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# THE EFFORT TO STOP ABUSE OF FOREIGN WORKERS IN THE U.S. COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Greg Holloway

*Abