11.300 et seq.), so this possible problem probably does not require correction.

(o) The chapter entitled Energy Conservation and Resource Renewal (42 U.S.C. 6801-6892) contains the Energy Conservation and Production Act of 1976, as amended. Its provisions treat the insular areas fairly. The first program pertains to the design of electric utility rate proposals to encourage energy conservation (42 U.S.C. 6803), to grants to "State" consumer protection offices (42 U.S.C. 6805), and to grants to utility regulatory commissions (42 U.S.C. 6807), with the term "State" defined to include "any territory or possession" (42 U.S.C. 6802(6)). The second concerns the development of voluntary energy conservation standards for new buildings and includes technical assistance to the "States" for energy efficient buildings (42 U.S.C. 6837), again with the term "State" defined to include "any territory and possession" (42 U.S.C. 6832(12)).

The third program, one of "weatherization" for the dwelling units of low income persons, applies only to the States and the District of Columbia (42 U.S.C. 6862(8)). Inasmuch as the definition of that term makes clear that it is directed to conserving energy in the heating (and not the air-conditioning) process (42 U.S.C. 6862(9)), the subject is irrelevant in light of the warm climates of all the insular areas. Additionally, even if cooling equipment were to be covered, low income persons in the territories (and elsewhere) would not be significantly affected, for this is a luxury generally beyond their reach.

(p) The chapter entitled Solid Waste Disposal (42 U.S.C. 6901-6992k) contains the Solid Waste Disposal Act and the Resource Conservation and Recovery Act. Under the authority contained in the chapter, the Administrator of the Environmental Protection Agency is authorized to assist "States"--a term defined expressly to include the Virgin Islands, Samoa, Guam, and the Northern Marianas (42 U.S.C. 6903(31))--in the development of solid waste management programs and hazardous waste management programs. Federal technical and financial assistance are available.

It is perhaps sufficient to say here that the territories are treated for all purposes in the same manner as the States, and that appears to be fair to them. There are no provisions of particular application to the territories; but one contains the potential for unusual generosity. A State or territory with an approved solid waste plan may receive Federal financial assistance in its implementation, and sums appropriated for this purpose are allotted on a population basis, "except that no State shall receive less than one-half of 1 per centum of the sums so allotted in any fiscal year" (42 U.S.C. 6948(b)). No territory has received a grant under this Act (see CFDA 66.801), perhaps because the Federal requirements for approval are stringent. Obviously if one were to qualify, its entitlement to "State" treatment would substantially exceed a population-based award.

Additionally, enforcement provisions rely upon the presence of a Federal District Court (42 U.S.C. 6928, 6972), so that requirement would present a difficulty in Samoa, where none exists. Samoa is not now known to present serious problems concerning solid or hazardous waste disposal, so the correction of this deficiency may appear to be nonurgent. But in informal comments on this memorandum, the Department of Justice has stated, "We urge correction of this deficiency before problems become apparent."

(q) The Energy Extension Service (42 U.S.C. 7001-7011), created in 1977, is administered by the Department of Energy through "State" energy extension programs. The term "State" includes "the territories and possessions of the United States" (42 U.S.C. 7011(2)), and in fact all four areas that are the subjects of this study receive Federal financial assistance under this program--which is one of outreach on energy conservation and new energy technologies. The insular areas fare well under the allocation formula, which requires that half the sum appropriated be divided "equally among all the States", with the other half divided on the basis of population (42 U.S.C. 7010(c)(2)).

(r) The Department of Energy, established in 1977, is the product of the laws contained in this chapter (42 U.S.C. 7101-7375) which define some of its responsibilities, its management and administration. Because the chapter is fundamentally housekeeping in nature, its shortcomings from the stand-point of the insular areas are probably of no practical importance, so it does not appear to warrant modification. But shortcomings do exist: an early reference to "citizens" in a Congressional finding concerning energy requirements to meet health and welfare needs of "citizens" (42 U.S.C. 7111(2)) does not recognize that Samoans have such needs too; many references to the "States" appear (e.g., at 42 U.S.C. 7113, 7191(f), 7211(a)(2), 7256a, 7265(a)), and that term is undefined, but in context the territories do not appear to be inconvenienced thereby; and the references to District Courts of the United States (42 U.S.C. 7192(b), 7218(b)) ignore Samoa's special judicial situation--but it seems quite unlikely that a forum for Samoa would be necessary for purposes of the sections in question. The territories are not entirely ignored: at 42 U.S.C. 7259(a) the Secretary of Energy and the Federal Energy Regulatory Commission are authorized to use research, equipment, and facilities of agencies of the States "or any territory or possession"--with their consent, and with or without reimbursement. But they are otherwise unmentioned. They do not appear thereby to be disadvantaged.

Conclusion: The laws examined herein do not appear to require modification to meet the needs of the territories, except that one portion of the Child Abuse Prevention and Treatment and Adoption Reform Act (part (a) above), pertaining to adoption opportunities, should be modified to include the territories; the Disaster Relief Act (part (b) above) should be amended to provide for enforcement in Samoa; the Age Discrimination Act (part (j) above) should be clarified to make certain its application in the territories and to provide for its enforcement in Samoa; and the solid waste disposal laws (part (p) above) should be amended to provide for enforcement in Samoa.

Federal agency comments: Comments were requested from the Departments of HHS, Energy, HUD, and Justice, and from EPA, and FEMA. All comments received have been reflected above.

Memorandum No. 42-14
September-November 1990
Revised December 1991

Subject: (a) Air Pollution Prevention and Control
Title 42, Chapter 85 (42 U.S.C. 7401 et seq.)

(b) Earthquake Hazards Reduction
Title 42, Chapter 86 (42 U.S.C. 7701-7706)

(c) Uranium Mill Tailings Radiation Control
Title 42, Chapter 88 (42 U.S.C. 7901-7942)

(d) Congregate Housing Services
Title 42, Chapter 89 (42 U.S.C. 8001-8010)

(e) Neighborhood and City Reinvestment, Self-Help and Revitalization
Title 42, Chapter 90 (42 U.S.C. 8101-8146)

(f) National Energy Conservation Policy
Title 42, Chapter 91 (42 U.S.C. 8201-8187c)

(g) Powerplant and Industrial Fuel Use
Title 42, Chapter 92 (42 U.S.C. 8301-8484)

(h) Emergency Energy Conservation
Title 42, Chapter 93 (42 U.S.C. 8501-8541)

(i) Low-Income Energy Assistance
Title 42, Chapter 94 (42 U.S.C. 8621-8629)

(j) United States Synthetic Fuels Corporation
Title 42, Chapter 95 (42 U.S.C. 8719)

(k) Biomass Energy and Alcohol Fuels
Title 42, Chapter 96 (42 U.S.C. 8801-8871)

(l) Acid Precipitation Program and Carbon Dioxide Study
Title 42, Chapter 97 (42 U.S.C. 8901-8912)

(m) Ocean Thermal Energy Conversion Research and Development
Title 42, Chapter 98 (42 U.S.C. 9001-9009)

(n) Ocean Thermal Energy Conversion
Title 42, Chapter 99 (42 U.S.C. 9101-9168)

(o) Wind Energy Systems
Title 42, Chapter 100 (42 U.S.C. 9201-9213)

(p) Magnetic Fusion Energy Engineering
Title 42, Chapter 101 (42 U.S.C. 9301-9312)

Comment: The laws of Title 42 that are considered herein are for the most part of little direct concern to the territories. The exceptions are the grant program for low-income energy assistance (in (i) below) and the two OTEC statutes (in (m) and (n) below). These make adequate provision for the territories.

Discussion: (a) The chapter entitled Air Pollution Prevention and Control (42 U.S.C. 7401 et seq.) contains the Clean Air Act, first enacted in 1955 and often amended since. It has most recently been amended and much expanded by the Clean Air Act Amendments of 1990 (Public Law 101-549, approved November 15, 1990), and because the 1990 amendments have not yet been codified, and because they run to approximately 750 pages, the analysis of the Act, as amended, is difficult. Further, the Act as amended is not only very long but also very complex, requiring an expertise fully to comprehend it that is not readily available for purposes of this study. Nevertheless, it can with some confidence be said that (1) the Act applies to the areas that are the subjects of this study, (2) the important exemption authority for the territories remains in effect, (3) the grant programs under the Act remain available to the territories, and (4) the possible shortcomings are minor, and it would be untimely now to seek their correction. Each of these propositions will be examined in turn.

(1) Territorial application. The Clean Air Act, both before and after the 1990 amendments, in general applies to the Virgin Islands, Guam, Samoa, and the Northern Marianas, all of which are explicitly defined as "States" (42 U.S.C. 7602(d)). (The Northern Marianas were expressly added to the definition in 1977, for reasons not disclosed in the legislative history.) These insular areas, however, are expressly excluded from the new 1990 Title IV of the Act, pertaining to acid rain. Only the 48 contiguous States and the District of Columbia are comprehended by that Title, which

carries its own definition of "State" (secs. 401(b), 402(14)). The territories are also excluded, but not expressly, from section 801 of the 1990 amendments, which pertains to air pollution from Outer Continental Shelf activities. This results from their exclusion generally from Outer Continental Shelf laws (see Memorandum No. 43-1). All of the foregoing is as it should be. (In its Interim Report of January, 1982, the Northern Mariana Islands Commission on Federal Laws warmly endorsed the general application of the Clean Air Act to the Northern Marianas (p. 61), although it recommended their exclusion--since accomplished by the territorial exemption authority--from certain motor vehicle constraints.)

In connection with the territorial application of the law, it should be observed that some care has been taken to include the territories in the new (1990) Title VI, concerning Stratospheric Ozone Protection. That title is concerned with the production, importation, and exportation of substances with an "ozone depletion potential", and at section 601(7) it defines "import" as the act of bringing into "any place subject to the jurisdiction of the United States, whether or not such . . . bringing . . . constitutes an importation within the meaning of the customs laws of the United States". That definition was directed to the territories, because they alone (with the Trust Territory) are under U.S. jurisdiction but outside the U.S. customs territory.

(2) Territorial exemption authority. From the territories' standpoint, the most important provision of the Clean Air Act is very likely the authority conferred by a 1983 amendment upon the Administrator of the Environmental Protection Agency to grant exemptions from the Act's requirements. That authority was expanded by the 1990 amendments. As codified before the 1990 amendment, the law provided in pertinent part:

> Upon petition by the Governor of Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands, the Administrator [of the Environmental Protection Agency] is

> authorized to exempt any person or source or class of persons or sources in such territory from any requirement under this chapter other than section 7412 of this title or any requirement under section 7410 of this title or Part D of subchapter I of this chapter necessary to attain or maintain a national primary ambient air quality standard. Such exemption may be granted if the Administrator finds that compliance with such requirement is not feasible or is unreasonable due to unique geographical, meteorological, or economic factors of such territory, or such other local factors as the Administrator deems significant. (42 U.S.C. 7625-1)

The 1990 amendments add the Virgin Islands to those who may petition (sec. 806), but the quoted language is otherwise untouched. The 1983 exemption authority was enacted (in legislation from the House Interior and Senate Energy Committees, which became Public Law 98-213, the Territorial Omnibus Act of that year) in response to urgent pleas from Guam and the Northern Marianas. Guam argued that the costs of compliance by its generating plants with Clean Air Act standards were enormously high, and without benefits because pollutants were swiftly blown over the Pacific; the Northern Marianas argued that compliance with motor vehicle requirements were similarly costly, without benefits, for the same reason (Interim Report, pp. 51-62). The readily available legislative history offers no explanation (1983 U.S. Code Cong. and Admin. News 2210), the Clean Air Act exemption having been added to the bill late in the legislative process.

The sections or parts of the Act that are stated in the foregoing quotation to be exceptions are central to the air quality standards of the Act:

-- The section appearing at 42 U.S.C. 7410 (which is section 110 of the Act) concerns State implementation plans for national primary and secondary ambient air quality standards. New language has been added to the section by section 101 of the 1990 amendments.

-- The section appearing at 42 U.S.C. 7412 (which is section 112 of the Act) concerns national emission standards for hazardous air pollutants, and it too has been much expanded, by Title III of the 1990 amendment.

-- Part D of Title I of the Clean Air Act (which is referred to in the foregoing quotation as "Part D of subchapter I of this chapter", codified currently at 42 U.S.C. 7501-7508), which has been much expanded by amendments in Title I of the 1990 amendments, concerns plan requirements for nonattainment areas. A "nonattainment area" is one whose air pollutants exceed national air quality standards.

It seems possible to construe the exemption authority at 42 U.S.C. 7625-1 as not permitting an exemption for a territory from any of these three portions of the Act if the continued application of the section or portion to the territory is "necessary to attain or maintain a national primary ambient air quality standard". In commenting informally on this memorandum, however, the Justice Department states as to 42 U.S.C. 7625-1:

> This provision permits the EPA, upon petition from the governor of Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands, to exempt any person or source of air pollution "from any requirement under [the Clean Air Act] other than section 7412 . . . 7410 . . . or Part D of subchapter I of this chapter necessary to attain or maintain a national primary ambient air quality standard." 42 U.S.C. 7625-1(a)(1). Interior interprets the phrase "necessary to attain or maintain a national primary ambient air quality standard" as limiting EPA's authority to exempt a territory from all three portions of the Act. This phrase may have been

> intended to apply only to exemption from Part D, concerning plan requirements for nonattainment areas. EPA may have no authority to exempt the Territories from the requirements of section 7412, regarding hazardous air pollutions, or the State Implementation Plan requirements of section 7410.

In any event,territorial complaints about the Clean Air Act in recent years have ceased. In sum, the evidence suggests that the territories are content with this exemption authority, and that it has served their particular requirements.

(3) Grant programs. The Clean Air Act contains several grant programs, and the territories are eligible for them:

-- 42 U.S.C. 7403 and 7404, as amended by Title IX of the Clean Air Amendments of 1990, concern research and development, and permit grants to "public and nonprofit agencies" for these purposes.

-- 42 U.S.C. 7405 provides formula grants to the States and territories for the support of air pollution planning and control programs. As amended by section 802(d) of the 1990 amendments, the program contains the potential for a territorial windfall (as did its predecessor, currently found at 42 U.S.C. 7405(c)), because each State or territory is guaranteed a minimum grant of "one-half of 1 per centum of the annual appropriation"; but it may be that the requirements that the grant be measured in part by the grantee's prior year expenditures for air pollution programs, plus the grantee's need to pay 2/5ths of the program cost (42 U.S.C. 7405(b) and (c)), serve to eliminate such a potential windfall. In any event, the territories have all received grants under this section.[1]

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[1] As reported to the Interior Department, these grants have (continued...)

-- 42 U.S.C. 7406 authorizes discretionary grants to the States and territories for "up to three-fourths of the air quality planning program costs" of the State or territorial agency.

-- 42 U.S.C. 7544 authorizes grants to States (and territorial) agencies "in an amount up to two-thirds of the cost of developing and maintaining effective vehicle emission devices and systems inspection and emission testing and control programs".

(4) Possible shortcomings. It is possible that as experience develops with the administration of the newly-amended Clean Air Act, problems peculiar to the territories may emerge, just as they did in years past that caused the enactment of the territorial exemption authority in 1983. None appears from a reading of the amended law, and it seems probable at this time that the continuing availability of the 1983 exemption authority will be sufficient to meet the territories' special needs. One possible shortcoming is identified above, in connection with minimum grants under 42 U.S.C. 7405, but that may be more apparent than real, and it may be manageable administratively. A further shortcoming, probably entirely academic at this time, is the absence of a forum in American Samoa for enforcement of the Act. Federal district courts have jurisdiction (e.g., 42 U.S.C. 7413, 7523, 7603-7607), and Samoa has none. Samoa may be freer of air pollution than any other area of the United States, so this defect is not pressing--at least for now. And given the anguish so widely experienced in achieving the 1990 amendments to the Act, this is surely no time to seek further changes.

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[1](...continued) fluctuated surprisingly between fiscal years 1989 and 1990. The following figures show the changes from 1989 (actual) to 1990 (estimated): the Virgin Islands, from $4,000 in 1989 to $105,000 in 1990; Guam, from $148,000 to $74,000; Samoa, from $15,000 to $8,000; and the Northern Marianas, from $23,000 to $8,000.

(b) Earthquake Hazards Reduction (42 U.S.C. 7701-7706) refers to the 1977 Act of that name, which creates a Federal program directed toward earthquake prediction and mitigation. Although it names certain areas, all of which are States, that are at particular earthquake risk (42 U.S.C. 7701(1)), the Act also applies to the Virgin Islands, Guam, Samoa, and the Northern Marianas by name (42 U.S.C. 7703(4)). Principally the Act charges various Federal agencies with earthquake related responsibilities, with the Federal Emergency Management Agency as lead agency. It also provides assistance to the States and territories, so that when assistance is made available to them under the Disaster Relief Act (which applies to the territories, as discussed in Memorandum No. 42-13(b)), the President may also "make such assistance available to further the purposes" of the Earthquake Hazards Reduction Act (42 U.S.C. 7704(g)). The territories are, thus, accorded the same treatment as the States.

(c) Uranium Mill Tailings Radiation Control (42 U.S.C. 7901-7942) refers to the 1978 Act of that name, which concerns the disposal and, when appropriate, reprocessing of radioactive residues from processing plants associated with uranium and thorium mining operations. The Secretary of Energy is authorized to designate processing sites "within the United States" that require remedial action (42 U.S.C. 7912(a)(1)), with the "United States" defined to include "the territories and possessions" (42 U.S.C. 7911(10)). The insular areas are thus covered, but the point is academic because there are no such mines in any of them.

(d) Congregate Housing Services (42 U.S.C. 8001-8010) refers to the program, administered by the Department of Housing and Urban Development, of Federal financial assistance to local public housing agencies and nonprofit corporations that provide housing and services to the elderly, the handicapped, and the temporarily disabled, so as to avoid their institutionalization. The law was amended in 1990 to make it expressly applicable to the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 8011(k)(18)). The law was probably applicable to them before the 1990 addition, owing to internal references to other Federal laws that do apply to them all, but the amendment removed any doubt.

(e) The chapter entitled Neighborhood and City Reinvestment, Self-Help and Revitalization (42 U.S.C. 8101-8146) provides for two Federal programs. The first creates a Government corporation, the Neighborhood Reinvestment Corporation, which is authorized to make grants and provide technical assistance to programs for neighborhood housing services in order to revitalize "older urban neighborhoods by mobilizing public, private, and community resources at the neighborhood level" (42 U.S.C. 8101(a)(1)). There is no provision for the geographic areas in which this assistance may be provided, but inferentially the territories are included in light of a section that refers to the tax status of the corporation. That section provides tax exemption for the Corporation by any State, the United States, "or any territory, dependency, or possession thereof", except for the corporation's real property, which is subject to taxation (42 U.S.C. 8102(d)). It is thus reasonable to infer that the corporation could carry on its activities in the insular areas.

The second program concerns "livable cities", and provides grants to nonprofit organizations for the development and preservation of the "artistic, cultural, and historic resources . . . of the Nation's urban areas" (42 U.S.C. 8141), such grants to be made by the Secretary of Housing and Urban Development in consultation with the Chairman of the National Endowment for the Arts (42 U.S.C. 8144). There is in this portion of the law also no indication of its geographic reach, but no language to exclude the territories appears. The National Endowment for the Arts is authorized to provide assistance in the territories. (See Memorandum No. 20-3(f).) The probability is that this program is not now funded. It does not appear in the current Catalog of Federal Domestic Assistance, and the authorization contained in the law has expired (42 U.S.C. 8146).

(f) The chapter entitled National Energy Conservation Policy (42 U.S.C. 8201-8287c) refers to the Act of that name enacted in 1978, and states as its purposes the reduction of growth in demand for energy in the U.S., and the conservation of nonrenewable energy resources (42 U.S.C. 8201(b)). The Act provides for several programs to meet these purposes, and they very largely do not apply to the areas that are the subjects of this study--but in the circumstances, that does not appear inappropriate or injurious to them. The program for residential energy conservation (42 U.S.C. 8211 et seq.), which applies only to the States, the District of Columbia, and Puerto Rico (42 U.S.C. 8211(13)), imposes requirements through State plans upon large gas and electric utility companies to aid residential customers in installing energy conservation devices. The utilities affected are indeed large: those that sell natural gas in excess of 10 billion cubic feet per year (and there is no natural gas in the territories), and those that sell electric energy in excess of 750 million kilowatt-hours per year (42 U.S.C. 8212)--an amount vastly greater than electricity production in any of the territories. Their exclusion from this program is thus appropriate.

A related section, however, which authorizes the Secretary of Housing and Urban Development to make grants "to finance energy conserving improvements" in housing projects that have received certain Federal financial assistance under specified sections of the National Housing Act of 1934 (42 U.S.C. 8231), is available to the territories--to the extent they may have such projects. (As discussed in Memorandum No. 12-6, that Act is for the most part applicable to the territories.)

Remaining portions of the Act, with one exception referred to below, apply essentially to Federal agencies and Federal buildings, and are thus not applicable to the territories as such: Federal initiatives for energy demonstrations and conservation in Federal buildings (42 U.S.C. 8241 et seq.), Federal energy data collection (42 U.S.C. 8286 et seq.),and Federal agency contracts to share energy savings (42 U.S.C. 8287 et seq.). The exception is the program of Federal grants for the training of individuals to conduct energy audits for residential and commercial buildings (42 U.S.C. 8285-8285c). Such grants are available to the territories by name (42 U.S.C. 8285a(2)), and on the same terms as apply to the States.

(g) The chapter entitled <u>Powerplant and Industrial Fuel Use</u> (42 U.S.C. 8301-8484) contains the Powerplant and

Industrial Fuel Use Act of 1987, as amended. It does not now apply in any particular to any area outside the 48 contiguous States and the District of Columbia (42 U.S.C. 8303)--this as a result of a 1987 amendment, the rationale for which does not appear in the readily available legislative history (1987 U.S. Code Cong. and Admin. News 270,278). (Formerly the Act applied to all of the States, Puerto Rico, and "the territories and possessions", but the territories were then excluded from certain provisions of the Act.) Their exclusion is doubtless welcome to the territories. The Fuel Use Act is regulatory in nature, being designed to discourage the use of natural gas and petroleum in new and existing electric powerplants, and to encourage the use instead of coal and alternate fuels.

(h) Emergency Energy Conservation (42 U.S.C. 8501-8541) refers to the Emergency Energy Conservation Act of 1979, which provided emergency authority for dealing with disruptions in gasoline and diesel fuel markets. Its provisions permitted establishing "monthly emergency conservation targets" in the States (42 U.S.C. 8511)--a kind of rationing plan--with the "States" defined to include "any territory or possession" (42 U.S.C. 8502(8)), as well as a kind of "anti-topping" provision for gasoline sales for automobiles (42 U.S.C. 8521) and restrictions on odd-even gasoline purchase plans (42 U.S.C. 8522). A sunset provision has become effective, with termination of all of the foregoing effective July 1, 1983 (42 U.S.C. 8541(c)).

(i) The chapter entitled Low-Income Energy Assistance (42 U.S.C. 8621-8629) contains the Low-Income Home Energy Assistance Act of 1981, which authorizes grants from the Department of Health and Human Services to the States and territories to assist eligible, low-income households to meet the costs of home energy. Although the territories are not defined as States (42 U.S.C. 8622(6)), a special set-aside applies to the Virgin Islands, Guam, Samoa, and the Northern Marianas, along with Puerto Rico and the Trust Territory (now Palau only). That set-aside can range from 1/10 of one percent to 1/2 of one percent, as determined by the Secretary of HHS, based on the need for assistance (42 U.S.C. 8623(b)). All of the insular areas that are the subjects of this study now receive grant assistance under this program (CFDA 93.028).

While the set-aside at first blush may appear to be low, given relative populations and the sizeable low-income populations in all of the insular areas, it is clear that none would require assistance in meeting heating bills, and few in that population would possess household cooling systems. In the circumstances, the percentages do not appear to be unfair.

(j) The United States Synthetic Fuels Corporation (42 U.S.C. 8719), created by the Energy Security Act of 1980 to oversee a program to produce synthetic oil and gas from unconventional sources, exists no longer, having been abolished in 1986. One section of the law, pertaining to an advisory committee to the Corporation (42 U.S.C. 8719) unaccountably remains live, but for no apparent purpose.

(k) The chapter entitled Biomass Energy and Alcohol Fuels (42 U.S.C. 8801-8871) derives from a 1980 act of that title, which was also a part of the Energy Security Act of 1980 and which has also terminated (42 U.S.C. 8821), as of 1987. But the law remains codified. For that reason it can be noted that "biomass" means "any organic matter which is available on a renewable basis, including agricultural crops and agricultural wastes and residues . . ." (42 U.S.C. 8802(2)(A)); the purpose of the Act was to create a national program for the production of biomass energy (such as gasohol), so as to reduce the United States dependence on imported petroleum and natural gas (42 U.S.C. 8801); and the insular areas were fully comprehended by its terms (42 U.S.C. 8802(18)).

(l) The laws titled Acid Precipitation Program and Carbon Dioxide Study (42 U.S.C. 8901-8912), also derived from the Energy Security Act of 1980, contain no provisions on geographic application. They provide for acid rain studies, and for studies of the impact on the carbon dioxide level in the atmosphere of fossil fuel combustion and other fuel activities--commonly termed the Greenhouse Effect.

(m) Ocean Thermal Energy Conversion Research and Development (42 U.S.C. 9001-9009) contains the Ocean Thermal Energy Conversion Research, Development, and Demonstration

Act, enacted in 1980. (Ocean thermal energy conversion, or OTEC, is intended to exploit differences in temperatures between the ocean surface and its depths to generate electricity.) The program, administered by the Secretary of Energy, takes particular account of the insular areas, one of its purposes being to achieve ". . . for islands in the United States, its possessions and its territories" an average cost of electricity from OTEC systems that is competitive with conventional energy sources (42 U.S.C. 9001(b)(3)). In addition, in providing financial assistance for demonstration plants, the Secretary of Energy is required to give "full consideration" to projects that provide energy to the "territories" and "possessions" (42 U.S.C. 9004(c)).

(n) Ocean Thermal Conversion (42 U.S.C. 9101-9168) refers to the Act of that name, enacted in 1980. It provides for the authorization and regulation through a licensing procedure, administered by the National Oceanic and Atmospheric Administration, of OTEC facilities and "plantships" that are "located in whole or in part between the highwater mark and the seaward boundary of the territorial sea, of the United States" (42 U.S.C. 9111(a)). The Act applies to the Virgin Islands, Guam, Samoa, and the Northern Marianas, all of which are expressly named (42 U.S.C. 9102(15)), and thus to OTEC facilities and plantships in the territorial waters around them.

In its 1985 Report, the Northern Mariana Islands Commission on Federal Laws considered but rejected the idea of causing the Northern Marianas to be separated from the Federal scheme and thus allowing it to enact its own OTEC regulatory laws. It concluded that Federal regulation in the Northern Marianas represents the "more economical course" (Report, p. 521). But the Commission offered two lesser recommendations for change in the OTEC Act, the first of which has become unnecessary, but the second remains appropriate. The first related to U.S. citizenship requirements in various sections of the law, but that problem has been overcome by the subsequent collective naturalization of the people of the Northern Marianas under section 301 of the Covenant. The second Commission recommendation concerns jurisdiction and venue for enforcement of the Act, because the Act names the District Court of Guam as the proper forum for lawsuits arising in the Northern Marianas (42 U.S.C. 9153(c)). Inasmuch as the Northern Marianas has its own U.S. District Court (and in fact did have such a court in 1980, when the OTEC Act was passed), the Commission recommended that that fact be recognized and that the section be amended to name the District Court for the Northern Marianas as the appropriate forum for Northern Marianas litigation (Report, pp 157-160). That recommendation continues to be appropriate--but since there is no current OTEC activity there, the change can be viewed as nonurgent.

It might be noted that the frequent problem of court jurisdiction for Samoa does not exist in this law, because the same section names the U.S. District Court of Hawaii as the "appropriate" forum for Samoan cases (42 U.S.C. 9153(c)). Further, a section that makes Federal customs duties and taxes applicable to "foreign articles to be used in the construction" of OTEC facilities and plantships would not have the effect of making such duties and taxes applicable to OTEC undertakings around the territories, because such duties and taxes are to be paid "in accordance with laws applicable to merchandise imported into the customs territory of the United States" (42 U.S.C. 9163(c))--and the territories are all outside of the customs territory.

(o) The chapter entitled Wind Energy Systems (42 U.S.C. 9201-9213) contains the 1980 law of that title, which provides for the establishment under the Secretary of Energy of "an aggressive research, development, demonstration, and technical applications program for converting wind energy into electrical and mechanical energy" (42 U.S.C. 9201(b)). The law provides Federal assistance to public and private entities working toward that end (42 U.S.C. 9205), and it applies expressly to "the Commonwealth of the Northern Mariana Islands and the territories and possessions of the United States" (42 U.S.C. 9212(b)).

(p) Magnetic Fusion Energy Engineering (42 U.S.C. 9301-9312) refers to the 1980 Act of that name, designed to "accelerate the national effort in research, development, and demonstration activities related to magnetic fusion energy systems" (42 U.S.C. 9301(b)). The Act defines "magnetic fusion" to mean "the use of magnetic fields to confine a very hot, fully ionized gas of light nuclei, so that the fusion process can occur" (42 U.S.C. 9302(2)). Inasmuch as the definition of "fusion" is even less enlightening, it will not be repeated here, but the interested reader may find it at 42 U.S.C. 9302(1). Because the program is to be created, maintained, supervised, and funded by the Secretary of Energy, it contains no provisions concerning geographical application. None appear to be needed.

Conclusion: Except for the Ocean Thermal Conversion Act of 1980 ((n) above), which ought to be modified to recognize the creation of the District Court of the Northern Marianas, the laws of Title 42 considered herein require no modification to accommodate the territories. A few contain no provisions as to geographic application, but in all such instances none appears to be needed. Most of the remainder apply expressly to the territories, and in the cases of the few that do not, that result is appropriate and the territories are the beneficiaries.

Federal agency comments: Comments were requested from EPA as to (a), from the Department of Health and Human Services as to (i), from the Department of Energy as to (c), (f), (g), (m), (o), and (p), and generally from the Department of Justice. All comments received have been reflected here.

Memorandum No. 42-15
October 1990
Revised December 1991

Subject: (a) Mental Health Systems
Title 42, Chapter 102 (42 U.S.C. 9401-9522)

(b) Comprehensive Environmental Response, Compensation, and Liability
Title 42, Chapter 103 (42 U.S.C. 9601-9675)

(c) Nuclear Safety Research, Development, and Demonstration
Title 42, Chapter 104 (42 U.S.C. 9701-9708)

(d) Community Services Programs
Title 42, Chapter 105 (42 U.S.C. 9801-9887)

(e) Community Services Block Grant Programs
Title 42, Chapter 106 (42 U.S.C. 9901-9912)

(f) Consumer-Patient Radiation Health and Safety
Title 42, Chapter 107 (42 U.S.C. 10001-10008)

(g) Nuclear Waste Policy
Title 42, Chapter 108 (42 U.S.C. 10101-10226)

(h) Water Resources Research
Title 42, Chapter 109 (42 U.S.C. 10301-10309)

(i) Family Violence Prevention and Services
Title 42, Chapter 110 (42 U.S.C. 10401-10413)

(j) Emergency Federal Law Enforcement Assistance
Title 42, Chapter 111 (42 U.S.C. 10501-10513)

(k) Victim Compensation and Assistance
Title 42, Chapter 112 (42 U.S.C. 10601-10605)

(l) State Justice Institute
Title 42, Chapter 113 (42 U.S.C. 10701-10713)

(m) Protection and Advocacy for Mentally Ill Individuals
Title 42, Chapter 114 (42 U.S.C. 10801-10851)

(n) Child Development Associate Scholarship Assistance Program
Title 42, Chapter 115 (42 U.S.C. 10901-10905)

(o) Emergency Planning and Community Right-to-Know
Title 42, Chapter 116 (42 U.S.C. 11001-11050

(p) Encouraging Good Faith Professional Review Activities
Title 42, Chapter 117 (42 U.S.C. 11101-11152

(q) Alzheimer's Disease and Related Dementias Services Research
Title 42, Chapter 118 (42 U.S.C. 11201-11294)

(r) Homeless Assistance
Title 42, Chapter 119 (42 U.S.C. 11301-11472)

(s) Enterprise Zone Development
Title 42, Chapter 120 (42 U.S.C. 11501-11505)

(t) International Child Abduction Remedies
Title 42, Chapter 121 (42 U.S.C. 11601-11610)

(u) Native Hawaiian Health Care
Title 42, Chapter 122 (42 U.S.C. 11701-11710)

(v) Drug Abuse Education and Prevention
Title 42, Chapter 123 (42 U.S.C. 11801-11851)

(w) Public Housing Drug Elimination
Title 42, Chapter 124 (42 U.S.C. 11901-11925)

(x) Renewable Energy and Energy Efficiency Technology Competitiveness
Title 42, Chapter 125 (42 U.S.C. 12001-12007)

Comment: The chapters of Title 42 that are examined herein all contain adequate language as to their application to the territories. Many such chapters provide for Federal grant programs, and in each case the territories appear to be treated with at least fairness, and sometimes generosity. Only one statute, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (discussed below at (b)), appears to require change to accommodate the territories fully, and that change is essentially perfecting.

<u>Discussion</u>: (a) The chapter entitled <u>Mental Health Systems</u> (42 U.S.C. 9401-9522) contains what remains of the Mental Health Systems Act, enacted in October, 1980. The bulk of the Act, including all but one of its grant programs, was repealed in August 1981. What remains are a definition of "State" to include the Virgin Islands, Guam, Samoa, and the Northern Marianas, by name (42 U.S.C. 9412(2)); a Congressional exhortation to the States and territories to enact legislation insuring fair treatment of mental health patients (42 U.S.C. 9501); and a program of grants on the subject of sex offense prevention and control (42 U.S.C. 9511). These grants, by the Secretary of Health and Human Services, are for such matters as a continuing study of sex offenses, an information clearing house on sex offenses, the preparation of training materials for prevention, and research and demonstration projects on rape prevention and control. Under the law the territories are treated as States for purposes of these project grants.

(b) <u>Comprehensive Environmental Response, Compensation and Liability</u> (42 U.S.C. 9601-9675) refers to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as substantially amended in 1986. It is commonly referred to as CERCLA, or as the Superfund law. The Act is of great length and considerable complexity, being directed toward (1) enabling the Federal Government to respond to and mitigate the effects of releases of hazardous substances, pollutants, or contaminants, (2) creating a Hazardous Substance Superfund (now established in the Internal Revenue Code, at 26 U.S.C. 9507) to assist in that response, and (3) imposing upon those responsible for the release of hazardous substances the costs of remedying the problem they created. The Environmental Protection Agency is chiefly responsible for the administration of the Act, but particular responsibilities are placed by it in the President and in the heads of various Departments and agencies.

For the immediate purpose of this study, it may be sufficient to note that the territories are in all instances accorded the same treatment as the States, being defined as such at 42 U.S.C. 9601(27). (They are further defined as such --probably needlessly--for purposes of the 1986 amendments pertaining to pollution insurance (42 U.S.C. 9671(5)), which are intended to facilitate obtaining such insurance.) The

Virgin Islands, Guam, Samoa, and the Northern Marianas, all being defined as States in the law, are accorded State-like treatment throughout it. With one possible exception only, discussed below, this appears to be appropriate for them. For example, when the President determines under 42 U.S.C. 9604 that remedial action relating to a hazardous substance, pollutant, or contaminant is required, coordination with and cooperation from the pertinent State (or territory) is required (42 U.S.C. 9604(c)(3)), and cost-sharing by such State (or territory) is also required.

The possible exception to the appropriateness of this State-like treatment appears at 42 U.S.C. 9623, which authorizes the President to provide for federal reimbursement to a "general purpose unit of local government" which has incurred expenses

> in carrying out temporary emergency measures necessary to prevent or mitigate injury to human health or the environment associated with the release or threatened release of any hazardous substance or pollutant or contaminant. (42 U.S.C. 9623(b)(1))

A ceiling of $25,000 is imposed for each response by a local government. Inasmuch as none of the territories has "general purpose units of local government" (or "local community authorities", which the section uses as a synonym) of the sort apparently here contemplated, it is not clear how this reimbursement might be handled by them. EPA suggests informally, however, that if this were to become a problem, it could be corrected by EPA's regulations, so corrective legislation is apparently not necessary.

In addition, the familiar problem of court jurisdiction arises. District courts of the United States have jurisdiction under the Act (for example, under 42 U.S.C. 9606, 9607(l) and (m), 9609, 9613), and without a Federal District Court, Samoa is disadvantaged. Samoa is probably freer of hazardous waste sites than most communities under

U.S. jurisdiction, but it would seem appropriate to provide a forum, lest that judgment be in error or that condition not continue. (The Act is obviously intended to apply to Samoa, given references to that territory at 42 U.S.C. 9601(27) and 9671(5).) The problem could be met by vesting jurisdiction of Samoa cases in the U.S. District Court of Hawaii, or in the Samoan High Court.

(c) The chapter entitled Nuclear Safety Research, Development, and Demonstration (42 U.S.C. 9701-9708) contains the 1980 Act of that name. It requires the Secretary of Energy, in cooperation with other Federal agencies, to undertake various studies, as well as research, development, and demonstration projects, directed to reducing nuclear powerplant accidents and reducing population disruptions resulting from them. As is usual for a law of its sort, it contains no provisions as to geographic application, and it needs none.

(d) The chapter entitled Community Services Programs (42 U.S.C. 9801-9887) contains five separate programs, three dating from the Omnibus Budget Reconciliation Act of 1981, with two more recently added. Not all such programs are currently live, but all make or made adequate provision for the territories.

-- Community economic development programs, derived from the Community Economic Development Act of 1981 (42 U.S.C. 9801-9822), have been deleted from the Catalog of Federal Domestic Assistance (formerly 13.665), so it may be inferred that they are not now funded, though the law has not been repealed. Such programs involved urban and rural special impact programs, special rural programs in the form of grants to low-income rural families and to cooperatives, and development loans and loan guarantees for community economic development programs. The availability of these programs to the territories is unspecified in the law, but because funding for it, as provided at 42 U.S.C. 9803, is available to the Secretary of Health and Human Services from funds made available under 42 U.S.C. 9910(c)--a section pertaining to the Community Services Block Grant Program, which is examined below at (e) in this Memorandum, and which applies fully to the territories--the territories were (and as a matter of law, are) eligible for this program assistance.

-- The Head Start Programs (42 U.S.C. 9831-9852) are alive and well and in use in the territories, to which they are expressly applicable (42 U.S.C. 9832(2)). (Such care has been exercised to guarantee this result that in 1984 the definition of "State" in that section was amended to change "the Northern Mariana Islands" to "the Commonwealth of the Northern Mariana Islands".) The territories are second on the priority list for Head Start allotments, following Indian and migrant Head Start programs and services for handicapped children--except that payments to the Virgin Islands, Guam, Samoa, and the Northern Marianas (plus Palau at this time) cannot exceed 1/2 of one percent of the sums appropriated (42 U.S.C. 9835(a) (2)(B)). On a relative child-population basis, which is the basis for allotments to the States (42 U.S.C. 9835(a)(3)), this ceiling appears very generous.

-- Follow Through Programs (42 U.S.C. 9861 et seq.), directed toward older children, have been terminated.

-- Grants by the Secretary of Health and Human Services for the establishment of referral systems to provide information on dependent care services (42 U.S.C. 9874(a)), and for school-age child care services (42 U.S.C. 9874(b)), are available to the territories by name (42 U.S.C. 9877(10)), but the minimum grant of $50,000 for each State does not apply to the territories (42 U.S.C. 9872). Because funds are allotted on a population basis, this provision seems reasonable.

-- Grants are available under a program enacted in 1988 for Comprehensive Child Development (42 U.S.C. 9881-9887), consisting of grants for supporting the development of low-income children (42 U.S.C. 9881(a)), and for certain supportive services for low-income infants, young children, and family members (42 U.S.C. 9881(c)). Geographical application is not stated, but the grant recipients are "eligible agencies" under the Head Start program (42 U.S.C. 9886(2)), and because the Head Start program applies to and is used in the territories, "eligible agencies" in the territories would qualify for these grants.

In sum, the laws contained in this chapter make sufficient provision for the territories.

(e) The Community Services Block Grant Program (42 U.S.C. 9901-9912), derived from the Omnibus Budget Reconciliation Act of 1981, applies to the Virgin Islands, Guam, Samoa, and the Northern Marianas by name (42 U.S.C. 9902(4)), and is in use in them all (CFDA 93.031). This is a program of grants by the Secretary of Health and Human Services to the States and territories "to ameliorate the causes of poverty in communities" in the States and territories (42 U.S.C. 9901(a)), with the grant funds being used by them for programs "having a measurable and potentially major impact on causes of poverty in the community", programs "to assist low-income participants including the elderly poor", and programs related thereto (42 U.S.C. 9904(c) (1)). These grants are formula grants, but with a set-aside for the Virgin Islands, Guam, Samoa, and the Northern Marianas (plus Palau, for now) of 1/2 of one percent of the amount appropriated (42 U.S.C. 9903(b)). On a relative population basis, that set-aside is generous. The Secretary also has authority to make discretionary grants for training and other support activities (42 U.S.C. 9910), for programs for community food and nutrition services (42 U.S.C. 9910a), and for certain demonstration projects (42 U.S.C. 9910b). The territories are eligible for them all.

(f) In the chapter entitled Consumer-Patient Radiation Health and Safety (42 U.S.C. 10001-10008), the Secretary of Health and Human Services is required to promulgate standards for the accreditation of educational programs to train individuals who perform radiologic procedures, and for the certification of persons who perform such procedures (42 U.S.C. 10004), in order to "insure that medical and dental radiologic procedures are consistent with rigorous safety precautions and standards" (42 U.S.C. 10002(2)). Administration and enforcement are shared by the Federal Government and the States, with the latter defined to include the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 10003(7)).

(g) The chapter entitled Nuclear Waste Policy (42 U.S.C. 10101-10226) contains the Nuclear Waste Policy Act of 1982, as appreciably amended in 1987. The purposes of the Act are to provide (1) for the creation of a repository, or of repositories, for the storage of high-level radioactive waste and spent nuclear fuel (42 U.S.C. 10131-10145), (2) for the interim storage of spent nuclear fuel (42 U.S.C. 10151-10157), (3) for the study of monitored retrieval storage facilities for high-level radioactive waste and spent nuclear fuel (42 U.S.C. 10161-10169), and (4) for an extensive program, with many details stipulated in the law, of research, development, and demonstrations regarding the disposal of high-level radioactive waste and spent nuclear fuel (42 U.S.C. 10191-10204). The last of these contains a particular provision on sub-seabed disposal (42 U.S.C. 10204). The Act does not apply to a repository used exclusively for the disposal of high-level radioactive waste or spent fuel "from atomic energy defense activities" or research and development activities by the Secretary of Energy (42 U.S.C. 10107(c)), but if a repository were to be developed at such a site, cooperation with the Governor and Legislature of the pertinent State or territory would be required (42 U.S.C. 10121).

With one helpful exception, the Act applies to the territories--to the Virgin Islands, Guam, Samoa, and the Northern Marianas--on precisely the same terms as the States. They are all defined as such (42 U.S.C. 10101(24)). The exception appears at 42 U.S.C. 10103, which expressly preserves the special protection, enacted in 1980 and found at 48 U.S.C. 1491, that is accorded to each "territory or possession of the United States". Under that 1980 law no person can be authorized to transport high-level radioactive waste or spent nuclear fuel or to store it--on an interim, long-term, or permanent basis--in any territory or possession, unless the transportation or storage "has been expressly authorized by Act of Congress".[1] The 1980 law was enacted

[1] In unpublished research, the staff of the Northern Mariana (continued...)

in recognition of the territories' particular concern on this subject, and in light of Executive Branch site investigations in the offshore areas that came as a surprise to the Congress (Memorandum No. 48-2(c)).

Although when the Nuclear Waste Policy Act was originally enacted the territories joined the States as possible candidates for selection as sites for a repository under the first purpose stated above, the amendments in 1987 now focus on the site at Yucca Mountain in Nevada (42 U.S.C. 10133), and as the law now stands, a second repository site is unlikely to be selected until the next century (42 U.S.C. 10172, 10172a). The territories thus join 49 of the States in a welcome, de facto exclusion from this part of the program.

As for the remaining parts--interim storage, monitored retrieval, research and development--the territories have as extensive participatory rights as do the States. For example, as to interim sites, the Governor and Legislature of each territory have the same right as those of a State to evidence disapproval (42 U.S.C. 10155(d)(6)); they have the same right to veto a monitored retrieval storage site (42 U.S.C. 10166); and they have the same rights to participate in research and development activities (e.g., 42 U.S.C. 10193(b), 10195, 10199).

1/(...continued)
Commission on Federal Laws recommended the amendment of 48 U.S.C. 1491 to make it expressly applicable to the Northern Marianas, inasmuch as it had been enacted following the effective date (in January 1978) of section 502 of the Covenant. Such an amendment appears unnecessary. While 48 U.S.C. 1491(b) defines "territory or possession" for purposes of the section to include "any area not within the boundaries of the several States over which the United States claims or exercises sovereignty", and by section 101 of the Covenant, the Northern Marianas are "under the sovereignty of the United States of America", the Northern Marianas are not "specifically named", as section 105 of the Covenant provides. But under section 105 a law applies to the Northern Marianas if it could "also be made applicable to the several States", and 48 U.S.C. 1491 could have been or could be made so applicable.

Two further titles were added to the Nuclear Waste Policy Act in 1987, but neither poses a particular problem for the territories. The first authorizes the appointment of a Nuclear Waste Negotiator (42 U.S.C. 10241-10251), whose function is to

> attempt to find a State or Indian tribe willing to host a repository or monitored retrievable storage facility at a technically qualified site on reasonable terms and [to] . . . negotiate with any State or Indian tribe which expresses an interest in hosting a repository or monitored retrievable storage facility. (42 U.S.C. 10242(b)

The term "State" is defined for this title of the Act to include, among others, the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 10241), a definition that parallels that for the Act generally (42 U.S.C. 10101(24)), except that for purposes of the Nuclear Waste Negotiator title, the term also includes the Marshall Islands. The second title, added in 1987, provides for a Nuclear Waste Technical Review Board (42 U.S.C. 10261-10270), whose function is to evaluate the technical and scientific validity of pertinent activities of the Secretary of Energy (42 U.S.C. 10263).

The territories appear to be treated fairly under the Nuclear Waste Policy Act.

(h) The chapter entitled Water Resources Research (42 U.S.C. 10301-10309) contains the Act of that name, passed in 1984. With the approval of the Secretary of the Interior, it provides for the establishment in each State, and in the Virgin Islands, Guam, Samoa, and the Northern Marianas, of a water resources research and technology institute, with local funding required to match Federal grants (42 U.S.C. 10303). Discretionary grants are also available for "national interest" research and for water-related technology projects (42 U.S.C. 10304, 10305). The named territories are eligible for such grants.

(i) Family Violence Prevention and Services (42 U.S.C. 10401-10413) refers to the Act of that name, enacted in 1984, under which the Secretary of Health and Human Services is authorized to make formula grants to the States (defined at 42 U.S.C. 10408(6) to include the Virgin Islands, Guam, Samoa, and the Northern Marianas) for programs to prevent incidents of family violence, and for programs to provide "immediate shelter" and related assistance to the victims of family violence (42 U.S.C. 10402(a)(1)). The grants are made on a population basis, with each State assured of the greater of 1/2 of one percent or $50,000, but with the Virgin Islands, Guam, Samoa, and the Northern Marianas each being entitled to a 1/8 of one percent set-aside (42 U.S.C. 10403). Set-asides for these four areas, often including Palau at this time, customarily are stipulated at 1/2 of one percent (and when that is so, they are routinely described as "generous" in this study. The set-asides here considered are obviously on the same order of magnitude, and thus also "generous".) All territories currently participate in the program (CFDA 93.671). The Secretary may also make discretionary grants for training and technical assistance (42 U.S.C. 10410), and for these also the territories are eligible.

(j) The chapter entitled Emergency Federal Law Enforcement Assistance (42 U.S.C. 10501-10513) contains the 1984 law under which the U.S. Attorney General may, if the Governor of a "State" applies for it, provide Federal law enforcement assistance "if such assistance is necessary to provide an adequate response to a law enforcement emergency" (42 U.S.C. 10501(c)). The term "State" includes the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 10502(4)). The Attorney General must respond to an application within 10 days (42 U.S.C. 10501(b)); he must take into account several criteria before responding, including cost (42 U.S.C. 10501(c)); and those engaged in Federal law enforcement are subject to several limitations, including a bar to their engaging in investigations of criminal law violations (42 U.S.C. 10503). Federal law enforcement agencies potentially available are listed and are numerous, including the FBI, the Drug Enforcement Administration, the Marshals Service, and the Postal Service (42 U.S.C. 10502(2)). The territories are treated precisely as are the States under this law, and that seems appropriate.

(k) The chapter entitled Victim Compensation and Assistance (42 U.S.C. 10601-10605) is derived from the Victims of Crime Act of 1984. The Act provides for the creation of the Crime Victims Fund, to which are deposited most fines collected from persons convicted of Federal offenses, penalty assessments, and other funds (42 U.S.C. 10601(b)). From this Fund the Department of Justice is authorized to make grants to the States (and territories) for two principal programs. The first is a program of grants to State-operated crime victim compensation programs, to permit payments for medical expenses, loss of wages, and funeral expenses (42 U.S.C. 10602). Although the term "State" is defined to include Puerto Rico "and any other possession or territory of the United States" (42 U.S.C. 10602(d)(4)), so that all of the areas that are subjects of this study are eligible to participate, reports prepared for the Department of the Interior show that the Virgin Islands, alone among the subjects of this study, receives these grants for crime victim compensation (CFDA 16.576). (The Northern Marianas would be included in the foregoing definition of "State", by operation of section 105 of the Covenant.) The Department of Justice advises informally that the Virgin Islands alone receives a victim compensation grant under 42 U.S.C. 10602 because it is the only territory that has a crime victim compensation program that meets the Act's victim compensation grant program eligibility requirements.

The second major grant program under this law is for crime victim assistance, with the requirement that the State or territorial program must give priority to providing assistance to victims of sexual assault, spousal abuse, or child abuse (42 U.S.C. 10603). Each State and territory is entitled to a base grant of $100,000, with that amount rising or falling depending upon the availability of money in the

Crime Victims Fund (42 U.S.C. 10603(a)(3), (4)).[2] The Justice Department reports informally that the "base amount" for fiscal year 1991 is $150,000. The excess amount available in the Crime Victims Fund is then distributed among the States and territories on a relative population basis (42 U.S.C. 1603(a)(3)(B)). The treatment accorded the territories under this formula is quite clearly fair to them. Reports to the Interior Department show that each that is the subject of this study has received grants for crime victim assistance during all recent years, with fiscal year 1990 grants of $173,000 for the Virgin Islands, $180,000 for Guam, $159,000 for American Samoa, and $155,000 for the Northern Marianas.

(l) The chapter entitled State Justice Institute (42 U.S.C. 10701-10713) contains the 1984 Act of that name, which created the private, nonprofit corporation termed the State Justice Institute, governed by a Board of Directors appointed by the President. The purpose of the Institute is "to further the development and adoption of improved judicial administration in State courts in the United States" (42 U.S.C. 10702(a)). To this end the Institute is to focus on the State courts' assuring ready access to a fair and effective system of justice, cooperation with the Federal judiciary, recognition of the importance of an independent judiciary, and encouraging education for judges and other personnel of State courts (42 U.S.C. 10702(b)). The term "State" includes the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 10701(6)). To further these purposes, the Institute is authorized to make grants to, and to enter contracts and cooperative agreements with, State and territorial courts, national nonprofit organizations associated with State (and territorial) judiciaries, and other national nonprofit organizations (42 U.S.C. 10705). The grants are project grants. The territories are as eligible as the States for the assistance authorized.

(m) The Protection and Advocacy for Mentally Ill Individuals (42 U.S.C. 10801-10851) refers to the 1986 Act of

[2] The $100,000 has been raised for certain fiscal years, as shown in the notes following 42 U.S.C.A. 10603, but the $100,000 appears as the "permanent" figure at 42 U.S.C. 10603(a)(3)(A).

that name, by which formula grants are made to "eligible systems" in the States and territories, for the purpose of protecting and advocating the rights of the mentally ill, and of investigating incidents of abuse and neglect of the mentally ill. The Virgin Islands, Guam, Samoa, and the Northern Marianas are defined as "States" (42 U.S.C. 10802(6)), and "eligible systems" are those established under the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 10802(2)), an Act that applies to the territories and from which they have derived financial assistance (see Memorandum No. 42-13(i)). An "eligible system" must meet certain standards and comply with certain requirements (42 U.S.C. 10805, 10806), and while these appear unduly elaborate for small territories, the territories have all met them and they have received grants under this Act (CFDA 93.138).

It is difficult to judge whether the allotment formula is fair to the territories, but it would be even harder to devise one that would with confidence be more just. The allotment formula is unusually complex, involving three levels of computations. First, the Secretary of Health and Human Services allocates appropriated funds to States and territories which have "eligible systems", on the basis of the State's or territory's population and its population weighted by its relative per capita income--giving each element equal weight. A State's relative per capita income is the quotient of the per capita income of the U.S. as a whole, and the per capita income of the State--thereby giving poorer States some advantage over richer ones. But the Virgin Islands, Guam, Samoa, and the Northern Marianas (plus Palau, for now) have a statutory quotient of "one", which places each of them in the category of the State with the average per capita income. (All of the foregoing emerges from 42 U.S.C. 10822(a)(1)). That almost certainly places some of the territories (but probably not all of them) in a disadvantaged position for this part of the allotment, but very likely the lack of reliable per capita income data from the territories prompted the statutory "one".

But the second part of the allotment procedure, at 42 U.S.C. 10822(a)(2), provides for territorial treatment more generous than that accorded the States. Under that provision, depending upon the appropriation level, each State (which includes for this purpose the District Columbia and Puerto Rico) is guaranteed the greater of either $140,000 or $125,000 plus its entitlement under the first part of the allocation described above, while each of the territories is guaranteed the greater of either $75,000 or $67,000 plus its entitlement under the first part. On the basis of population, these amounts are clearly generous for the territories.

The third part of the allotment procedure, at 42 U.S.C. 10822(a)(3), has to do with adjustments in allotments to be made in light of the Consumer Price Index, and because it does not differentiate between the States and the territories, it can conveniently be ignored here.

In sum, it seems reasonable to conclude that the territories receive allotment treatment that is appropriate, and perhaps on balance generous, under this program. In any event, information provided to the Interior Department shows that the Virgin Islands, Guam, Samoa, and the Northern Marianas each received the same amount under the Act in fiscal year 1989--$81,000--and each was expected to receive the same amount--$89,000--in fiscal year 1990.

(n) The Child Development Associate Scholarship Assistance Program (42 U.S.C. 10901-10905) authorizes the Secretary of Health and Human Services to make grants to the States and territories to enable them to provide scholarships to financially needy candidates for the Child Development Associate Credential (42 U.S.C. 10902). A State or territory is eligible if it receives a grant under Title XX of the Social Security Act (42 U.S.C. 1397), which is the authority for block grants for social services, and the Virgin Islands, Guam, Samoa, and the Northern Marianas are all eligible for such block grants (see Memorandum No. 42-3). For good measure, the term "State" is also defined in this scholarship assistance act to include them all (42 U.S.C. 10903(3)).

(o) The chapter entitled Emergency Planning and Community Right-to-Know (42 U.S.C. 11001-11050) contains the 1986 Act of that name, contained in the Superfund Amendments of 1986. The Act imposes detailed reporting requirements upon the owners or operators of facilities that deal with or release hazardous substances, hazardous chemicals, and toxic chemicals (42 U.S.C. 11102, 11104, 11123). The Governor of each State--defined to include the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 11049(9))--is required to appoint an emergency response commission (42 U.S.C. 11001(a)); and each such commission is required to designate emergency planning districts and local emergency planning committees (42 U.S.C. 11001(b) and (c)). (This machinery seems unduly elaborate for a small territory, but in the absence of a State (or territorial) commission, the Governor may operate as such (42 U.S.C. 11001(a)), so the territories need not be overburdened.) Information and reports filed with the emergency response commission is to be made available to the public upon request, subject to procedures of the commission (42 U.S.C. 11044) and subject to certain statutory exceptions. Because enforcement jurisdiction is granted to Federal District Courts (42 U.S.C. 11045, 11046), Samoa would lack a forum, but at this time Samoa probably does not have the environmental problem to which the Act is directed. But other territories do, at least potentially, and as to them the Act appears fully to meet their needs.

(p) The chapter entitled Encouraging Good Faith Professional Review Activities (42 U.S.C. 11101-11152) contains the Health Care Quality Improvement Act of 1986, an act concerning medical malpractice. It is intended to encourage effective professional peer review and to reduce the ability of incompetent physicians to move from State to State (or territory) (42 U.S.C. 11101). The term "State" includes each of the territories, by name (42 U.S.C. 11151(13)). The Act limits the liability in damages under Federal or State (or territorial) law of professional peer reviewers (42 U.S.C. 11111), and it requires reporting to the Secretary of Health and Human Services of medical malpractice payments by insurance companies (42 U.S.C. 11131), of sanctions imposed by boards of medical examiners (42 U.S.C. 11132), and of adverse actions taken by hospitals and other professional societies and entities (42 U.S.C. 11133). A duty is imposed upon each hospital to seek from the Secretary information pertinent to applicants for the staff or for privileges at the hospital, as well as information pertinent to those already on its staff (42 U.S.C. 11135). It is appropriate that this law apply to the territories and it does so fully.

(q) Alzheimer's Disease and Related Dementias Services Research (42 U.S.C. 11201-11294) concerns the 1986 Act of that name. The Act contains no provisions on geographic application, and it needs none for it creates a Federal program of research and assistance on Alzheimer's Disease and related disorders, and from it the territories would benefit as fully as the States. The Act creates some new machinery--a Council on Alzheimer's Disease and an Advisory Panel on the same subject--and confers new responsibilities on existing agencies--the National Institute of Mental Health, the National Center for Health Services Research and Health Care Technology Assessment, and the Health Care Financing Administration.

(r) The chapter entitled Homeless Assistance (42 U.S.C. 11301-11472) contains the Stewart B. McKinney Homeless Assistance Act, enacted in 1987, as amended. Its purpose is to coordinate programs for the homeless, and to provide Federal funds for programs to assist them, "with special emphasis on elderly persons, handicapped persons, families with children, Native Americans, and veterans" (42 U.S.C. 11301(b)). Somewhat oddly, there is no general definition that has the effect of making all of the Act applicable to the territories, but analysis of the Act demonstrates that portions of likely interest and use to the territories--some of which have problems of homelessness, but of a sort and dimension quite different from that known in mainland metropolitan areas--without exception apply to them.

Titles I and II of the Act, containing general provisions (42 U.S.C. 11301-11304) and provisions establishing the Interagency Council on the Homeless (42 U.S.C. 11311-11320), respectively, appear not to apply to the territories, but they are not thereby the losers. Some provisions do apply to "States", undefined, but they are not of great importance (e.g., 42 U.S.C. 11313(a)(4), which refers to limited technical assistance, and 42 U.S.C. 11320, which exhorts the States to become involved in the problem).

The major assistance programs are all expressly applicable to the Virgin Islands, Guam, Samoa, and the Northern Marianas, in each case by name, viz,

-- The Federal Emergency Management Food and Shelter Program (42 U.S.C. 11331-11352), by the definition at 42 U.S.C. 11351(7);

-- The Emergency Shelter Grants Program (42 U.S.C. 11371-11377), by the definition at 42 U.S.C. 11371(8)--but it is interesting to note that the comprehensive homeless assistance plan that is required of all States or political subdivisions (42 U.S.C. 11361) is not required of the territories; grants for the emergency shelter program for the territories are made by the Secretary of Housing and Urban Development "in accordance with an allocation formula established" by him (42 U.S.C. 11373(e));

-- The Supportive Housing Demonstration Program (42 U.S.C. 11381-11388) is available by the definition at 42 U.S.C. 11382(11);

-- Supplemental assistance grants to aid the homeless (42 U.S.C. 11391-11394), by the definition at 42 U.S.C. 11391(8);

-- Grants for education for homeless adults (42 U.S.C. 11421), by the definition at 42 U.S.C. 11421(d);

-- Grants for the education of homeless children and youth (42 U.S.C. 11431-11435), by the definition at 42 U.S.C. 11435(2)--but note that the territories receive a set-aside of .1% of the appropriated funds (42 U.S.C. 11432(b)), which is relatively generous;

-- Grants for job training (42 U.S.C. 11441-11450), by the definition at 42 U.S.C. 11447(5); and

-- Grants for an Emergency Community Services Homeless program (42 U.S.C. 11461-11464), which is available to States and territories that administer programs under the Community Services Block Grant Act, and that Act is available to the territories and they participate in it (see part (e) above).

In addition, while the program of assistance for single room occupancy dwellings (42 U.S.C. 11401) may be of little interest in the territories--since few, if any, have such dwellings--the program does apply to them, since its application turns on the applicability of the pertinent sections of the Housing Act of 1937, which applies to the territories (see Memorandum No. 42-4(a)).

In sum, the territories are eligible for all relevant grants under the Homeless Act, and on terms that are fair to them.

(s) The chapter entitled Enterprise Zone Development (42 U.S.C. 111501-11505) contains the 1988 law by which the Secretary of Housing and Urban Development is authorized to designate up to 100 areas in the States (and territories) as "enterprise zones". (The term "State" includes the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 11501(e)(4)). But on the matter of geographic applicability, see the HUD comment in the paragraph immediately following below.) In order to be designated by the Secretary, the area must first be nominated by the State and local government in which it is located, and it must meet certain statutory requirements: it must meet certain unemployment and poverty rate levels, and it must be an area "of pervasive poverty, unemployment, and general distress" (42 U.S.C. 11501(c)(3)). In addition, the pertinent State and local governments must agree to "a specified course of action" for the area that is intended to "reduce the various burdens borne by employers and employees in such area" (42 U.S.C. 11501(d)), with some of the components of that course of action, such as reduced taxes and increased public services, being stipulated in the law (42 U.S.C. 11501(d) (2)). When the designation as an enterprise zone has been achieved, the prize is the potential waiver or modification of Federal rules, "in order to further the job creation, community development, or economic revitalization objectives of the zone" (42 U.S.C. 11504(a)). It is difficult to imagine a territorial area that could meet the tests of nomination and designation, or that is significantly distinguishable from similar areas in the same territory, so their eligibility under this law is probably academic. It was not designed to meet territorial problems.

In commenting on this memorandum, the Department of Housing and Urban Development offers the following:

> Under the Enterprise Zone legislation, States are required to nominate areas to be designated as "enterprise zones." The term "State," is defined to include Guam, the Virgin Islands, Samoa and the Northern Marianas. However, the law also provides that in order to be eligible as an enterprise zone, an area must be located wholly within the jurisdiction of a local government eligible for assistance under section 119 of the Housing and Community Development Act of 1974 (which governs the UDAG program). UDAG, which was available to cities and urban counties, defined "city" to include Guam and the Virgin Islands, but not Samoa or the Marianas. Consequently, it appears that the latter two entities may <u>not</u> be designated as enterprise zones.

It is possible that section 502(a)(2) of the Covenant could serve to make this UDAG provision applicable to the Northern Marianas, but as already stated, the Enterprise Zone legislation here involved is almost certainly not calculated to meet territorial problems, so the point seems not to require further examination.

(t) <u>International Child Abduction Remedies</u> (42 U.S.C. 11601-11610) refers to the Act of that name, passed in 1988 to implement the 1980 International Convention on the Civil Aspects of International Child Abduction. The Convention and the Act pertain to the international abduction and retention of children, and they are intended to deter such action. The term "State" includes "any commonwealth, territory, or possession of the United States" (42 U.S.C. 11602(8)), and courts of such "States" as well as Federal District Courts have concurrent jurisdiction of actions arising under the Convention (42 U.S.C. 11603(a)). The Act thus not only applies to the territories, but all territorial courts have jurisdiction under it.

(u) The chapter entitled Native Hawaiian Health Care (42 U.S.C. 11701-11710) contains the Act of that name, enacted in 1988. It has no application to the territories, or to any area or people other than native Hawaiians in Hawaii.

(v) The chapter entitled Drug Abuse Education and Prevention (42 U.S.C. 11801-11851) contains a 1988 law that authorizes three grant programs, and all are available to the territories. (The term "State" is defined at 42 U.S.C. 11851(10) as having the meaning given it at 42 U.S.C. 5603(7), and in that latter section, which is part of the Juvenile Justice and Delinquency Prevention Act of 1974 (Memorandum No. 42-13(f)), it includes the Virgin Islands, Guam, Samoa, and the Northern Marianas.)

-- Project grants are authorized to public and nonprofit entities and individuals in the States and territories to prevent or reduce the participation of young people in activities of gangs that commit drug-related crimes (42 U.S.C. 11801);

-- Project grants are authorized to public and nonprofit agencies in the States and territories for services for runaway and homeless youths, with emphasis on their illicit use of drugs (42 U.S.C. 11821); and

-- Grants, partly on a formula basis, are authorized to the States and territories "for community activities . . . targeted at drug abuse prevention through education, training, and recreation projects" (42 U.S.C. 11841(e)). Of the sums appropriated, 1/2 of one percent is set aside for the Virgin Islands, Guam, Samoa, and the Northern Marianas (plus, for now, Palau)--a generous sum when measured by population--and after specified sums are paid to other jurisdictions (the States, the District of Columbia, and Puerto Rico), the remainder is available for project grants, awarded on a competitive basis (42 U.S.C. 11841(c)(3)). Such project grants are also available to the territories.

Their treatment under these programs, thus, is appropriate and fair.

(w) Public Housing Drug Elimination (42 U.S.C. 11901-11925) represents a portion of the 1988 Anti-Drug Abuse Act. It authorizes the Secretary of Housing and Urban Development to make project grants to a "public housing agency" for use in eliminating drug-related crime in public housing projects (42 U.S.C. 11902), with the grant funds to be used for such purposes as payment of security personnel, and physical improvements in public housing projects to improve security (42 U.S.C. 11903). The law contains no provisions as to its geographic reach, nor does it define the "public housing agency" that may apply for and receive the grants. (The pertinent section of the Catalog of Federal Domestic Assistance, 14.854, also contains no relevant limitations, although the Applicant Index lists only "States" as eligible for grants. But this is not dispositive. Such lists have sometimes been found to be inaccurate in this study, and additionally, Indian tribal governments are also not shown on the Applicant Index to be eligible, although the law particularly targets Indian housing authorities (42 U.S.C. 11902).) In the circumstances, the term "public housing agency" must be viewed as generic, and as comprehending public housing agencies in the territories. Several territories have such agencies, and they would be eligible for these project grants.

(x) The chapter entitled Renewable Energy and Energy Efficiency Technology Competitiveness (42 U.S.C. 12001-12007) contains the 1989 Act of that name, which authorizes the

Secretary of Energy "to pursue an aggressive national program of research, development, and demonstration of renewable energy and energy efficiency technologies" (42 U.S.C. 12001(b)). The Act imposes specific cost and other pertinent goals, to be achieved by 1995, for programs in wind, photovoltaics, and solar thermal energy, and it requires the Secretary to submit similar goals for other forms of energy systems (42 U.S.C. 12003). The Act is intended to benefit the "United States" generally, and that term is defined to include expressly the Virgin Islands, Guam, Samoa, and the Northern Marianas (42 U.S.C. 12002(6)). Although that term is not often used in the Act, it is used in such a way as to make clear that persons and firms in the territories, as in the States, may participate in joint ventures and other undertakings pursuant to the Act (e.g., 42 U.S.C. 12005(b), (c), (e)). While the term "State" is undefined, it is used only once (42 U.S.C. 12002(3)(E)), and there it appears in an illustrative and not an exclusionary context. Accordingly, the territories are comprehended fully by the Act.

Conclusion: The chapters of Title 42 discussed in this memorandum are, almost without exception, applicable in their entirety to the territories. One exception is the Stewart B. McKinney Homeless Assistance Act of 1987, discussed above at (r), some portions of which do not apply to the territories; but because the several grant programs under the Act do apply to all of the territories, and on terms that appear to be fair, there is no need to modify the law to accommodate them. One other law, however, needs refinement: the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), discussed above at (b), should be amended to provide for court jurisdiction in Samoa and to make reference to the District Court of the Northern Marianas.

Federal agency comments: Comments were requested from the Department of Justice and the Department of Health and Human Services as to (a), (d), (e), (f), (i), (m), (n), (p), and (v); from EPA as to (b) and (o); from the Department of Energy as to (c), (g), and (x); and from HUD as to (s) and (w). All comments received have been reflected above.

Title 43 - PUBLIC LANDS

* Contains matters of interest to the territories, but no legislative recommendations.

Memorandum Number	Subject	43 U.S.C. sections
43-1	* Public Lands	1-2012

Memorandum No. 43-1
April 1986

Subject: Title 43 of the United States Code
Public Lands[1]

Comment: The laws contained in Title 43, to the extent that they relate to the public lands of the United States, are inapplicable to and irrelevant to the current territories, where there are no such lands. A statute concerning oil spills on the outer continental shelf, however, does comprehend the territories. No change in the laws contained in Title 43 is necessary to meet the needs of the territories.

Discussion: The term "public lands of the United States"--often used synonymously with "public domain"--is a term sometimes used in the law in a word-of-art sense to denote lands acquired by the United States upon their original cession to U.S. sovereignty, and now available for settlement or for other use under the public land laws. In that sense, there are none in the current U.S. territories. By a different route, that result is also clear, because the term "public lands" is nowhere defined in Title 43 to include the territories. In the monumental 1976 revision of the public lands laws (the Federal Land Policy and Management Act of 1976) the term means

> any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership . . . . (43 U.S.C. 1702(e)).

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[1] Title 43 contains about forty chapters, not otherwise subdivided, and they relate to disparate subjects, some creating Federal agencies, some providing guidance as to the administration of public lands, some relating to the treating of lands in particular States, some creating particular public projects. It appears that no useful purpose would be served either by a chapter-by-chapter analysis of the Title, or by a listing here of the chapter titles. Most are, as noted in the text above, without relevance to the current territories.

The term "States" is not further defined in the law, so it doubtless means "States" alone. In any event, the Bureau of Land Management has no administrative responsibilities in any of the current territories.

American Samoa is the only current territory explicitly exempt from the U.S. public land laws, having been made so when the U.S. Congress first focussed on Samoa in 1929 (48 U.S.C. 1661(b)). Hawaii as a territory was also explicitly exempt, and from the earliest possible point, for the 1898 Annexation Resolution so provided (30 Stat. 750.)[2] But circumstances peculiar to each of the remaining territories make clear the inapplicability of the public land laws to them.

-- In the <u>Virgin Islands</u>, the United States acquired public property from Denmark upon purchase of the Territory in 1917, but that property has since passed into administration and ownership by the Government of the Virgin Islands under section 4 of the 1936 Organic Act, and section 31 of the 1954 Revised Organic Act (48 U.S.C. 1545). Apart from land included within the Virgin Islands National Park, the United States' land holdings in the Virgin Islands are now de minimis.

-- In <u>Guam</u>, excluding the substantial tracts held for military purposes, largely acquired toward the end of and just after World War II (about one-third of the island), the United States' land holdings are slight. Under section 28 of the Guam Organic Act passed in 1950 (48 U.S.C. 1421f), all United States property in Guam in 1950 was transferred to the Government of Guam except for that reserved essentially for military purposes.

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[2] Although it was largely made up of public lands, the Territory of Alaska was never brought under the public land laws in general. Various of the public land laws were extended to Alaska, and Congress legislated extensively on the subject of the public lands in Alaska, but there was never a general extension of U.S. public land laws to that Territory.

-- In the <u>Northern Marianas</u>, the United States owns no real property. That which it occupies is held on a leasehold basis. Article VIII of the Northern Marianas Covenant makes clear that the United States may own land in the Northern Marianas, but the Covenant also discourages the U.S. from doing so.

Thus, there are no "public lands" in either a word-of-art sense or in any other realistic sense in the current territories.

Title 43 nevertheless contains a number of sections that hold some interest to the territories, and some comment upon them is therefore warranted:

<u>The Interior Department's organic legislation</u>. Federal statutes passed over a period of almost 150 years that bear upon the organization and responsibilities of the Department of the Interior appear in Chapter 31 of Title 43 (43 U.S.C. 1451, <u>et seq.</u>) The laws in question have been enacted over almost that entire period, thus having an ad hoc quality, and only one bears directly upon the offshore areas. The first (and one of the few) Congressional indications of Interior's role as administrator of or liaison to the territories is the Act of March 1, 1873, which transfers to the Secretary of the Interior

> all the powers . . . and duties in relation to the Territories of the United States that were, prior to March 1, 1873, by law or by custom exercised and performed by the Secretary of State (43 U.S.C. 1458).

If any effort was ever made to catalogue those laws or customs, it has been lost in history. The effects of the provision are thus largely uncertain, except that it does provide the earliest statutory basis for an Interior role vis-a-vis the territories.

<u>Interior's bureaus</u>. Three important components of the Interior Department are created by laws found in Title 43: the Bureau of Land Management (43 U.S.C. 1), the U.S. Geological Survey (43 U.S.C. 31) and the Bureau of Reclamation (43 U.S.C. 371). None functions in the territories in the manner in which they perform their activities in the States, and indeed, either because of the absence of public lands in the territories or because of the nature and size of these insular areas, there is no need for them to do so. The frequent appearance of the word "Territories" in chapters concerning these bureaus and elsewhere in the early public land laws (e.g., 43 U.S.C. 36b, 83, 121), does not contradict this conclusion. As the term is used in 19th and early 20th century public land laws, it refers to the incorporated territories of the western continental United States, which unexceptionally were public land Territories--as they are now public land States.

Although these Interior agencies do not function in the current territories as they do in the States, they can and do perform particular services in and for the territories when needed there, with the Bureau of Reclamation in particular having carried out substantial work in Guam in recent years. The laws authorizing technical assistance for the territories permit this (48 U.S.C. 1469c, 1469d(a)). Nothing further is now required to meet territorial needs.

<u>Citizenship requirements</u>. The laws contained in Title 43 often confer benefits upon U.S. "citizens," thus necessarily excluding from eligibility noncitizen nationals in American Samoa, as well as the people of the Northern Marianas prior to trusteeship termination. For example, certain public lands may be sold only to U.S. citizens (43 U.S.C. 145); desert land entries are confined to citizens (43 U.S.C. 321). Inasmuch as the Northern Marianas Commission on Federal Laws did not identify Title 43 citizenship requirements as ones that needed to be overcome (and they were not, therefore, the subject of the kind of waiver provided in Proclamation No. 5207 of June 7, 1984 for so many other laws requiring U.S. citizenship), it can be supposed that that Commission considered that there was no practical problem involved. (The Commission was thorough in recommending the inclusion of the people of the Northern Marianas in several hundred Federal

statutes, pending their becoming U.S. citizens.) That result seems appropriate, and it is equally appropriate in the case of noncitizen Samoans. None is known to have been disadvantaged by this requirement, so a modification of the law is unnecessary.

Submerged Lands. The 1953 Submerged Lands Act, contained in Title 43 (43 U.S.C. 1301-1343), conveyed to the U.S. Coastal States the lands lying between the line of mean high tide and three miles seaward from it. The conveyance was obviously a matter of great value, and also of great controversy at the time. The grantees in the law are the "States," and to emphasize that the term means exactly that, the term "State" is defined to mean a "State" and no more (43 U.S.C. 1301(g)). In 1974, however, substantially the same action was taken in the case of the territories of the Virgin Islands, Guam, and American Samoa (48 U.S.C. 1704-1708), and all that remains is for the Northern Marianas to be given equal treatment. That recommendation is made in Memorandum No. 48-4, and the subject is discussed in great detail in the Northern Marianas Commission Report (pp. 172-188). (The conclusions and the recommendations of Memorandum No. 48-4 and of the Commission Report coincide.)

Outer Continental Shelf Lands Act Amendments of 1978. This 1978 enactment provides for the leasing for oil and natural gas production of submerged lands on the Outer Continental Shelf (OCS) (43 U.S.C. 1344-1356), beyond the submerged lands lying within the three mile limit that were conveyed to coastal States by the Submerged Lands Act in 1953. There is no authority for the leasing of such OCS submerged lands off the coasts of the territories, and apparently it has never become an issue--possibly because of the absence of known mineral deposits, or possibly because of the absence at least in the case of some territories of anything resembling a continental shelf. In any event, the 1978 Act also provides two compensation funds related to outer continental shelf development, one an oil spill pollution fund, the second a fishermen's contingency fund. Rather oddly, a generous definition of "State" makes the territories eligible to participate in the former (43 U.S.C. 1811(12)), when oil spills result in damage; but not in the latter, when fishing gear or vessels are hurt as a result of oil or gas exploration or production (see 43 U.S.C. 1841, et seq.). In fact, it is extremely improbable that a territory could have an oil spill claim, given the requirement that the claims must generally relate to activity on an OCS leasehold (43 U.S.C. 1811(9)); but an Interior Department expert speculates that conceivably Alaska North Slope oil might be transported near a territory, so as to give rise to a claim. If so, that possibility would seem to justify inclusion of the territories in the fishermen's contingency fund--but it appears that that fund was created as a political response to a narrow but vigorous lobbying effort. And the territories were, for purposes of that fund, overlooked. Just as it seems unlikely that the territories will benefit from their inclusion in the pollution fund, so it seems just as unlikely that they will be hurt by their exclusion from the fishermen's fund. Accordingly, it does not seem necessary to urge that this anomaly be corrected, because it is probably harmless.

Conclusion: The laws contained in Title 43 are, for the most part, inapplicable to the territories, and there is no need for any change in the laws in Title 43 to meet any needs in the territories.

Federal agency comments: Comments were invited from the Department of the Interior, and all comments received have been incorporated above.

Title 44 - PUBLIC PRINTING AND DOCUMENTS

* Contains matters of particular interest to the territories, but no legislative recommendations.

Memorandum Number	Subject	44 U.S.C. sections
44-1	* Public Printing and Documents	101-3703

Memorandum No. 44-1
April 1986

Subject: Title 44 of the United States Code Public Printing and Documents[1/]

Comment: The laws contained in Title 44 are largely irrelevant to and inapplicable to the territories, and they require no modification to meet territorial needs.

Discussion: Many of the laws contained in Title 44 relate to Federal agencies, and the usual view is that the territories are not agencies or instrumentalities of the United States Government.[2/]

[1/] Given the content of Title 44, it need not here be analyzed on a chapter-by-chapter basis. Its substance is revealed to some extent by its chapter headings, and they are the following: Chapter 1, Joint Committee on Printing (44 U.S.C. 101-103); Chapter 3, Government Printing Office (44 U.S.C. 301-317); Chapter 5, Production and Procurement of Printing and Binding (44 U.S.C. 501-517); Chapter 7, Congressional Printing and Binding (44 U.S.C. 701-741); Chapter 9, Congressional Record (44 U.S.C. 901-910); Chapter 11, Executive and Judiciary Printing and Binding (44 U.S.C. 1101-1123); Chapter 13, Particular Reports and Documents (44 U.S.C. 1301-1344); Chapter 15, Federal Register and Code of Federal Regulations (44 U.S.C. 1501-1511); Chapter 17, Distribution and Sale of Public Documents (44 U.S.C. 1701-1722); Chapter 19, Depository Library Program (44 U.S.C. 1901-1916); Chapter 21, National Archives and Records Administration (44 U.S.C. 2101-2118); Chapter 22, Presidential Archives (44 U.S.C. 2201-2207); Chapter 23, National Archives Trust Fund Board (44 U.S.C. 2301-2308); Chapter 25, National Historical Publications and Records Commission (44 U.S.C. 2501-2506); Chapter 29, Records Management (44 U.S.C. 2901-2909); Chapter 31, Records Management by Federal Agencies (44 U.S.C. 3101-3107); Chapter 33, Disposal of Records (44 U.S.C. 3301-3324); Chapter 35, Coordination of Federal Information Policy (44 U.S.C. 3501-3520); and Chapter 37, Advertisements by Government Agencies (44 U.S.C. 3701-3703).

[2/] The weight of authority, and the standard Federal practice, is to the effect that the territorial governments are not Federal agencies. In its report on appropriations for fiscal year 1986, (continued...)

In one instance, pertaining to paperwork reduction, the definition expressly excludes the territories (44 U.S.C. 3502(1)); in another, pertaining to requirements for publication in the Federal Register (44 U.S.C. 1501), they are not explicitly excluded, but they have in practice never been regarded as being covered by the Act. These results are altogether proper.

An examination of the provisions of Title 44 reveals only one instance where legislation might later be desirable to meet territorial interests: the laws pertaining to the designation of depository libraries do not now include the Northern Marianas. That matter is discussed below, followed by a brief discussion of two other points of some interest to the territories and arising from this title: various privilege of Members of Congress, and the effect in the territories of Federal Register publication.

Depository Libraries. U.S. Government publications are usually of "interest" to the "public" and usually have "educational value," and most Government publications--excluding those classified for reasons of national security --are therefore made available without cost to depository

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[2/](...continued)
for example, the Senate Appropriations Committee stated that

> these island governments [of Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Marianas] are not entities of the Department of the Interior, nor are they agencies or instrumentalities of the Federal Government. (Senate Report 99-141, p. 50.)

Occasionally, however, there is a decision to the contrary. A recent one is Sakamoto v. Duty Free Shoppers, Ltd., 764 F.2d 1285 (1985), where the Court of Appeals for the Ninth Circuit held the Government of Guam to be a Federal instrumentality for purposes of the Sherman Act.

libraries (44 U.S.C. 1902). A "depository library" is one so designated by Senators, Representatives, or the Resident Commissioner from Puerto Rico, or in the case of the territories, by the Governors of Guam, American Samoa, and the Virgin Islands (44 U.S.C. 1905). The law permits the designation of one by each territorial Governor, except in the case of the Virgin Islands, where there may be one each on St. Thomas and St. Croix (44 U.S.C. 1905). There is, in fact, a second depository library on Guam, at the University of Guam, because land-grant colleges are by law accorded that status (44 U.S.C. 1905).

The provisions of section 502 of the Northern Marianas Covenant that extend to the Northern Marianas numerous Federal laws do not here appear to have that effect, because the application of the law turns on named officials, and none in the Northern Marianas is named. The Northern Marianas Federal Laws Commission had the same view, and while it recommended the extension of the depository library program to the Northern Marianas, it expressed certain misgivings: it is not clear that the Northern Marianas now has a library of sufficient size (10,000 volumes at a minimum, 44 U.S.C. 1909) to qualify; it would be both expensive and otherwise difficult to maintain the high standards of service and custody that the law requires (44 U.S.C. 1909), given climatic conditions (Commission Report, pp. 188-191). The Commission suggested that the Guam library resources might meet the Northern Marianas needs for the present--and although that Commission did not so state, it seems quite likely that an inter-library loan program between Guam and the Northern Marianas might be developed if the need were to warrant. Librarians as a profession are unusually cooperative and creative, and by definition devoted to making books widely available. So, while libraries are, per se, a boon to society and thus to be encouraged--so that in due course the Northern Marianas should surely have its own depository library--it may be that for a time the Northern Marianas' needs can reasonably be met by a less expensive procedure for borrowing books.[3/]

[3/] Note added in 1993: Later in 1986, after this memorandum was written, the College of the Northern Marianas became a land grant college pursuant to section 9 of Public Law 99-396. As such,

(continued...)

Congressional privileges. Title 44 contains provisions for certain privileges related to publications, and while the statutory references to the territories are uneven, there do not appear to be any deprivations that require legislative correction:

-- 44 U.S.C. 733 provides that Members of Congress and the Resident Commissioner of Puerto Rico may obtain certain printing services and franked envelopes. Inasmuch as the Delegates from Guam and the Virgin Islands are entitled to the same benefits and privileges as the Resident Commissioner (48 U.S.C. 1715), and the Delegate from Samoa is entitled to those of the Delegate from Guam (48 U.S.C. 1735), all three Delegates are in effect included within this section.

-- 44 U.S.C. 906 provides for the distribution of the Congressional Record, with each Representative and Delegate entitled to receive 34 copies. Accordingly, the provision later in this section for five copies of the Record for the Governors of Guam and the Virgin Islands does not realistically require expansion to include the Governors of Samoa and the Northern Marianas. It seems certain that a Delegate, probably any Delegate, would be quite willing to share with them his largesse.

-- 44 U.S.C. 907 affords Members of Congress and the Resident Commissioner the benefit of separately printed extracts from the Record--a benefit that the Delegates also have on the rationale stated above.

Federal Register notice. A section of the Federal Register Act, passed in 1935, provides that a notice of hearing that is published in a timely manner (i.e., usually at least 15 days in advance) in the Federal Register

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[3](...continued)
it became a depository library under 44 U.S.C. 1906. See Memorandum No. 7-2.

> shall be deemed to have been given to all persons residing within the States of the Union and the District of Columbia. . . . (44 U.S.C. 1508).

It is probable that at the time of enactment, transportation of mail to points outside the original 48 States was so slow as to preclude their inclusion in the section. (Air mail to the territories was unusual until after World War II.) The section is thus out-dated, but there is no advantage to the territories in modernizing it, although there would seem to be an advantage from the standpoint of Federal agencies. Since the general modernization of the laws of the United States is beyond the purposes of this study, no recommendation is offered as to this section.

It should be noted that 44 U.S.C. 1507, which governs Federal Register notices other than notices of hearing, does not exclude the territories. (That section contains no provision as to its geographical effect, but does refer to "a person subject to or affected by" the Federal Register notice.) Section 1507 may have greater impact at this time than section 1508, inasmuch as the former relates to informal rulemaking, which has become a procedure preferred to the hearing-adjudication procedure to which section 1508 relates. Most Federal Register notices, thus, are effective within the territories.

Conclusion: Title 44 holds little of interest to the territories, and no provision appears to require modification to meet territorial needs.

Federal agency comments: None have been sought, because none appear to be needed.

Title 45 - RAILROADS

* Contains matters of interest to the territories, but no legislative recommendations.

Memorandum Number	Subject	45 U.S.C. sections
45-1	* Railroads	1-1214

Memorandum No. 45-1
April 1986

Subject: Title 45 of the United States Code
Railroads[1]

Comment: Given the absence of railroads in the areas that are the subjects of this study, most of the laws contained in Title 45 are irrelevant to them. The Railway Labor Act, however, which deals also with labor disputes in the airline industry, does apply to the territories. No modifications of any of the laws of Title 45 are needed to meet territorial needs.

Discussion: There are no railroads in the Virgin Islands, Guam, Samoa, or the Northern Marianas, and it seems quite likely that that condition will continue more or less forever--although there are in the Northern Marianas today the remnants of a narrow gauge railway used by the Japanese before World War II to transport sugar cane. Nevertheless, an examination of Title 45 reveals a few matters of at least slight interest to the territories:

-- In general, the early Federal laws concerning railroads apply to the current territories, sometimes because they expressly apply to "possessions" (e.g., the Employers' Liability Act, 45 U.S.C. 52), and other times because they apply to "Territories"; and Puerto Rico--when it was unquestionably an unincorporated territory (or "territory" or possession) of the United States was held to be a "Territory" for purposes of the law in question (see, for example, Am. R.R. of Puerto Rico v. Didricksen, 227 U.S. 145 (1913), holding that Puerto Rico is a "Territory" for purposes of the Safety Appliance Act, 45 U.S.C. 8). It is interesting to note that the Railroad Hours of Service Act, when it was originally enacted in 1907, applied to "any Territory of the United States" (34 Stat. 1415); but a 1969 amendment changed "Territory" to "territory" (83 Stat. 463, 45 U.S.C. 61)--probably because some draftsman perceived the change as somehow increasing social justice, even though there were and

[1] Given the content of Title 45, and its general irrelevance to the territories, it seems unnecessary to analyze it on a chapter-by-chapter basis, or to list its chapter headings.

are no railroad employees in the territories to benefit from the change.[2]

The application of these rather venerable railroad laws to the territories could, however, have more than a theoretical effect, in the event that a mainland railroad were to establish a subsidiary operation--say, for example, a refrigeration company--in a territory. None is known to have done so, and none may ever do so, so the legal consequences will not here be examined. It is enough to note that the laws could apply, if certain fact situations were to develop.

-- Most railroad laws of more recent decades exclude the current territories, doubtless in recognition of the absence of any subject matter there. This is true, for example, of the Railroad Retirement Act (45 U.S.C. 231(m)), the Railroad Unemployment Insurance Act (45 U.S.C. 351(s)), and the Railroad Safety Act (45 U.S.C. 434).

-- A few provisions of Title 45 contain U. S. citizenship requirements, thereby potentially disadvantaging people of the Northern Marianas and American Samoa, who do not have that status. The requirements appear, however, in sections quite unlikely to be of realistic concern to the people of those areas, so it seems acceptable to refrain from recommending a change: 45 U.S.C. 231(d)(3) and 231(h)(6), both relating to Railroad Retirement; 45 U.S.C. 351(e), relating to Railroad Unemployment Insurance; and 45 U.S.C. 543(a)(1) and 543(d), both relating to service on the Board of the National Railroad Passenger Corporation.

-- One statute here codified is of importance to the territories: the Railway Labor Act, which in 1936 was extended to air carriers (45 U.S.C. 181). The original

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[2] A 1916 law appearing at 45 U.S.C. 65 appears to use both "Territory" and "territory" within the same section, but this is not in fact a legal curiosity, but simply a typographical error. An examination of the primary source, at 39 Stat. 721, shows that "Territory" should appear throughout.

Railway Labor Act, enacted in 1926, probably does not apply to the territories, inasmuch as its application is confined to carriers that are subject to the Interstate Commerce Act (45 U.S.C. 151), and the territories are generally excluded from that Act (see Memorandum No. 49-7). The 1936 extension, however, applies to "every common carrier by air engaged in interstate or foreign commerce" (45 U.S.C. 181), and these words have been held to include the territories (Air Line Stewards, etc. Ass'n v. Northwest Airlines, Inc., 267 F.2d 170 (1959)). The effect of their inclusion means that labor disputes in the territories involving air carriers are subject to the procedures for settlement of disputes that are set forth in the Act, and that are under the jurisdiction of the National Mediation Board. Since airline employees in the territories, as elsewhere in the United States, are usually members of national employees' organizations, the effect is to provide the same treatment for territorial employees of airlines as for Stateside employees of the same airlines. This is as it should be.

Conclusion: The laws contained in Title 45 require no change to meet the needs of the territories.

Federal agency comments: An official of the National Mediation Board concurs with the above discussion.

Title 46 - SHIPPING

- \- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

Memorandum Number		Subject	46 U.S.C. sections
		Prefatory Comment	
46-1	(**)	Vessels and Seamen (Subtitle II)	2010-14702
46-2	*	Maritime Liability (Subtitle III)	30101-30343
			46 Appendix U.S.C secs.
46-3	-	(a) Oath of Ownership	42
	-	(b) Clearance and Entry	91-113
	*	(c) Tonnage Duties	121-135
	-	(d) Discriminating Duties and Reciprocal Privileges	141-146
	-	(e) Boarding Vessels Before Inspection	163
	-	(f) Limitation of Vessel Owner's Liability	181-196
46-4	*	The Nicholson Act	251
46-5	*	The Coastwise Laws	289, 883, and others
46-6	-	(a) Regulation of Vessels in Domestic Commerce	303-336
	-	(b) Passports and Papers of Vessels Engaged in Foreign Commerce	354-355
	-	(c) Inspection of Steam Vessels	441-446(c)
	-	(d) Transportation of Passengers and Merchandise by Steam Vessels	466c

October 1992

Prefatory Comment - Title 46

During the 1980's, the Congress in three steps enacted a substantial portion of Title 46 (Shipping) into positive law: Public Law 98-89 (1983), Public Law 99-509 (1986), and Public Law 100-710 (1988). The laws so treated involve most of the maritime safety and seamen protection laws, which are administered by the Coast Guard (and which now constitute Subtitle II of Title 46, 46 U.S.C. 2101-14702), and the Ship Mortgage Act, 1920, and related laws (which now constitute Subtitle III of Title 46, 46 U.S.C. 30101-30343). (There is not yet a Subtitle I of Title 46.) The laws so codified had formerly been contained in about a dozen and a half chapters of the "old" Title 46, and although they had been scattered throughout that Title, they were largely in the early portion of it.

All of the "old" Title 46 was examined in 1981-1982 for purposes of this project, and the resulting memoranda were carefully assessed in 1982 by the Coast Guard, among other Federal agencies. The codification and enactment into positive law of portions of Title 46 thereafter have obviously rendered some of those memoranda obsolete--so the memoranda that were overtaken by the "new" Subtitles of Title 46 have now been eliminated from this study. New memoranda on those Subtitles are presented here, designated as Memoranda Nos. 46-1 and 46-2. In assessing the Subtitles for purposes of preparing Memoranda Nos. 46-1 and 46-2, it became apparent that the bulk of the problems on their subjects identified in 1981 and 1982 have been eliminated by the new codification.

In the interest of bringing this research project to a close, these new memoranda have not been circulated to the pertinent Federal agencies, nor to the Governors of the territories, for comment. None of the latter offered comments on the Title 46 memoranda when they were invited to do so in 1982, and the legal and other conclusions presented here, arising from the codification, are relatively free of complications or contention. On that basis, further Federal agency comment has not been sought.

Substantial portions of Title 46 remain, however--those untouched by the 1980's enactments into positive law, and those containing more recent enactments. They are contained in what is now designated "Title 46 Appendix," but they are represented by the same section numbers as earlier. Accordingly Memoranda Nos. 46-3 through 46-10 that follow are largely the memoranda written on those subjects in 1982. They were commented upon at that time by pertinent Federal agencies, and that fact is noted in them. They have, however, been updated as necessary to reflect changes in the law through 1991. Memorandum No. 46-10 in part concerns laws enacted after the completion of the 1982 research. For the reasons stated above, that memorandum too has not been the subject of a renewed request for comment by pertinent Federal agencies.

Memorandum No. 46-1
June 1992

Subject: Vessels and Seamen
Title 46, Subtitle II (46 U.S.C. 2101-14702)

Purpose: To provide for vessel inspection in the interest of safety, and for some aspects of the safe operation of vessels; for the manning of vessels and the documentation of certain vessel personnel; and for the documentation or numbering of certain vessels.

Territorial application: This relatively new Subtitle II of Title 46 largely applies to the territories as it applies to the States. The exceptions, which are noted below, appear either appropriate or unobjectionable from the territories' stand-point.

Recommendation: Subtitle II should be amended to meet the problem of enforcement jurisdiction in American Samoa--perhaps by vesting such jurisdiction in the High Court--but otherwise these provisions of Title 46 appear to deal adequately with the territories and to reflect their peculiar needs.

Comment: The enactment into positive law of a substantial portion of the shipping laws has had, from the standpoint of this study, many salutary effects--and some regrettable, but minor, ones. The principal salutary effect is that the modernization of the shipping laws into their current form has permitted the elimination of many of the recommendations first made in 1982, in memoranda for this study on Title 46 in its then current form. That is largely a consequence of the new definition of "citizen" of the United States to include noncitizen nationals (and also of the fact that the people of the Northern Marianas in the intervening years achieved U.S. citizenship under the Covenant). Other problems identified in 1982 remain, and they are discussed below, but a further benefit of the modernization-codification is that upwards of 75 pages of 1982 memoranda have now been reduced to about 1/10 of that number.

The regrettable effects are that once valuable Federal agency comment has been lost in the process. The Coast Guard in particular offered extensive comments in 1982. They were uniformly enlightening, if occasionally testy, and they reflected strongly held Coast Guard views. Most are not now repeated, either because the laws that precipitated them have been changed so that they are no longer pertinent, or because the recommendations contained herein have been changed. The testiness resulted from ill-advised draft recommendations. For example, a 1982 recommendation hac been that the Federal Boat Safety Act of 1971 [FBSA] should contain exemptions for the Pacific territories, so that boats manufactured in foreign shipyards could be imported lawfully and used in and around those territories, even if they did not meet U.S. safety standards. The Coast Guard responded:

> The Coast Guard can envision many problems with the proposal to totally exempt certain territories from the FBSA, partially exempt others, and leave it intact for others. Particular care would have to be made to insure that noncomplying boats built in the exempted territories could not be exported to the 50 States or the nonexempt territories.
>
> Overall, we fail to see how the FBSA and the boating safety regulations place an undue burden on the territories or are an unreasonable intrusion in their affairs. The safety standards are for the benefit of consumers. They are minimums of good safety practice that have been developed to protect boaters from significant and well-documented hazards (e.g., overloading of small boats, fires and explosions in gasoline powered boats, etc.). Boat owners are also afforded the protection of the defect notification and correction provisions of the FBSA. This statute is meeting its objective of bringing about increased local control of boating safety under

guidelines established by the federal government.

That Coast Guard comment would have been enough to eliminate the 1982 draft recommendation for reduced standards. (But it might be noted that the new law permits the granting of exemptions from statutory or regulatory requirements for boating safety (46 U.S.C. 4305), so some flexibility is possible, and this could be of benefit to the insular areas.)

And it is regrettable when an engaging, even if quite unimportant, statute is lost. One discussed in 1982 that was derived from a 1872 law that formerly appeared at 46 U.S.C. 666 required that vessels carry "a chest of medicines," and more importantly, that they carry lemon or lime juice, sugar, vinegar, "or other antiscorbutics." The medicine chest requirement lives on (now at 46 U.S.C. 11102(a)), but the antiscorbutics law--complete with a recipe for minimum daily requirements--has departed forever. This provision, and others that served to bemuse the modern reader, were discussed in the 1982 memoranda that have now been eliminated, proving again that a change for the better often involves a little loss.

Discussion: The laws considered herein constitute Subtitle II of the portion of Title 46 that has been enacted into positive law (46 U.S.C. 2101-14702). Subtitle II, which is entitled Vessels and Seaman, constitutes the first of two Subtitles so treated (with the second being considered in Memorandum 46-2), and it replaces upwards of 20 chapters of the "old" Title 46. An examination of the new Subtitle II contrasted with analyses of these "old" chapters shows that--

(1) an unusual definition of "citizen of the United States" has now served to eliminate substantial problems that were earlier presented in connection with vessel documentation and vessel manning laws;

(2) problems concerning the enforcement of these laws in American Samoa persist; but

(3) while the insular areas are usually accorded State-like treatment in Subtitle II, occasionally they are not --but the exceptions to State-like treatment do not appear to be seriously objectionable from the territories' standpoint.

..ese three propositions are considered in turn.

(1) Citizenship. Earlier difficulties associated with the frequent requirement in the "old" Title 46 of U.S. citizenship--for such purposes as vessel documentation and vessel operators--have been eliminated by the following definition, added in 1984:

> "citizen of the United States" means a national of the United States as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22) or an individual citizen of the Trust Territory of the Pacific Islands who is exclusively domiciled in the Northern Mariana Islands within the meaning of section 1005(e) of the Covenant to establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (48 U.S.C. 1681 note). (46 U.S.C. 2101(3a).)

The reference to section 101(a)(22) of the Immigration and Nationality Act serves to include as "citizens" of the U.S. noncitizen nationals of the United States in Samoa, because that section defines "national" as either a U.S. citizen or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States." Other sections of the Immigration and Nationality Act make clear that those born in Samoa are U.S. nationals (8 U.S.C. 1408, 1101(21), (29)).

The second portion of the definition--that pertaining to the Trust Territory citizens domiciled in the Northern Marianas--has served its purpose and has no further function, now that the people of the Northern Marianas have achieved U.S. citizenship following the 1986 termination of the Trusteeship Agreement. It was of value before that, however, as a transition provision, and it illustrated admirably the flexibility and generosity of the Coast Guard in administering its laws in a way that would accommodate the people of the Northern Marianas before trusteeship termination.[1/]

There is thus no longer any problem associated with vessel documentation or with service on vessels as they relate to citizens and nationals of the U.S. in the insular areas.

(2) Enforcement in Samoa. Subtitle II is studded with references to the "district courts of the United States," to which jurisdiction to enforce its provisions is assigned: 46 U.S.C. 2106, 2107, 2114, 2305, 3718, 4311, 6304(b), 10707-10710, 10902, 11505, 12111, and 12309. As is by now well-known to users of this study, there is no U.S. district court in Samoa, and none elsewhere with general jurisdiction in Samoa. The absence of a court with jurisdiction in Samoa ought to be overcome, perhaps by defining the High Court of American Samoa as a district court for purposes of the Subchapter. (This is the approach taken at 46 U.S.C. 31301(2)(E)), but there are others.)

In its 1982 comments, the Coast guard suggested that this problem might not be fatal. In connection with the

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1/ In an opinion dated June 27, 1978 (No. G-LMI-16675), the Chief Counsel of the Coast Guard concluded that in the period before trusteeship termination, citizens of the Northern Marianas could be treated as U.S. citizens for purposes of vessel documentation and licensing. Among other things, this facilitated the documentation as a U.S. vessel of the OLWOL, a fishing vessel delivered to the Northern Marianas as war reparations from Japan--and for a time immobilized in Northern Marianas water because Federal laws foreclosed both its documentation and manning (by Northern Marianas persons who were then aliens under U.S. law). The Coast Guard opinion and common sense administration overcame these problems. But regrettably the OLWOL sunk a few years later, reportedly as a result of deficient maintenance.

Motorboat Act of 1940, which had placed enforcement in a "court of the United States" (formerly 46 U.S.C. 526n)), the Coast Guard offered the following comment--which could apply as well to other provisions of Title 46:

> While it is recognized that the High Court of American Samoa is not a U.S. court and that American Samoa is not within the jurisdictional limits of any U.S. District Court, collection action may not be impossible. The United States may be able to bring an action as a party in the High Court of American Samoa asserting personal jurisdiction against individuals who refuse to pay civil penalties. While this mechanism has not yet been utilized, preliminary discussions have been conducted with personnel of the High Court who have indicated a willingness to consider arguments for such jurisdiction.

But it would be better not to leave this matter to so uncertain a route. Particularly because Subtitle III includes so full a definition, at 46 U.S.C. 31301(2)(E), and in the absence of any explanation in the readily available legislative history to suggest a reason for excluding from Samoa Subtitle II, it would be well to amend Subtitle II to meet this problem.

(3) Exceptions to State-like treatment. For purposes of Subtitle II, the term "State" explicitly includes the Virgin Islands, Guam, Samoa, and the Northern Marianas (46 U.S.C. 2101(36)), as does the term "United States" (46 U.S.C. 2101(44)). It is, therefore, unsurprising that these four areas are treated in Subtitle II for the most part precisely as are the States. The substance of these many provisions does not suggest that the result should be different, and indeed, in the single financial assistance program contained in Subtitle II--a grant program for Recreational Boating Safety (46 U.S.C. 13101-13110)--the territories received aid on the same basis as the States (46 U.S.C. 13103). Reports to

the Interior Department indicate that all four areas participate in the program. As a practical matter, they probably do so on terms more favorable than the States, inasmuch as the insular areas are the beneficiaries of a requirement for the waiver of matching (48 U.S.C. 1469a(d)).

The instances in these sections (46 U.S.C. 2101-14702) in which the territories received different treatment require examination in turn:

--46 U.S.C. 3704 is one of the coastwise laws (see Memorandum No. 46-5), and it provides that if certain components (specifically a "segregated ballast tank, a crude oil washing system, or an inert gas system") are required to be installed on a vessel entitled to engage in the coastwise trade under 46 App. U.S.C. 883, then the component "shall be installed in the United States."[2/] The Virgin Islands, Samoa, and for the most part the Northern Marianas, are exempt from the coastwise laws, including 46 App. U.S.C. 883. Guam is not, but the political difficulty of achieving an exemption for Guam appears insurmountable. The point is discussed further in Memorandum No. 46-5.

--46 U.S.C. 5101 defines "domestic voyage" for purposes of the load line laws (46 U.S.C. 5101-5116). The term excludes a voyage between a "territory or possession" and a place outside that territory or possession (46 U.S.C. 5101(1)) The load line laws apply generally to vessels of the United States, among others (46 U.S.C. 5102(a)), but among the exceptions to them--and recreational vessels and fishing vessels are among the exceptions--are several kinds of vessels "on a domestic voyage," including, for example, "a

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[2/] After "United States" in 46 U.S.C. 3704, there appears "except the trust territories." The phrase can be ignored. Apart from the illiteracy (because the U.S. has never had more than one trust territory), there was probably never any question, and there surely is none now, that the U.S.-administered Trust Territory of the Pacific Islands was outside "the United States."

small passenger vessel on a domestic voyage" (46 U.S.C. 5102(b)(11)). There is no explanation for the territories' exclusion from this definition in the readily available legislative history. The territories are thus, potentially, subject to more frequent load line requirements than vessels sailing between States. But this should probably not be regarded as undesirable, given their mid-ocean locations, and given the motive of human safety that underlies the load line laws.

--46 U.S.C. 12105, 12106, 12108, 12112 are all provisions pertaining to vessel documentation, and each makes express mention of some of the insular areas. The vessel documentation laws provide generally that vessels are eligible for documentation if they are at least 5 net tons, owned by citizens of the U.S. (or by an association, carefully defined at 46 U.S.C. 12102(a)(2)), and measured under the Title 46 requirements. A vessel so documented is a vessel of the United States, and its documentation is "conclusive evidence of nationality for international purposes" (46 U.S.C. 12104). A certificate of documentation may then be "endorsed" for the coastwise (or coasting) trade (46 U.S.C. 12106)--with such other terms as "license" and "enrollment and license" also defined as referring to a coastwise endorsement (46 U.S.C. 12101(b)(2)); for the fisheries (46 U.S.C. 12108); or for the foreign trade--in which event it is termed a "registry endorsement" (46 U.S.C. 12105). (Standard usage for some decades has involved a "register" or "registry" for the foreign trade, and a "license" and/or "enrollment" for the coastwise trade. "License"is usually applied to the document for a fishing vessel. "Documentation" is generic.) To obtain a coastwise or fishery endorsement, the vessel must be built in the U.S. (with exceptions not now pertinent) (46 U.S.C. 12106, 12108). There is no requirement that the vessel be U.S.-built if it is to be registered for the foreign trade.

Turning then to the sections above cited that make particular reference to insular areas, 46 U.S.C. 12105 provides that a vessel's certificate of documentation that has been endorsed with a registry endorsement "may be employed in foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef." The effect of this provision is to permit a foreign-built, U.S.-documented vessel to engage in trade between U.S. ports and the five named insular areas, thereby ameliorating the effect of the coastwise laws that would confine such trade to U.S.-built and U.S.-documented vessels. But it would seem that only Guam could be the practical beneficiary of this provision, inasmuch as Samoa, is exempt from the coastwise laws (see Memorandum No. 46-5), and the other named islands probably experience no commercial surface transportation. But Guam's coastwise concern turns on its interest in transportation by foreign-registered (not foreign-built U.S.-registered) vessels, so the section will not meet Guam's objective.

The reference to these five island areas is curious, and its rationale may have been lost in history. The Coast Guard has advised unofficially that the statutory reference, dating from 1912, was part of a Congressional effort at that time to strengthen hastily the U.S. merchant fleet. The coastwise trade and the U.S. fisheries were accordingly confined to U.S.-built vessels. Documentation for vessels in the foreign trade did not require a U.S. construction site, but there was apparently some thought that these five remote islands might benefit from this special provision. So far as is known, none ever has.

A useful, special provision of the Pacific insular areas appears at 46 U.S.C. 12106. The section concerns a coastwise endorsement of a certificate of documentation (for which the vessel must, as noted, be "built in the United States"), without which the vessel cannot engage in the coastwise trade. But a particular provision appears at 46 U.S.C. 12106(c) by which a foreign-built vessel may be documented with a "coastwise endorsement to engage in the coastwise trade of fisheries products between places in Guam, American Samoa, and the Northern Mariana Islands." Similarly, under 46 U.S.C. 12108(c), a vessel "not built or rebuilt in the United States" may be documented and endorsed with a fishery endorsement "to engage in fishing in the territorial sea and fishery conservation zone adjacent to Guam, American

Samoa, and the Northern Mariana Islands." These provisions are a reflection of the need in those areas to permit the use of vessels built in foreign shipyards--because they cost less. Foreign-built vessels may thus be used for the limited fisheries purposes above stated.

Finally, the same five islands turn up once again, at 46 U.S.C. 12112, which permits the Secretaries of Transportation and State to provide a temporary certificate of documentation to certain vessels procured outside the U.S. Such vessels may then proceed to the U.S., and en route they may engage "in the foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef." One wonders if one ever has.

Conclusion: Subtitle II of Title 46 for the most part reflects the territories' particular needs, but it should make provision of enforcement in American Samoa, perhaps by vesting jurisdiction in the High Court of American Samoa.

Federal agency comments: Memoranda discussing chapters of Title 46 before it was enacted into positive law, commencing in 1983, and that concerned the subjects that are now contained in Subtitle II, were distributed for comment to all of the pertinent Federal agencies: the Departments of Commerce, Justice, Labor, State, Transportation (particularly including the Coast Guard), and the Treasury. All comments received (with those from the Coat Guard being of particular value), were incorporated in revised memoranda and transmitted to the Governors of the four insular areas for their comments. (No substantive comments were received from them.) This memorandum on Subtitle II has not been transmitted to either Federal agencies or the governors for comment, in the interest of saving time, but some few comments in response to the earlier request have been restated herein, when they appear to remain timely.

Memorandum No. 46-2
July 1992

Subject: Maritime Liability
Title 46, Subtitle III (46 U.S.C. 30101-30343)

Comment: This Subtitle of Title 46, recently codified and enacted into positive law, applies fully to the territories and contains no problem for them.

Discussion: Subtitle III of Title 46 was enacted into positive law by Public Law 100-710 in 1988. It represents essentially a codification of the Ship Mortgage Act, 1920, a law that itself had applied generally to the territories (a conclusion with which expert Federal agency commentators in 1981 had agreed, in their review of a memorandum on the Act for this study.) The 1920 Act, like Subtitle III, was designed to encourage ship financing by offering security to private investors. These laws prescribe the manner of recording conveyances and mortgages; they define "preferred mortgages" and make clear the rights of preferred mortgagees; and they prescribe filing and foreclosures procedures.

But while it was necessary to struggle to conclude that the 1920 Act applied to the territories, the new codification does so forthrightly. It not only defines "State" and "United States" to include expressly the Virgin Islands, Guam, Samoa, and the Northern Marianas (46 U.S.C. 30101(6) and (8), respectively)--in the same manner as the new Subtitle II of Title 46--but it also includes an unusually extensive and clear definition of "district court" at 46 U.S.C. 31301(2). The term explicitly includes not only the District Courts of Guam, the Virgin Islands, and the Northern Marianas--provisions that are probably unnecessary, because each has the jurisdiction of a district court of the United States (see Memorandum No. 28-1)--but the term includes "the High Court of American Samoa" as well (46 U.S.C. 31301(2)(E)). And, so as to anticipate developments not yet imagined, there is also included "any other court of original jurisdiction of a territory or possession of the United States" (46 U.S.C. 31301(2)(F)).

Conclusion: This portion of Title 46 makes adequate provision for the territories.

Federal agency comment: No comments were invited on this memorandum from other Federal agencies.

Memorandum No. 46-3
July 1992

Subject: (a) Oath of Ownership (46 App. U.S.C. 42)

(b) Clearance and Entry
Title 46 App., Chapter 3 (46 App. U.S.C. 91-113)

(c) Tonnage Duties
Title 46 App., Chapter 4 (46 App. U.S.C. 121-135)

(d) Discriminating Duties and Reciprocal Privileges
Title 46 App., Chapter 5 (46 App. U.S.C. 141-146)

(e) Boarding Vessels Before Inspection (46 App. U.S.C. 163)

(f) Limitation of Vessel owner's Liability
Title 46 App., Chapter 8 (46 App. U.S.C. 181-196)

Comment: The enactment of Subtitle II of Title 46 ("Vessels and Seamen") into positive law (Memorandum No. 46-1) resulted in the repeal or elimination for other reasons of almost all laws codified in the first portion of the "old" Title 46. But because of their subject matter, some sections of statutes and some whole chapters in the first portion of the "old" Title 46 remain. An examination of these sections and chapters does not reveal any that appear to create problems for the territories, and indeed, most of them are of no interest whatsoever to the territories. No recommendation for change is offered here. But in the interest of completeness, these loose-end laws are discussed below.

Discussion: (a) A 1792 law requires an oath of ownership when a vessel of the United States engages in "entry . . . from any foreign port," to assure that "no foreign subject or citizen" has acquired an interest in the vessel (46 App. U.S.C. 42). There is nothing within the few lines of this little law to suggest whether vessels entering ports of the insular areas are or are not covered by it. It seems unlikely to matter, either way.

(b) The clearance and entry laws (46 App. U.S.C. 91-113), some of which date from the 18th Century and others of which were amended as recently as 1980, in general do not apply to the insular areas. The Customs Service is charged with their administration (see, for example, 46 App. U.S.C. 93, 104), and because the territories here involved are outside the U.S. customs area, the Customs Service does not function in them, except for the Virgin Islands where it has special responsibilities under 48 U.S.C. 1406i.

An early law, formerly appearing at 46 U.S.C. 92, had required the delivery of a cargo manifest to the customs collector in order for a vessel bound for a foreign port to achieve clearance to depart. (That manifest requirement has been modernized, and it now appears at 46 App. U.S.C. 93.) That early law was extended to "trade between the United States and Puerto Rico, Guam, and its other noncontiguous territory" by a law enacted in 1902 (formerly 46 U.S.C. 95), but that 1902 law was repealed in 1962 (by Public Law 87-826), so the manifest requirement quite clearly does not now apply to trade between the States of the U.S. and the insular areas.

(c) Tonnage duties (46 App. U.S.C. 121-135), which derive from a 1790 statute, are assessed upon vessels entering "the United States" (undefined) from foreign points if the vessels are not vessels of the United States (i.e., not documented under U.S. law). The level of the duty depends upon whether the vessel was built within the United States, is owned by foreign subjects, or has an officer who is not a U.S. citizen (46 App. U.S.C. 121). Tonnage duties are not now assessed against the vessels of a foreign country that has abolished them with respect to vessels of the U.S. A further duty applicable to foreign vessels is termed a "light money" duty (46 App. U.S.C. 128).

It is clear by statute that tonnage duties do not apply to vessels arriving in the Virgin Islands from foreign points, because the 1936 Organic Act exempts the Virgin Islands from these duties (48 U.S.C. 1405c(c)). The Treasury Department reports that it has, by regulation, in effect provided that Guam and Samoa (and by extension, the Northern Marianas) are not part of "the United States" for tonnage duty purposes (19 CFR 4.21(b)(15)). That result seems desirable. Among other things, there are no Customs Service personnel in those areas to collect tonnage duties.

It might be noted, however, that a contrary result could be reached by reasoning that the Virgin Islands and Guam occupy the same status, as organized, unincorporated territories; but for its 1936 statutory exemption, the Virgin Islands would be an area where tonnage duties would be collectible (because otherwise it would not have needed the exemption); because it has no such statutory exemption, Guam is an area where tonnage duties would apply--as are the Northern Mariana and Samoa, which seem for purposes of these laws, to occupy a status comparable to Guam's. This reasoning leads to an inconvenient result, but it would seem to have as much logic to support it as the contrary conclusion.

Inasmuch as the issue has not been raised in any substantial way, however, the problem does not appear to require further attention. It is the kind of issue which, if legislation could be achieved at little cost in time or energy, might reasonably be resolved by clarifying legislation. But because legislation does entail costs, and because this problem is not pressing and is not likely to become so, it seems soundest to pass it by.

(d) A "<u>discriminating duty</u>" (46 App. U.S.C. 141-146), which is "in addition to the duties imposed by law," applies to goods, wares, and merchandise imported into ports of the U.S. by vessels that are not vessels of the U.S. (46 App. U.S.C. 146). Although the key sections contain no clear geographical limitation, they do contain language that quite clearly limits these laws to the U.S. customs territory--thus excluding the Virgin Islands, Guam, American Samoa, and the Northern Marianas from their application. The term "port of the United States" is sometimes a term of art, denoting a port within the U.S. customs area; and the reference to a duty on "goods" that is "in addition to the duties" on such goods otherwise imposed by Federal law, almost certainly refers to a duty in addition to whatever duty is imposed by the basic U.S. tariff statute. Because the basic tariff statute does not apply to the territories, it is reasonable to suppose that the duties here in question also do not do so.

(e) A law concerning <u>boarding vessels before inspection</u> (46 App. U.S.C. 163) authorizes the Commissioner of Customs to issue regulations governing this activity as to vessels "arriving at the seaports of the United States." Because ports in the insular areas are generally not regarded as ports of the United States for customs purposes, it is likely that this authority does not extend to insular ports.

(f) The laws permitting the <u>limitation of a vessel owner's liability</u> (46 App. U.S.C. 181-192)--which were designed to encourage the maritime shipping industry by reducing the financial responsibility of the ship owner in various ways--contain no provisions that pose problems to the territories. The laws are broadly applicable (46 App. U.S.C. 188). One reference to "district court of the United States" (46 App. U.S.C. 185) might require a vessel owner in Samoa to use a court in Hawaii, but no other words of limitation appear.

<u>Conclusion</u>: The assorted sections and chapters discussed above require no modification to meet the needs of the territories.

<u>Federal agency comments</u>: Comments were invited in 1982 from the Departments of Justice, Transportation, and the Treasury on memoranda dealing with the above provisions. Because of changes in the Title since them, some of the above paragraphs have been rewritten in 1992--but in a manner consistent with all comments received in 1982. Parts (c), (d), and (f), however, have not required revision, and they appear substantially as they did before and after the 1982 comments.

Memorandum No. 46-4
October 1981[1]

<u>Subject</u>: The Nicholson Act
Act of September 2, 1950, as amended
46 App. U.S.C. 251

<u>Purpose</u>: To prohibit the landing of fish in U.S. ports from foreign fishing vessels.

<u>Recommendation</u>: The nonapplication of the Nicholson Act to American Samoa, Guam, the Northern Marianas, and the Trust Territory, and its partial nonapplication to the Virgin Islands, should not be modified.

<u>Territorial application</u>: Except for the Virgin Islands, which are partly exempt, the Nicholson Act is not applicable to the territories or the Trust Territory.

<u>American Samoa</u> was held to be exempt by Marine Circular No. 124 of June 12, 1953 (issued by the Bureau of Customs, Treasury Department), on the ground that it is an unorganized, unincorporated territory of the United States, and thus that neither Samoa nor any port therein constitute a "port of the United States" for purposes of the Nicholson Act. The Bureau of Customs stated that its conclusion would be to the contrary if it appeared that "Congress intended otherwise," but the Bureau concluded that it did not appear that Congress had so intended.

<u>Guam</u> was held to be exempt in the same Marine Circular, on the ground that the Nicholson Act was approved on a date

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[1] This memorandum was reviewed in September 1992, by which time one amendment had been enacted to 46 App. U.S.C. 251 that post-dated composition of the memorandum in October 1981. That amendment, enacted in 1988, permits the Secretary of Commerce to obtain certain fisheries information (46 App. U.S.C. 251(a)), and it is irrelevant for current purposes. The information contained in this memorandum as to the statute thus remains accurate as of 1992. The memorandum has, therefore, not been revised since its original date of October 1981.

(September 2, 1950) subsequent to the date of the Guam Organic Act (August 1, 1950), and that the latter statute provided that subsequently enacted laws would not apply to Guam unless Guam is referred to by name or by explicit reference to "possessions."

The Northern Marianas are excluded under section 503(b) of the Northern Marianas Covenant (set out following 48 U.S.C. 1681), which states that unless the Congress otherwise provides by law following trusteeship termination, "any prohibition in the laws of the United States against foreign vessels landing fish . . ." will not apply to the Northern Marianas. The exclusion will, clearly, survive trusteeship termination, absent further Congressional action.

The Virgin Islands, while not generally exempt from the Nicholson Act, are partially exempt under a 1961 amendment (46 App. U.S.C. 251(b)), which permits the landing in the Virgin Islands, from a foreign-flag vessel that is not more than 50 feet long, of fresh fish for immediate consumption.

The Trust Territory is exempt because its ports could not be construed as "ports of the United States." The language of section 503 of the Northern Marianas Covenant, which states in effect that the Nicholson Act is "presently inapplicable to the Trust Territory," makes clear that this exclusion was the Congress' intent.[2/]

Discussion: The Nicholson Act, designed to protect American fishermen, prohibits the landing by a foreign flag vessel in "a port of the United States" of fish taken aboard it on the high seas.

[2/] As used in section 503 of the Covenant, it seems reasonable to suppose that "presently" is intended to mean "currently." Language purists understand the term to mean not "currently" but "soon"--with the latter being a troublesome result in this instance. But in context, and given the frequent misuse of the term, in statutes and elsewhere, it should doubtless be read as meaning "now" or "currently."

The nonapplication of the Act to Samoa is important to the American Samoan fish canning industry, currently Samoa's most significant private economic endeavor. There was no Samoan fish canning industry until after the Bureau of Customs issued Marine Circular No. 124 in 1953, at which time it became possible for foreign fishing vessels (Japanese, Korean, Taiwanese) to land fish there, to be canned by American companies. The American companies contract now, as they have done since the 1950's, to purchase fish from foreign fishing fleets. The companies have also, lately, begun to buy fish from American fishing vessels, which have recently commenced fishing in Samoan waters. Notwithstanding considerable efforts to inspire the Samoans themselves to fish commercially, they remain largely uninterested in doing so, and the cannery operation is, therefore, heavily dependent upon the Nicholson Act exemption.

Although a canning industry, based upon foreign fishing fleets, has not similarly developed in Guam, interest has been displayed from time to time in such an industry or in the use of Guam as a transshipment point for tuna. The continuous nonapplication of the Nicholson Act to Guam would be essential to a successful canning or transshipment enterprise there, if it were based upon a foreign fishing fleet. The same is true of the Northern Marianas.

The partial exemption for the Virgin Islands appears sufficient at this time. Under it, small fishing boats from neighboring Caribbean islands can continue to supply fish to the Virgin Islands' local market, where it is clearly welcome. A Samoan-type industry, with foreign fleets supplying the raw material for island-based cannery operations, has not been proposed for the Virgin Islands and is presumably not economically attractive, so a larger exemption for the Virgin Islands currently appears unnecessary.

Although there is no landing of fish in substantial quantities by non-U.S. vessels in Micronesia--except for Palau, where a Van Camp freezing facility has been in operation since the 1960's--the fishery resource represents Micronesia's principal economic asset, and freedom from the restrictions of the Nicholson Act is important to it, for both economic and political reasons. The Compact of Free Association (November 1980 version) would make no change on this point.

<u>Conclusion</u>: The current nonapplication of the Nicholson Act to the offshore areas should, as a matter of policy, be preserved. Inasmuch as Samoa's exclusion from it is of key importance to economic activity in Samoa, but rests on a rather thin administrative (instead of statutory) reed, the question arises as to whether Samoa's exemption should be fortified by an Act of Congress. The same question arises in connection with Guam and the Northern Marianas, but is less pressing as to them because of their current lack of a fish canning industry, based on a foreign fishing fleet.

Knowledgeable observers tend to the view that such an amendment would be difficult to achieve as a practical political matter. Domestic fishing interests, which can display great strength, have occasionally viewed the Samoa cannery operation as hurtful to them, and they could be expected to oppose legislation supportive of it. Because a legislative effort, assessed in a worst-case manner, could even result in reversing the current favorable treatment of Samoa (and other Pacific areas), the wisest course appears to be to take no action at all, thereby perpetuating the status quo as to the law.

Note should be taken of a 1975 Congressional Committee comment, which supports the Treasury ruling and thus gives comfort to those who seek to continue the Samoan cannery operation. In its report on the legislation that became the Fishery Conservation and Management Act, the House Committee on Merchant Marine and Fisheries referred to the administrative exclusion of Samoa and Guam from the Nicholson Act, and stated:

> The Committee would like to make it clear that nothing in this [Fishery Conservation and Management] Act would, or is intended to, affect that

> [Nicholson] Act, and in particular, the Treasury Department's interpretation of that Act. (H. Rept. 94-445, p. 49).

Federal agency comments: Comments on this memorandum were invited from the Departments of Commerce, Treasury, Justice, and Transportation. All comments received have been reflected above.

Memorandum No. 46-5
November 1981
Revised June 1982
Revised September 1992[1/]

Subject: The Coastwise Laws (including the Jones Act)
46 App. U.S.C. 289, 292, 316, 877, 883, 883-1, 883a, 1156, 1175(a), and 1223(a)

Purpose: To require the use of U.S. flag vessels in the transportation of passengers and cargo between two points in the United States.

Territorial application: The coastwise laws apply to Guam. They do not apply to American Samoa or the Virgin Islands, and they largely do not apply to the Northern Marianas. They also do not apply to the Trust Territory.

Recommendation: None is offered here. The Government of Guam, however, strongly recommends that Guam be made exempt from the coastwise laws, and thus placed in the same position as the other territories.

[1/] The 1992 revision of this memorandum has resulted in only modest changes from the version that was the subject of Federal agency comment in 1981-82: (1) The 1991 Guam data, reflected in footnote 6 below, has been added. (2) Citations have been changed to reflect the inclusion now of the sections that are the subject of this memorandum in 46 "Appendix" U.S. Code. An examination of the post-1981 amendments to such sections reveals that, although several have been amended, sometimes more than once, none of the amendments affects the substance of the section for purposes of the discussion contained in this memorandum. Attention is, however, invited to newly codified 46 U.S.C. 3704, which is also termed a "coastwise" law (and is discussed in Memorandum No. 46-1), but that section could not be objectionable from the territories' standpoint. Attention is also invited to a 1984 law, codified at 46 App. U.S.C. 289c, that permits use of foreign vessels in the transportation of passengers between ports in Puerto Rico and the United States. Under that law the coastwise exemption can be lifted, and it can then also be reinstated, by administrative action. (3) Explanatory footnote 3 has been added.

Discussion:

Definition of coastwise laws: The term "coastwise laws" does not appear to be a term of art. There is, in any event, no established understanding as to precisely what Federal statutes are embraced by the term, or by the term "coasting" laws--the latter being an earlier usage that is now viewed as synonymous with "coastwise" laws.

This memorandum includes in its discussion all of the Federal statutes that contain coastwise-type restrictions, even though some such statutes are of little moment for immediate purposes. The two major coastwise laws, and those that constitute the greatest problem in the only U.S. territory now fully embraced by the coastwise laws (Guam), are these:

46 App. U.S.C. 289, an 1886 statute that bars the use of foreign vessels in the transportation of passengers between "ports or places" in the United States; and

46 App. U.S.C. 883, derived from section 27 of the Merchant Marine Act of 1920, commonly called the "Jones Act," that bars the use of foreign vessels in the transportation of merchandise between "points" in the United States, its Territories and possessions. Such transportation must be performed only by "a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States." A 1960 amendment to this section adds a proviso concerning repair: any vessel in excess of 500 tons, lawfully entitled to engage in the coastwise trade, which is later rebuilt, cannot thereafter engage in the coastwise trade "unless the entire rebuilding . . . . is effected within the United States, its Territories (not including trust territories), or its possessions . . . ." Another provision permits sale to an alien in whole or in part, or foreign registry, without loss of coastwise privileges.

Particular coastwise laws: In addition to the major coastwise laws referred to above, and codified at 46 App.

U.S.C., sections 289 and 883, the following also contain restrictions of a sort that permit them to be regarded as coastwise laws:

46 App. U.S.C. 292 bars the use of a "foreign-built dredge . . . in the United States," unless the dredge is among those few permitted by a 1906 law to be documented as a vessel of the United States.

46 App. U.S.C. 316, in subsection (a), bars the use of any vessel not U.S.-owned and U.S.-documented or numbered from towing U.S. vessels "from any port or place in the United States, its Territories or possessions, embraced within the coastwise laws" to any other such place, or within the harbor of such a place; and in subsection (d), a foreign vessel is barred from salvaging operations "on the Atlantic or Pacific Coast of the United States, in any portion of the Great Lakes . . ., or in territorial waters of the United States on the Gulf of Mexico . . ."--but this prohibition appears not to apply to Guam, given the statutory language which slants toward the continental U.S. only.

46 App. U.S.C. 877 extends the coastwise laws "to the island Territories and possessions of the United States," effective February 1, 1922, and directs the Secretary of Commerce (changed by P.L. 97-31, August 6, 1981, to "Secretary of Transportation") by that date to establish adequate steamship services at reasonable rates, with the proviso that if adequate shipping is not provided by February 1, 1922, the President can extend the effective date as long as necessary to do so. The 1981 amendment is curious, inasmuch as the Secretary of Transportation obviously did not exist in 1922, and no Presidential action pursuant to the proviso was ever taken. This section is of further interest because it provides that "the coastwise laws of the United States shall not extend to the Virgin Islands . . . until the President . . . shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands. . . ." There has been no Presidential action under this provision either--a matter discussed further below.

46 App. U.S.C. 883-1 permits a U.S. corporation, engaged "in a manufacturing or mineral industry in the United States," to document its vessels under U.S. law, but such vessel cannot engage in the coastwise trade or the fisheries except as a service to a parent or subsidiary corporation.

46 App. U.S.C. 883a requires a report to the appropriate Federal authority whenever a U.S. documented vessel of over 500 tons is rebuilt, or major components are constructed, outside "the United States, its Territories (not including trust territories), or its possessions."

46 App. U.S.C. 1156, from the Merchant Marine Act, 1936, provides that a construction-differential subsidy is to be paid only with respect to vessels in the foreign trade, but several exceptions are stated, one of which permits such a subsidized vessel "on a voyage in foreign trade . . . [to] stop at . . . an island possession or island territory of the United States," but the revenue thereby gained results in a proportionate reduction of the construction subsidy.

46 App. U.S.C. 1175(a), also from the Merchant Marine Act, 1936, bars an operating-differential subsidy for vessels in the coastwise trade, but several exceptions again are stated, including "a voyage in the foreign trade on which the vessel may stop at . . . an island possession or island territory of the United States," but the vessel loses a part of its subsidy as a result, the loss being measured by what is gained by the coastwise visit.

46 App. U.S.C. 1223(a), from the Merchant Marine Act, 1936, prohibits the award of a subsidy or the charter of a vessel by the Secretary of Commerce to a contractor having an interest in companies involved in coastwise trade.

Territorial application: American Samoa and the Virgin Islands are, by statute, exempt from the coastwise laws, and foreign vessels may thus carry passengers and merchandise to them from U.S. ports, and from them to U.S. ports.

The exemption for American Samoa, derived from the Act of June 14, 1934 (48 U.S.C. 1664), states that the "provisions of law of the United States restricting to vessels of the United States the transportation of passengers and merchandise . . . from any port of the United States to another port of the United States shall not be applicable to . . . the islands of American Samoa. . . ."

The Virgin Islands exemption derives, first, from 46 App. U.S.C. 877, discussed above, and from section 4(d) of the 1936 Organic Act (48 U.S.C. 1405c(d)), which provides in pertinent part that--

> the President shall have power to make applicable to the Virgin Islands such of the navigation, vessel inspection, and coastwise laws of the United States as he may find and declare to be necessary in the public interest, . . .

second, from the World War II Executive Order (No. 9170, May 21, 1942) by which the President did make applicable to the Virgin Islands "all of the navigation and vessel inspection laws,' with certain exceptions, and one such exception is the "coastwise laws of the United States;" and finally, from section 8(c) of the 1954 Organic Act (48 U.S.C. 1574(c)), which provides in pertinent part that the--

> laws of the United States applicable to the Virgin Islands on July 22, 1954, including those made applicable to the Virgin Islands by or pursuant to the provisions of [among others, section 4(d) of the 1936 act above quoted] . . . shall . . . continue in force and effect until otherwise provided by the Congress.

The Attorney General of the United States stated in a 1963 opinion that the effect of the 1954 law is to eliminate the President's authority under the 1936 Act to change the application of the navigation and coastwise laws to the Virgin Islands (42 Op. Atty. Gen. 189). Only the Congress can now do that. (That 1963 Opinion of the Attorney General held that the foreign dredging statute, codified at 46 U.S.C. 292 and discussed above, is both a navigation and coastwise law, and that, owing to the Virgin Islands' exemption from the coastwise laws, the foreign dredging statute does not apply to the Virgin Islands). It may be, however, that the 1954 termination of the President's authority to extend the coastwise laws to the Virgin Islands by proclamation is arguable. Several commentators have suggested that even if then terminated, the authority may have been revived by the 1981 amendment to 46 App. U.S.C. 877. As noted above, that 1981 amendment (Public Law 93-71, 95 Stat. 151, 157, August 6, 1981) substituted "Secretary of Transportation" for the reference to "Secretary of Commerce." The section was not reenacted at length, but perhaps it may be possible to impute to the Congress approval of those portions of the section that were not changed.[2/]

It is clear, in any event, that the Virgin Islands believes that its exemption from the coastwise laws is valuable to it. This was made evident in 1979, following the President's transmittal on July 20, 1979, of a message to the Chairman of the House Merchant Marine and Fisheries Committee, stating in part that--

> . . . provisions in existing laws calling for substantial or exclusive use of American flag vessels should be

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[2/] It may also be that Public Law 97-357 (1982) could affect the President's authority to extend the coastwise laws to the Virgin Islands by proclamation. That law, designed essentially to amend the laws pertaining to the Virgin Islands judiciary, contains an amendment to 48 U.S.C. 1405c(d). While the amendment would not modify the language pertaining to the President's authority, it might be argued that any amendment to that section revives the authority contained in it.

> vigorously pursued, and exemptions in these laws should be reexamined.

Soon thereafter both the President and the Secretary of the Interior received cabled protests from the Governor of the Virgin Islands and the President of the Gift Shop Association, stating that if the coastwise laws applied the Virgin Islands, transportation and freight charges would rise and the Virgin Islands' ability to compete as a tourist area would be destroyed. (It appears that no further action has been taken concerning the Virgin Islands' exemption).

Unlike Samoa and the Virgin Islands, the Northern Marianas are not entirely exempt from the coastwise laws. The Northern Marianas Covenant (set out in a note following 48 U.S.C. 1681), provides in section 503:

> The following laws of the United States, presently inapplicable to the Trust Territory of the Pacific Islands, will not apply to the Northern Mariana Islands . . ..
>
> (b) except as otherwise provided in subsection (b) of Section 502, the coastwise laws of the United States . . ..

Subsection (b) of Section 502 in turn states that--

> The laws of the United States regarding coastal shipments and the conditions of employment, including the wages and hours of employees, will apply to the activities of the United States Government and its contractors in the Northern Mariana Islands.

In early 1981, the U.S. Customs Service held that these provisions mean what they say. In an opinion dated February 18, 1981 (104942 MKT), the Director, Carriers, Drawback and Bonds Division, Customs Service, advised the Agriculture Department's Agricultural Stabilization and Conservation Service that a Federal agency must employ "coastwise-qualified vessels to transport food commodities from the West Coast to the Northern Mariana Islands. . . ." The Agricultural Stabilization and Conservation Service, in shipping food to the Northern Marianas under a program of the Food and Nutrition Service of the Agriculture Department, had utilized a foreign vessel because "it found the service on United States-flag vessels to be unacceptable." (Interior's files contain a letter from the American President Lines to the Secretary of Agriculture, in June 1980, protesting the use of a foreign-flag carrier to the Northern Marianas and presenting figures showing that the pertinent rates of the foreign carrier in question substantially exceeded those of APL). The effect of the 1981 Customs ruling was to say that the Agriculture Department practice of using a foreign flag vessel must stop.

The Trust Territory is exempt from the coastwise laws. Its ports could not be regarded as ports of the United States. The Congress, in effect, so stated in section 503 of the Northern Marianas Covenant, quoted above.

Guam, alone among the offshore areas herein considered, is embraced by the coastwise laws.

Guam's inclusion - a statutory conflict: Those who deal with the vessel documentation laws, particularly the Customs Bureau and the Coast Guard, have, they report, long been plagued by the difficulty involved in reconciling the coastwise laws as they apply to Guam (46 App. U.S.C. 877, 883) with the special provision of the vessel documentation laws that applies to Guam (46 U.S.C. 11).[3/]

[3/] The law that appeared at 46 U.S.C. 11, which later became 46 U.S.C. 65h, has been replaced in the new codification by 46 (continued...)

--Under 46 App. U.S.C. 883, foreign-built vessels cannot engage in the coastwise trade;

--Under 46 App. U.S.C. 877, the Territories and possessions are included in the coastwise trade; but

--Under 46 App. U.S.C. 11, such foreign-built vessels may be documented under U.S. law if they are to engage only in trade with Guam, Tutuila, Wake, Midway, and Kingman Reef; but also

--Such a foreign-built vessel, authorized to be employed in trade with Guam and the other four named islands, cannot be employed in the coastwise trade.[4]

Customs and the Coast Guard have proceeded to read 46 U.S.C. 11 as carving out an exception to the coastwise laws, so that foreign-built, U.S.-documented vessels may engage in the coastwise trade between the States and Guam. They have

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[3](...continued) U.S.C. 12105(b). That section is discussed in some detail in Memorandum No. 46-1. It provides in full:

> A vessel for which a registry endorsement is issued may be employed in foreign trade or trade with Guam, American Samoa, Wake, Midway, or Kingman Reef.

The earlier section 11 (and 65h) contained substantially the same provision. Accordingly, the conundrum above discussed probably continues, but "46 U.S.C. 11" should, now be read as "46 U.S.C. 12105(b)."

[4] The former 46 U.S.C. 11 explicitly so provided. Currently 46 U.S.C. 12105(b) and 12106(b) together have that effect.

also concluded that the exception permits foreign-built, U.S.-documented vessels to be used in service between two points in Guam, and between a point in Guam on a "voyage to nowhere" and back to the same point. (Coast Guard memoranda of January 27, 1982, 16215, and March 23, 1982, 16214).

There is, however, sentiment for statutory clarification of these matters.

Guam's inclusion - the policy question: In the belief that the application of the coastwise laws causes increased costs in Guam--a proposition not universally accepted (see below)--spokesmen for Guam for many decades have urged that Guam be made exempt from the coastwise laws. The 1950-51 Commission of the Application of Federal Laws to Guam so recommended (H. Doc. 212, 82d Congress, p. 11, item 13), but when the Interior Department later initiated legislation to implement that Commission's recommendations, it excluded the coastwise laws. (See P.L. 896, 84th Congress, 70 Stat. 908, and its legislative history.) Interior did so on the ground that the issue of the coastwise laws was so controversial that a proposal on the subject would jeopardize enactment of the other, desirable implementing legislation.

Requests from Guam for exemption have grown more strident in recent years, the contention being that the continued application to Guam of the coastwise laws constitutes a "Federal constraint" to Guam's economic development. Some Guam spokesmen have argued that the current state of affairs represents a conscious Federal policy to restrain Guam's economic progress.

In a letter dated June 1, 1979, to Interior, the Acting Governor of Guam argued:

--that Guam pays "probably the highest cargo rates in the world for surface shipping," owing to the application of the coastwise laws;

--that by way of comparisons in the costs of some goods,

	U.S.	Guam
Douglas fir lumber	$ 0.35 per board ft	$ 0.54
Bathtub	$89.00	$133.00
Lettuce	$ 0.32	$ 0.60
Potatoes	$ 0.16	$ 0.27

--U.S. shipping strikes have resulted in Guam's being deprived of cargo service for periods up to 60 days, a condition that would not exist if foreign vessels could serve it from U.S. ports.[5/]

On the other hand, in a July 1980 report by the Division of Marine Plans, Office of Policy and Plans, Federal Maritime Administration (then of the Department of Commerce, now of the Department of Transportation), the conclusion is reached that if Guam were made exempt from the coastwise laws, "foreign flag rates in the U.S.-Guam trade would probably not be lower than for U.S.-flag carriers." The Maritime study, entitled "Impact of Excluding Guam from U.S. Cabotage Requirements," states in part:

--The bar to the transportation of passengers on foreign vessels is of only slight importance to Guam, because only 3% of Guam's tourists arrive by ship; even if exemption from the coastwise laws were to encourage a cruise trade for Guam, this would be largely Japanese traffic and the economic return would go largely to Japan, not Guam.

--Apart from the coastwise laws, the Cargo Preference Act of 1904 (10 U.S.C. 2631) requires that all supplies for

[5/] The Maritime Administration points out informally that this argument has had no validity in recent years. Since about 1968 there have been no maritime disputes that could have interfered with the delivery of good to Guam.

the U.S. Armed Services be carried on vessels owned by the U.S. or documented under U.S. law, and because one-half of Guam's outgoing cargo is military, and one-third of its incoming is military, the amount of cargo that could benefit from an exemption is substantially reduced.

--In peacetime, the military relies largely on commercial vessels to carry military cargo, and given the amount of military traffic to Guam, plus the fact that domestic carriers provide service to Guam as part of their service to the Far East, an exemption for Guam from the coastwise laws would be unlikely to result in reduced service by U.S. vessels to Guam, or in a different rate structure.

--Because service to American Samoa (which is exempt from the coastwise laws) by foreign flag vessels is "comparable" to service to Guam, rates for foreign-flag service from the U.S. West Coast to Samoa, and for U.S. flag service from the U.S. West Coast to Guam, are compared, viz,

	Guam	Samoa
Rice	\$62-\$74 per ton bag	\$ 75.00
Motor vehicles	\$ 78.80-\$ 86.95 per ton	\$109.00
Cargo NOS	\$110.50-\$121.95 per ton	\$109.00
Meat and Vegetables	\$272.90 per ton meat \$152.45 per ton vegetables	\$190.00 (chilled) \$218.00 (frozen)

Notwithstanding these figures, the Maritime Administrative report stated that they show that "foreign flag rates to Guam from the U.S. would probably be higher than current U.S.-flag rates even if cabotage restrictions were lifted." The report states that foreign carriers might offer low rates initially "to lure business away from U.S. operators," but they would probably later raise them to become "compensatory." The report further states that "it is clear that U.S.-flag rates are now very competitive, and it does not seem likely that Guam would benefit from lower rates if cabotage restrictions were removed."

Finally, a later report by private consultants, engaged by the Guam Port Authority, reaches the same ultimate conclusion, but for somewhat different reasons. In April 1982 the firm of Simat, Helliesen & Eichner recommended against any effort to amend the Jones Act to exclude Guam. Its report states that the present arrangements "have given Guam both excellent service and reasonable rates." A revision of the Jones Act, so as to permit foreign competition, could possibly result in the best of all worlds, with frequent and reliable service accompanied by low rates, but the consultants think it more likely that the action--

(1) would probably in fact entice foreign competition into the Guam service;

(2) might or might not result in reduced service by U.S. carriers, because on the one hand the Military Sealift Command would continue to have transportation requirements for which it is required by law to pay commercial rates, but on the other hand either or both of the current U.S. carriers might "drop out of the trade" in the face of foreign competition;

(3) would probably not result in lower rates to Guam, (a) because current rates to Guam are reasonable, owing to the current state of the law which requires that military cargoes pay their own way, thereby precluding the subsidization of military cargoes by commercial cargoes; and (b) because a comparison of current rates from the States to Guam with those from the States to various foreign points where there is foreign-flag competition (i.e., Yokohama, Manila, Okinawa) shows the former to be for the most part substantially lower, so there is no reason to suppose that foreign-flag competition to Guam would result in reduced rates.

In sum, the report concludes that the "risks of revising the Jones Act would appear to be more formidable than the potential benefits." The report also states that the legislation would be extremely difficult to achieve: the political opposition from maritime labor, the ship building industry, and domestic carriers would be "vigorous and effective." Moreover, the President committed himself during the 1980 campaign to "preserving the integrity of the Jones Act."

In its comments on this subject, the Navy has predicted that if Guam were exempt from the Jones Act, service by U.S. vessels would probably continue approximately as at present, but reduced rates would be unlikely. Even if reduced rates were likely to result, however, the Navy speculates that it would probably oppose Guam's exemption, on the ground that a strong U.S merchant marine is important to the national defense, and legislation to exempt Guam would be perceived as a lessening of support for the U.S-flag merchant fleet.

In briefing papers prepared by a group of Guam businessmen for a White House conference in April 1982, the businessmen concluded that Guam should not seek an exemption from the Jones Act. Their reasoning was similar to that contained in the consultants' report, summarized above. The businessmen stated that Guam could "stand to lose more than it gains in blindly demanding relief from this alleged Federal constraint."[6]

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[6] As of September 1992, the position of the Government of Guam had become clear: It supported Guam's full exemption from the coastwise laws. The proposed Guam Commonwealth Act (H.R. 98), which was endorsed by a popular referendum in Guam, contains only a partial exemption (i.e., for "fish and fish products" only). Nevertheless, in formal discussions with Federal representatives on the content of the Commonwealth proposal, the Guam Commission on Self-Determination has supported a full exemption. In a strong statement by the Governor of Guam, presented at a session with Federal representatives in San Francisco on April 25, 1991, the Governor stated in part:

(continued...)

Conclusion: No useful purpose would be served by offering a recommendation here as to whether Guam should be accorded an exemption from the coastwise laws, either total (as in the case of the Virgin Islands and Samoa) or partial (as in the case of the Northern Marianas). Obviously arguments for an exemption, based upon both economics and fairness, can be made. But the Federal Executive Branch has been unable to support that result in recent years (as it was also unable to do in the early 1950's, as stated above). It is conventional wisdom that the Congress views the coastwise laws as close to sacrosanct. The problem is, thus, at least intractable.

Federal agency comments: Comments were invited from the Depart ments of Commerce, Defense, Justice, State, Transportation, and the Treasury. All comments received have been reflected above.

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[5](...continued)
A comparison of certain shipping rates between the U.S West Coast and Guam with rates for identical cargoes from the West Coast to points beyond Guam, can be very revealing. For example, in the category of plastic pipes and fittings, the rate to Guam is $5,258 for a forty-foot container while the rate for the same cargo to Taiwan on a ship that first stops in Guam--is only $1,949.60. In the area of office supplies, the rate for Guam is $3,817 for a twenty-foot container, but only $889 for the same container to Japan. For furniture, the tariff for a twenty-foot container to Guam is $4,400, but the same load sent to Taiwan, 1,500 miles beyond Guam, and once again sent on the same ship that stops at Guam, will only cost you $2,447.40 from the West Coast.

Since we are talking about ocean shipping, I almost hesitate to say this, but something is fishy here.

Memorandum No. 46-6
January 1982
Revised June 1982
Revised September 1992[1/]

Subject: (a) Regulation of Vessels in Domestic Commerce
Title 46 Appendix, Chapter 12 (46 App. U.S.C. 306-336)

(b) Passports and Papers of Vessels Engaged in Foreign Commerce
Title 46 Appendix, Chapter 13 (46 App. U.S.C. 354-355)

(c) Inspection of Steam Vessels
Title 46 Appendix, Chapter 14 (46 App. U.S.C. 441-444, 446-446(c)

(d) Transportation of Passengers and Merchandise by Steam Vessels
Title 46 Appendix, Chapter 15 (46 App. U.S.C. 466c)

(e) Merchant Seamen
Title 46 Appendix, Chapter 18 (46 App. U.S.C. 674-677, 688)

(f) Wrecks and Salvage
Title 46 Appendix, Chapter 19 (46 App. U.S.C. 721-738d)

(g) Admiralty and Maritime Jurisdiction
Title 46 Appendix, Chapter 19A (46 App. U.S.C. 740)

(h) Suits in Admiralty
Title 46 Appendix, Chapter 20 (46 App. U.S.C. 741-752)

[1/] The 1992 revision of material appearing in this memorandum has been largely confined to the deletion of material now contained in the portion of Title 46 that has been enacted into positive law, and in the addition of the discussion of the 1989 Misch decision in (e). Accordingly, this material is in large measure in the form it appeared when the pertinent Departments were asked to comment on it in 1982.

(i) Death on the High Seas
Title 46 Appendix, Chapter 21 (46 App. U.S.C. 761-767)

(j) Suits in Admiralty against the U.S.
Title 46 Appendix, Chapter 22 (46 App. U.S.C. 781-790)

Comments: Many of the laws considered in this memorandum are either of little importance to the territories, or pose no problems to them. But several that involve admiralty jurisdiction of Federal district courts--i.e., those discussed at (e), (g), (h), and (i)--ought to be amended to provide for jurisdiction in American Samoa.

Discussion: (a) Much of the chapter entitled Regulation of Vessels in Domestic Commerce (46 App. U.S.C. 251 et seq.) was repealed in connection with the Title 46 codification (Memorandum No. 46-1), or earlier, but two important sections are discussed at some length in other memoranda (46 App. U.S.C. 251 in Memorandum No. 46-4, 316 in No. 46-5). The sections that remain (including 46 App. U.S.C. 306-315, 319-324, 327) are for the most part either obsolete (having been enacted in 1793) or irrelevant (because they relate solely to Alaska, or to "inland transportation," or the like). In any event, none appear to require modification to meet the needs of the territories.

(b) The statutes pertaining to the delivery to U.S. consular officers of passports and papers of U.S. vessels arriving in foreign ports (46 App. U.S.C. 354-355) are irrelevant to the territories.

(c) The once substantial chapter entitled Inspection of Steam Vessels has almost wholly been repealed (and enacted into positive law), with only 46 App. U.S.C. 441-444 and 446-446c remaining. The first of these provides exemptions from certain Federal statutory requirements to oceanographic research vessels and their scientific personnel, while the latter sections provide similar exemptions to sailing school vessels, their instructors and students. It seems probable that either kind of vessel in the waters of a territory would qualify for such exemptions. No explicit geographic limitations appear in the cited sections.

(d) The only section remaining of Chapter 15 on Transportation of Passengers and Merchandise by Steam Vessels (46 App. U.S.C. 466c) bars the export of a horse "by sea from the United States, or any of its territories or possessions" unless a waiver has been granted by the Secretaries of Commerce and Agriculture. (The purpose of the law is to prevent the exportation of horses "for purposes of slaughter" (46 App. U.S.C. 466c(b)). Obviously the shipment of a horse from a territory to a foreign country would be subject to the bar in question.

(e) A few sections pertaining to Merchant Seamen remain (46 App. U.S.C. 674-677), mostly dating from the early years of the 19th century, with all dealing with lists of crewmen on vessels sailing to or from foreign ports and the customs collector's duties concerning them. It is probable that these laws do not apply to voyages from territorial ports to foreign points.

A law concerning seaman recovery for injury or death (46 App. U.S.C. 688) is of substantial importance, has given rise to mountains of litigation, and has lately been held applicable to the Northern Mariana--on which basis it can be viewed as clearly applicable as well to the Virgin Islands, Guam, and Samoa. This is as it should be.

The law in question, enacted in 1915 and amended as recently as 1982, is part of yet another law known as the Jones Act. It permits a seaman who has suffered personal injury in his employment to obtain damages in a jury trial, on the same basis as railway employees under Federal law; and it permits his personal representative to do so in the case of the death of a seaman. Jurisdiction is in the court of the district in which the defendant employer resides, or where his principal office is located (46 App. U.S.C. 688(a)).

Apparently the only case to arise under this law in any of the areas that are the subject of this study is Misch v. Zee Enterprises, Inc. (879 F.2d 628), in which the Court of Appeals for the Ninth Circuit held in 1989 that 46 App. U.S.C. 688 is applicable to a proceeding in the Northern Marianas. The court so concluded on the basis of the following: (1) The Federal law pertaining to railway employees, which is incorporated by reference in 46 App. U.S.C. 688, itself applies to "Territories" and "possessions of the United States" (45 U.S.C. 52); (2) such railway law applies to Guam, as the 1950 Guam Commission concluded (citing research prepared for it and published in 1952 as a Congressional Committee Print), and as did researchers for the 1985 Northern Marianas Federal Laws Commission,[2] and, therefore, the law applies to the Northern Marianas, by operation of section 502(a)(2) of the Covenant; and (3) as amended, the section itself refers to "territories, or possessions" (46 App. U.S.C. 688(b)(1)(B))--this in the context of the continental shelf--which shows a legislative awareness of these areas. In

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[2] It is gratifying to a government lawyer, particularly one engaged in research concerning the application of Federal laws to insular areas, to note the deference the Court of Appeals paid in the Misch decision, at page 630, to unpublished research by the staff of the Northern Marianas Commission. The Northern Marianas Commission came to a sudden end, one not anticipated by most associated with it, when its funding expired and was not renewed in 1985. The Commission's staff had completed considerable legal research which it had recorded in a series of memoranda, but those memoranda had not been presented to the Commission, had of course not been acted upon by the Commission, and were not entirely finished products, having not been reviewed in the standard bureaucratic manner. When the Commission went out of business, these memoranda were collected, reproduced, and bound in three loose-leaf notebooks, a few sets of which were distributed to persons who might find them of value. One set obviously came to the attention of the Ninth Circuit, to its benefit. The court cites this work, in connection with 46 App. U.S.C. 688, as "3 Legal Analysis of Selected Titles of the United States Code: Research by the Staff of the Northern Mariana Islands Commission on Federal Laws 74 (1985)" (a correct citation). It is encouraging that this work lives on, for it was skillfully executed. It is often cited as "unpublished research by the staff of the Northern Marianas Commission" in this study.

response to the argument that because the Commonwealth of Puerto Rico had been held beyond the reach of this section of the Jones Act, so too should the Commonwealth of the Northern Marianas, the Misch court point out that the Puerto Rican result was based on a particular Federal law applicable to Puerto Rico only (48 U.S.C. 749), and that because the Northern Marianas was not the subject of any similar treatment, the result was different as to it.

The decision seems unarguably correct, and its language would comprehend Guam, the Virgin Islands, and Samoa as well. (It should be noted that the Commission on the Application of Federal Laws to the Virgin Islands concluded, in its 1956 report, that 46 U.S.C. 688 applied to the Virgin Islands (Committee Print No. 7, 84th Cong., p. 23).) The court jurisdiction provision, however, would not extend to a vessel owner living in or having his office in Samoa, so a Samoan seaman employed on such a vessel would be disadvantaged. It would be well if the language at 46 App. 688(a) were expanded to remedy this deficiency.

(f) The laws concerning Wrecks and Salvage (46 App. U.S.C. 721-738d)--designed to encourage voluntary action to assist vessels in peril on the sea--are without geographical limitations, except to the extent that the waters off Florida and iceberg areas of the North Atlantic are the subject of special legislation.

(g) The statute concerning admiralty and maritime jurisdiction for damage caused by a vessel that results in injury on land (46 App. U.S.C. 740) affects the admiralty jurisdiction of the district courts of the U.S., and thus the jurisdiction of the District Courts in the Virgin Islands, Guam, and the Northern Marianas. It could appropriately be modified to accommodate American Samoa.

(h) The statute concerning suits in admiralty by or against vessels or cargoes of the United States (46 App. U.S.C. 741-752) also affects the admiralty jurisdiction of the district courts, and thus of the District Courts in the Virgin Islands, Guam, and the Northern Marianas. These laws waive sovereign immunity and thus expand the courts' jurisdiction. It, too, could appropriately be modified to accommodate American Samoa.

(i) The seaman's wrongful death statute, entitled Death on the High Seas by Wrongful Act (46 App. U.S.C. 761-767) permits suits in admiralty in the Federal District courts. Inasmuch as aliens can benefit from this law, noncitizen nationals of Samoa can also expect to be able to do so, but the absence of a Federal district court with jurisdiction in Samoa could clearly inhibit their benefitting from this law. The problem of court jurisdiction in Samoa should be corrected.

(j) The law concerning suits in admiralty against the United States for damages caused by public vessels or for towing or salvage service (46 App. U.S.C. 781-790) also involves a waiver of sovereign immunity and an expansion of the admiralty jurisdiction of the district courts, including those in the Virgin Islands, Guam, and the Northern Marianas. The U.S. District Courts would be available to the people of Samoa (46 App. U.S.C. 782).

Conclusion: Most of the laws discussed above require no modification to accommodate the territories, but those considered at (e), (g), (h), and (i) ought to be modified to provide a forum in American Samoa. Each of these now restricts jurisdiction to the district courts of the United States.

Federal agency comments: Comments were invited in 1982 from the Departments of Justice, Labor, Transportation, and the Treasury on the above portions of Title 46. Because of changes in the title since then, much of the foregoing has been rewritten, but in a manner consistent with comments received in 1982.

Memorandum No. 46-7
December 1981
Revised June 1982
Revised September 1992[1]

Subject: The Shipping Act, 1916
Title 46, Chapter 23 (46 App. U.S.C. 801-842)

The Intercoastal Shipping Act, 1933
Title 46, Chapter 23A (46 App. U.S.C. 843-848)

Purpose: To provide for the regulation of the rates and practices of common carriers by water in interstate commerce.

Territorial application: The Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, apply to American Samoa, Guam, the Northern Marianas, and the Virgin Islands. Neither statute applies to the Trust Territory.

Recommendation: These laws require no change, but see the Conclusion below for a suggested improvement.

Discussion:

Substance of the statutes:

The Shipping Act, 1916, vests in the Federal Maritime Commission and the Secretary of Transportation a variety of powers concerning transportation in interstate commerce by common carriers by water. Principally, the statute bars in interstate commerce certain rebates, unfair or discriminatory practices (46 App. U.S.C. 812), and discriminatory or prejudicial rates (46 App. U.S.C. 816); it requires the filing with the Commission of contracts between carriers concerning

[1] The December 1992 revision has involved the updating of citations, and the elimination of references to the jurisdiction of the Maritime Commission over transportation by water between the United States (including its territories) and foreign ports. That jurisdiction was terminated by Public Laws 98-237 and 98-595 in 1984.

rates or concerning any other "exclusive, preferential, or cooperative working arrangement," and authorizes the Commission to disapprove, cancel, or modify such agreements (46 App. U.S.C. 814); and it requires interstate carriers to establish just and reasonable rates and to file them with the Commission, and it authorizes the Commission to determine whether they are just and reasonable and to modify them as necessary (46 App. U.S.C. 817(a)).

The Shipping Act also requires the Secretary of Transportation (and the Maritime Administration of that Department) to investigate the relative costs of constructing merchant vessels in the U.S. and in foreign countries, to examine the navigation laws of the U.S. and make recommendations to the Congress for their improvement, and to report annually to the Congress on these and other subjects (46 App. U.S.C. 811).

The Intercoastal Shipping Act, 1933, requires every "common carrier by water in intercoastal commerce" to file its rates with the Commission (46 App. U.S.C. 844), and the Commission is empowered to suspend rates that it finds unlawful and to fix just and reasonable rates (46 App. U.S.C. 845a).

Both of the shipping acts were in part superseded in 1940 by the enactment of Part III of the Interstate Commerce Act, which vests in the Interstate Commerce Commission regulatory authority over transportation performed by certain water carriers. (See Memorandum No. 49-2). The complexities of the division of jurisdiction between the Maritime Commission and the ICC with respect to the regulation of common carriers by water are beyond the scope of this memorandum, and in any event they present no unusual problems to the territories.

Geographical application:

The explicit language of the Shipping Act, 1916, makes clear its application to the territories, and its nonapplication to the Trust Territory. The statute applies to common carriers by water in interstate commerce, and this phrase means common carrier transportation on regular routes--

--from port to port between one State, Territory, District, or possession of the U.S., and any other State, Territory, District, or possession of the U.S.; and

--between places in the same Territory, District, or possession (46 App. U.S.C. 801).

Many Federal regulatory statutes, in addition to the Shipping Act, 1916, grant to the regulating agency authority to regulate <u>within</u> a territory, as well as <u>between</u> a State and a territory. Federal regulation within a State would be barred by the Commerce Clause of the Constitution. The language just referred to gives to the Federal Maritime Commission authority to regulate intraterritorial water transportation in the Virgin Islands, Guam, and American Samoa, but it does not have that effect in the Northern Mariana Islands. By operation of section 502(a)(2) of the Covenant, the Shipping Act, 1916, applies to the Northern Marianas, but given the language of that section, it does so in the same manner as it is "applicable to the several States."

Elsewhere in the Shipping Act, 1916, and the later additions to it, there is continued evidence of the careful drafting that makes clear the full application of the Act to the current territories. For example,

<u>46 App. U.S.C. 815</u> contains language, added in 1961, that permits the filing with the Maritime Commission of complaints of unjust discrimination by "the Governor of any State, Commonwealth, or possession of the United States."

<u>46 App. U.S.C. 817e(b)</u>, added in 1966, provides that if a bond is to be filed with the Commission, the bonding company must be authorized to do business in, among other

areas, "the Commonwealth of Puerto Rico, the Virgin Islands or any territory or possession of the United States."

46 App. U.S.C. 819, which dates from 1916, pertains to the disclosure of information "to any officer or agent of the Government of the United States, or of any State, Territory, District, or possession thereof . . .".

46 App. U.S.C. 829, also from 1916, concerns enforcement and refers to courts of general jurisdiction in "a State, Territory, District, or possession of the United States."

All of the quoted phrases, and others like them elsewhere in Chapter 23 of Title 46, Appendix, are sufficient to comprehend the four current territories.[2/]

The Intercoastal Shipping Act, 1933, presents a different situation, but the same result occurs. That Act provides for the regulation of every "common carrier by water in intercoastal commerce," a term defined when the statute was enacted in 1933 to mean common and contract carriers that transport passengers or property "between one State of the United States and any other State of the United States by way of the Panama Canal" (46 App. U.S.C. 843(1)). The term

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[2/] A further section of the Shipping Act, 46 App. U.S.C. 834, permits the Secretary of the Treasury to deny clearance to a vessel that has refused to accept cargo tendered by a U.S. citizen. The Northern Mariana Islands Commission on Federal Laws in its January 1982 report to the Congress recommended that legislation be enacted to provide that for purposes of that section (then 46 U.S.C. 834), citizens of the Northern Marianas be deemed to be citizens of the United States. That recommendation has become moot in light of the termination of the Trusteeship Agreement and the effectiveness of the citizenship provisions of the Covenant. The term would as well exclude noncitizen nationals in American Samoa. If a need for a change in the law to include them were made known, then that should be done, but in its absence, it is perhaps enough to state the point and pass it by.

"State" was and is undefined. But a later section, added in 1938, extends the Intercoastal Shipping Act to all common carriers by water in interstate commerce, as defined in the Shipping Act, 1916 (46 App. U.S.C. 845b), and as shown above, the current territories are clearly included in that definition. The United States District Court in Puerto Rico explicitly so held with respect to traffic between the States and Puerto Rico (Federal Insurance Co. v. Transconex, Inc., 430 F. Supp. 290, at 296 (1976)), and the United States Court of Appeals for the District of Columbia has also done so (Commonwealth of Puerto Rico v. Fed. Maritime Comm., 468 F.2d 872, at 873 (1972)). The territories and Puerto Rico are given the same treatment by these two statutes, so the coverage of the territories is beyond argument.

Further support for this conclusion, as it applies to one area, appears in a 1978 letter in Interior Department files from the General Counsel of the Federal Maritime Commission, stating his opinion that the Shipping Act, 1916, applies to the Northern Marianas. (Letter of October 3, 1978, to Interior's Assistant Solicitor for Territories.) He so concluded on the basis of section 502(a)(2) of the Northern Marianas Covenant. The Assistant Solicitor for Territories subsequently (October 20, 1978) advised that the Intercoastal Shipping Act, 1933, also applies to the Northern Marianas.

Lest the application to the territories of these two statutes be thought to be affected by the coastwise laws, it should be noted that they are quite separate. The application of the shipping acts does not turn on the application or inapplication of the coastwise laws. In 1978, in Senate Report No. 95-1240, the Senate Committee on Commerce, Science, and Industry stated the following in connection with a bill to amend the Intercoastal Shipping Act, 1933:

> Under the 1933 act, the FMC is authorized to regulate the rate assessed by oceangoing common carriers between the noncontiguous or domestic offshore areas and the continental United States and between any two or more of these noncontiguous areas to insure that such rates are just and reasonable. These areas

> are: Alaska, Hawaii, Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, Wake Island, Midway Island, Northern Marianas, and Johnston Island. (p. 2.)
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> * * *
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> Of the 10 domestic offshore areas mentioned earlier, three are exempt from U.S. cabotage [i.e., coastwise] laws so that they may be served with foreign vessels. These three are the U.S. Virgin Islands, American Samoa, and the Commonwealth of Northern Marianas. (p. 3.)

Finally, Interior's files also contain a memorandum dated July 2, 1981, to the Acting Deputy High Commissioner from an Assistant Attorney General of the Trust Territory. The memorandum, which concerns service to the Trust Territory by a Japanese shipping company, states in part that it is "settled that the U.S. law does not apply to the Trust Territory unless the U.S. statute specifically embodies the TT," but the memorandum further states that "there is some question whether the Shipping Act of 1916 has international application" and thus that it apparently, in the author's view, may apply at least in part to the Trust Territory. The question is not further discussed nor is any rationale or other support provided, so it seems correct to reject the suggestion that the Shipping Act, 1916, may now apply to the Trust Territory. The author may have had in mind the authority of the Federal Maritime Commission to affect foreign carriers serving the United States, such as the authority then contained in 46 U.S.C. 813 (but repealed in 1984). That authority would seem to involve a kind of "international application," but it would not make the Shipping Act, 1916, applicable to the Trust Territory.

Regulation of intraterritorial shipping:

Full Federal regulation on intraterritorial water carriers is provided by these statutes, but apparently it is not provided in fact. Informal advice from the Federal Maritime Commission suggests that some intraterritorial carriers do file tariffs, but there seems to be no way of knowing whether all or even most who are subject to the shipping acts do so. In any event, the Commission concedes that there is no "active enforcement" of the shipping acts with respect to intraterritorial traffic. The most that could be expected to occur is Commission action arising from a complaint filed, most likely by someone in one of the territories who is adversely affected by the carrier action complained of.

Small carriers providing service from St. Thomas to St. Croix, or from Tutuila to Manua, are fully subject to the Commission's authority outlined above. It seems probable that most such carriers do not know that, or if they do, that they are unaffected by the knowledge. As also explained above, transportation within points in the Northern Marianas--from, say, Saipan to Tinian--would not be subject to the Commission's authority, in light of the language of section 502(a)(2) of the Covenant.

Conclusion: It would seem appropriate to eliminate that portion of the Federal Maritime Commission's regulatory jurisdiction that pertains to transportation "between places in the same Territory, District, or possession" (46 App. U.S.C. 801). Such an amendment would probably be consistent with reality, consistent with self-government in the territories, and welcomed by the territories. The territories would thereafter be free to provide such regulation of intraterritorial traffic as they chose. (The question of the Federal regulation of traffic between points in Puerto Rico would require investigation, since that regulation too would be eliminated by such amendment. Such Federal regulation may or may not be desirable in Puerto Rico, but that question is not intended to be answered here). Otherwise the continued application of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, to the territories, in a manner no less fully than they apply to the States, should not be disturbed. Nor is there reason to modify the nonapplicability of the two statutes to the Trust Territory.

Federal agency comments: Comments were invited in 1982 from the Departments of Justice, Transportation, and the Treasury, and from the Federal Maritime Commission. All comments received have been reflected above.

Memorandum No. 46-8
December 1981
Revised October 1992

Subject: (a) The Merchant Marine Act, 1920 (sometime called the "Jones Act")
Title 46 Appendix, Chapter 24 (46 App. U.S.C. 861-889)

Note: Sections of this Chapter that constitute "coastwise laws," i.e., sections 877, 883, 883-1, and 883a, are discussed in Memorandum No. 46-5 on that subject.

(b) The Merchant Marine Act, 1928
Title 46 Appendix, Chapter 24A (46 App. U.S.C. 891-891x)

Comment: The statutes considered herein present no problems of consequence to the territories or the Trust Territory.

Discussion: (a) The Merchant Marine Act, 1920, sometime called the Jones Act, contains the most important of the coastwise laws (46 App. U.S.C. 883, which bars the transportation of merchandise between U.S. ports in other than vessels of the United States--a matter discussed in Memorandum 46-5), but it contains no other provisions of unusual interest to the territories or the Trust Territory today. Most of the Merchant Marine Act, 1920, that has not been repealed has grown obsolete. The statute's purpose is to encourage the development of an efficient merchant marine, "ultimately to be owned and operated privately by citizens of the United States" (46 App. U.S.C. 861), and to that end it vested authority in the Secretary of Commerce (now the Secretary of Transportation) to dispose of vessels acquired during the World War I emergency to U.S. citizens, and in certain circumstances, to aliens (46 App. U.S.C. 865). Many of the statutes codified in this chapter of Title 46 Appendix, prescribe procedures for the disposal of U.S.-owned vessels. Most such statutes are now obsolete, but in any event none would result in unequal treatment of citizens in the territories. Because noncitizen nationals in Samoa are not, realistically, likely to be buyers of Federal merchant vessels in the early future, the citizenship requirement appears to pose no practical problem.

Section 7 of the 1920 Act (46 App. U.S.C. 866) is one of historic interest to the territories. It directs the Secretary of Commerce, now Transportation, to determine what steamship lines are needed to serve U.S. domestic and foreign commerce requirements--including service between the continental U.S. and the territories; to dispose of vessels to U.S. citizens who agree to provide the needed service; and, in the absence of citizens willing to supply such service, to operate the vessels himself "under government administration." Although section 7 has not been repealed, the Maritime Administration informally advises that it is not regarded as "active" today, nor has it been for several decades. Efforts to learn what action the Secretary of Commerce might have taken pursuant to this section "promptly . . . after June 5, 1920, and from time to time thereafter" (46 App. U.S.C. 866) have been unavailing.

(b) The Merchant Marine Act, 1928, has been largely repealed. The sections that remain grant to the Secretary of Transportation authority to remodel and improve Government-owned vessels for the foreign trade, and to replace them when necessary with vessels "built in the United States" (46 App. U.S.C. 891c). (For a discussion of this often-repeated geographic restriction, see Memorandum No. 46-9 on the Merchant Marine Act, 1936).

Conclusion: None of the statutes discussed above requires modification to accommodate the territories or the Trust Territory.

Federal agency comments: Comments were invited in 1982 from the Departments of Justice and Transportation. All comments received have been reflected above.

Memorandum No. 46-9
December 1981
Revised June 1982
Revised October 1992

Subject: The Merchant Marine Act, 1936
Title 46, Chapter 27 (46 App. U.S.C. 1101-1295g)

Note: Sections of this Chapter that pertain to the coastwise laws (46 App. U.S.C. 1156, 1175(a), and 1223(a)), are discussed in Memorandum No. 46-5.

Purpose: To encourage development of the U.S. merchant fleet by, among other things, providing financial assistance for the construction and operation of U.S. merchant vessels, authorizing Federal acquisition and construction of merchant vessels, and providing for the training of officers and crews.

Territorial application: The application of the Merchant Marine Act, 1936, to the territories is uneven. In a few relatively minor particulars, all "Territories and possessions" are fully covered. But to the extent that some of the Act's benefits run to "citizens" of the United States only, the people of Samoa are not now eligible. And to the extent that vessel construction and repair must occur in the States or Puerto Rico, all of the current territories suffer discrimination. The educational program provided at the Merchant Marine Academy at Kings Point, however, is currently available to the people of all of the territories, as well at the Trust Territory. No other part of the Act touches the Trust Territory. The Ship Mortgage Insurance program is also available to all of the territories.

Recommendation: Although the territories and their people are, in various particulars described below, accorded treatment under the Merchant Marine Act, 1936, that is less favorable than that accorded to the States and their citizens, it seems likely that the problem is more theoretical than real: that is, the territories and their people have probably not been in a position, as a matter of practical economics, nor are they now, to derive benefits from the provisions of the statute that do not now apply to them. If that is true, and assuming that the Congress should not be asked to correct statutory deficiencies unless practical benefits will follow, then amendments to the Merchant Marine Act, 1936, are not required at this time.

Discussion:

Substance of the statute:

The Merchant Marine Act, 1936, is a long, complicated, and very live statute. Its purpose, as stated by the Congress in 1936 and as often reaffirmed by it since, is to foster a merchant marine that is (a) sufficient to carry all the U.S.'s domestic, water-borne commerce and a "substantial portion" of its foreign commerce, (b) capable of serving as an auxiliary in time of war, (c) operated by U.S. citizens and under the U.S. flag, (d) composed of the best vessels, constructed in U.S. shipyards, and manned by U.S. citizen personnel, and (e) supplemented by efficient shipbuilding and repair facilities (46 App. U.S.C. 1101).

To this end, the Act--

--creates governmental machinery to assist and oversee maritime activities, consisting today of the Maritime Administration, an agency (since August 1981) of the Department of Transportation (and before that, of the Department of Commerce), and the Federal Maritime Commission, an independent, regulatory agency;

--authorizes the Maritime Administration to acquire, construct, and reconstruct vessels (46 App. U.S.C. 1119, 1125, 1192)--but such vessels must be "constructed in the United States" (46 App. U.S.C. 1125), or in a "shipyard of the United States," defined to mean only the States and Puerto Rico (46 App. U.S.C. 1155), or "in shipyards in the continental United States" (46 App. U.S.C. 1192)--and to sell or charter such vessels to citizens of the United States for use in the foreign trade (46 App. U.S.C. 1195);

--directs the Secretary of Transportation to investigate and establish the ocean transportation services that are needed for trade between the United States, its territories and possessions, and foreign points, and the relative costs of constructing and operating vessels in the U.S. and in foreign countries (46 App. U.S.C. 1121);

--authorizes the payment of construction differential subsidies, to equalize the cost of ship construction in the U.S. as compared to the cost of foreign construction, but such domestic ship construction must be performed in one of the States or Puerto Rico (46 App. U.S.C. 1155), and the beneficiary must be a U.S. citizen or a shipyard in one of the States or Puerto Rico (46 App. U.S.C. 1151);

--authorizes the payment of operating differential subsidies to citizens of the U.S. for operations in foreign commerce, when such aid is necessary to place the operations "on a parity with those of foreign competitors" (46 App. U.S.C. 1171);

--requires vessel operators who receive an operating differential subsidy to buy "whenever practicable" subsistence items that are locally grown or produced in the States or Puerto Rico,[1] and to have vessel repairs effected in one of

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1/ That 46 App. U.S.C. 1176 restricts subsistence purchases to the U.S. and Puerto Rico is clear from the fact that that section refers for its definition of "United States" to 46 App. U.S.C. 1155. That section, in turn, refers to the definition in "paragraph K of section 1401 of Title 19." There is no such paragraph. Although the current paragraph (k) of 19 U.S.C. 1401 does not define "United States" (it defines instead "hovering vessel"), both the current definition of "United States" in 19 U.S.C. 1401, paragraph (h), and that contained for several decades in 19 U.S.C. 1401, paragraph (k), expressly excludes the Virgin Islands, Guam, and American Samoa. "Territories and possessions" are not excluded, so upon trusteeship termination, the Northern Marianas would probably qualify as a site for subsistence purchases.

the States or Puerto Rico "except in an emergency" (46 App. U.S.C. 1176);

--creates a capital construction fund for the construction and reconstruction of vessels in the foreign or noncontiguous domestic trade, "or in the fisheries of the United States" (defined to include fishing vessels that are U.S.-built and U.S-documented and are of two to five tons (46 App. U.S.C. 1177-1)), with the fund consisting of contributions made to it, with attendant Federal income tax advantages, by citizens who own or lease vessels constructed in the U.S. and documented under U.S. law (46 App. U.S.C. 1177);

--provides that in the chartering or sale of U.S.-owned vessels, and in the award of construction and operating subsidies, the Secretary of Transportation will arrange "to equitably serve . . . the foreign-trade requirements of the Atlantic, Gulf, Great Lakes, and Pacific ports of the United States" (46 App. U.S.C. 1213);

--creates a program of Federal Ship Mortgage Insurance, available to citizens and nationals of the U.S. and to citizens of the Northern Marianas, to facilitate the financing of the construction, repair, or purchase of fishing vessels (46 App. U.S.C. 1274(a)(2)),[2] and an insurance program available to citizens for the financing of "a commercial demonstration ocean thermal energy conversion facility" (46 App. U.S.C. 1279c);

--provides for the admission to the Merchant Marine Academy at Kings Point, New York, of U.S. citizens or nationals from American Samoa, Guam, the Virgin Islands, and

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[2] A 1980 amendment to what is now 46 App. U.S.C. 1274, as well as to 46 App. U.S.C. 1271(k), provides for express mention of citizens of the Northern Mariana Islands because in 1980 the Trusteeship Agreement remained in effect and the citizenship provisions of the Northern Marianas Covenant had not yet become effective. Such express references are no longer required.

the Northern Marianas (46 App. U.S.C. 1295b(b)(1)(B)), and of students from the Trust Territory (46 App. U.S.C. 1295b(b)(4)(A)); and

--directs the Secretary of Transportation to cooperate with maritime academies established by State or territorial governments, by providing financial support and vessels for instruction (46 App. U.S.C. 1295c).

In 1980, the Merchant Marine Act, 1936, was amended by Public Law 96-453 to add a definition of "United States" that explicitly includes the Northern Marianas, Guam, American Samoa, and the Virgin Islands (46 App. U.S.C. 1244(g)). Although the definition purports to apply throughout the Merchant Marine Act, 1936, it is doubtful whether it replaces the more specific and more limited definitions referred to above that, for example, require ship construction in the States or Puerto Rico (46 App. U.S.C. 1125, 1155, 1192). Although the 1980 definition is later in time than the earlier geographic limitations, it is probable that the usual rule of the specific taking precedence over the general would apply.

Matters of particular interest to the territories:

The pattern of territorial application of the Merchant Marine Act, 1936, suggests that (1) the original drafters were mindful of the fact that the U.S. had offshore areas, as evidenced by numerous references to the Territories and possessions of the U.S. (e.g., 46 App. U.S.C. 1121, 1124, 1204); (2) consistent with the documentation laws and the manning laws, benefits of the statutes were and are largely confined to U.S. citizens; (3) subsequent amendments recognized that Alaska and Hawaii had achieved Statehood, and occasionally they have referred explicitly to Puerto Rico, but such amendments have continued to restrict many benefits, particularly for shipbuilders, to the States and Puerto Rico; (4) beginning in the late 1950's, explicit recognition was given to the current territories, and later to the Trust Territory, in connection with maritime training; and (5) the Congress has displayed an awareness of the current territories, most recently in its amendments that expand the

Ship Mortgage Insurance program to cover both Samoa and Northern Marianas. Because maritime education and ship mortgages are two areas of clear territorial interest, and likely immediate benefits, one can infer a Congressional willingness to broaden the Merchant Marine Act, 1936, to include the territories when useful results are likely quickly to follow.

The following subjects of territorial interest deserve discussion:

Coastwise laws. A few sections of the Merchant Marine Act, 1936, constitute minor coastwise laws. These are discussed in Memorandum No. 46-5, where it is concluded that the territories are now largely exempt from the coastwise laws, except for Guam. Guam currently seeks exemption.

Ship construction sites. A vessel constructed in any of the current territories could not benefit from the construction subsidy program. An informed commentator states that the reason for the original, 1936 exclusion cannot be established, because of a lack of legislative records, but he surmises that "this was simply a protective measure for the benefit of U.S. shipbuilders" (Leibowitz, "The Applicability of Federal Law to Guam," 16 Va. Journal of International Law 45 (1975)). When the key section (46 App. U.S.C. 1155) was expanded to include Puerto Rico in 1970, no explanation was offered in the Congressional Committee Reports (1970 U.S. Code Cong. and Adm. News 4188), but the following paragraph in a letter of April 15, 1970, from the Federal Maritime Commission to the pertinent Senate Committee is of interest:

> Continental limits of the United States is defined in Titles V and VI of the Merchant Marine Act, 1936, as including the States of Alaska and Hawaii, but does not include the territories or possessions of the United States. Consequently, a shipyard in any of the territories or possessions would not be eligible for a construction subsidy under Title V, nor would an operator who receives a

> subsidy with respect to repairs under the provisions of section 603(b) (Sec. 14(4) of the Bill) [46 U.S.C. 1173] be permitted to perform maintenance and repairs at a shipyard located in such territories and possessions. (1970 U.S. Code Cong. and Admin. News 4188, 4251).

The Maritime Commission letter did not offer or recommend any amendment to correct this condition. But it may be that, in the face of this information, the Congress was moved to add Puerto Rico.

If a shipbuilding industry, constructing vessels for the foreign trade, were a likely prospect in any of the territories, then the geographical limitation should be expanded. But given the monumental investment needed for shipbuilding facilities, and the absence to date of any suggestion that any of the territories is a likely site, the modification of this section would be without real effect. Moreover, because shipbuilding facilities in the States are now under-utilized, with significant unemployment resulting, the Congress might be expected to be unwilling to expand the shipbuilding benefits to the territories.

(But query: Would it be useful to the territories if operators of vessels in the foreign trade, who receive operating differential subsidies, were permitted to buy in the territories locally-grown or produced subsistence items, or to have vessel repairs effected in the territories in nonemergency situations? An amendment to 46 App. U.S.C. 1176 would be necessary to achieve either of these results. Samoa has a small ship repair facility. So far as is known, Guam does not, apart from Navy facilities. Each would have some subsistence items of local growth or production for sale, but the quantity would be limited, and probably unpredictable. Informal advice from the Maritime Administration suggests that ship operators would be unlikely to rely upon the availability of subsistence items in the territories. They would normally purchase what they need at one time for the entire voyage, at the commencement of the voyage. Such an amendment would be likely, thus, to have only a slight effect, if any, in the territories, and would be predictably hard to achieve politically).

Citizenship requirements. Construction and operating subsidies are available only to "citizens" of the United States, and Federally-owned vessels may be sold or chartered only to citizens. American Samoans who are noncitizen nationals are thus not now eligible. Given, however, the magnitude of the basic investment that would be needed for these benefits to be of actual value, it is unlikely that persons or corporations from Samoa would realistically qualify in the early future.

It its report to the Congress of January 1982, the Northern Marianas Commission on Federal Laws recommended that legislation be enacted to provide that for purposes of a number of sections of the Merchant Marine Act, 1936, and related statutes, citizens of the Northern Marianas should be deemed to be citizens of the United States. Because the citizenship provisions of the Northern Marianas Covenant have since become effective, this recommendation is moot.

Merchant marine training. The laws concerning admission to the Merchant Marine Academy, and aid to territorial maritime academies, are sufficient to meet off-shore needs at this time. The Delegate from Samoa may nominate noncitizen nationals from Samoa to Kings Point (46 App. U.S.C. 1295b(b)(1)(B)). Residents of the Northern Marianas are to be nominated by the Governor. If the current position of Resident Representative to the United States from the Northern Marianas, created by the Covenant, is converted into the position of Delegate, it would then be appropriate if the appointing authority were conferred upon the Delegate--but that change may be viewed as premature until such a conversion is made.

Individuals from the Trust Territory, four at a time, may receive instruction at the Academy, upon designation by the Secretary of the Interior (46 App. U.S.C. 1295b(b)(4)), but unlike citizens of the U.S. appointed to the Academy, they are not entitled to a license authorizing them to serve on a

U.S. merchant vessel by reason of their graduation from the Academy (46 App. U.S.C. 1295b(b)(7)). Students from the Freely Associated States remain eligible, pursuant to section 342(b) of the Compact of Free Association. So far as can be established, no one from the Trust Territory, past or present, has yet entered Kings Point.

Conclusion: In the absence of a practical need, it appears that those sections of the Merchant Marine Act, 1936, that do not now apply to the territories or their people need not be amended to do so.

Federal agency comments: Comments were invited from the Departments of Justice and Transportation and from the Maritime Commission. All comments received have been reflected above.

Memorandum No. 46-10
February 1982
Expanded October 1992

Subject: (a) Carriage of Goods by Sea
Title 46 Appendix, Chapter 28 (46 App. U.S.C. 1300-1315)

(b) Safe Containers for International Cargo
Title 46 Appendix, Chapter 34 (46 App. U.S.C. 1501-1507)

(c) Maritime Administration
Title 46 Appendix, Chapter 35 (46 App. U.S.C. 1601-1610)

(d) International Ocean Commerce Transportation
Title 46 Appendix, Chapter 36 (46 App. U.S.C. 1701-1721)

(e) International Maritime and Port Security
Title 46 Appendix, Chapter 37 (46 App. U.S.C. 1801-1809)

(f) Maritime Drug Law Enforcement
Title 46 Appendix, Chapter 38 (46 App. U.S.C. 1901-1904)

(g) Merchant Marine Decorations and Medals
Title 46 Appendix, Chapter 39 (46 App. U.S.C. 2001-2007)

Comment: The statutes appearing in these chapters of the Appendix to Title 46 present no problems of consequence to the territories, except that three of them are deficient as to court jurisdiction in American Samoa. These--pertaining to safe containers (b), the regulation of international ocean commerce transportation (d), and drug law enforcement (f)--do not appear to require attention urgently, but amendment when convenient would be desirable.

Discussion: (a) The Carriage of Goods by Sea Act (46 App. U.S.C. 1300-1315) deals with bills of lading for the carriage of goods on the ocean from ports of the United States in the foreign trade, with the term "United States" defined to include expressly the territories and possessions (46 App.

U.S.C. 1312). The four territories are thus comprehended and there is no warrant for any change. The Act specifies certain responsibilities, as well as certain rights and immunities, of carrier owners and ships.

(b) The International Safe Container Act (46 App. U.S.C. 1501-1507) applies to containers used in transporting cargo from a place in the United States to a place in a foreign country, from a place in a foreign country to a place in the U.S., and between two places outside the United States by U.S. carriers. The "United States" is defined to include expressly Guam, Samoa, the Virgin Islands, and the Trust Territory (46 App. U.S.C. 1501(e)), and because the law was enacted in December 1977, it applies to the Northern Marianas by operation of section 502(a)(2) of the Covenant.

The Act implements an international convention on that subject, signed at Geneva in 1972, that is designed to create international standards for cargo containers. The Secretary of Transportation is charged with enforcement of the standards, and with testing, inspection, and approval of containers. A container owner who is domiciled in the U.S. and has his principal office in the U.S. (defined to include the territories and the Trust Territory) is responsible for obtaining approval. Penalties are imposed for violations of the Act, and a failure to pay a penalty could result in an action "in any district court of the United States" (46 App. U.S.C. 1505(b)). The statute thus shows a conscious effort to cause it to apply to all U.S. areas, but it also shows a failure to cause it to do so effectively, inasmuch as there is no "district court of the United States" in Samoa. (There is none in the Trust Territory either, but Palau's status as a Trust Territory is probably so short-lived (as of October 1992), that that matter need not give pause.)

The problem is relatively minor, and there may be no indigenous cargo container owners now in Samoa. Yet the application of this statute to Samoa may have some positive effect, and it is hard to imagine how it could have a negative one. When a convenient legislative vehicle is at hand, therefore, the defect as to court jurisdiction in American Samoa should be corrected.

(c) The chapter concerning the Maritime Administration (46 App. U.S.C. 1601-1610) provides for its transfer from the Department of Commerce to the Department of Transportation (in 1981). It concerns housekeeping only, and holds no matters of special interest to the territories.

(d) International Ocean Commerce Transportation (46 App. U.S.C. 1701-1721) contains the Shipping Act of 1984, as amended. This is a regulatory statute, the purposes of which are to establish a regulatory process for U.S. foreign commerce "with a minimum of government intervention and regulatory costs," to provide for a system for U.S. ocean commerce that is in harmony with international shipping practices, and to encourage a U.S. fleet that is capable of meeting national security needs (46 App. U.S.C. 1701). For purposes of the Act, the "United States" includes expressly the Northern Marianas "and all other United States territories and possessions" (46 App. U.S.C. 1702(27)). (The express reference to the Northern Marianas is helpful, but it is no longer essential. Inasmuch as the law was enacted in 1984, after the Covenant was approved and partially in effect, but before trusteeship termination, the reference had value in the period 1984-1986.)

The Act requires the filing with the Federal Maritime Commission of a variety of agreements made by ocean carriers in the foreign trade (46 App. U.S.C. 1703, 1704)--some of which are given an exemption from the anti-trust laws (46 App. U.S.C. 1706)--and of tariffs (46 App. U.S.C. 1707). Jurisdiction in connection with enforcement is given to district courts of the United States (46 App. U.S.C. 1710h, 1712, 1713(d)). While the matter would not seem to be urgent, it would be appropriate to make provision for jurisdiction in American Samoa (which has no Federal District Court), given Samoa's unusual dependency on ocean transportation.

(e) International Maritime and Port Security (46 App. U.S.C. 1801-1809) contains the 1986 Act of that name, which is directed to the problem of acts of terrorism against passenger vessels. The Act requires the Secretary of Transportation to assess the effectiveness of security measures in foreign ports, and to arrange for the notification of the foreign government of defects (46 App. U.S.C. 1803); the Secretary of State is required to issue a "travel advisory" with respect to a foreign port that does not maintain effective security (46 App. U.S.C. 1804); and the President is authorized to terminate passenger service with a foreign country that aids terrorists (46 App. U.S.C. 1805). The definitions provided of "common carrier" and "passenger vessel" (incorporated by reference at 46 App. U.S.C. 1807) make clear that ports in the territories are not foreign ports for purposes of this law. Ports in the territories are treated here in the same manner as ports in the States.

(f) Maritime Drug Law Enforcement (46 App. U.S.C. 1901-1904) contains the 1980 Act of that name, which makes it unlawful for any person aboard a vessel of the United States to manufacture, distribute, or possess a controlled substance. The frequent references to "territory, commonwealth, or possession of the United States" (e.g., 46 App. U.S.C. 1903(b)), the reference to a "citizen or national of the United States" (in the same subsection), and the incorporation by reference of the broad definitions in the Comprehensive Drug Abuse Prevention and Control Act (46 App. U.S.C. 1903(i)), make clear that the Act applies as fully to the offshore areas and their people as it does to the States and theirs. The provision on jurisdiction and venue would permit a person charged with a violation in Samoa to be tried in either the U.S. District Court in Hawaii or in the District of Columbia (46 App. U.S.C. 1903(f)), but it would obviously be more efficient to do so in American Samoa, so the problem of court jurisdiction there might well be corrected.

(g) The chapter entitled Merchant Marine Decorations and Medals (46 App. U.S.C. 2001-2007) provides for the awarding of them to appropriate individuals. There are no limitations or terms contained in the law that would place the territories or their people at a disadvantage.

Conclusion: The laws discussed above require no modification to meet the needs of the territories, except that the matter of court jurisdiction in Samoa, as it appears in the laws discussed above at (b), (d), and (f), should be given attention.

Federal agency comments: Comments were invited from the Departments of Justice and Transportation in 1982 with respect to the laws discussed at (a) and (b) above, and all comments received have been reflected.

The laws discussed at (c) through (g) were later enacted and have not been the subject of Federal agency comment.

Title 47 - COMMUNICATIONS

- Contains nothing of substantial interest to the territories or the Trust Territory.

* Contains matters of particular interest to the territories and the Trust Territory, but no legislative recommendations.

** Contains recommendations for changes in the law.

Memorandum Number	Subject	47 U.S.C. sections
	Prefatory Comment	
- 47-1	(a) Telegraphs (b) Submarine Cables	9-17 21-39
** 47-2	The Communications Act of 1934	151-613
* 47-3	The Communications Satellite Act of 1962	701-757

June 1993

Prefatory Comment - Title 47

The Memoranda that follow on Title 47 were first written in 1982. They have been updated and modestly revised in 1993. Memorandum No. 47-1 concerns laws that have not been amended in the last decade, so it has not been substantially changed. But the Communications Act of 1934 (Memorandum No. 47-2) has often been amended during that period, and other developments have affected the Communications Satellite Act of 1962 (Memorandum No. 47-3).

Because Memoranda Nos. 47-2 and 47-3 were carefully reviewed in 1982 by the interested Federal agencies, particularly the Federal Communications Commission, the 1993 revision has been limited so as not to suffer the loss of that earlier review and comment, and revisions have largely been confined to new footnotes and an addendum. Because of the importance of the subject in the territories, however, comments as to accuracy have again been sought in 1993 from the FCC, and all comments received are reflected in the Memoranda that follow.

Memorandum No. 47-1
November 1992
Revised June 1993

Subject: (a) Telegraphs
Title 47, Chapter 1 (47 U.S.C. 9-17)

(b) Submarine Cables
Title 47, Chapter 2 (47 U.S.C. 21-39)

Comment: The statutes considered herein present no problems of consequence to the territories or the Trust Territory.

Discussion: (a) The Federal laws concerning telegraphs that appear at the beginning of this title of the Code (47 U.S.C. 9-17) are of no concern to the current territories or the Trust Territory. They are about a century old (1888), and they concern telegraph facilities constructed and operated in conjunction with railroads.

(b) The laws concerning submarine cables (47 U.S.C. 21-39) relate, first, to injuries inflicted upon underwater communication cables, with penalties imposed upon those committing such injuries, and, second, to procedures for lawfully connecting a part of the United States to a foreign point, or a part of the continental United States with an offshore U.S. point, by submarine cable. Of the areas subject to this study, only Guam and the Virgin Islands are, as a matter of fact, served by underwater communication cable, and nothing in the laws concerning injuries to cable (47 U.S.C. 21-33) is likely to be troublesome to them.[1] The law on the second subject (47 U.S.C. 34-39) is of at least academic interest to all the territories and the Trust Territory, for it applies "to all territory continental or insular, subject to the jurisdiction of the United States of America" (47 U.S.C. 38)--and hence it applies to all of them. But this law, which requires a license from the Federal Communication Commission if cable is to be landed in the U.S., should not be objectionable to the territories or the Trust Territory, for Federal regulation of so important an activity seems

[1] In addition, in 1993 the Federal Communications Commission granted authority for the construction and operation of a submarine cable between and among Guam, Samoa, Tinian, and Rota.

unarguably appropriate. This law would cease to apply to the Trust Territory, in the absence of special arrangements not currently contemplated, at such time as the Trusteeship Agreement is terminated.

Conclusion: These laws require no change to accommodate the territories or the Trust Territory.

Federal agency comments: Comments were requested from the Federal Communications Commission. All comments received have been reflected herein.

Memorandum No. 47-2
July 1982
Revised November 1982
Revised June 1993

Subject: The Communications Act of 1934
Title 47, Chapter 5 (47 U.S.C. 151-613)

Purpose: To create the Federal Communications Commission and to provide for the regulation by it of telephone, telegraph, radio, and television services.

Territorial application: The Communications Act applies as fully to the territories as to the States,

> --but it permits slightly greater regulation by the Federal Communications Commission within the Virgin Islands, Guam, and American Samoa (but not the Northern Marianas) than is permissible within the States, and

> --because of distances that were reflected in the long-standing practices of communications carriers (and later codified in a former section of the Act, 47 U.S.C. 222), and because of the technology associated with modern communications satellites, some of the territories are treated as international instead of domestic areas, thereby resulting in substantially higher rates for communications services to and from them.1/

The Federal Communications Commission considers the Communications Act applicable, at least in part, to the Trust Territory. Difficulties that arose because of the nationality status of the people of the Northern Marianas have been overcome by trusteeship termination, and there do not appear to be comparable problems elsewhere in the territories.

1/ Note added in 1993: This is less true in 1993 than in 1982. See "Addendum, June 1993" at the end of this memorandum.

__Recommendation__: The Communications Act does not require amendment to meet the needs of the territories and the Trust Territory, because whatever unfavorable rate treatment is experienced in the Pacific territories (Guam, Samoa, and the Northern Marianas) results not from the statute but from technical considerations that cannot be corrected by statute. It would be desirable, however, if the Act were amended to provide for enforcement in American Samoa, where none is now possible because Samoa lacks a Federal District Court.

__Discussion__:

__Substance of the statute__: The Communications Act of 1934 creates the Federal Communications Commission (FCC) and vests in it the authority to regulate certain interstate communications, and certain foreign communications if they originate in or are received in the United States. The kinds of communications involved include those by radio and television broadcasting, telephone and telegraph, and satellite communication. Rates are subject to FCC regulation (47 U.S.C. 201 __et seq.__), and radio and television stations and operators are subject to FCC licensing (47 U.S.C. 301 __et seq.__).

The statute's definitions make clear its wide application:

--"United States" includes the "Territories" and "possessions" of the United States (47 U.S.C. 153(g));

--"State" includes the "Territories and possessions" (47 U.S.C. 153(v)); and

--radio "station operators" may be licensed if they "are found to be qualified by the Commission and . . .

are legally eligible for employment in the United States. . . ." (47 U.S.C. 303(l)(1)).[2/]

Notwithstanding the foregoing definitions, however, the FCC has not accorded to all of the territories the same treatment as the States. This was originally the result of the long-standing practice of communications carriers, which charged higher rates to the far Pacific territories because of their distance, and whose practice in doing so was in effect ratified and codified in a statute enacted in 1943--former section 222 of the Communications Act, formerly codified at 47 U.S.C. 222. That section provided for different treatment of "domestic" and "international" areas. It defined "domestic telegraph operations" to include the continental United States and other specified points in North America (i.e., "Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland"),[3/] and "international operations" to mean messages between those North American points and ones outside. Even after Statehood, Hawaii was excluded from the definition of "domestic" telegraph operations, this by express amendment enacted in 1960 (P.L. 86-624), thereby making clear that "domestic" treatment was a matter of geography, not political status (1960 U.S. Code Cong. and Admin. News 2963, 2979-80). This remains so today.

With the introduction of communications satellites in the 1970's, however, the FCC by administrative action began to accord to Hawaii, Puerto Rico, and the Virgin Islands--because

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[2/] The original U.S. citizenship requirement for radio operators foreclosed the licensing of most Samoans, so the Act was amended in 1962 to permit the licensing of "nationals"; but it then continued to create a problem for residents of the Trust Territory, so the Act was amended in 1964 to permit licensing of them. The language quoted above was enacted in 1982, and it should be sufficiently flexible to last forever.

[3/] Saint Pierre and Miquelon are islands lying south of Newfoundland that constitute an overseas territory of France. They are, according to the Encyclopedia Americana, "all that remains of the old French colonial empire in northern North America."

of geography--what amounted to "domestic" rate treatment. It could do so because domestic commercial satellites were able to serve such areas, in addition to their primary targets. A revision of 47 U.S.C. 222 in 1981, by P.L. 97-130 (the Record Carrier Competition Act of 1981) eliminates the definitions of "domestic" and "international" operations, but the new law does not eliminate the different rate treatment accorded to distant Pacific territories because that treatment is a result of the coverage of, and thus the technological limitations of, domestic commercial communications satellites, not of language of the statute. (For updated information, see Point 1, "Guam's complaints," below, and the "Addendum, June 1993" at the end of this memorandum.)

The FCC does not have intrastate (and thus not intraterritorial) jurisdiction with respect to telephone and telegraph carriers "if such communication is regulated by a State commission" (47 U.S.C. 153(e)). It appears, however, that the FCC has not consistently regulated intraterritorial service, even if there is no territorial utility commission. The statute also gives the FCC authority to license radio and telephone operations from point to point within the same territory (47 U.S.C. 301(a)), and the FCC has reportedly exercised that authority within the Virgin Islands and Guam. The statute also permits the Commission to regulate the capacity of television receivers moving in intraterritorial commerce in the "possessions" (47 U.S.C. 330), but it has not acted to regulate that traffic as such. Inasmuch as television receivers are not manufactured in any of the territories, however, those sold there in effect are regulated by the FCC under its authority with respect to interstate or foreign commerce.

The intraterritorial jurisdiction of the FCC, it should be noted, applies to the territories of the Virgin Islands, Guam, and Samoa, but not to the Northern Marianas. This is because the Communications Act of 1934 applies to the Northern Marianas by operation of section 502(a)(2) of the Covenant, which extends to the Northern Marianas Federal laws that are applicable to Guam and generally to the States, but on the same basis "as they are applicable to the several States."

The Commission also has particular authority in connection with radio station licenses for commercial communications "between the United States or any Territory or possession . . . subject to the jurisdiction of the United States, and any foreign country" (47 U.S.C. 308(c)). (The phrase "subject to the jurisdiction of the United States" is commonly construed to comprehend the Trust Territory. It does not appear elsewhere in the Communications Act.)

There are stringent citizenship requirements in connection with the ownership of radio and television stations. Barred from being licensed are foreign governments, aliens, and corporations with alien officers and directors or with other one-fifth alien ownership (47 U.S.C. 310(b)). As discussed below (Point 3), this provision posed a problem in the Northern Marianas, but that problem has now been eliminated.

An unusual provision permits the FCC to designate an employee of another Federal agency to perform services for the FCC in connection with the administration of the Communications Act "in any Territory or possession" (47 U.S.C. 329). So far as can be established, this authority has not been used in any of the current territories.

The Communications Act also now contains a later addition to it--the law creating in 1962 the Corporation for Public Broadcasting, and providing a grant program, administered by the Secretary of Commerce, to aid public telecommunications in the States, "the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands" (47 U.S.C. 397(16)). The statutory requirements for these grants, which are designed to extend public telecommunications to "as many citizens of the United States as possible" (47 U.S.C. 390), are not easy to meet. Among many other things, the applicant must engage in comprehensive planning, including an "evaluation of alternative technologies" (47 U.S.C. 392(a)(5)), and the applicant must be prepared to supply at least 25% of the project cost (47 U.S.C. 392(b)).

Finally, the Communications Act now contains the Cable Act, added in 1984. Communications by cable may not hold great interest to the territories, but the Cable Act does apply to them. At first blush it appears not to do so, given the definition of "State" at 47 U.S.C. 522(15) to include only the States and their agencies and political subdivisions, but the broad definition of the term (to include Territories and possessions) at 47 U.S.C. 153(g) applies to the entire Act. The Cable Act, enacted 50 years after the original Communications Act, took the form of an amendment to it. In at least one case, the Court of Appeals for the Third Circuit had no difficulty in viewing the Cable Act as applicable to Puerto Rico, and Puerto Rico is not subject to any unusual treatment in the Act (Playboy Enterprises v. Public Service Commission, 906 F.2d 25 (1990)). Hence the Cable Act quite clearly applies to the smaller territories as well.

Matters of territorial interest:

1. Guam's complaints. In April 1982, in connection with a White House-Interior conference on Guam business problems, a group of Guam businessmen stated the following complaints with respect to Guam's treatment under the Communications Act:

(1) Guam is treated as an international, not a domestic, area.[4]

(2) As a result, communication rates between Guam and the U.S. mainland are higher than they would otherwise be.

(3) Communications carriers cannot now compete to provide services in Guam, but they should be permitted by the FCC to do so.

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[4] Note added in 1993: This statement is no longer true. See the "Addendum, June 1993" at the end of this memorandum. Guam is now regarded as a "domestic" area.

In later years, from 1989 to the present (June 1993), Guam has formalized its complaint on the first two points by including in its bill to create a Commonwealth of Guam (H.R. 98 in recent Congresses) a requirement that the FCC treat Guam as "domestic" instead of "international" for rate-setting purposes.

The first two numbered points are correct.[5/] Domestic rates are much lower than international rates, and sometimes less than half as much. As stated above, the FCC treats Guam (and Samoa and the Northern Marianas) as "international" points, owing originally to carrier practice and to former section 222 to the Communications Act. This section dealt with record (i.e., telegraph and telex) communications. Although the section was materially amended in 1981, the domestic-international distinction so far as rates are concerned survives, because of the realities of current satellite communications. That is, there are no domestic satellites that are placed to serve Samoa, Guam, and the Northern Marianas. These three areas are served instead by international satellites. Domestic communications companies do not "integrate" their international satellite costs with their domestic costs so as to equalize rates for services and so as, in effect, to reduce rates to the "international" points of Guam, the Northern Marianas, and Samoa. The effect of this nonintegration is substantially higher communications costs to Guam (and Samoa and the Northern Marianas) than to other U.S. "domestic" areas. The cause, however, has nothing to do with the territorial status of these areas, nor with any defects in the statute. The cause is technological, arising from the service limitations of domestic commercial satellites, which preclude their serving the areas they are primarily intended to serve, plus these distant territorial points, as well.

[5/] Note added in 1993: The points were correct in 1982, but are not in 1993. That is true also of the paragraph of the text in which the number of this footnote appears. For an updated statement, see the "Addendum, June 1993" at the end of this memorandum.

As for the third complaint, i.e., the lack of competition among communications common carriers in Guam, in fact the FCC has not imposed an RCA monopoly upon Guam. There was a time when the FCC discouraged competition among carriers, but its policy is now the reverse. The Guam problem, however, results from the fact that there can be no competition unless there are those who seek to compete, and few have sought to compete with RCA in Guam. In one recent instance, however, applicants sought to provide competition and the FCC sanctioned it. The Guam Telephone Authority and the Hawaiian Telephone Company applied to the FCC in 1981 to provide data communications services between Hawaii and Guam, in competition with RCA. In an opinion released on February 5, 1982, the FCC stated that in that case "competition is reasonably feasible" and the added competition "is in the public interest" (I-T-C-81-028, p. 5).[6]

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[6] Note added in June 1993: Competition in Guam has continued and increased. In June 1993 comments on this memorandum, the FCC has observed:

> Interexchange competition to and from Guam exists, and is accelerating. At least three IXCs [interexchange carriers, providing long distance service] serve Guam, and two more have expressed interest in serving that Territory as of May, 1993. IXC rates have been dropping in response to competitive pressures. The Guam Telephone Authority (GTA) has filed exchange access tariffs with the Federal Communications Commission and proposed to file tariffs that will more closely approximate the costs of providing exchange access services on Guam. Since existing GTA access tariff rates exceed costs, GTA tariffs that are based upon actual costs should reduce the expenses of providing long distance communications to and from Guam, and a more competitive interexchange marketplace should result in the enjoyment of those cost reductions by ratepayers calling to, and from, the Territory of Guam.

2. Northern Marianas - jurisdiction. On January 9, 1978, pursuant to the Northern Marianas Covenant and Presidential Proclamation No. 4534, the Commonwealth of the Northern Marianas came into being, and certain Federal laws then became applicable to the Northern Marianas. Among them were (and are) the Communications Act of 1934 and the Communications Satellite Act of 1962 (Memorandum No. 47-3). In anticipation of that event, in the fall of 1977, the private company operating communications facilities in the Northern Marianas urged the Secretary of the Interior to take the necessary steps to cause the application of such laws to the Northern Marianas to be postponed until trusteeship termination--an action the President could have taken under section 1004(a) of the Northern Marianas Covenant. The company argued essentially that its plans to modernize communications in the Northern Marianas would be seriously delayed if FCC approval were to be required, and that the service would be more costly if COMSAT were involved.

The question was resolved by not seeking a delay in the application of the two Acts. Department of the Interior files show that the matter was discussed with officers of both the FCC and COMSAT, following which Interior concluded that the company's arguments were without merit. Interior also concluded that communications services in the Northern Marianas should be subject to some regulation, and that they would almost certainly not be if the application of the Communications Act were postponed. The Secretary of the Interior concurred in these conclusions in November 1977.

The application of the Communications Act to the Northern Marianas was in effect confirmed in June 1980, when the FCC authorized COMSAT to construct an earth station there (FCC File Nos. 489-CSC-P-80, I-P-C-89, Mimeo No. 32379).

3. Northern Marianas - citizenship. The application to the Northern Marianas of the Communications Act of 1934 did, however, create a difficulty: citizens of the Northern Marianas, who have since generally become citizens of the United States upon trusteeship termination, did not have that status when the Covenant became in part effective in January 1978, and they then could not be granted licenses for radio or

television broadcasting. Some Federal agencies found it possible, by administrative action, to treat Northern Marianas citizens as though they were already citizens of the U.S. after January 1978, but the FCC seems to have felt unable to do that. To overcome this problem, the President, by Proclamation No. 4938 of May 3, 1982, suspended until trusteeship termination any provision of the Communications Act of 1934--particularly citing the sections at 47 U.S.C. 303 and 310, referred to above--under which "citizens of the Northern Mariana Islands would be considered as aliens." That action was taken under section 1004(a) of the Covenant, on the ground that the continued application to the Northern Marianas of the pertinent provisions of the Communications Act would be inconsistent with the Trusteeship Agreement.

The Northern Marianas Federal Laws Commission recommended in January 1982 that for the period prior to trusteeship termination, legislation be enacted to cause citizens of the Northern Marianas to be considered "citizens of the United States" for purposes of 47 U.S.C. 303 and 310(b). Trusteeship termination in 1986, and with it citizenship for the people of the Northern Mariana, made such legislation unnecessary.

4. American Samoa. Except for enforcement, there does not appear to be any statutory problem in connection with FCC jurisdiction in Samoa. In January 1979, the FCC granted authority to COMSAT to construct an earth station in Samoa and to provide commercial satellite communication services for the territory (FCC File Nos. 325-CSG-P-78, I-P-C-7352-14). About 10 months later, service was inaugurated.

There is, however, the not unusual problem of an absence of a means for enforcement of the Federal Communications Act in American Samoa--where neither a U.S. Attorney nor a Federal District Court exists. The central section that requires attention appears at 47 U.S.C. 401, but other affected sections include 47 U.S.C. 277(f), 402, 407, 503(b)(3), 504, 510, and 555.

5. Trust Territory jurisdiction. The FCC has reached the same jurisdictional result in the case of the Micronesian entities, but it has encountered and overcome some hurdles in the process. In the case, first, of Palau, the Commission concluded that it had jurisdiction to authorize a proposed COMSAT earth station there, notwithstanding Palau's status as part of the Trust Territory, and notwithstanding its possible future political status of free association with the United States. In its File Nos. CSG-81-001-P, I-P-C-81-019, released July 10, 1981, the FCC stated in part that its "general jurisdiction over 'territories' and 'possessions' includes unincorporated territorial possessions" (citing its 1979 Samoa decision, referred to above), "and trust territories" (FCC decision, p. 4). While it cited no authority then for the "trust territories" inclusion, the FCC might have cited its own earlier decision with respect to Kwajalein (Communications Satellite Corp., 56 FCC 2d 1101 (1975)), because Kwajalein and Palau occupied then the same fundamental political status--a point made in the pleadings in the proceeding, in correspondence to the FCC from the Interior Department, and in the Commission's order on reconsideration in the Palau case. The Commission might also have cited Vermilya-Brown v. Connell, 335 U.S. 377 (1948), as support.

The FCC did conclude, however, that because Palau might soon achieve a new and more independent status--"outside the boundaries of U.S. jurisdiction" (FCC decision, p. 4), COMSAT must keep separate books so as to be able then to exclude Palau costs from its domestic rate base. Further, the FCC reserved the right to require COMSAT, if Palau achieved a new status warranting it, to divest itself of its investment in the Palau station at not less than net book value.

Having reached these results in the case of Palau, the FCC easily did the same in the case of the remaining two political entities of the Trust Territory--the Federated States of Micronesia (FSM) and the Marshalls. COMSAT proposed a total of six earth stations for them, and in a decision released April 2, 1982, the FCC authorized such stations (File Nos. CSG-82-005-P, et al., I-P-C-82-011, et al.). The same conditions were imposed, i.e., that COMSAT maintain separate books for its facilities in the FSM and the Marshalls, so as to be able to exclude them from COMSAT's U.S. rate base; and that the FCC retains the right to order COMSAT to terminate its investments in the FSM and the Marshalls, should their future political status warrant.

A question that arose in connection with the Trust Territory status negotiations was whether provision should be made so as to permit COMSAT to continue its operations in the Micronesian entities in the same manner after trusteeship termination as before. The negotiating governments agreed to do so, in section 131(a)(2) of the Compact of Free Association, discussed further in Memorandum No. 47-3.

6. Public telecommunications grants. Although it is not easy to qualify for these Federal grants, three of the off-shore areas had, as of 1982, done so: American Samoa received one grant, this in the early 1970's, for $164,000; Guam, one grant, in 1978-80 for $117,000; and the Virgin Islands, four grants in the 1970's and early 80's, totaling approximately $870,000. All grants under this program are project grants. It does not appear that any of these areas received grants in later years. Reports to the Department of the Interior show no grants to any of the insular areas for public telecommunications. It may be that the 25% local contribution has deterred them. Additionally, while each area has some radio television broadcasting, they rely almost entirely upon mainland program sources, and, therefore, it is possible that they lack resources to put Federal public telecommunications grants to use. The application of the program to them, thus, is probably without value, but it is also without harm.

Conclusion: Although, as the foregoing discussion demonstrates, the Communications Act has presented the territories with a number of problems, those problems have either been overcome or they are not susceptible to statutory solutions, except that the matter of court jurisdiction for enforcement of the Act in Samoa should be attended to.

Federal agency comments: Comments were invited in 1982 from the Department of Commerce, the Department of Justice, and the Federal Communications Commission. All comments received have been reflected above. The revised version was reviewed by the Federal Communications Commission in 1993, and all comments received have been reflected above.

Addendum, June 1993:

As the FCC explained in comments in June 1993 on this Memorandum 47-2, on the matter of treatment of Guam and other Pacific areas as "international" points,

> Guam, together with American Samoa, the Commonwealth of the Northern Marianas and the Pacific Trust Territories, present a unique situation. As set forth in Memorandum 47-2, with the advent of domestic satellite systems in the 1970's, the Commission required the rates for the offshore points to which those satellite systems were capable of serving (Hawaii, Puerto Rico and the U.S. Virgin Islands) to be integrated with the rates for the continental U.S. Because the domestic satellite systems were not technically capable of serving Guam, American Samoa, the new Commonwealth of the Northern Marianas and the Pacific Trust Territories, these point were not included in the rate integration proceeding.
>
> However, after the original Section 222 of the Communications Act of 1934 was replaced by the new Section 222 (the Record Carrier Competition Act of 1981), the Commission declared the off-shore points to be domestic points. But, since points such as Guam, American Samoa, the Commonwealth of the Northern Marianas and the Pacific Trust Territories are served only by international transmission facilities that provide service primarily between the U.S. mainland and foreign points, authorization of those facilities are processed by the Commission's

International Facilities Division of the Common Carrier Bureau.[1] In early 1993, the Commission authorized Columbia Communications Corporation, a U.S. private international satellite system provider, to provide domestic services between the Pacific offshore points and the U.S. mainland. This provides some of these offshore points such as American Samoa and the Pacific Trust Territories with their first alternative facilities to the INTELSAT facilities provided by Comsat.

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[1] Facilities serving the Commonwealth of Puerto Rico and the U.S. Virgin Islands are processed by both the International Facilities Division (for Facilities which also serve foreign points) and the Domestic Facilities Division (for facilities which serve other domestic points).

Memorandum No. 47-3
July 1982
Revised November 1992

Subject: The Communications Satellite Act of 1962
Title 47, Chapter 6 (47 U.S.C. 701-757)

Purpose: To create the Communications Satellite Corporation, and through it, to provide for U.S. participation in commercial satellite communications on a global scale.

Territorial application: The statute contains no geographical limitations that would adversely affect the territories or the Trust Territory.

Recommendation: The Communications Satellite Act requires no modifications to accommodate the needs of the territories and the Trust Territory.

Discussion:

Substance of the statute: The Communications Satellite Act of 1962 creates the Communication Satellite Corporation (COMSAT), a private corporation "for profit," that is "subject to appropriate governmental regulation" (47 U.S.C. 731, 701(c)). COMSAT is not a Federal agency. It is authorized to own and operate a commercial communications satellite system, to furnish channels of communication to U.S communications common carriers, and to own and operate satellite terminal stations (47 U.S.C. 735(a)). COMSAT is managed by a board of directors and by officers who must be U.S. citizens (47 U.S.C. 733(a)), and its activities are subject to regulation by the FCC (47 U.S.C. 721(c)).

A 1978 addition to the Communications Satellite Act is the International Maritime Satellite Telecommunications Act (47 U.S.C. 751-757), which provides for U.S. participation though COMSAT in a global satellite telecommunications system designed to serve maritime commercial and safety needs. The statute defines "State" for purposes of maritime satellite communications, so as to include "Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any other territory or possession of the United States" (47 U.S.C. 75(4)).

Matters of territorial interest: As is discussed in Memorandum No. 47-2, COMSAT can and does carry out its activities through-out the territories and the Trust Territory. The FCC has approved its constructing and owning earth stations in the territories of American Samoa, Guam, and the Northern Marianas (and unquestionably it could as a matter of law do so in the case of the Virgin Islands as well), and in all three political entities of the Trust Territory.[1/]

[1/] Footnote added in 1992: On this point, the Compact of Free Association for the Federated States of Micronesia and the Marshall Islands, as contained in the Compact of Free Association Act (Pub. L. 99-239), provides in section 131(a)(2) that the FCC has jurisdiction under the Communications Act of 1934 and the Communications Satellite Act of 1962

> over all domestic and foreign communications services furnished by means of earth terminal stations where such stations are owned or operated by the United States common carriers and are located in the Marshall Islands or the Federated States of Micronesia.

The subsidiary agreement under section 131, executed in 1982 and 1983, contains no provisions pertinent to section 131(a)(2), being confined to U.S. responsibilities under section 131(a)(1) pertaining to international communications matters. The agreement does, however, contain the following Agreed Minute:

> The Signatory Governments [of the U.S. and the Freely Associated States] agree that in order to facilitate common carrier, including satellite, telecommunications in the [Freely Associated States] . . . this Agreement shall be amended as to the matter of United States Federal Communications Commission (FCC)

(continued...)

The requirement of the Communications Satellite Act, that its directors and officers by U.S. citizens, obviously bars Samoans who are U.S. nationals, as it formerly did for Northern Marianas citizens. The Northern Marianas Federal Laws Commission did not propose to remedy this situation with respect to its area of concern, probably on the sensible ground that the Northern Marianas was not known to hold any likely COMSAT board or officer candidates.[2/] The same is probably true of Samoa.

As noted, the term "State" is generously defined for purposes of international maritime satellite telecommunications. While that term is used only once in the statute--in 47 U.S.C. 752(h), which permits COMSAT to function in an emergency situation notwithstanding "any provision of State law" to the contrary--the presence of the definition makes clear that COMSAT has authority to provide maritime satellite telecommunications services throughout the territories and the Trust Territory.[3/]

[1/](...continued)
jurisdiction in the Marshall Islands and the Federated States of Micronesia.

There has been no such amendment, and none appears currently (November 1992) to be contemplated.

[2/] In its 1985 Report to the Congress, the Northern Marianas Commission referred to other sections of Title 47 that presented problems of citizenship to the people of the Northern Marianas, who were not then U.S. citizens (Report, pp. 524-525), but it identified no other problems for the Northern Marianas within Title 47. The citizenship issues were all eliminated when the Trusteeship Agreement came to an end and the people of the Northern Marianas became U.S. citizens under the Covenant.

[3/] The application of the International Maritime Satellite Telecommunications Act to the Northern Marianas deserves further (continued...)

Conclusion: The Communications Satellite Act requires no modification to accommodate the needs of the territories and the Trust Territory.

Federal agency comments: Comments were invited from the Department of Justice and the Federal Communications Commission. All comments received have been reflected above.

3/(...continued) comment. There are probably several theories that would permit the conclusion that the Act applies to the Northern Mariana, but the simplest may be by operation of section 502(a)(2) of the Covenant. Section 502(a)(2) extends to the Northern Mariana those "laws of the United States in existence" on the effective date of the section (which date was January 9, 1978) "and subsequent amendments to such laws"--if the law in question applies both to Guam and to the States. The International Maritime Satellite Telecommunications Act applies to both. Although it was enacted on November 1, 1978, and thus after the effective date of section 502, the enactment took the form of an amendment to the 1962 Communications Satellite Act (92 Stat. 2392), so 502(a)(2) applies.

Title 48 - TERRITORIES AND INSULAR POSSESSIONS

* Contains matters of particular interest to the territories, but no legislative recommendations.

** Contains recommendations for changes in the law.

Memorandum Number	Subject	48 U.S.C. sections
48-1	* (a) Puerto Rico	731-916
	* (b) The Virgin Islands	1392-1408e
	* (c) Guano Islands	1411-1419
	* (d) Guam 1421-1428e	
48-2	* Territorial Provisions of a General Nature	(a) 1451-1452 (with comments on other sections recently repealed)
		(b) 1469a through 1470a
		(c) 1489, 1491-1492
48-3	** (a) Alien Owners of Land	1501-1512
	* (b) The Virgin Islands	1541-1645
	* (c) Eastern (American) Samoa	1661-1669
	* (d) Trust Territory of the Pacific Islands	1681-1695
48-4	** Conveyance of Submerged Lands to the Territories	1704-1708
48-5	* Delegates to Congress	1711-1735

Memorandum No. 48-1
July 1983

Subject: (a) Puerto Rico
Title 48, Chapter 4 (48 U.S.C. 731-916)

(b) The Virgin Islands
Title 48, Chapter 7 (48 U.S.C. 1392-1408e)

(c) Guano Islands
Title 48, Chapter 8 (48 U.S.C. 1411-1419)

(d) Guam
Title 48, Chapter 8A (48 U.S.C. 1421-1428e)

Comment: The statutes considered herein, because they are all by definition applicable to particular offshore areas only, require no sustained attention for purposes of this study.

Discussion: (a) Chapter 4 of Title 48, which pertains to Puerto Rico (48 U.S.C. 731-916), derives in substantial part from Puerto Rico's 1917 Organic Act, now termed the Federal Relations Act. At least some sections that remain have probably been overtaken by the creation of the Commonwealth in 1952, but the codifiers have presumably chosen not to omit such sections because of the uncertainty, sometimes verging on mystery, that surrounds Puerto Rico's status. The sections, however, are of application peculiarly to Puerto Rico alone, and were enacted with that purpose only in mind, so they need not be further analyzed for purposes of the instant inquiry.

(Reference might be made, however, for the benefit of students of government organization, to 48 U.S.C. 794, a section from the 1917 Organic Act. In entirety it reads:

> All reports required by law to be made by the governor or heads of departments to any official of the United States shall be made to an executive department of the Government of the United States to be designated by the President, and the President is authorized to place all matters pertaining to the government of Puerto Rico in the jurisdiction of such departments.

An Executive Order was issued pursuant to that section in 1943, placing the Secretary of the Interior in charge (see note following 48 U.S.C. 794)--as he already was because of earlier (1934) Presidential action--but that was almost certainly repealed by implication in 1952 with the creation of the Commonwealth. In any event it was surely terminated by President Kennedy's "Memorandum" of July 25, 1961, when he named "the Office of the President" as the contact point for matters touching Puerto Rico's relationship to the United States. Puerto Rico has been regarded since 1952 as having no "home" within the Executive Branch, a situation which some observers find hurtful to Puerto Rico, and which almost all regard as regrettable from the standpoint of good governmental order. Whether 48 U.S.C. 794 permits an easy remedy, however, is not certain. Of course no remedy could be "easy" politically, because a new form of bureaucratic oversight would be viewed by some as a new form of colonialism. But with respect to the legal question solely, conventional wisdom in the Interior Department has been that there are no "reports" of the sort described in the first part of the section, and indeed none has come to light. The statutory language would seem to permit placing jurisdiction over Puerto Rican affairs only in the U.S. official designated to receive such "reports required by law", and if no such official exists, it probably follows that the President is without authority to act under this section.)

(b) Similarly, the remaining sections of Chapter 7 pertaining to the Virgin Islands (48 U.S.C. 1392-1408e) are derived largely from the transition provisions enacted at the time of purchase (1917), and from the Virgin Islands' 1936 Organic Act. The chapter was tidied up in 1982, when much of it was repealed: provisions of the 1936 Act that were superseded by the 1954 Revised Organic Act (referred to in Memorandum No. 48-3); the charter of the Virgin Islands Corporation, which was terminated in the 1960's; the 1944 Public Works Program, which was completed in the 1950's. The remaining provisions are all of application to the Virgin Islands peculiarly, and thus require no further consideration here.

(c) The 19th century Guano Islands provisions (48 U.S.C. 1411-1419), may have served their purpose, assuming that every "island, rock, or key" in the world has by now been discovered, whether or not it holds "a deposit of Guano." In any event, these laws, rather regrettably, need no consideration for purposes of the current study.

(d) The laws here codified pertaining to Guam (48 U.S.C. 1421-1428e) apply to it alone. They include the 1950 Organic Act, and the Guam Development Fund Act of 1968. Most are very much alive, but given their content, they require no further consideration for immediate purposes.

Conclusion: None of the statutes discussed herein require further attention for purposes of this study.

Federal agency comments: Comments were invited from the Department of the Interior and the Department of Justice. All comments received have been reflected herein.

Memorandum No. 48-2
July 1983
Revised March 1984

Subject: Territorial Provisions of a General Nature
Title 48, Chapter 10

(a) 48 U.S.C. 1451-1452 (with comments on other sections recently repealed).

(b) 48 U.S.C. 1469a through 1470a

(c) 48 U.S.C. 1489, 1491-1492

Comment: Most of the laws that remain in Chapter 10 are very much alive and of current importance. No legislative change is needed.

Discussion: (a) The laws appearing at 48 U.S.C. 1451 and 1452 pertain to "Indians" in any "Territory" of the United States, and in 1983 they were amended (by section 15 of Public Law 98-213, approved December 8, 1983) to state that "Territory" as used therein does not include the Virgin Islands, Puerto Rico, American Samoa, Guam, or the Northern Marianas. Those two laws may be obsolete, but the Interior Department recommended to the Congress, and the Congress agreed, that in the interests of caution the laws ought not to be repealed, lest repeal adversely affect any Indian rights that might remain. But to be certain that the laws were confined to native American Indians, as originally contemplated in these 19th century laws, Interior further recommended that they be made expressly inapplicable to the territories, and the 1983 law explicitly does that.

In the same Public Law 98-213, the bulk of the laws formerly appearing in Chapter 10 were also repealed. By section 16, there were repealed the laws that had been codified at 48 U.S.C. 1453-1469-1, 1470, 1471-1479, 1481-85, 1487, and 1488. (Those codified at 48 U.S.C. 1469a-1470a were not repealed and are considered below.) It was reasoned that those laws were, for the most part, derived from organic acts for the incorporated territories of the continental United States, and as such they were not enacted with the Virgin Islands, Guam, and American Samoa in mind. Because the current territories differ markedly from the former Territories of the Western

United States in terms of size, location, governmental structure, and other considerations, the old laws in question were regarded as of arguable appropriateness if applied to the current territories. Their repeal was recommended by the Interior Department so as to eliminate ambiguity, reduce redundancy, and remove the potential for surprise.

As to the element of ambiguity, it was argued that if strictly construed, most of the provisions of Chapter 10 proposed for repeal would probably be found applicable to incorporated Territories only--i.e., to Territories to which the Congress expressly extended the U.S. Constitution--and not to the current territories, all of which are unincorporated. But it is always possible, following the instruction of Puerto Rico v. Shell Co. (302 U.S. 253 (1937)), to conclude that the Congress would have made the law applicable to unincorporated territories had it anticipated their later acquisition. So repeal was recommended in order to eliminate any uncertainty concerning their application to the current territories.

It was also argued that most of the subjects with which the laws in question deal are ones that are covered by existing organic acts (in the case of the Virgin Islands and Guam), the Covenant (in the case of the Northern Marianas), or a local constitution (in the case of American Samoa and the Northern Marianas), so they are no longer needed in them.

Finally, it was argued that so long as these laws remain on the books, they constitute a potential for surprise, and in some cases a potential hazard, in the territories. For that reasons, among others, in 1978 the Congress repealed the laws formerly codified at 48 U.S.C. 1480, 1480a, and 1480b, which had restricted the ability of religious institutions to own property in "any Territory" of the United States (P.L. 95-584, approved November 2, 1978). The Department of the Interior's Assistant Solicitor for Territories had earlier concluded that the laws in question were obsolete, and that they were of dubious constitutionality, but that they might be found applicable to Samoa and other unincorporated territories. (S. Rept. No. 95-1275, 95th Cong., pp. 5-8).

In January 1984, almost immediately following the repeal that was effected by section 16 of Public Law 98-213, a controversy arose pertaining to one statute that had been repealed. Section 16(w) repealed an 1886 law (formerly codified at 48 U.S.C. 1471) that barred the legislatures of "the Territories" from enacting local or special laws, and a controversy had arisen in the Virgin Islands in connection with the provision that barred the granting "to any corporation . . . any special or exclusive privilege, immunity, or franchise whatever." It was reported that some had proposed to rely upon that section in an argument opposing a recent action by the Government of the Virgin Islands. While 48 U.S.C. 1471 had been held to apply to the Virgin Islands (Smith v. Government of the Virgin Islands, 375 F.2d 714 (1967)), it was later held (in Thomas v. Government of the Virgin Islands, 333 F. Supp. 961 (1971)) that special legislation is barred in the Virgin Islands by the equal protection clause that expressly applies to the Virgin Islands under its Organic Act (48 U.S.C. 1561). The repeal of 48 U.S.C. 1471, thus, effected no change in the state of the law in the Virgin Islands.

(b) Within Chapter 10 there remain other provisions that are both live and important:

48 U.S.C. 1469a, part of the 1977 Territories Omnibus Act, permits block grants to the territories and the Trust Territory and requires the waiving of matching in certain circumstances. The statute has been less used than was anticipated upon its enactment, but it has continuing, potential value. In light of the amendment in 1980 carried in Public Law 96-205 (see note following 48 U.S.C. 1469a), the effect of the section is to require the Interior Department to waive all matching requirements for its programs in all of the territories and the Trust Territory, while other departments and agencies have discretion to do so. The limited waiver of matching that is provided for is clearly of continuing value to American Samoa and the Northern Marianas. By section 6 of Public Law 98-213, requirements for matching up to $200,000 must be waived for each of them, by all agencies.

48 U.S.C. 1469b requires audits by the General Accounting Office of the territorial governments. The language

frequently appears in Interior Department appropriation acts and it cannot but be continued, although its relationship to the work performed by the Interior Department's Inspector General is uncertain. To avoid duplication, GAO in recent years has mostly audited the territorial comptrollers, not the territorial governments.

48 U.S.C. 1469c permits any Federal agency, with reimbursement, to make its services and equipment available to the territories and the Trust Territory. It applies to all areas here involved and should be continued.

48 U.S.C. 1469d(a) is a companion 1980 technical assistance provision, giving the Secretary of the Interior authority to arrange for expert help--usually with reimbursement, at least from Interior to the donor agency, but not necessarily from the territorial or Trust Territory recipient.

48 U.S.C. 1469d(b) requires the Department of the Interior to provide special help to the people of Bikini and Enewetak as long as necessary, even after trusteeship termination. Whether this provision will survive trusteeship termination is arguable (see the discussion in Memorandum No. 48-3 concerning 48 U.S.C. 1695), inasmuch as the basis for its enactment is very likely the Trusteeship Agreement, and section 171 of the Compact provides that such laws cease to be effective with the Compact's approval.

48 U.S.C. 1469d(c) permits the Secretary of Agriculture in his discretion to extend Agriculture Department programs to the territories and the Trust Territory, and to modify statutory requirements as necessary to make the programs effective there. This provision is discussed at length in a Prefatory Comment following the Table of contents to Title 16 of this Study.

48 U.S.C. 1470a authorizes the Secretary of the Interior to buy or charter boats if needed in the territories or the Trust Territory (see 48 U.S.C. 1687) for official or

commercial purposes. Neither Interior nor the Trust Territory Government has operated shipping services in the Trust Territory for many years, and not within living memory in any of the territories, so the provision may have no continuing, direct value. But the Trust Territory authority (48 U.S.C. 1687) was used by the High Commissioner in the early 1980's in order to persuade the several subordinate Trust Territory jurisdictions to permit shipping companies, under contract with one such jurisdiction, to enter the ports of all of them.

(c) A diverse assortment of statutes brings chapter 10 to a close:

48 U.S.C. 1489 provides that the United States may not lose its title to land in any territory or area under U.S. jurisdiction by adverse possession or its equivalent. This is a 1934 law, clearly of continuing value to the U.S.

48 U.S.C. 1491 requires the Secretary of the Interior to report to Congress upon any proposed license to transport or store spent nuclear fuel in a territory or the Trust Territory, and to refrain from granting such a license unless expressly authorized by the Congress. The section was enacted in 1980, following Congressional surprise upon learning that certain Pacific Islands were being investigated as sites for nuclear waste storage.

48 U.S.C. 1492 requires the Secretary of Energy to prepare comprehensive energy plans for the territories and the Trust Territory. The deadline for the plans has passed (12/24/82), but section 7 of Public Law 98-213 amends the law to permit the Secretary of Energy to implement any recommendations in the plans.

Conclusion: The bulk of the provisions of Chapter 10 have recently been repealed. Those that remain, all of which are identified above, require no immediate legislative attention.

Federal agency comments: Comments were invited from the Department of the Interior and the Department of Justice. All comments received have been reflected herein.

Memorandum No. 48-3
July 1983
Revised March 1984

Subject: (a) Alien Owners of Land
Title 48, Chapter 11 (48 U.S.C. 1501-1512)

(b) The Virgin Islands
Title 48, Chapter 12 (48 U.S.C. 1541-1645)

(c) Eastern (American) Samoa
Title 48, Chapter 13 (48 U.S.C. 1661-1669)

(d) Trust Territory of the Pacific Islands
Title 48, Chapter 14 (48 U.S.C. 1681-1695)

Comment: Except for Chapter 11 (Alien Owners of Land), which ought to be repealed as archaic and possibly mischiefmaking, the statutes considered herein, owing to the fact that they are all by definition applicable to particular offshore areas only, require no sustained attention for purposes of this study.

Discussion: (a) The sections concerning Alien Owners of Land (48 U.S.C. 1501-1512) come largely from an 1887 law providing that one who is not a U.S. citizen cannot "acquire title to or own any land in any of the Territories of the United States" (48 U.S.C. 1501). A number of exceptions follow (rights derived from treaties or from inheritance, a standard grandfather clause, and others), but they are not broad enough to countenance current practices in some of the territories, were this law to be applied to them today. The law was certainly not directed at the current territories, given the date of enactment; by its terms it applies to incorporated territories only; but to avoid uncertainty, it should be repealed. Before that is done, however, it will be necessary to establish that there would be no unintended consequences in the District of Columbia (48 U.S.C. 1508, see codification note following 48 U.S.C. 1501) and Hawaii (48 U.S.C. 1509-1512).

In its report to the Senate Committee on Energy and Natural Resources on the bill that became the Territories Omnibus Act for 1983 (P.L. 98-213, approved December 8, 1983), the Interior Department recommended that Chapter 11 be repealed, but noted that because both the District of Columbia and the

State of Hawaii are also affected by Chapter 11, their formal concurrence in the recommendation would be required. (Each had expressed informal concurrence to the Department of the Interior.) But the repeal of Chapter 11 was not contained in the Senate bill (S. 589, 98th Congress), for the following reasons, as stated on the Senate floor:

> The administration also feels that chapter 11 dealing with alien ownership of land is archaic and should be repealed. Portions of that chapter have been extended to Hawaii and the District of Columbia. Recent conversations with the attorney general of Hawaii indicate that Hawaii concurs but we have not received a formal comment from the Corporation Counsel for the District of Columbia and, therefore, are deferring consideration of chapter 11 at this time. (Cong. Rec., Nov. 17, 1983, p. S 16483, daily pagination.)

(b) Chapter 12 (48 U.S.C. 1541-1645) contains the Revised Organic Act of the Virgin Islands, a statute very much alive and in force, but of course limited to the Virgin Islands in its application. It does not require analysis for current purposes.

(c) The sections concerning Eastern (i.e., American), Samoa (48 U.S.C. 1661-1669) represent a miscellany of laws enacted for Samoa from 1906 to the present, e.g.,

--Samoa's "temporary organic act" of 1929 (so described by Senior Judge Albert B. Maris of the Third Circuit), consisting of one subsection by which the President is authorized to determine who has administrative authority in Samoa (48 U.S.C. 1661(c));

--Samoa's valuable exemption from the coastwise laws (48 U.S.C 1664 (see Memorandum No. 46-5));

--A law passed in 1906 (almost immediately after the cessions, and the only law passed by Congress for Samoa until 1925 when sovereignty was extended over Swains Island (48 U.S.C. 1662)), describing how deeds to real property in the District of Columbia and in the Territories might be acknowledged in Samoa (48 U.S.C. 1663); and

--The 1962 technical assistance act for Samoa (48 U.S.C. 1666), of interest now largely because it is so modest when contrasted with latter-day technical assistance provisions (see Memorandum No. 48-2(b)).

None of these statutes for Samoa requires further attention for purposes of this study.

(d) The <u>Trust Territory</u> sections (48 U.S.C. 1681-1695) are similarly miscellaneous, but they of course arise from a much shorter period, e.g.,

--Another "temporary organic act" (see above) (48 U.S.C. 1681(a));

--Another modest technical assistance authorization (48 U.S.C. 1681(b); cf. 48 U.S.C. 1469c);

--Provisions repeated annually in Interior Department Appropriations Acts (48 U.S.C. 1682, 1683, 1687);

--The authorization for the Trust Territory's Economic Development Loan Fund (48 U.S.C. 1688-1693);

--Provisions concerning the District Court of the Northern Marianas (48 U.S.C. 1694-1694e); and

--An unusual provision, destined to give rise to arguments for years to come, purporting to perpetuate Federal health and education programs in the Trust Territory even after trusteeship termination, absent express approval by the Congress (48 U.S.C. 1695). Because those laws apply to the Trust Territory by virtue of the Trusteeship Agreement, the weight of Washington opinion seems to be that the statutes fall when the trusteeship ends--but it can be expected that that view will not be universally accepted.

Conclusion: None of the statutes discussed herein requires further attention for purposes of this study.

Federal agency comments: Comments were invited from the Department of the Interior and the Department of Justice. All comments received have been incorporated herein.

Memorandum No. 48-4
July 1983

Subject: Conveyance of Submerged Lands to the Territories (The Territorial Submerged Lands Act) Title 48, Chapter 15 (48 U.S.C. 1704-1708)

Purpose: To convey title to the Governments of the Virgin Islands, Guam, and American Samoa of the tidelands, submerged lands, and filled lands that surround them.

Territorial application: The Territorial Submerged Lands Act applies to the three territories named therein, but probably not to the Northern Marianas, and clearly not to the Trust Territory.

Recommendation: The Territorial Submerged Lands Act should be made expressly applicable to the Northern Marianas, effective upon trusteeship termination.

Discussion: The Solicitor of the Interior Department held in 1958 that the United States, as an incident of sovereignty, owned the tidelands, submerged lands, and filled lands in Guam from the line of mean high tide seaward for three miles (65 I.D. 193). As a consequence, the Interior Department initiated legislation, resulting in Public Law 88-183 (77 Stat. 338, approved January 20, 1963), that permitted the Secretary of the Interior to convey particular tracts of such land to the three territorial governments, following a procedure that included Congressional committee review. The procedure was cumbersome and time-consuming.

In 1974, in order to equalize the treatment of the territories and the States--because the latter had been donees under the Submerged Lands Act of 1953 (43 U.S.C. 1301)--and in order to vest further incidents of self-government in the territories, the Congress enacted P.L. 93-435 (48 U.S.C. 1705-1708). By that statute the title of the United States to lands between the line of mean high tide and three miles distant was transferred to the territories of the Virgin Islands, Guam, and American Samoa. Certain exceptions are stated, but they can for the most part be overcome (48 U.S.C. 1705(b)).

Because the United States has never claimed sovereignty in the Trust Territory, and because in any event the Trust Territory is en route to an even more distant relationship to the United States, there is no basis for making this law applicable to the Trust Territory. But there is probably good reason to do so in the case of the Northern Marianas, at such time as the trusteeship terminates and the Northern Marianas become fully a commonwealth (or "territory") of the United States.

The submerged lands and tidelands of the Northern Marianas will probably then become the property of the United States, given the reasoning in the Solicitor's 1958 decision and the absence of language in the Northern Marianas Covenant dealing differently with such lands. (It will be remembered that section 502(a)(2) of the Covenant extends to the Northern Marianas those Federal laws that apply to Guam only if they are of general application to the several States. The Territorial Submerged Lands Act would thus not automatically extend to the Northern Marianas.) Upon trusteeship termination, the Northern Marianas should be treated no less generously under Federal law than the other territories, so the Territorial Submerged Lands Act should then be appropriately expanded.

Conclusion: Upon trusteeship termination, the rights granted the territories of the Virgin Islands, Guam, and American Samoa under the Territorial Submerged Lands Act should be extended to the Northern Marianas.[1]

Federal agency comments: Comments were invited from the Department of the Interior and the Department of Justice. All comments received have been reflected herein.

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[1] Note added in 1993: The recommendation of the 1985 report of the Northern Marianas Commission on Federal Laws coincides with this conclusion. The issue is discussed in careful detail in the report at pages 172-188.

Memorandum No. 48-5
July 1983
Revised March 1984

Subject: Delegates to Congress
Title 48, Chapter 16 (48 U.S.C. 1711-1735)

Comment: The Virgin Islands, Guam, and American Samoa all have nonvoting representatives in the Congress. The Northern Marianas does not, and some there would welcome it. Given the nature of this question, however, no useful purpose would be served by offering here a recommendation, either way, on the Northern Marianas representation issue.

Discussion: Since 1972, the Virgin Islands and Guam have elected nonvoting delegates to the House of Representatives (48 U.S.C. 1711-1715), as Alaska and Hawaii did before them. Puerto Rico is somewhat similarly represented by the Resident Commissioner from Puerto Rico (48 U.S.C. 891-894). In 1978, Congress provided for a Delegate from American Samoa, who need not be a U.S. citizen but must be a U.S. national (48 U.S.C. 1733(b)).

Thus, the Northern Marianas alone are not now so represented. Their elected "Resident Representative" in Washington does not sit in the Congress, and as defined in the Covenant is a representative to the Executive Branch of the U.S. Government. Whether his mission should be broadened is a question that was debated in connection with the negotiation and approval of the Covenant, with the answer being, for then, negative.

Reasons for providing for such representation are manifold and manifest--most particularly including the 200-year tradition of representative government in America. But so are the reasons for not providing it, particularly considering the small population that would be given a voice, even if no vote. (The Northern Marianas' population is about 17,000, as contrasted with the average Congressional district of about half a million.)

The Northern Marianas Federal Laws Commission has recommended that the Resident Representative be made a nonvoting delegate to the Congress. The staff Recommendation to the Commission on the subject, prepared in March 1983, explores the issue at some length and supports that result.

In any case, action on the subject can, probably in good conscience be deferred until the trusteeship is terminated and the people of the Northern Marianas become citizens of the United States. They do not now, strictly speaking, owe allegiance to the United States, and their representation in the Congress may seem inappropriate until that status changes.

Conclusion: These laws require no change at this time.

Federal agency comments: Comments were invited from the Department of the Interior and the Department of Justice. All comments received have been reflected herein.

Title 49 - TRANSPORTATION

- \- Contains nothing of substantial interest to the territories.
- * Contains matters of particular interest to the territories, but no legislative recommendations.
- ** Contains recommendations for changes in the law.
- (**) Contains recommendations for changes in the law, but the need for them is not urgent.

Memorandum Number		Subject	49 U.S.C. sections
		Prefatory Comment	
49-1	(**)	(a) Department of Transportation	101-526
	-	(b) Motor Carrier Safety	3101-3104
49-2	*	Interstate Commerce	10101-11917
			49 App. U.S.C sections
49-3	*	(a) Bills of Lading	81-124
	-	(b) Inland Waterways Transportation	142
	-	(c) Air Commerce	211-213, 231
	**	(d) Contraband Seizure	781-789
	-	(e) International Aviation Facilities	1151-1160
	-	(f) Medals of Honor	1201-1203
49-4	*	Federal Aviation Program	1301-1557
49-5	*	Urban Mass Transportation	1601-1621
49-6	-	(a) Department of Transportation	1652f-1659
	-	(b) Natural Gas Pipeline Safety	1671-1687
	-	(c) Aviation Facilities Expansion and Improvement	1704-1743
	*	(d) Hazardous Materials Transportation	1801-1819

June 1991

Prefatory Comment - Title 49

Portions of Title 49, Transportation, have been enacted into positive law. Public Law 95-473 (1978) enacted into positive law the Interstate Commerce Act, which is discussed below in Memorandum No. 49-2; and Public Law 97-449 (1983) enacted into positive law Subtitle I concerning the Department of Transportation, discussed below in Memorandum No. 49-1(a), and Chapter 31 of Part C of Subtitle II, concerning Motor Carrier Safety, discussed below in Memorandum No. 49-1(b). The foregoing are cited as 49 U.S.C, followed by appropriate section references.

The remainder of Title 49 has not yet been enacted into positive law, although that is foreseen. The remainder continue to carry the same section numbers as before enactment of the Public Laws cited above, but they are now cited as 49 App. U.S.C., followed by the appropriate section references. These laws are discussed below in Memoranda Nos. 49-3 through 49-8.

Except for Memorandum No. 49-7 (on Airport and Airway Improvement), part (h) of Memorandum No. 49-6 (Aviation Noise Policy), and Memorandum No. 49-8 (on miscellaneous transportation subjects)--all of which are of relatively recent enactment--all of the memoranda that follow were originally drafted in 1982 and then circulated for comment among the pertinent Federal agencies. When such agency comments were incorporated in revised memoranda, the Title 49 memoranda were then transmitted to the Governors of the Virgin Islands, Guam, American Samoa, and the Northern Marianas for their comment. Because of organization changes in the Code resulting from the codification referred to above, all Title 49 memoranda have been reexamined in 1991 and modified to reflect those organizational changes, and also to reflect recent additions and substantive changes (if pertinent) in the laws that appear in that Title. Those substantive changes have not been of material effect so far as the territories are concerned, but some of the recent additions are of possible interest. The revised memoranda have not been recirculated to Federal agencies or to the Governors for comment, nor have those cited above as exceptions to the 1982 comment process been circulated at all. Time has foreclosed the comment process as to those late entries.

Memorandum No. 49-1
May 1991

Subject: (a) Department of Transportation
Title 49, Subtitle I (49 U.S.C. 101-526)

(b) Motor Carrier Safety
Title 49, Subtitle II, Part C, Chapter 31 (49 U.S.C. 3101-3104)

Comment: Neither of the portions of Title 49 discussed herein contain any provisions that create significant difficulties in or for the territories.

Discussion: (a) Subtitle I contains organic legislation for the Department of Transportation (49 U.S.C. 101-526). Its provisions concerning the organization of the Department (49 U.S.C. 101-110) pertain to housekeeping matters and are not directly relevant to the territories. (A reference to "State" governments, in 49 U.S.C. 101(b)(3), pertaining to the purpose of the Department, can be viewed as illustrative and not confining.) Sections pertaining to general powers (49 U.S.C. 301-336) similarly contain no provisions presenting difficulties to the territories. ("State" references in 49 U.S.C. 301(7) and in 303(b) and (c) again do not appear to be confining, although an elaboration of the term in 49 U.S.C. 303, which pertains to transportation policy as it affects parks, refuges, and historic sites, so as to be clearer that the territories are comprehended, would give comfort.) References to "territorial" agencies and to "territory, or possession" in 49 U.S.C. 322(c)(3) and 329(c)(1), respectively, pertaining to intergovernmental cooperation and studies, clearly comprehend the insular areas here involved. Use of Federal district courts for the enforcement of civil penalties pertaining to the Maritime Administration or the Coast Guard (49 U.S.C. 336(c)), raises the familiar problem of Samoa, where there is no Federal district court. But in this context no difficulty is known to exist, so legislative correction appears not urgently required.

The remaining sections of the Subtitle concern special authority in the Secretary of Transportation in relation to motor carriers (49 U.S.C. 501-526). These sections do not apply to the territories because the territories are excluded under 49 U.S.C. 10102(24) and (27), which are definitions in the interstate commerce laws (Memorandum No. 49-2), and such definitions are incorporated by reference for purposes of these sections on the special authority of the Secretary (49 U.S.C. 501(a)(1)). Inasmuch as the interstate commerce laws generally do not apply to the territories, this result appears to be appropriate.

(b) The provisions entitled Motor Carrier Safety (49 U.S.C. 3101-3104) are derived from the interstate commerce laws, and they confer upon the Secretary of Transportation certain regulatory authority respecting motor carriers that was formerly vested in the Interstate Commerce Commission. The definition of "United States" for purposes of these motor carrier safety laws is the same as that contained in the motor safety section of the interstate commerce laws (49 U.S.C. 3101(2), 10102(27)), and that definition excludes the territories. Accordingly, these motor carrier safety laws are not applicable to the territories.

Conclusion: The provisions of Title 49 discussed above require no modification to meet the needs of the territories, but a clarification of the application to them of the provisions of 49 U.S.C. 303 could have value, as would the expansion of the reference to "district court of the United States" at 49 U.S.C. 336(c) to accommodate American Samoa.

Federal agency comments: Earlier versions of the memoranda discussing the foregoing provisions were submitted for comment in 1982 to the Departments of Justice and Transportation and the Interstate Commerce Commission. All comments received have been reflected above.

Memorandum No. 49-2
May 1982
Revised May 1991

Subject: Interstate Commerce
Title 49, Subtitle IV (49 U.S.C. 10101-11917)

Purpose: To provide for the Federal regulation of interstate commerce and certain intraterritorial commerce by railroad, jointly by rail and water carrier, and by certain motor carriers, water carriers, and freight forwarders.

Territorial application: The statutes pertaining to the regulation of interstate commerce have no practical application to the territories. It is possible that they have theoretical application, but even that is very limited and in any event of no current relevance.

Recommendation: The interstate commerce laws pose no problem to the territories and require no modification to accommodate them.

Discussion: The statutes pertaining to the Federal regulation of interstate commerce by the Interstate Commerce Commission--formerly chapters 1, 1A, 8, 12, and 13 of Title 49--were in 1978 enacted into positive law (P.L. 95-473), and they now constitute Subtitle IV of Title 49.

ICC Jurisdiction:

For current purposes, four sections of Title 49 pertaining to the jurisdiction of the Interstate Commerce Commission (ICC), plus two general definitions, are of principal interest. The definitions provide that:

--the "United States" means the States and the District of Columbia (49 U.S.C. 10102(27)).

--a "State" means one of the States or the District of Columbia (49 U.S.C. 10102(24)).

Of the four jurisdictional sections, each of which is discussed below, three make clear that Federal regulation does not touch the territories (49 U.S.C. 10521, 10541, 10561), but the fourth (49 U.S.C. 10501) is of less certain effect.

--Section 10501 sets forth the jurisdiction of the ICC with respect to transportation by railroad, express carrier, sleeping car carrier, water common carrier, and pipeline carrier. Owing to geography, and to the absence in the territories of railroads and pipelines, the regulation of all of these forms of transportation is irrelevant to the territories, with one exception: joint rail-water transportation, i.e., transportation "by railroad and water, when the transportation is under common control, management or arrangement for a continuous carriage or shipment" (49 U.S.C. 10501(a)(1)(B)). Such transportation is within the ICC's jurisdiction if it occurs between a State and a territory or possession (49 U.S.C. 10501(a)(2)(C)), or within a territory or possession (49 U.S.C. 10501(a)(2)(E)).

Hence, transportation between an inland continental U.S. point and a territory, if such transportation is provided on a through fare basis using a railroad in the continental United States and a water carrier to the territory, is subject to ICC jurisdiction. Trailer Marine Transport Corp. v. Federal Maritime Commission (602 F.2d 379 (1979)), so held, with respect to precisely that kind of transportation from the States to Puerto Rico. (The ICC does not, however, any longer exercise such jurisdiction between the continental United States and a territory with regard to containerized goods (American Trucking Associations v. ICC, 656 F.2d 1115 (1981)). It is improbable, however, that such through fares exist for transportation to such distant territories as American Samoa, Guam, and the Northern Marianas, nor to the Virgin Islands. For that reason, the ICC's jurisdiction touching the current territories under such through tariffs is almost certainly only theoretical.

ICC jurisdiction within the territories with respect to the transportation described above (rail, rail and water, and pipeline) also theoretically exists. As noted above, 49

U.S.C. 10501(a)(2)(E) refers to transportation within a territory or possession. Puerto Rico has been held to be a "territory" for purposes of the interstate commerce laws (Trailer Marine Transport, supra, note 26 at p. 385). Puerto Rico's 1917 organic act exempts it from the "Interstate Commerce Act and the several amendments made or to be made thereto" (48 U.S.C. 751), but that section has been held to exempt Puerto Rico only from ICC regulation of intra-Puerto Rican transportation (Benedicto v. West India & Panama Telegraph Co., 256 F. 417, 420-421 (1919)).

It follows that, in the absence of a provision similar to that contained in Puerto Rico's 1917 organic act--and such provisions are absent so far as American Samoa, Guam, and the Virgin Islands are concerned--there is inchoate ICC jurisdiction over certain, very limited forms of transportation within each of these territories. But since none of these forms of transportation involved (rail, rail and water, and pipeline) now occurs in any of these areas, the Federal regulation does not and could not occur. ICC regulation of these forms of intraterritorial transportation could not, in any event, occur in the Northern Marianas. While section 502(a)(2) of the Northern Marianas Covenant would cause the interstate commerce laws to apply generally to the Northern Marianas if they apply to Guam, they would under that section apply only on the terms on which "they are applicable to the several States." The ICC's authority within the territories under 49 U.S.C. 10501(a) (2)(E) is confined to "a territory or possession," and, therefore, would not extend to the Northern Marianas.

Section 10521 sets forth the ICC's jurisdiction over motor carriers. That jurisdiction is limited to transportation in the States and the District of Columbia; to transportation, in the case of joint motor-water through tariffs, to (but not within) the territories and possessions; and to transportation "in a reservation under the exclusive jurisdiction of the United States or on a public highway." As to the joint motor/water tariff jurisdiction, the Court of Appeals for the District of Columbia Circuit held in 1981 that the ICC has jurisdiction of such tariffs between the continental United States and Puerto Rico. Puerto Rico Maritime Shipping Authority v. Interstate Commerce Commission, 645 F.2d 1102. If any such joint fares exist to the territories, the ICC by analogy would have jurisdiction over them. It is stated above in connection with joint rail/water fares that there are probably no such fares to the Pacific territories or to the Virgin Islands. The same is almost certainly true in the case of joint motor/water fares. As to "reservations" under exclusive Federal jurisdiction, there are no such reservations in the territories. And the "public highway" provision, given the statute from which it is derived (formerly 49 U.S.C. 303(c)), seems clearly limited to the States and the District of Columbia.

--Section 10541 provides for the ICC's jurisdiction over water carriers serving places in the States. The territories are clearly excluded.

--Section 10561 concerns jurisdiction over household goods freight forwarders who provide transportation between places in States, and this jurisdiction has no application to the territories.

References to territories:

Subtitle IV of Title 49 contains references from time to time to the "territories and possessions" of the United States. Except for the reference in section 10501, discussed above, these references have no effect so far as the extent of ICC regulatory jurisdiction is concerned. They appear in fact to represent an effort to update territorial nomenclature. While the motive is commendable, the result may as a legal matter give rise to uncertainty--but it is minimal.

For example, the original Interstate Commerce Act of 1887 referred, as statutes of that era generally did, to the "States and Territories." That reference meant incorporated territories (for at that time the U.S. had none that were not incorporated). The recent law revisers have turned the 1887 "Territories" into "territories and possessions," thereby picking up the unincorporated territories of Guam, Samoa, the Virgin Islands, and possibly (but not certainly) the Northern

Marianas. And this may not be what the Congress intended, or indeed what the law revisers intended. (See, for example, 49 U.S.C. 10746, 10781, 11507, and their predecessors, formerly 49 U.S.C. 1(8), 19a(c), 60, respectively.) But the matter requires no correction, for the sections are immaterial so far as the insular areas are concerned. The 49 U.S.C. 10746 reference is to rail carriers; 49 U.S.C. 10781 refers to the carriers discussed above under Section 10501, which are rail, rail and water, and pipeline; and 49 U.S.C. 11507 provides for State (or territorial) jurisdiction over most prison-made goods. There are no problems presented by these.

Similarly, a 1950 statute that referred, as statutes of that era generally did, to the "Territories and possessions" of the United States (formerly 49 U.S.C. 306(a)(2)) has been changed by the law revisers to "territories and possessions" (49 U.S.C. 10932(a)). The usage is more modern, and unlike the other modifications referred to above, it clearly effects no change in the law.

<u>Conclusion</u>: The interstate commerce laws present no practical problem to the territories. It is unlikely that they ever will. But if transportation techniques in or to the territories develop in such a way as to invite ICC jurisdiction, then it would be wise to reexamine the question of the application of these laws and their actual effects in the territories.

<u>Federal agency comments</u>: Comments were invited in 1982 from the Department of Justice and the Interstate Commerce Commission. All comments received have been reflected above.

Memorandum No. 49-3
May 1982
Revised May 1991

Subject: Chapters 1-19 of Title 49 Appendix, Transportation (49 App. U.S.C. 1-1203), including:

(a) Bills of Lading
Title 49 App., Chapter 4 (49 App. U.S.C. 81-124)

(b) Inland Waterways Transportation
Title 49 App., Chapter 5 (49 App. U.S.C. 142)

(c) Air Commerce
Title 49 App., Chapter 6 (49 App. U.S.C. 211-213, 231)

(d) Contraband Seizure
Title 49 App., Chapter 11 (49 App. U.S.C. 781-789)

(e) International Aviation Facilities
Title 49 App., Chapter 15 (49 App. U.S.C. 1151-1160)

(f) Medals of Honor
Title 49 App., Chapter 17 (49 App. U.S.C. 1201-1203)

Comment: The statutes considered herein present no problems of known consequence to the territories, but consideration should be given to expanding the enforcement provision contained in the contraband seizure laws (discussed at (d) below) to include Samoa and the Northern Marianas.

Discussion: Of the first 19 chapters of Title 49 and its Appendix, 13 have been repealed or transferred to other parts of the Code, and they are thus not discussed here. The six chapters that remain in whole or in part are discussed below. Among the chapters that have been repealed are those pertaining to interstate commerce and its regulation, matters now dealt with in Subtitle IV of Title 49, which was enacted into positive law in 1978. Those laws are considered in Memorandum No. 49-2.

(a) The 1916 statute pertaining to Bills of Lading (49 App. U.S.C. 81-124) applies to and within the territories. The statute is designed to cause bills of lading to be treated as fully negotiable instruments, and to that end it specifies the rights of the carrier, the consignor, the consignee, purchasers, creditors, and other relevant parties. The law applies to the territories, given the definition of "State" to include "any . . . insular possession" (49 App. U.S.C. 122), and it applies also to transportation between States and territories and within a "territory" (49 App. U.S.C. 81). To reach the latter conclusion one need only construe a "Territory" to include a "territory," which is easily done under Puerto Rico v. Shell Oil Co., 302 U.S. 253 (1937). The law did apply to transactions within incorporated territories ("Territories"), and it applies to transactions within the District of Columbia (49 App. U.S.C. 81, 122), so the same treatment would occur with respect to transactions within unincorporated territories--though not within the Northern Marianas, because they are entitled to "State"-like treatment under section 502(a)(2) of the Covenant. Probably few goods are carried within the present territories on the basis of negotiable bills of lading, but for such goods as are so carried, this 1916 act is probably useful, containing as it does rather ordinary rules of commercial transactions.

Two sections, each of very limited importance, provide treatment for the territories that differs from the treatment of the States: 49 App. U.S.C. 84 and 85 concerning carrier liability apply only to transportation on the North American Continent. The relative age of the sections (1916), plus the absence of reported decisions concerning them, suggest that these sections are unlikely to be of substantial interest in the territories.

(b) Only one section remains in the chapter entitled Inland Waterways Transportation (49 App. U.S.C. 142), and it charges the Secretary of Transportation with promoting "inland waterway transportation facilities in connection with the commerce of the United States." The territories have no "inland waterways" of significance to intraterritorial transportation.

(c) A very few sections of Chapter 6 on Air Commerce remain live, but they are of no interest to the territories. That is, the law that permits the Secretary of the Interior to lease public lands for airports (49 App. U.S.C. 211-213) is irrelevant, for there are in the territories no "public lands" as that term is used in Federal law. The 1931 law permitting participation in the International Technical Committee of Aerial Legal Experts is probably obsolete, but in any event it contains no troublesome geographic limitations (49 App. U.S.C. 231).

(d) The 1939 statute providing for contraband seizure (49 App. U.S.C. 781-789) permits the seizure and forfeiture of any vessel, vehicle, or aircraft that is used for the transportation of articles of contraband. Contraband articles consist of--

(1) certain narcotics, possessed or handled in violation of U.S. law or transported "within any Territory [or] possession" or between States, Territories, and possessions;[1/]

(2) firearms that involve a violation of the National Firearms Act;

(3) certain counterfeit coins; and

(4) certain cigarettes with respect to which State taxes have not been paid (49 U.S.C. 781)[2/]

[1/] Transportation "within" the Northern Marianas would not be covered, because the Northern Marianas is entitled to "State"-like treatment under section 502(a)(2) of the Covenant.

[2/] The application to the territories of the Federal statutes on these subjects is considered in connection with each of the pertinent laws: narcotics laws (Memorandum No. 21-6); firearms (Memorandum No. 26-4); coins (Memorandum No. 31-1); and nontaxed cigarettes (Memorandum No. 18-1). Their application to the territories should not be assumed from internal references in the contraband seizure statute here considered.

Enforcement is the responsibility of the Customs Service, but that agency has no agents stationed in the territories, except for the Virgin Islands. In light of that fact, the Congress in 1956, in the Guam Omnibus Act that implemented recommendations of the Commission on the Application of Federal Laws to Guam, provided that in Guam enforcement and administration of the contraband seizure act would be the responsibility of the Governor of Guam and his subordinates (49 App. U.S.C. 789). The authority earlier vested in the Secretary of the Treasury to designate officers to assist in enforcement (49 App. U.S.C. 783) was regarded as insufficient to permit him to arrange for enforcement in the territories by territorial governments.

It may be that the Guam provision should be expanded to include Samoa and the Northern Marianas, given the concern with drug trafficking in all the insular areas. Since territorial governors are now uniformly elected, such a provision (and the existing 49 App. U.S.C. 789) could be vulnerable to Constitutional attack under the Appointments Clause, but that problem could probably be overcome by authorizing the head of the agency to appoint the Governor as his enforcement agent.

(e) A 1948 statute pertaining to <u>International Aviation Facilities</u> (49 App. U.S.C. 1151-1160) applies in small part to the territories, but the matter appears to be of little consequence, and no legislation modification is necessary. The statute relates to airports in foreign territory--a term defined so as to include the Trust Territory (but not the territories), because it includes ". . . any area of land . . . administered by the United States . . . . under any international agreement" (49 App. U.S.C. 1151(3))--and it permits the construction by the U.S. of airports in foreign territory. The statute also authorizes the training of foreign nationals in aeronautics, the acceptance of funds from foreign governments or international organizations for U.S. services, and the transfer of airport property of the Defense Department to the Secretary of Transportation--this if the property is located outside the "continental" United States (49 App. U.S.C. 1157, 1159). Because for this purpose Alaska is "outside" the U.S. (along with Hawaii and the territories), the territories are not receiving adverse discriminatory treatment based upon their political status, so these provisions are unobjectionable.

(f) Medals of Honor (49 App. U.S.C. 1201-1203) may be awarded for acts of heroism pertaining to a railroad within the United States and to "any motor vehicle on the public highways, roads, or streets of the United States" (49 App. U.S.C. 1201). Although the "United States" is not defined, the legislative history suggests that one who performs an heroic act on a territorial highway, etc., would probably be eligible. This seems so because, while the original legislation was confined to vehicles regulated by the Interstate Commerce Commission, the Congress took pleasure before the legislative process was completed in eliminating that limitation and thus expanding the eligible areas (1957 U.S. Code Cong. and Admin. News 1204-1205).

Conclusion: None of the statutes discussed above requires modification to accommodate the territories, excepting the enforcement provisions for contraband seizure (49 App. U.S.C. 789) which might usefully extend to Samoa and the Northern Marianas.

Federal agency comments: Comments were invited from the Departments of Defense, Justice, Transportation, and the Treasury, and all comments received have been reflected above.

Memorandum No. 49-4
April 1982
Revised November 1982
Revised May 1991

Subject: Federal Aviation Program
Title 49 Appendix, Chapter 20 (49 App. U.S.C. 1301-1557), including--

The Federal Aviation Act of 1958
The Airline Deregulation Act of 1978

Note: This memorandum, drafted and revised in 1982, has been modestly revised in May 1991--but only to reflect new U.S Code references, to add footnotes to provide some updating, and to change verb tenses. Much of what is stated below, particularly with respect to the Trust Territory, is now of historic interest only, but it has been retained for that reason.

Purpose: To regulate air transportation services to, from, and within the United States, and to encourage safe air transportation services.

Territorial application: The Federal Aviation Act and the related statutes considered herein apply fully to the Virgin Islands, Guam, American Samoa, and the Northern Mariana. The application of the Federal Aviation Act to the Trust Territory was formerly in dispute, with the two principal agencies concerned with its administration holding opposite opinions.

Recommendation: Although the Federal Aviation Act has been the source of a number of problems in the territories, and particularly in the Trust Territory--as described below--the amendment of it or of related statutes in this chapter of Title 49 is not necessary. Trusteeship termination and airline deregulation have resolved most of the serious issues.

Discussion:

Substance of the Chapter:

The Federal Aviation Act of 1958 defines the "United States" for purposes of the Act to include the States, the Territories, and the possessions (49 App. U.S.C. 1301(41)); and it defines "possessions" to include the Canal Zone, "all other possessions of the United States," and--if not "manifestly incompatible"--Puerto Rico (49 App. U.S.C. 1301(34)). The term "interstate air commerce"and "interstate air transportation" include carriage between places in the same possession (49 App. U.S.C. 1301(23)(a), (24)(a)). "Overseas air transportation" means transportation from a State or the District of Columbia to a Territory or possession, or between one Territory or possession and another, or between places within the same Territory or possession (49 App. U.S.C. 1301(24)).

The 1958 Act sets forth the functions of the former Civil Aeronautics Board (CAB) and the Federal Aviation Agency (FAA), vesting in the former extensive economic regulatory powers and in the FAA, numerous functions pertaining to the safe operation of aircraft. The CAB was authorized, among other things, to

--grant to air carriers certificates of public convenience and necessity, without which lawful operation of civil aircraft in the U.S was not possible (49 App. U.S.C. 1371);

--determine the justness and reasonableness of air carrier rates, and to fix just and reasonable rates in certain circumstances--subject to significant limitations (49 App. U.S.C. 1373, 1482(d));

--issue permits to foreign air carriers seeking to provide service to and from the U.S. (49 App. U.S.C. 1372);

--fix mail rates (49 App. U.S.C. 1375);

--approve consolidations and mergers of airlines (49 App. U.S.C. 1378); and

--pay subsidies to air carriers if that is necessary in order to provide essential air service (49 App. U.S.C. 1389).

Among the functions of the FAA (or the Secretary of Transportation) are:

--the registration of aircraft, to show nationality (49 App. U.S.C. 1401);

--the certification of U.S. registered aircraft (49 App. U.S.C. 1423);

--regulating the inspection, servicing, and overhaul of aircraft (49 App. U.S.C. 1421);

--issuing airman certificates to persons who are properly qualified (49 App. U.S.C. 1422); and

--providing for the safe operation of airports (49 App. U.S.C. 1348, 1432).

Under the terms of the Airline Deregulation Act of 1978, the functions of the FAA, which is an agency of the Department of Transportation, continue. Those of the CAB, on the other hand, have terminated no later than January 1, 1985, on which date the CAB itself ceased to exist, or have been dispersed to other Federal agencies: the CAB's authority over foreign air transportation, over "essential air transportation," and over payment of subsidies to support such essential transportation, have passed to the Department of

Transportation; authority over the inter-carrier mergers has gone to the Department of Justice; and authority to set mail rates has gone to the Postal Service (49 App. U.S.C. 1551). CAB functions under 49 App. U.S.C. 1371 and 1373, referred to above, have largely terminated.

Matters of particular territorial interest:

(1) CAB-FAA jurisdiction in the Trust Territory. For many years the two Federal agencies most concerned with the administration of the Federal Aviation Act of 1958 held conflicting views as to the jurisdiction of the U.S. under the Act in the Trust Territory. The CAB took the position that it had full jurisdiction there, on the ground that the Trust Territory is a "possession" for purposes of the Act (49 App. U.S.C. 1301(34)). The CAB thus certificated Continental/Air Micronesia for Trust Territory service and it otherwise regulated that carrier's Trust Territory activities. The FAA, on the other hand, believed that the Trust Territory is not a "possession" for purposes of the Act; and such functions as the FAA has performed there--such as air traffic control--have been performed pursuant to an Executive Order issued under the Act that has the effect, in the FAA's view, of making part of the Act applicable to the Trust Territory. That is, section 1110 of the 1958 Act (49 App. U.S.C. 1510) permits the President to extend the Act to "any areas of land or water outside of the United States" if by treaty or otherwise the United States "has the necessary legal authority to take such action." (The United States has indisputable authority under the Trusteeship Agreement to legislate for the Trust Territory.) Pursuant to that section, President Eisenhower in 1959 signed Executive Order No. 10854 (set out as a note following 49 App. U.S.C. 1510), which extends Titles III and XII of the Federal Aviation Act of 1958 (pertaining to air safety and national security) to such areas, i.e., "areas . . . outside the United States" where the U.S. has authority to take such action. Assuming it was not already comprehended as a "possession," then the Trust Territory, although unnamed, was unquestionably comprehended by the Executive Order.

In reaching its legal conclusion, the CAB relied upon the Supreme court's decision in Vermilya-Brown v.

Connell, 335 U.S. 377 (1948), which held that an area of the British Crown Colony of Bermuda that was under a 99-year lease from Britain to the U.S, could be regarded as a U.S. "possession" for purposes of the Fair Labor Standards Act (29 U.S.C. 201 et seq., Memorandum No. 29-5). The term should, the Court held, be defined in light of the Congress' purpose. The FAA, on the other hand, has applied the more conventional construction, regarding "possession" as denoting an area over which the U.S. exercises sovereignty. (The FAA view is here described as "more conventional" because the Vermilya-Brown result seemed surprising when announced, and it has not had wide application since.) The U.S. does not claim and has never claimed sovereignty in the Trust Territory. The FAA thus considers that its jurisdiction in the Trust Territory derives from section 1110 of the Act and Executive Order No. 10854, on the ground that the Trust Territory is an area "outside the United States" where the U.S. is authorized to legislate.

No useful purpose would be served by a judgment here as to which legal position is the better one. There is clearly a respectable foundation for each conclusion.

If the conflict were likely to create difficulties for many years to come, then it ought to be resolved. This could be achieved by a further Executive Order, issued pursuant to section 1110 of Act (49 App. U.S.C. 1510). Of course it could also be resolved through Congressional action, inasmuch as the fundamental question is one of the Congress' intent. The conflict, however, will disappear upon trusteeship termination, and because that event is expected to occur soon,[1/] the President or the Congress ought not to be asked to act--unless new and more compelling circumstances arise. In addition, the problem would be materially reduced in any event as of January 1, 1985, because of Airline deregulation,

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1/ Trusteeship termination as to the Northern Marianas, the Federated States of Micronesia, and the Marshalls occurred in 1986 pursuant to Presidential Proclamation 5564 of November 3, 1986. The Security Council of the United Nations agreed with that result in December 1990. The trusteeship continues (as of May 1991) with respect to Palau.

but it is reasonable to suppose that trusteeship termination will precede that date.

The Compact of Free Association, signed in 1982 by the United States and the three Trust Territory entities, provides that both the CAB and the FAA would have certain jurisdiction in post-trusteeship Micronesia.[2/] As detailed in a separate Federal Programs and Services Agreement,

--the FAA would provide to the Marshalls and the Federated States certain aviation safety services "at the levels equivalent to those available to the Trust Territory of the Pacific Islands during the year prior to the effective date of this Compact" (section 221(a) of the Compact, Article VIII of the Agreement), and it would also provide certain technical assistance; and

--the CAB or its successors would provide economic services and related programs, including subsidy compensation, if necessary to support essential air transportation services between the U.S. and the Marshalls and the U.S. and the Federated States, to U.S. carriers and in some circumstances to carriers of either the Marshalls or the Federated States. The Marshalls and the Federated States would assume responsibility for their own air services, but U.S. carriers would be assured of unrestricted access to these states. The CAB would have authority to grant authorization to carriers of the Marshalls and the Federated States to provide services between Guam, the Northern Marianas, and Honolulu, and within the Northern Marianas--in effect a potential exemption from the cabotage rules for these Micronesian carriers. In addition, the CAB would also, if requested, "process" applications pertaining to air service to, from, and within the Marshalls and the Federated States, but the disposition of

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[2/] The Compact of Free Association is in effect in the Federated States of Micronesia and the Marshalls, pursuant to the Compact of Free Association Act (P.L. 99 239) and Presidential Proclamation 5564 of November 3, 1986. It is not in effect as of May 1991 in Palau, nor is the Federal Programs and Services Agreement. Palau remains a trust territory.

the applications would be the responsibility of the Freely Associated State. (Article IX, Federal Programs and Services Agreement).

In sum, although the CAB-FAA disharmony has been inconvenient and untidy, and expensive in the sense that it has consumed countless governmental working hours, either administrative or legislative action to resolve it is unnecessary. Legislative action in particular is also expensive and should not be sought if the problem will otherwise go away. This one will.

(2) FAA and the Marshalls. Beginning in 1980, the Marshall Islands government commenced its own air service, using two NOMAD aircraft purchased in Australia. The question soon arose as to the safety inspection and certification of such aircraft, with the FAA stating that it was without authority to perform that function owing to its basic legal position described above. (Executive Order No. 10854 did not authorize the FAA to perform the air safety functions here involved.) In that state of affairs, it was generally agreed that the problem could have been resolved through either of two routes: a further Executive Order, pursuant to 49 App. U.S.C. 1510, expanding the FAA's jurisdiction, or the transfer of the NOMADS to U.S. citizen ownership. Another possible solution might have involved the promulgation by Interior of aviation rules, with FAA help in administering them on a reimbursable basis. Although Marshall Islands representatives from time to time were receptive to some of these approaches, their views shifted before either result was accomplished. Finally, in early 1982, the FAA inspected the aircraft under an agreement with the Interior Department and reported the results, which were satisfactory as to safety. The key parties, for now, find this an acceptable solution. This legal problem, too, will cease upon trusteeship termination.

(3) Citizenship. It should be noted in passing that a problem the territories probably do not have under the Federal Aviation Act is the problem of citizenship. While Federal statutes often define "citizen of the United States" to mean precisely that and no more, the Federal Aviation Act's definition is unusual: It defines the term to include as well

"an individual who is a citizen of one of its [the United States] possessions" (49 App. U.S.C. 1301(16)). Thus, citizens of American Samoa who are noncitizen nationals of the U.S., and citizens of the Northern Marianas who will be but are not yet US. citizens, appear to be included in the term and entitled to all the benefits conferred by the statute on U.S. citizens.[3] Given the CAB's view that the Trust Territory is a "possession," Micronesians could also constitute "citizens of the United States" for those parts of the Act that are administered by the CAB.

(4) Cabotage laws. The cabotage laws (49 App. U.S.C. 1372, 1508(b)), are the air equivalent of the coastwise laws. In pertinent part 49 App. U.S.C. 1508(b) provides that--

> Foreign civil aircraft . . . shall not take on at any point within the United States, persons, property, or mail carried for compensation or hire and

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[3] The Northern Mariana Islands Commission on Federal Laws, in its January 1982 report to the Congress, recommended that legislation be enacted to make explicit that this definition (49 App. U.S.C. 1301(16)) includes citizens of the Northern Marianas. It offered similar recommendations with respect to the aviation laws appearing at 49 App. U.S.C. 1304, 1371(d)(4), 1388, 1401, 1422, and 1533. While further legislation would obviously eliminate any question, it does appear that the same result should be reached without it: The Northern Marianas are now, as a matter of law, an unincorporated territory (i.e., "territory") of the U.S.; an unincorporated territory is synonymous with a "possession;" and citizens of possessions are citizens of the U.S. for purposes of the Federal Aviation Act of 1958. Furthermore, under section 502(a)(2) of the Northern Marianas Covenant, the Northern Marianas should receive the same treatment as Guam under the Federal Aviation Act. (Note added in May 1991: The people of the Northern Marianas have for the most part become citizens of the United States, under Article III of the Northern Marianas Covenant, which became effective with the termination of the trusteeship as to the Northern Marianas by Presidential Proclamation 5564 of November 3, 1986.)

destined for another point within the United States. . . .

Two exceptions follow, both so narrow as to confirm the rigidity and relative sanctity of the cabotage restrictions: 30 day emergency exemptions may be granted to a foreign air carrier, if certain findings are made (49 App. U.S.C. 1386(b)(7)); and U.S. air carriers may in certain circumstances use leased foreign aircraft (49 App. U.S.C. 1508(b)). The cabotage laws are scheduled to survive deregulation.

Complaints concerning the cabotage laws and requests for exemption from them have been heard from time to time from both Guam and the Northern Marianas. The cabotage laws would not apply to the Trust Territory entities under the Compact. At that point, Trust Territory sites would be foreign, and the U.S. cabotage rules would not affect the carriage of persons or property between two points within Micronesia or between Micronesia and the U.S.

With trusteeship termination, and the status of Micronesian airports as foreign, Guam's interest in relief from the cabotage laws so far as Micronesia is concerned should also cease. Guam has been interested in the carriage of persons and property between Guam and Trust Territory points by foreign carriers--something that, as matters now stand, will not be barred when the trusteeship is terminated. As for service between Guam and Hawaii and the U.S. mainland, Guam would welcome more service, but Guam has not lately asked for an exemption from the cabotage laws for this purpose, and given the air service that it now has available, coupled with the political difficulty involved in achieving an exemption form the cabotage laws, it is unlikely that such a request would be successful. It appears, therefore, that a cabotage exemption for Guam need not now be sought.

The former Governor of the Northern Marianas stated that the cabotage laws create an inhibition to the development of the tourist industry there:

> The interpretation of the so-called cabotage laws considers the Saipan/Guam leg to be domestic, therefore, Japan Air Lines and other foreign carriers cannot pick up passengers who go to Guam and vice versa. This inhibits tourists from utilizing the circle-tour concept, where they would visit Saipan and Guam at the same time as no common fare can be published. In this day and age of high energy costs, it is wasteful. (Letter from Governor Comacho to the Interior Department, November 10, 1981.)

The FAA states informally that circle traffic, serving both Saipan and Guam from Japan, is now possible. Beyond that, the possible advantage that the Northern Marianas might gain from the general exemption the former Governor outlined above would seem to be relatively minor, in terms of the likely cost to the current U.S. carrier serving the Trust Territory, and to the United States. The Guam-Saipan leg of the service provided in the Trust Territory by Continental/Air Micronesia is unusually lucrative; Continental/Air Micronesia argue, and statistics appear to support the argument, that a diminution of revenues from this leg could jeopardize its Trust Territory service; reduction in service could force the U.S. either to provide a contract service or a subsidy, so that essential air transportation could continue--and either way, this would constitute a substantial cost to the U.S. On a cost-effective basis, therefore, an exemption for the Northern Marianas from the cabotage laws appears to be unjustified.

In June 1982 the staff of the Northern Mariana Islands Commission on Federal Laws circulated a draft recommendation that the cabotage laws be amended to lift restrictions to the extent necessary to permit foreign air carriers to transport passengers between the Northern Marianas and Guam. The staff recommendation states that tourism is the Northern Marianas principal industry; that the greater availability of service between the Northern Marianas and Guam would be attractive to tourists; that the service now provided between these points by the U.S. domestic carrier (Continental/Air Micronesia) is incidental to its Guam-Japanese service; and that even if Continental/Air Micronesia were to suffer a short term loss on this leg because of foreign competition, that loss should be offset in the long run by a larger tourist pool.

That recommendation is not seconded here because of the potential cost to the United States, described above. In addition, a cabotage exemption for the Northern Marianas would almost certainly precipitate requests for the same exemption from other territories, and fairness would require that they all receive the same treatment. But the possible economic injury to U.S. carriers would then grow substantially, and the potential costs to the United States would also grow, thereby making the proposal even less attractive from the Federal Government's standpoint.

(5) Intra-territorial regulation. The Act's definition of "interstate air commerce" includes air transportation "between places in the same Territory or possession of the United States" (49 App. U.S.C. 1301(23)(a)). The CAB's regulatory authority, thus, extended to intraterritorial air transportation, and this means that air service between two points in the Virgin Islands, or Samoa, was subject to CAB regulation--whereas service exclusively between two points in a State would not be so subject and could not be, given the U.S. Constitution. Air service between points in the Northern Marianas, however, could not be the subject of regulation, because the Northern Marianas is entitled to "State"-like treatment under section 502(a)(2) of the Covenant.

In this state of affairs, which is not unusual in the Federal regulatory framework, a recommendation that the law be amended so as to accord to the territories the same treatment as the States is often appropriate. Such a recommendation is not made here, however, first, because the offshore areas have not been heard to complain of the Federal regulatory authority, perhaps because it relieves the territorial governments of the need to perform it; and secondly, because with the demise of the CAB on January 1, 1985, the problem will disappear anyway. In fact, most intraterritorial carriers probably provide service outside the territory as well, so that they are routinely subject to CAB regulation for that reason.

(6) Presidential approval. Except for its provisions concerning the regulation of intraterritorial air transportation, described immediately above, the Federal Aviation Act now contains no provisions by which the territories are treated in a way that differs from the States.[4] That has only recently, however, become true. Until 1978 any CAB certificate concerning "overseas or foreign air transportation" was subject to the President's approval--without limitation as to the bases for his disapproval. That occasionally gave rise to territorial complaints, based on a second-class-treatment argument. But the Deregulation Act eliminated "overseas," the term that had picked up the territories; and it now limits the President's disapproval to reasons of foreign relations or national defense (49 App. U.S.C. 1461). So the territories now experience the same treatment as the States.

(7) Current Guam concerns. In preparation for a conference held in Washington, D.C., in April 1982 on the subject of Federal constraints to economic development in Guam, Guam business spokesmen identified four problems associated with air transportation. It seems relevant to advert to them here, but to point out that none of these problems would be ameliorated or resolved by legislation amending the Federal aviation statutes now under consideration (Chapter 20 of Title 49, App. U.S.C.):

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[4] Interestingly, in the Senate version of the legislation that became the Airline Deregulation Act of 1978, there is displayed an anxiety to give Puerto Rico and the Virgin Islands special attention, and to treat them as well as the States, but, by silence, to do less well by the Pacific territories and the Trust Territory. Puerto Rico and the Virgin Islands were singled out in several instances for special mention in the Senate bill (see 1978 U.S. Code Cong. and Admin. News 3779, 3781, 3794, 3796). But the legislation ultimately enacted accorded equal treatment to all of the territories.

1. Guam spokesmen argue that they need more air service to Hawaii, a matter that was at issue in the Guam Essential Air Transportation proceeding before the CAB, but that proceeding has recently been terminated for technical reasons, with no decision on the merits. That problem of Hawaii-Guam service, however, concerns CAB policy, not basic legal authority. The latter is now no less complete for Guam than for any other part of the U.S.

2. They also argue that foreign carriers are discouraged from serving Guam, notwithstanding the fact that bilateral air service agreements generally name Guam as a permitted stop, because by stopping at Guam the foreign carriers forfeit the right to stop at a mainland city--this because the bilateral agreements provide for a maximum number of U.S. stops. Apart from the fact that the matter is one of policy, not legislation, an informal check with the CAB indicates that this is not in fact a problem. The relevant bilateral agreements generally permit stops at a maximum number of U.S. points, plus Guam.

3. It is argued that joint use of Guam's International Airport by the Navy and civil air carriers discourages the development of general aviation in Guam. This matter could be dealt with administratively.

4. Guam's spokesmen believe that Customs pre-clearance in Guam would make Guam a more attractive place to visit for both tourists and airlines. This matter, too, is an administrative one, and in any case outside the scope of air transportation legislation.

Conclusion: The problems outlined above have largely disappeared, either because of trusteeship termination of because of airline deregulation. Accordingly, there is no need to seek amendments to the Federal Aviation Act of 1958 and related statutes in order to accommodate the territories.

Federal agency comments: Comments were invited in 1982 from the Departments of Defense, Justice, State, and Transportation and from the Civil Aeronautics Board. All comments received have been reflected above.

Memorandum No. 49-5
May 1982
Revised May 1991

Subject: Urban Mass Transportation
Title 49, Chapter 21 (49 App. U.S.C. 1601-1621)

Purpose: To provide Federal loans and grants to public bodies for planning, constructing, operating, and extending mass transit systems.

Territorial application: The Urban Mass Transportation Act applies to the territories.

Recommendation: The statute requires no change in order to accommodate the needs of the territories.

Discussion:

Substance of the statute: The Urban Mass Transportation Act provides Federal assistance for the creation and improvement of transportation systems that move people to and from metropolitan areas. It is concerned fundamentally with aiding bus and rail systems, "fixed guideway systems" (e.g., subways and trolleys), and related transportation projects (e.g., walkways, transit malls, and open space) (49 App. U.S.C. 1602(a)(1)). In addition, however, the statute provides for formula grants for nonurban areas, "for expenditure for public transportation projects" (49 App. U.S.C. 1614); and it also authorizes grants for projects "to meet the special needs of elderly and handicapped persons" (49 App. U.S.C. 1612(b)).

The Federal aid provided under the law need not be directed solely to publicly-owned transportation systems. Private providers of public transportation also qualify (e.g., 49 App. U.S.C. 1614(c)).

The statute imposes a number of requirements upon grantees: payment of Davis-Bacon Act wages (49 App. U.S.C. 1609); environmental protection (49 App. U.S.C. 1610); use of a uniform system of accounts and records (49 App. U.S.C.

1611); deference to the needs of the handicapped (49 App. U.S.C. 1612); and nondiscrimination in employment (49 App. U.S.C. 1615).

Value to the territories: Although a first glance suggests that the subject matter of the Urban Mass Transportation Act (UMTA) would have little to offer the territories, a second glance suggests the contrary: the Virgin Islands and Guam have each expressed the need over the years for improved public transportation services. While obviously neither territory requires subways, each could profit from additional and predictable bus service. Samoa and the Northern Marianas have similar, if lesser, needs. Further, the two small programs described above (grants for nonurban areas, and for meeting the needs of the elderly and handicapped) could have a value to the territories.

In fact, however, the territories have used the statute only slightly. Reports on Federal grants for fiscal years 1979 and 1980 show that no territory received assistance under UMTA for fiscal year 1979, but the Virgin Islands received a capital improvement grant in fiscal year 1980.[1]

Territorial application: The original Urban Mass Transportation Act, enacted in 1964, applied in general to the territories. It defined "States" to include "the possessions of the United States." (P.L. 88-365, Sec. 9(d)(1), 78 Stat. 302, 306). The readily available legislative history does not reveal any rationale for this geographical application (1964 U.S. Code Cong. and Admin. News 2569, 2588). A key section, however, one enacted in 1974 that provides grants for "urbanized areas," could be carried out only in the States and

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[1] Note added in May 1991: Reports to the Department of the Interior show that all of the territories have received UMTA assistance in recent years. In the late 1980's and early 1990's, all four received Federal funds for public transportation in nonurban areas (49 App. U.S.C. 1614; CFDA 20.509); and the Virgin Islands, Guam, and Samoa have received assistance for programs for the elderly and the handicapped (49 App. U.S.C. 1612(b); CFDA 20.513).

Puerto Rico (P.L. 93-503, sec. 103, 88 Stat. 1565, 1567). Again, the legislative history does not reveal why. But that section has since been substantially amended, and the particular reference to the States and Puerto Rico no longer exists (49 App. U.S.C. 1604). No other geographical limitation that would adversely affect the territories remains in the law.

(Added in May 1991: The term "State: is now defined to include, by name, the Virgin Islands, Guam, Samoa, and the Northern Marianas (49 App. U.S.C. 1608(c)(9)).)

Conclusion: The Urban Mass Transportation Act does not require change in order to accommodate the territories.

Federal agency comments: Comments were invited from the Departments of Justice and Transportation. All comments received have been reflected above.

Memorandum No. 49-6
May 1982
Revised May 1991

Subject: (a) Department of Transportation
Title 49 Appendix, Chapter 23 (49 App. U.S.C. 1652f-1659)

(b) Natural Gas Pipeline Safety
Title 49 Appendix, Chapter 24 (49 App. U.S.C. 1671-1687)

(c) Aviation Facilities Expansion and Improvement
Title 49 Appendix, Chapter 25 (49 App. U.S.C. 1704-1743)

(d) Hazardous Materials Transportation
Title 49 Appendix, Chapter 27 (49 App. U.S.C. 1801-1819)

(e) National Transportation Safety Board
Title 49 Appendix, Chapter 28 (49 App. U.S.C. 1901-1907)

(f) Hazardous Liquid Pipeline Safety
Title 49 Appendix, Chapter 29 (49 App. U.S.C. 2001-2015)

(g) Abatement of Aviation Noise
Title 49 Appendix, Chapter 30 (49 App. U.S.C. 2101-2125)

(h) Aviation Noise Policy
Title 49 Appendix, Chapter 30A (49 App. U.S.C. 2151-2158)

Comment: The statutes considered herein present no problems to the territories and do not require legislative modification.

Discussion: (a) Much of Chapter 23, entitled Department of Transportation (49 App. U.S.C. 1652f-1659), has been moved to the codified Subtitle I of Title 49 (Memorandum No. 49-1(a)), and the sections that remain are irrelevant to the territories. The remaining sections concern such matters as the conversion of railroad terminals, and Federal grants to "States" (defined to exclude the territories at 49 App. U.S.C.

1654(p) and 49 U.S.C. 10501, Memorandum No. 49-2) for "local rail freight assistance." This is a kind of assistance that the territories could not use.

(b) Inasmuch as natural gas is not gathered, transmitted, or distributed in the territories, the fact that the Natural Gas Pipeline Safety Act of 1968 (49 App. U.S.C. 1671-1687) does not apply to them--being confined to the States, the District of Columbia, and Puerto Rico (49 App. U.S.C. 1671(5)--is precisely as it should be.

(c) Much of the chapter entitled Aviation Facilities Expansion and Improvement (49 App. U.S.C. 1704-1743) which had contained the Airport and Airway Development Act of 1970, was repealed in 1982 with the enactment of the Airport and Airway Improvement Act of 1982 (Memorandum No. 49-7). The few sections of the chapter that remain (49 App. U.S.C. 1704, 1713a, 1731, 1741, and 1743) create no problems for the territories.

(d) This chapter, which constitutes the Hazardous Materials Transportation Act, enacted in 1975 (49 App. U.S.C. 1801-1819), empowers the Secretary of Transportation, to regulate the transportation, by air, sea, or land, between "States" of hazardous materials--such as radioactive material, explosives, flammable or combustible liquids or solids, and others (49 App. U.S.C. 1803). The term "State" includes the Virgin Islands, Guam, Samoa, and the Northern Marianas (49 App. U.S.C. 1802(14)). Certain transportation is exempt from regulation, including that to which the Secretary provides a waiver because it meets certain safety and public interest standards (49 App. U.S.C. 1806(a)), and that which is already regulated under the Ports and Waterways Safety Act of 1972 (33 U.S.C. 1221, see Memorandum No. 33-5(d)). Inasmuch as that 1972 statute is fully applicable to the territories, it follows that transportation to them of hazardous materials is susceptible to regulation in the territories as in the States, under a combination of the Hazardous Materials Transportation Act and the Ports and Waterways Safety Act. This is as it should be.

(e) The National Transportation Safety Board (49 App. U.S.C. 1901-1907), an unusually independent Federal agency, is charged with investigating transportation accidents in the air, on land or sea, in pipelines, or on railroads. The geographical limits on its authority are nowhere spelt out in its authorizing legislation, but it seems clear that the Board has authority to investigate air accidents in the territories, because its authority to do so derives from that of the Civil Aeronautics Board under the Federal Aviation Act of 1958 (49 App. U.S.C. 1903(a)(1)(A)), an Act that applied to all "Territories and possessions" (see Memorandum No. 49-4). It has authority in connection with marine accidents in the territories, because that authority extends to the "territorial seas of the United States" (49 App. U.S.C. 1903(a)(1)(E)), and the territorial sea, as defined in Presidential Proclamation 5928 of December 27, 1988, expressly includes the waters surrounding the Virgin Islands, Guam, Samoa, and the Northern Marianas. The Board's jurisdiction with respect to accidents on highways is uncertain but in doubt, because the highway authority is to be exercised "in cooperation with the States" (49 App. U.S.C. 1903(a)(1)(B) and "State" is undefined. The Board has investigated air crashes in the territories, but it reports informally that the question of its authority to investigate other transportation accidents has not arisen. The matter of investigating highway accidents does not seem sufficiently material to warrant legislative correction.

(f) Because the Hazardous Liquid Pipeline Safety Act of 1979 (49 App. U.S.C. 2001-2015) is directed toward a problem that does not exist in the territories (i.e., the transportation of liquids by pipeline), it is untroublesome that the statute may apply only to the States, the District of Columbia, and Puerto Rico (49 App. U.S.C. 2001(8)). The Act does not expressly limit the Secretary of Transportation's authority to those areas, but because the issue is currently academic and likely to remain so, the point does not require resolution.

(g) The chapter entitled Abatement of Aviation Noise (49 App. U.S.C. 2101-2125), which contains the Aviation Safety and Noise Abatement Act of 1979, provides for discretionary grants by the Secretary of Transportation for noise abatement projects at public use airports. Such airports in the territories would be covered (49 App. U.S.C. 2101(1), and 2202(18), Memorandum No. 49-7).

(h) Aviation Noise Policy (49 App. U.S.C. 2151-2158) contains the Airport Noise and Capacity Act of 1990. That Act directs the Secretary of Transportation to issue regulations by July 1, 1991, outlining a national aviation noise policy--many of the details of which are specified in the Act--and to report to the Congress by that date recommendations for additional legislation and for appropriate relationships between Federal and "State" programs on this subject (49 App. U.S.C. 2152(a), (c)). The term "State" is undefined, but that seems not a serious shortcoming, inasmuch as legislation and recommendations to follow can be expected to take account of territorial interests. In due course, however, compliance with certain noise level restrictions will be required in order to qualify for grants under the Airport and Airway Improvement Act, an important Act that is applicable to the territories (see Memorandum No. 49-7). After December 21, 1999, large aircraft (i.e., "civil subsonic turbojet aircraft" weighing over 75,000 pounds, 49 App. U.S.C. 2157(a)) cannot be operated to or from "an airport in the United States" unless there is compliance with the Secretary's noise level requirements, but that prohibition would not apply to aircraft used "solely to provide air transportation outside the 48 contiguous States" (49 App. U.S.C. 2157(d)). So much of this law is prospective in effect that it is not now possible to conclude whether its treatment of the territories is appropriate. It would appear, however, that noise abatement in the insular areas is no less desirable than in the States. This Act is directed to that end.

Conclusion: None of the statutes considered above requires modification to accommodate the territories.

Federal agency comments: Except for (h) (Aviation Noise Policy), all of the comments on the above statutes were shared in 1982 with the Departments of Justice and Transportation, and all comments received are reflected above. The Aviation Noise Policy law was enacted in 1990, and was, therefore, not a part of the 1982 comment process.

Memorandum No. 49-7
October 1982
Revised June 1991

Subject: Airport and Airway Improvement
Title 49 Appendix, Chapter 31 (49 App. U.S.C. 2201-2227)

Purpose: To provide Federal financial assistance for the improvement of airports.

Territorial application: Chapter 31, which contains the Airport and Airway Improvement Act of 1982, as amended, applies fully to the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands.

Recommendation: The Act requires no change to meet the particular needs of the territories.

Discussion: The Airport and Airway Improvement Act of 1982 replaced the 1970 Airport and Airway Development Act (Memorandum No. 49-6(c)), and is a marked improvement over it from the standpoint of the territor es. The 1970 Act was of uneven application to the territories, suggesting that no very focussed or informed attention had been given to them by the draftsmen. The 1982 Act, approved in September 1982, applies fully, although it is interesting to note that as late as August 1982 it would have applied to none of them, being restricted to the States, the District of Columbia, and Puerto Rico (1982 U.S. Code Cong. and Admin. News 781, 1463). As enacted, however, the term "State" was defined to include expressly the Virgin Islands, Guam, Samoa and the Northern Marianas (49 App. U.S.C. 2202(23)).

The 1982 Act was enacted as Title V of the Tax Equity and Fiscal Responsibility Act of 1982, although its own legislative history much precedes that tax law. Among the major provisions of the Airport and Airway Improvement Act of 1982 are authorizations to the Secretary of Transportation to make project grants for airport development and airport planning, and for noise abatement projects (49 App. U.S.C. 2204); grants for airway improvement, including air navigation facilities (49 App. U.S.C. 2205(a)); and grants for research and development and for demonstration projects (49 App. U.S.C.

2205(b)). The apportionment scheme places some discretion in the Secretary of Transportation (see, for example, 49 App. U.S.C. 2205(a)(2)), but grants for primary airports (defined at 49 App. U.S.C. 2202(12) as those having more than 10,000 persons enplaning annually), are based on number of passengers enplaning. The most important consideration, however, for immediate purposes is that the Act accords "State-like" treatment to all of the territories in all particulars--except for one particular in which they receive far more generous treatment.

Under 49 App. U.S.C. 2206(a)(3), 12% of the amount made available annually from the "Trust fund for airport development and airport planning" (49 App. U.S.C. 2204(a)) is to be made available to all of the States (including the Virgin Islands, Guam, Samoa, the Northern Marianas, and the Trust Territory), with 99% of such sum going to the Sates as such, the District of Columbia and Puerto Rico and distributed among them on the basis of population and area. The remaining 1% is directed to the "insular areas" of the Virgin Islands, Guam, Samoa, the Northern Marianas, and the Trust Territory (49 App. U.S.C. 2206(a)(3)(A))--an amount that on a population and/or area basis is high in relation to the 99% otherwise directed. (Alaska and Puerto Rico are given more lenient treatment than other jurisdictions in that 99% category (49 App. U.S.C. 2206(b)(6)), but that merely reduces limitations placed by the law on jurisdictions in that 99% category, and the "insular areas" are not subject to those limitations. In sum, Alaska and Puerto Rico receive preferential treatment in relation to the States, but not in relation to the territories.)

In general, for projects that are approved under the Act the U.S. share is 90% (49 App. U.S.C. 2209(a)).

Conclusion: The Airport and Airway Improvement Act of 1982 requires no modification to accommodate the needs of the territories.

Federal agency comments: The Airport and Airway Improvement Act of 1982 was enacted too late to be among the subjects on which comments were sought from the Department of Transportation in 1982, and time has not permitted the comment process with respect to this revised memorandum in 1991.

Memorandum No. 49-8
June 1991

Subject: (a) Commercial Motor Vehicles
Title 49 App., Chapter 32 (49 App. U.S.C. 2301-2316)

(b) Public Airports
Title 49 App., Chapter 33 (49 App. U.S.C. 2401-2461)

(c) Motor Carrier Safety
Title 49 App., Chapter 34 (49 App. U.S.C. 2501-2521)

(d) Commercial Space Launch
Title 49 App., Chapter 35 (49 App. U.S.C. 2601-2623)

(e) Commercial Motor Vehicle Safety
Title 49 App., Chapter 36 (49 App. U.S.C. 2701-2716)

(f) Sanitary Food Transportation
Title 49 App., Chapter 37 (49 App. U.S.C. 2801-2812)

Comment: The transportation laws considered below, all of relatively recent enactment, apply to the territories when their subject matter warrants, and many are of some interest to the territories. None appears to require amendment now, except that the Sanitary Food Transportation Act of 1990, considered below at (f), should be amended to make provision for enforcement in Samoa.

Discussion: (a) Commercial Motor Vehicles (49 App. U.S.C. 2301-2316) refers to the program of Federal grants to the States--a term defined to include expressly the Virgin Islands, Guam, Samoa, and the Northern Marianas (49 App. U.S.C. 2301(6))--for the development and implementation of programs for the enforcement of Federal rules and "compatible" State rules for vehicular safety. The vehicles in question are those of a certain size, capacity, or function that transport passengers or cargo "in commerce" (49 App. U.S.C. 2301(1)). While many commercial vehicles in the territories may be exempt, as engaged only in intraterritorial commerce, many others doubtless are not, including such obvious examples as vans that carry passengers between airports and hotels, and trucks that transport cargo between docks and commercial establishments. The statute, which is sometimes referred to as the Surface Transportation Assistance Act, thus has realistic application to the territories, and in recent years, according to the

Catalog of Federal domestic Assistance, both Samoa and Guam have received grants (CFDA No. 20.218). The Virgin Islands and the Northern Marianas have not. The Federal share for assisted programs is 80% (49 App. U.S.C. 2303).

The statute also imposes certain requirements as to length and width limitations and splash and spray suppressants. Interestingly, the State of Hawaii is by law exempt from the vehicle width limitation of 102 inches (whether to permit an increase or decrease in the figure does not appear in the law, 49 App. U.S.C. 2316(a)), suggesting that if a territory were to find the limitations onerous, a statutory exclusion would not be without precedent. But no such problem has been made known, so the current treatment of the territories by this law is apparently appropriate.

(b) Public Airports (49 App. U.S.C. 2401-2461) refers to certain airports in the Washington, D.C., metropolitan area, and to their operation. It is irrelevant to the current study.

(c) The chapter entitled Motor Carrier Safety (49 App. U.S.C. 2501-2521) contains the Motor Carrier Safety Act of 1984. That Act is a near relative of the Surface Transportation Assistance Act of 1983, considered above at (a)--as shown, for example, by the similarity of their definitions of "commercial motor vehicle" (49 App. U.S.C. 2301(1), 2503(1)). As stated above, the 1983 Act applies to the territories; but the Motor Carrier Safety Act of 1984 does not. The terms "State" and "United States" are defined to exclude them (49 App. U.S.C. 2503(10), (13)). This apparent inconsistency can be explained, however, by the fact that the 1983 law is in considerable measure one that provides for a Federal financial assistance program, and it is a program from which the territories can and do in fact benefit. The Motor Carrier Safety Act of 1984 is a regulatory statute, one intended to impose safety requirements upon large trucks traveling Federal highways (1984 U.S. Code Cong. and Admin. News 4769). While there are large trucks in the territories, as well as federally-aided roads, the problem lacks the dimensions there that it surely has in the States. Additionally, both the readily available legislative history (1984 U.S. Code Cong.

and Admin. News 4769) and the law itself (49 App. U.S.C. 2512) indicate that motor carriers subject to the Interstate Commerce Act are the ones intended to be covered by the regulatory authority of the Motor Carrier Safety Act. The Interstate Commerce Act is, as a practical matter, inapplicable to the territories (see Memorandum No. 49-2). In the circumstances, the inapplicability of the Motor Carrier Safety Act of 1984 to the territories appears to be wholly appropriate.

(d) The chapter entitled Commercial Space Launch (49 App. U.S.C. 2601-2623) contains the Commercial Space Launch Act, enacted in 1984. Its declared purpose is to encourage space launches by the private sector, and to provide a licensing program (but "only to the extent necessary [to] regulate such launches"), administered by the Secretary of Transportation (49 App. U.S.C. 2601, 2602). (The licensing requirements set forth in the statute are indeed modest, given the cosmic purpose involved and the current practice of detailed legislating.) The law applies to launches by persons in the "United States," a term defined to include expressly the Virgin Islands, Guam, and Samoa, as well any other commonwealth, territory, or possession of the United States" (49 App. U.S.C. 2603(10)). The language was probably intended to comprehend the Northern Marianas, but it does not unarguably do so, given the requirement of section 105 of the Northern Marianas Covenant that a Federal law enacted after January 1978 applies to the Northern Marianas only if it is "specifically named therein." (So, it would appear that one would not violate this 1984 Act by perpetrating an unlicensed, private sector space launch from an island of the Northern Marianas.) A further shortcoming appears in the definition of "United States citizen," a term defined to exclude a noncitizen U.S. national (49 App. U.S.C. 2603(12)). (That would seem to mean that a noncitizen national in American Samoa could, with impunity, launch a space vehicle "outside the United States" (49 App. U.S.C. 2605(a)(3)(A)), even though a U.S. citizen could not do so.) Before any reliance is placed on these perhaps strained constructions, the definitions in the Commercial Space Launch Act should be tidied up--if there is any potential whatsoever for private sector activities concerning space in the territories. Very likely, there is not.

(e) The chapter entitled Commercial Motor Vehicle Safety (49 App. U.S.C. 2701-2716), enacted as part of the Anti-Drug Abuse Act of 1986 (Public Law 99-570), does not apply to the territories. It applies only to the States and the District of Columbia (49 App. U.S.C. 2716(14), (15)). The Act represents a forceful Federal effort to regulate the operators of commercial vehicles, among other things requiring operators to advise their licensing States of violations committed in other States (49 App. U.S.C. 2702); prohibiting employers from permitting drivers with suspended or revoked licenses by any State from operating a commercial vehicle (49 App. U.S.C. 2703); imposing Federal standards for testing commercial vehicle operators and for licensing them (49 App. U.S.C. 2704, 2705); stipulating grounds for disqualification for licenses, including drunk driving offenses, controlled substance felonies, and serious traffic violations (49 App. U.S.C. 2707); and establishing an information system as a tool of enforcement (49 App. U.S.C. 2706). Grants are provided to assist the States (49 App. U.S.C. 2704(c), 2709), and States that do not comply with the law's requirements are subject to withholding of a portion of their Federal highway funds (49 App. U.S.C. 2710).

The problem to which the Act is directed--i.e., the safe operation of commercial motor vehicles--obviously is of concern in the territories as well as in the States. Their island status does not foreclose it. (There is no readily available legislative history to explain the territories' exclusion (1986 U.S. Code Cong. and Admin. News 5393).) But the scheme presented by this 1986 law would be difficult to adapt to territorial needs: Not only is there no serious need for interjurisdictional cooperation (for the territories' problem is internal as to each), but various other provisions would need considerable special tailoring to fit the territories' situation. Minimum grants, for example, would require reduction in the interest of equity; and their special treatment under the Federal highway laws would require attention for enforcement purposes. Hence, while the issue should not be dismissed as irrelevant, it appears that if the territories have a sufficient concern about this subject to warrant Federal regulation and assistance, a separate law crafted for them alone would be the better vehicle for providing it.

(f) The chapter entitled Sanitary Food Transportation (49 App. U.S.C. 2801-2812) contains the Act of that name, enacted in November 1990. It requires the Secretary of Transportation to issue regulations pertaining to the transportation of food in tank trucks or motor vehicle cargo tanks, so as to prevent their use in carrying food if they are also used to transport refuse--or if they are used to transport food along with drugs, or after transporting drugs, so as to render the food unsafe to the health of humans or animals (49 App. U.S.C. 2803). The Act applies by name to the Virgin Islands, Guam, Samoa, and the Northern Marianas, all of which are defined as "States" (49 App. U.S.C. 2802(5)), and it defines "transportation" to mean "any movement of property in commerce (including intrastate commerce) by motor vehicle or rail vehicle" (49 App. U.S.C. 2802(6)). Civil and criminal penalties attach for a violation of the Secretary's regulations. The act applies fully to the areas subject to this study, without regard to the inter- or intra-territorial nature of the transportation involved, but it will again be noted that there is no mechanism for enforcement in Samoa, which lacks a District Court (49 App. U.S.C. 2810, 1809(a)(2)). This void ought to be filled.

Conclusion: The foregoing transportation laws, enacted within the last decade, accommodate the territories adequately when the subject matter is suitable for them--except that the absence of a Federal District Court in Samoa poses a problem of enforcement for the Sanitary Food Transportation Act (considered at (f) above).

Federal agency comments: Because this memorandum was composed late in the process of preparing this study, its contents have not been the subject of comments from interested agencies.

Title 50 - WAR AND NATIONAL DEFENSE

- Contains nothing of substantial interest to the territories.

* Contains matters of particular interest to the territories, but no legislative recommendations.

(**) Contains recommendations for changes in the law, but the need for them is not urgent.

Memorandum Number			Subject	50 U.S.C. sections
50-1	-	(a)	Council of National Defense	1-6
	-	(b)	Alien Enemies	21-24
	-	(c)	Atomic Weapons and Special Nuclear Materials Information Rewards	47a-47f
	-	(d)	Arsenals, Armories, Arms, and War Material Generally	82, 98-100a
	-	(e)	Helium Gas	167-167n
	*	(f)	Vessels in Territorial Waters of the United States	191-198
	*	(g)	Insurrection	205-226
	(**)	(h)	National Security	401-432
	-	(i)	National Industrial Reserves	451-455
	-	(j)	Air-Warning Screen	491
	-	(k)	Guided Missiles	501-504
	-	(l)	Wind Tunnels	511-524
	*	(m)	Internal Security	781-858
	-	(n)	Gifts for Defense Purposes	1151-1156
	-	(o)	National Defense Contracts	1431-1435
	*	(p)	Chemical and Biological Warfare Program	1511-1521
	-	(q)	War Powers Resolution	1541-1548
	-	(r)	National Emergencies	1601-1651
	-	(s)	International Emergency Economic Powers	1701-1706
	(**)	(t)	Foreign Intelligence Surveillance	1801-1811

				50 U.S.C App. sections
50-2	(**)	(a)	Trading With the Enemy Act of 1917	1-44
	-	(b)	Office of Selective Service Records	321-330
	*	(c)	Military Selective Service Act	451-473
	*	(d)	Soldiers' and Sailors' Civil Relief Act of 1940	501-591
	-	(e)	National Emergency and War Shipping Acts	1291-1294
	-	(f)	Surplus Property Act of 1944	1622-1622c
	-	(g)	Sale of Surplus War-Built Vessels	1735-1745
	-	(h)	Stabilization of Economy and Commodity Prices	1911-1919
	-	(i)	Disposal of Government-Owned Rubber-Producing Facilities	1941-1941u
	-	(j)	American-Japanese Evacuation Claims	1981-1987
	-	(k)	War Claims	2001-2017p
	*	(l)	Defense Production Act	2061-2169
	-	(m)	Domestic Minerals Program Extension	2181-2183
	*	(n)	Civil Defense	2251-2303
	-	(o)	World War II License Agreements	2371
	*	(p)	Export Regulation	2401-2420

Memorandum No. 50-1
April 1987

<u>Subject</u>: Title 50, War and National Defense

(a) Council of National Defense
Title 50, Chapter 1 (50 U.S.C. 1-6)

(b) Alien Enemies
Title 50, Chapter 3 (50 U.S.C. 21-24)

(c) Atomic Weapons and Special Nuclear Materials Information Rewards
Title 50, Chapter 4C (50 U.S.C. 47a-47f)

(d) Arsenals, Armories, Arms, and War Material Generally
Title 50, Chapter 5 (50 U.S.C. 82, 98-100a)

(e) Helium Gas
Title 50, Chapter 10 (50 U.S.C. 167-167n)

(f) Vessels in Territorial Waters of the United States
Title 50, Chapter 12 (50 U.S.C. 191-198)

(g) Insurrection
Title 50, Chapter 13 (50 U.S.C. 205-226)

(h) National Security
Title 50, Chapter 15 (50 U.S.C. 401-432)

(i) National Industrial Reserves
Title 50, Chapter 16 (50 U.S.C. 451-455)

(j) Air-Warning Screen
Title 50, Chapter 18 (50 U.S.C. 491)

(k) Guided Missiles
Title 50, Chapter 19 (50 U.S.C. 501-504)

(l) Wind Tunnels
Title 50, Chapter 20 (50 U.S.C. 511-524)

(m) Internal Security
Title 50, Chapter 23 (50 U.S.C. 781-858)

(n) Gifts for Defense Purposes
Title 50, Chapter 26 (50 U.S.C. 1151-1156)

(o) National Defense Contracts
Title 50, Chapter 29 (U.S.C. 1431-1435)

(p) Chemical and Biological Warfare Program
Title 50, Chapter 32 (50 U.S.C. 1511-1521)

(q) War Powers Resolution
Title 50, Chapter 33 (50 U.S.C. 1541-1548)

(r) National Emergencies
Title 50, Chapter 34 (50 U.S.C. 1601-1651)

(s) International Emergency Economic Powers
Title 50, Chapter 35 (50 U.S.C. 1701-1706)

(t) Foreign Intelligence Surveillance
Title 50, Chapter 36 (50 U.S.C. 1801-1811)

Comment: Title 50, excluding its Appendix, contains about twenty active chapters, all of which relate to the national defense and national security. Many of these laws concern Federal officers and agencies and their authority, and they thus relate to matters internal to the U.S. Government. (Such laws are sometimes said below to relate to "administration", a term that usually does not do justice to their importance, but which is used as a convenient shorthand.) As such, many of them contain no provisions as to their geographic reach, but given the subject matter, none is needed. In two instances, however (items (h) and (t) below), the status of most Samoans as noncitizen nationals ought to be recognized. Otherwise, Title 50 appears to contain no deficiencies as to its treatment of the territories.

Discussion: (a) The Council of National Defense (50 U.S.C. 1-6), created in 1916, is composed of certain Cabinet officers and exists "for the coordination of industries and resources for the national security and welfare" (50 U.S.C. 1). The subject, therefore, relates to administration, and no geographic limitations are imposed or needed.

(b) Alien Enemies (50 U.S.C. 21-24) derives from 18th century laws that permit the removal from "the territory of the United States" of "all natives, citizens, denizens, or subjects of the hostile nation" with which the U.S. is at war, or which threatens the invasion of U.S. territory (50 U.S.C. 21). The geographic references appear sufficient for purposes of the territories, although the provision giving to "courts of the United States" jurisdiction over deportation proceedings (50 U.S.C. 23) may raise a question for American Samoa, which does not have a Federal District Court. It is likely, however, that if a case were to arise there--itself not a likely event--the High Court of American Samoa would be viewed as having jurisdiction, in light of Meaamaile v. American Samoa, 550 F. Supp. 1227 (1982).

(c) Atomic Weapons and Special Nuclear Materials Information Rewards (50 U.S.C. 47a-47f) provides for monetary rewards to persons (who need not be U.S. citizens) who provide information about the illegal introduction, manufacture, acquisition, or export, to or from or within the United States, of nuclear material or an atomic weapon. The "United States" includes the Territories and possessions (50 U.S.C. 47f(d)).

(d) The chapter entitled Arsenals, Armories, Arms, and War Material Generally (50 U.S.C. 82, 98-100a) now consists of one section dating from 1917 (50 U.S.C. 82), plus the Strategic and Critical Materials Stock Piling Act, originally enacted in 1939. The first gives to the President broad procurement powers in "time of war", including the right to commandeer factories; the second permits the stockpiling of strategic and critical materials needed for national defense. The "United States" is defined to include "all territory and waters, continental and insular" for purposes of the first (50 U.S.C. 82(a)), but it is not defined in the stockpiling act. Given its purposes, however, to meet "needs of the United States for national defense" (50 U.S.C. 98a(a)), the stockpiling act unquestionably also includes the territories.

(e) The Helium Gas chapter (50 U.S.C. 167-167n) authorizes the Secretary of the Interior to acquire helium gas-producing lands and to engage in its production and disposal for defense needs. The law contains no geographic limitations (except for a reference to a "State" at 50 U.S.C.

167(2)), but because helium is not known to exist in the territories, it matters not.

(f) The chapter on the subject of Vessels in Territorial Waters of United States (50 U.S.C. 191-198) permits, during periods of national emergency, the regulation of the anchorage and movement of all vessels, foreign and domestic, and the taking of "full possession and control" of any such vessel to prevent damage (50 U.S.C. 191)--if the vessel is in the "territory" or waters, continental or insular, "subject to the jurisdiction of the United States" (50 U.S.C. 195). The territories are all comprehended.

(g) The laws contained in the chapter entitled Insurrection (50 U.S.C. 205-226) date from the Civil War, and are commonly known as the Non-Intercourse Acts. They make criminal any "commercial intercourse" between "the inhabitants of any State or part thereof . . . in insurrection against the United States" and "the citizens of the rest of the United States" (50 U.S.C. 205). Given the frequent reference to "States"--and often to "insurrectionary States"--in most of the sections that remain in this chapter (50 U.S.C. 205, 206, 207, 208, 210, 211, and 223), and given the historic situation that gave rise to these laws, it is probable that they apply to the States alone. Yet at least three (50 U.S.C. 212, 216, and 224) are without geographic limitations, and they would appear to be available in the event of insurrection in a territory against the authority of the United States: 50 U.S.C. 212, which permits the confiscation of property used to aid an insurrection; 50 U.S.C. 216, which permits the Secretary of the Treasury to prohibit the transportation by water of goods destined for insurgents; and 50 U.S.C. 224, which permits the Secretary of the Treasury to refuse clearance to a vessel when he believes it is intended for a port under the control of insurgents, "whatever may be its ostensible destination". We may suppose that these authorities are sufficient. It would, surely, be unseemly to suggest a sufficient likelihood of territorial insurrection to warrant expanding now those laws of 1861, and thereabouts, that are designed to deal with that subject.

(h) The chapter entitled National Security (50 U.S.C. 401-432) contains the National Security Act of 1947 and its amendments. That Act creates the National Security Council and the Central Intelligence Agency, and as such relates to administration. Geographical provisions are neither present generally nor are they necessary. In two particulars, however, recognition is given the territories. At 50 U.S.C. 403e special leave benefits are provided for CIA officers and employees who are assigned to duty stations outside the original 48 States and the District of Columbia; and leave may be provided for such persons in their State, "territory or possession", of residence at the time of recruitment (50 U.S.C. 403e(a)(3)(A)). And in connection with provisions designed to protect covert agents (50 U.S.C. 421-426), a definition of the "United States" is provided--meaning "all areas under the territorial sovereignty of the United States" (50 U.S.C. 426(9)). That definition has meaning in relation to the section on extraterritorial jurisdiction, which provides for jurisdiction over the unlawful disclosure of information identifying a covert agent

> committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence. (50 U.S.C. 424)

Samoans who are noncitizens nationals of the U.S. (and who, as such, cannot be "aliens lawfully admitted to the United States" (see Memorandum No. 10-3)), are not covered by the provision--a statutory deficiency that should be corrected, given the apparent intent of the provision to be comprehensive, although it is not likely to be of moment as a practical matter. In comments dated September 24, 1987, the Office of General Counsel, Department of Defense, endorses this recommendation.

(i) Under National Industrial Reserves (50 U.S.C. 451-455), the Secretary of Defense is authorized to designate industrial plants, machine tools, and other industrial manufacturing equipment as a defense industrial reserve "for the future safety and for the defense of the United States"

(50 U.S.C. 451). No provisions defining geographic scope appear, but the territories can be presumed to be included, inasmuch as the United States is responsible for the defense of them all.

(j) Under Air-Warning Screen (50 U.S.C. 491), the Secretary of the Air Force is authorized to establish a land-based early warning system, "within and without the continental limits of the United States". The territories are obviously included, and they ought to be.

(k) In the chapter entitled Guided Missiles (50 U.S.C. 501-504), the Secretary of the Air Force is permitted to establish a long-range proving ground for guided missiles and other weapons--again "within or without the continental limits of the United States" (50 U.S.C. 501). Although the inclusion of the territories may not be welcomed by them, it is not inappropriate that they too be candidates.

(l) Wind Tunnels (50 U.S.C. 511-524) are authorized to be developed jointly by the Administrator of the National Aeronautics and Space Administration and the Secretary of Defense, to meet research, developmental, and evaluation problems in aeronautics. Facilities may be constructed "at educational institutions within the continental limits of the United States" (50 U.S.C. 511), a phrase that excludes the territories. None, however, has now, nor is likely to have in the early future, an institution of sufficient expertise on the subject to warrant the expansion of the statutory language to include them.

(m) Internal Security 50 U.S.C. 781-858) contains the Internal Security Act of 1950, as amended and supplemented--popularly known as the Smith Act. It contains no provisions concerning geographic applicability that apply to all components of the Act as supplemented, so it is necessary to consider the components separately:

-- Title I, entitled "Control of Subversive Activities", applies in general throughout the Territories and possessions (50 U.S.C. 782(9)), and thus to all of the territories that are the subjects of this study. The term "interstate or foreign commerce", however, is defined to include both commerce between a Territory or possession and any place outside, and also commerce "within any Territory or possession" (50 U.S.C. 782(10)). This definition again includes the territories, except that commerce "within" the Northern Marianas would not be comprehended, in light of the application to the Northern Marianas of the Act pursuant to section 502(a)(2) of the Covenant, which requires that it apply there in the same manner as it is "applicable to the several States". Title I makes it a criminal offense to conspire to establish a totalitarian dictatorship "within the United States"; for a Federal officer or employee to transmit classified information to a foreign government or to a Communist organization; or for a foreign government or a Communist organization to receive such classified information (50 U.S.C. 783). Also barred are the use of the mails by a Communist organization to disseminate information or to raise funds, unless the envelope states clearly the Communist-organization-source; and the use of the airways, by radio or television, unless the source is made clear (50 U.S.C. 789). As noted, mail between two points in the Northern Marianas would not be covered, in light of the language of section 502(a)(2) of the Covenant.

-- Title III (Title II having been repealed) concerns security procedures for the National Security Agency, and as such relates to administration. No provisions nor limitations concerning geographic scope appear.

-- The Communist Control Act of 1954 (50 U.S.C. 841-844) "proscribes", and in effect, outlaws, the Communist Party, or any successor to it whose purpose is "to overthrow the Government of the United States, or the government of any State, Territory, District, or possession thereof . . . by force and violence . . ." (50 U.S.C. 842). The territories are all comprehended by this language. The succeeding section, however, makes it a criminal offense to be a member of the Communist Party or of any other organization that has as its purpose the "overthrow of the Government of the United States, or the government of any State or political subdivision thereof by the use of force or violence" (50

U.S.C. 843(a)--and there is no mention of the Territories, territories, or possessions--nor is "State" anywhere defined to include them. It seems probable, however, that that section, like its predecessor, would be held applicable to the territories, in light of the sweeping declaration of the legislative purpose (50 U.S.C. 841) and the specific mention of them in the key (and just preceding) section (50 U.S.C. 842). The deficiency would be likely to be ascribed, almost surely accurately, merely to imprecise legislative drafting.

-- The last component concerns the registration with the Attorney General of persons who have "received instruction" in espionage or sabotage from a foreign country or a foreign political party (50 U.S.C. 851-858). Among those exempt from registration are persons who obtained instruction "by reason of civilian, military, or police service" with the United States Government or the governments of the States, the District, "the Territories, or the Canal Zone" (50 U.S.C. 852). The questions arises as to whether "the Territories", in this 1956 enactment (when the incorporated Territories of Alaska and Hawaii still existed) includes the "territories" (unincorporated) with which this study is concerned. The answer is almost certainly that it does, in light of _Puerto Rico v. Shell Co_. (302 U.S. 253 (1937)) and its progeny, holding that "Territory" may include an unincorporated territory if the legislative purpose warrants. It would seem clearly to do so in this instance. The express mention of the Canal Zone, and the extension of the registration law to it in 1962 by an amendment for that purpose (50 U.S.C. 858), do not cast doubt upon the foregoing conclusion as to the territories. The Canal Zone was not then, or ever, a "territory" of the United States in the Constitutional sense, although it was sometimes defined as such as a legislative shortcut.

In sum, although the internal security laws contained in this portion of Title 50 are uneven in their statutory references to geographic reach, the pertinent provisions comprehend the territories--except for the Northern Marianas' exclusion from certain labeling requirements on intra-Commonwealth mail. The exclusion appears minor enough to ignore.

(n) Gifts for Defense Purposes (50 U.S.C. 1151-1156) permits the Secretary of the Treasury to accept gifts of money or other intangible personal project, and the Administrator of General Services to accept other property, real or personal, on the condition that it be used for a particular defense purpose. No geographic limitations appear, so gifts from territorial donors would appear to be welcome.

(o) The chapter entitled National Defense Contracts (50 U.S.C. 1431-1435) provides special procurement authority during a national emergency when the President determines that it is needed to "facilitate the national defense" (50 U.S.C. 1431). The law pertains to administration. It contains no provision limiting its geographic scope.

(p) The Chemical and Biological Warfare Program (50 U.S.C. 1511-1521) circumscribes the transportation, testing, and disposal of "any lethal chemical or any biological warfare agent" in the "the United States" (50 U.S.C. 1512), with the United States defined, unless otherwise indicated, to include the territories and possessions (50 U.S.C 1514). The term is otherwise defined for purposes of 50 U.S.C. 1513, where it includes only the States and the District of Columbia, but by that section even stricter procedures and controls are imposed upon the deployment, storage, or disposal of lethal chemical and biological agents "outside the United States". In effect, thus, the territories are more fully protected than are the States--an unusual but welcome result, given the subject matter involved.

(q) The War Powers Resolution (50 U.S.C. 1541-1548) is designed to limit the introduction of U.S. Armed Forces into hostilities by the President, and states that that may occur only pursuant to a declaration of war, or a specific statutory authorization, or as a result of a national emergency "created by attack upon the United States, its territories or possessions" (50 U.S.C. 1541(c)). For purposes of the Resolution, the "United States" consistently includes the territories (e.g., 50 U.S.C. 1544(c), 1546a)), and that is as it should be.

(r) The National Emergencies Act (50 U.S.C. 1601-1651), enacted in 1976, terminated the national emergency then in effect as a result of the Vietnam War and prescribes the manner in which future national emergencies may be declared and terminated. The subject relates to administration, and the law contains no provisions as to geographic scope.

(s) The International Emergency Economic Powers Act (50 U.S.C. 1701-1706), enacted in 1977, authorizes the President to impose economic sanctions "to deal with any unusual and extraordinary threat, which has its source . . . outside the United States, to the national security, foreign policy, or economy of the United States" (50 U.S.C. 1701(a)). The sanctions apply to "any person, or with respect to any property, subject to the jurisdiction of the United States" (50 U.S.C. 1702(a)--so the territories and their people are all comprehended.

(t) The Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801-1811) prescribes in great detail the procedure for obtaining electronic surveillance to acquire foreign intelligence information. That procedure applies throughout the United States (defined at 50 U.S.C. 1801(j) to include "all areas under the territorial sovereignty of the United States"); and the use of the information in "State" court proceedings (a term defined at 50 U.S.C. 1801(o) to include the territories and possessions) is circumscribed (50 U.S.C. 1806). The territories, thus, are fully covered by the Act. But the Act is also intended to protect United States persons from the misuse of information about them that is obtained in the course of acquiring foreign intelligence (e.g., 50 U.S.C. 1804(b), 1805(a), and 1806(a)), and although "United States person" is elaborately defined (to include citizens and aliens admitted for permanent residence (50 U.S.C. 1801(i)), the term does not include noncitizen nationals. It should do so, because nationals in Samoa are no less entitled to such protection than are citizens in the States and other territories. An amendment to expand the definition is in order. The Department of Defense has stated that it agrees.

Conclusion: The laws contained in Title 50, with two relatively minor exceptions, either contain appropriate geographic references that include the territories, or owing to their subject matter, need none. The two exceptions both concern the status of American Samoans as noncitizen nationals: A section of the National Security Act pertaining to the unlawful disclosure of information concerning covert agents (in (h) above), is for the benefit of the United States; the second, concerning protections afforded individuals in connection with the gathering of foreign intelligence (in (t) above) is for the benefit of private parties. In both cases the terms should be expanded to include noncitizen nationals, but there is no known urgency in doing so.

Federal agency comments: Comments were requested from the Department of Justice and the Department of Defense. The latter, in comments dated September 24, 1987, stated that it agrees that U.S. nationals should be included in pertinent provisions of the National Security Act (discussed at (h) above) and the Foreign Intelligence Surveillance Act (discussed at (t) above).

Memorandum No. 50-2
April 1987

Subject: Title 50, Appendix - War and National Defense

(a) Trading with the Enemy Act of 1917
(50 U.S.C. App. 1-44)

(b) Office of Selective Service Records
(50 U.S.C. App. 321-330)

(c) Military Selective Service Act
(50 U.S.C. App. 451-473)

(d) Soldiers' and Sailors' Civil Relief Act of 1940
(50 U.S.C. App. 501-591)

(e) National Emergency and War Shipping Acts
(50 U.S.C. App. 1291-1294)

(f) Surplus Property Act of 1944
(50 U.S.C. App. 1622-1622c)

(g) Sale of Surplus War-Built Vessels
(50 U.S.C. App. 1735-1745)

(h) Stabilization of Economy and Commodity Prices
(50 U.S.C. App. 1911-1919)

(i) Disposal of Government-Owned Rubber-Producing Facilities
(50 U.S.C. App. 1941-1941u)

(j) American-Japanese Evacuation Claims
(50 U.S.C. App. 1981-1987)

(k) War Claims
(50 U.S.C. App. 2001-2017p)

(l) Defense Production Act
(50 U.S.C. App. 2061-2069)

(m) Domestic Minerals Program Extension
(50 U.S.C. App. 2181-2183)

(n) Civil Defense
(50 U.S.C. App. 2251-2303)

(o) World War II License Agreements
(50 U.S.C. App. 2371)

(p) Export Regulation
(50 U.S.C. App. 2401-2420

Comment: The laws appearing in the Appendix to Title 50, dealing with emergency and post-war subjects, are for the most part not of indefinite duration, although some appear to constitute permanent legislation. Few hold significance for the territories today, but exceptions of possible interest include the Selective Service Act ((c) below), the Soldiers' and Sailors' Civil Relief Act ((d) below), the Defense Production Act ((1) below), the Civil Defense Act ((n) below), and the Export Administration Act ((p) below). None of these require modification to meet territorial needs. The Trading With the Enemy Act ((a) below) applies to the territories, but contains deficiencies with respect to American Samoa. There is no need for haste in correcting those deficiencies, but it would be desirable to effect corrections whenever it is convenient to do so.

Discussion: (a) The Trading With the Enemy Act of 1917 (50 U.S.C. App. 1-44) represents important World War I legislation, amended at the outset of World War II and from time to time since. In major particulars, it makes unlawful commercial transactions between "any person in the United States" and a person who is a citizen or a subject of an enemy nation with which the United States is at war; it permits the seizure by the Alien Property Custodian of property held in the United States by persons owing allegiance to the enemy; and it authorizes the President to prohibit imports "into the United States" when the public safety requires.

Notwithstanding its considerable age, the Trading With the Enemy Act uses language that comprehends the territories quite fully. The term "United States" means "all land and water, continental or insular, in any way within the jurisdiction of the United States" (50 U.S.C. App. 2). And because the prohibitions largely run to "any person in the United States" (e.g., 50 U.S.C. App. 3, 5), persons in the territories are included. In a few instances, there are express references to the Territories and possessions (50 U.S.C. App. 32(a), 34(h)).

There are, however, also references from time to time to United States citizens, a term not defined to include noncitizen nationals (i.e., 50 U.S.C. App. 8(b), 9(b), 10, 12, 21, 32, and 34). These provisions for the most part relate to contracts involving enemy countries and to property claims filed with the Alien Property Custodian. Additionally, a particular provision concerning the jurisdiction under the Act of courts in the Philippines and the Canal Zone (50 U.S.C. App. 18) makes clear that without something similar, a court in Samoa would be without jurisdiction. Should external circumstances give new life to the Act, these deficiencies with respect to American Samoa ought to be corrected. The matter is happily untimely, and additionally, noncitizen nationals in Samoa are not currently given to substantial foreign commercial transactions--so their potential deprivation of rights under the Act is not now of great significance. But if this venerable law is updated, so that a convenient legislative vehicle is at hand, it ought to be amended to take account of these two deficiencies touching Samoa.

(b) The <u>Office of Selective Service Records</u> (50 U.S.C. App. 321-330), created in 1947, was charged with liquidating the World War II Selective Service System but has a continuing responsibility to maintain its records. Its functions are housekeeping, but its authority in such areas as property disposal and details of personnel includes the "Territories and possessions" (50 U.S.C. App. 324, 326(a)).

(c) The <u>Military Selective Service Act</u> (50 U.S.C. App. 451-473), enacted in 1948, creates the current Selective Service System and requires the registration of males aged 18 to 26 for training and service in the U.S. Armed Forces. Registration continues to be required; but induction for training and service ceased in 1973 (50 U.S.C. App. 467(c)).

The Act applies to "every male citizen of the United States, and every other male person residing in the United States" (except for nonimmigrant aliens) (50 U.S.C. App. 453), with the "United States" defined to include the States, the District, Puerto Rico, the Virgin Islands, and Guam (50 U.S.C. App. 466(b)). Given the 1948 enactment date, and the expansion of the definition of the "United States" in 1951 to include Guam (65 Stat. 87), the Act applies also to the Northern Marianas by operation of section 502(a)(2) of the Covenant. In a 1950 case concerning Puerto Rico, it was held that the Act could constitutionally apply to U.S. citizens in the territories, notwithstanding their lack of voting representation in the Congress (Ruiz Alicea v. U.S., 180 F.2d 870).

But the Act does not apply to American Samoa (although it would apply to Samoans resident in the States, whether they be citizens or noncitizen nationals). This exclusion may be a consequence of Samoa's exclusion from the application in general of the Immigration and Nationality Act (Memorandum No. 8-1), because that Act is often used to determine status under the Selective Service Act. It is so used, for example, to define nonimmigrant aliens who need not register (50 U.S.C. App. 453), and to determine some who are entitled to deferments or exemptions from induction (50 U.S.C. App. 456(a)(1)). Because of the need for such standards for Selective Service purposes, the extension of the Selective Service Act to Samoa would therefore require the writing of legislation at the Federal level that would approach drafting an immigration law for Samoa--a task the Congress has so far been willing to leave to lawmakers in Samoa. Inasmuch as the Samoans display every sign of wanting to retain this power unto themselves, and inasmuch as the United States has clearly excluded Samoa from the Selective Service System, it seems appropriate to refrain from modifying the current application of the law. And since members of draft boards must be citizens (50 U.S.C. App. 460(b)(3)), of which too few might be found in Samoa for that purpose, we are spared having to deal with that issue.

The Act contains occasional references to the Territories and "possessions", a term that is undefined in the Act, and which therefore includes Samoa. Some such references are harmless--such as the deferment from induction of the Governors and members of the legislatures of the "possessions" (50 U.S.C.

App. 456(f)); but others create an internal inconsistency--such as the requirement that there be a Selective Service headquarters in each "possession" (thereby including Samoa) (50 U.S.C. App. 460(a)(2), and that the President establish a local draft board in each "possession" (also including Samoa) (50 U.S.C. App. 460(b)(3)). Federal authorities have apparently found it possible to overlook these requirements, so the problem need not be further dealt with here.

One section that appears to be deficient on its face is not. At 50 U.S.C. App. 471 reference is made to the release from Federal service of National Guard and Air National Guard units and their return to their respective "States, Territories, the District of Columbia, and Puerto Rico". That phrase should be understood to include the Virgin Islands and Guam (but not Samoa nor the Northern Marianas, which do not have National Guard units (see Memorandum No. 32-1)), in light of the definition in the National Guard laws at 32 U.S.C. 101(1), and its application to all Federal laws concerning the militia (see the discussion on this subject in Memorandum No. 10-5).

(d) The Soldiers' and Sailors Civil Relief Act of 1940 (50 U.S.C. App. 501-591) remains in effect (50 U.S.C. App. 464) and applies to the United States and all of its territories (50 U.S.C. App. 512). Its purpose is to relieve persons in the Armed Forces from a variety of civil liabilities, so as not to distract them from their military duty--or, in the words of the statute, "in order to enable such persons to devote their entire energy to the defense needs of the Nation" (50 U.S.C. App. 510). Particular provisions of the Act alter the effects of statutes of limitation as they would apply to persons in the Armed Forces, and relieve such persons of the usual consequences of civil proceedings relating to eviction, divorce and alimony, installment contracts, mortgages, leases, life insurance policies--and many other subjects. The Act applies to the United States and to "all territory subject to the jurisdiction of the United States, and to proceedings commenced in any court therein" (50 U.S.C. App. 512(1)), so no question as to geographic application or of court jurisdiction arises. Two sections confer benefits upon "citizens of the United States" only: 50 U.S.C. App. 514 and 572 provide that some of the benefits of the Act may be conferred upon citizens who serve in the forces of a wartime ally. Since no Samoan is known to have been disadvantaged by the exclusion of noncitizen nationals from these sections, the exclusion need not be remedied.

(e) The National Emergency and War Shipping Acts (50 U.S.C. App. 1291-1294) have largely been repealed, except for a few sections dating from 1943 and relating to persons employed as seamen under the World War II War Shipping Administration. The sections have no current relevance to the territories.

(f) The Surplus Property Act of 1944 (50 U.S.C. App. 1622-1622c) has expired or been repealed except for sections pertaining to the conveyance to "any State, political subdivision, municipality, or tax-supported institution" of surplus property that is suitable for public airports (50 U.S.C. App. 1622(g)(1)). Only in Guam does the United States own property that might be suitable for such use, and although it is unnamed in the Act, Guam would qualify as a donee--either because it is a "tax-supported institution", or because it is a recipient of assistance under the Airport and Airway Improvement Act of 1982 (see Memorandum No. 49-7), which is used as a standard in the Surplus Property Act (50 U.S.C. App. 1622(g)(1)).

(g) The Sale of Surplus War-Built Vessels (50 U.S.C. App. 1735-1745), although it relates to vessels built during World War II, has sufficient continuing life to remain in the Code. The Act permits the Secretary of Transportation to sell or to charter such war-built vessels to United States citizen --for the purposes of fostering the U.S. merchant marine. Sales to noncitizens are permitted, but citizen-buyers are preferred (50 U.S.C. App. 1740). Samoans are thereby disadvantaged, but given both the age of the law and the probable absence of Samoans buyers, the disadvantage does not require correction.

(h) Stabilization of Economy and Commodity Prices (50 U.S.C. App. 1911-1919) refers to a 1947 authorization intended to stabilize the U.S. post-war economy by promoting the equitable distribution of goods and curbing inflation. In addition to authorizing the President to carry out food conservation programs (50 U.S.C. App. 1918), he is also directed to advise the Congress of critical shortages, to be followed by Congressional action as Congress determines (50 U.S.C. App. 1916). No provisions of geographic scope appear, but that issue could be expected to be met by the implementing legislation.

(i) The Disposal of Government-Owned Rubber-Producing Facilities (50 U.S.C. App. 1941-1941a) has long since been effected (50 U.S.C. App. 1941g), so requires no further attention here.

(j) American-Japanese Evacuation Claims (50 U.S.C. App. 1981-1987) allowed the filing, until 1950, of claims by internees during World War II. It has, as a practical matter, expired.

(k) War Claims (50 U.S.C. App. 2001-2017p) creates the agency now termed the Foreign Claims Settlement Commission and grants authority for the settlement of claims arising from World War II, the Korean War, and the Vietnam conflict. Claims pertain to detainees, prisoners of war, and others who suffered losses. Most filing dates have long since passed, although deadlines with respect to the Vietnam conflict remain open (50 U.S.C. App. 2004(i)(6)). The statute is currently of only academic interest to the territories. Should circumstances result in its revival in the future, however, an effort should be made to accommodate noncitizens nationals, which the War Claims Act of 1948, as amended, sometimes does but more often does not. In recognition of that fact, particular provisions were enacted to take account of Guamanians (then nationals but not citizens) interned on Wake Island during World War II (50 U.S.C. App. 2004(h)).

(l) The Defense Production Act (50 U.S.C. App. 2061-2169), first enacted in 1950 and much amended since, has now been extended to September 30, 1989. The Act provides for a program of long-range defense preparedness, and permits the allocation of scarce materials needed for national defense, the giving of priority to defense and energy contracts, loans and guarantees for defense production, and a program of synthetic fuel production, among other things. The Act applies fully to all of the territories, in light of the 1950 provision making it applicable to "the United States, its Territories and possessions" (50 U.S.C. App. 2163). Additionally, the synthetic fuel production provisions carry their own statement of application, where the Virgin Islands, Guam, and the Northern Marianas are all expressly named, together with "any other territory or possession of the United States" (50 U.S.C. App. 2098(c)). The court jurisdiction provisions also appear sufficient to include all of the territories, inasmuch as jurisdiction is given to the Federal district courts plus "the United States courts of any Territory or other place subject to the jurisdiction of the United States" (50 U.S.C. App. 2156(b))--a phrase that would almost certainly include Samoa.

(m) The Domestic Minerals Program Extension (50 U.S.C. App. 2181-2183) concerns a program to encourage production and acquisition of certain strategic and critical minerals. It is supplementary to the Defense Production Act, and thus has the same geographic reach--thereby including the territories.

(n) Civil Defense (50 U.S.C. App. 2251-2303) refers to the Federal Civil Defense Act of 1950, as amended, and is intended to lead to a system of civil defense from attack and from certain natural disasters. The law is administered by the Federal Emergency Management Agency. It applies throughout the United States, including its Territories and possessions (50 U.S.C. App. 2252(g)), and it has since 1951, so the Northern Marianas as well as the other territories are covered by it.

(o) World War II License Agreements (50 U.S.C. App. 2371) contains a single section only, permitting Federal agency heads to modify patent agreements entered during World War II. There is no indication of geographic reach, but given the age and narrow focus of the law, that is unlikely to be troublesome in the territories.

(p) Export Regulation (50 U.S.C. App. 2401-2420) refers to the Export Administration Act, approved in September 1979. The Act authorizes the imposition of controls and the requirement of licenses for certain exports from the "United States" to particular foreign countries. The "United States" includes the States and "any commonwealth, territory, dependency, or possession of the United States" (50 U.S.C. App. 2415(7)), so there is no doubt that exports from the territories are comprehended by it. (The approval date of the Act is subsequent to the effective date of section 502(a)(2) of the Northern Marianas Covenant, but section 105 of the Covenant makes the Act applicable there because such Act is applicable throughout the "several States" as well as to all other parts of the United States.) The fact that the territories are all outside the United States customs area is not relevant for purposes of the application of this law. Its purpose is to serve the national security and foreign policy interests of the United States by permitting the control of exports to foreign countries, so the territories are logically, as well as by definition, a part of the United States. Additionally, certain prohibitions run to "United States persons" (e.g., 50 U.S.C. App. 2407(a)), and that term is defined to include U.S. nationals (50 U.S.C. App. 2415(2)), so American Samoans are comprehended.

Conclusion: The laws contained in the Appendix to Title 50 are sufficient for purposes of the territories, except for nonurgent deficiencies in the Trading With the Enemy Act, where provisions concerning citizenship and court jurisdiction ought to be corrected for American Samoa.

Federal agency comments: Comments were requested from the Department of Defense, and the Department of Justice. All comments received are reflected above.

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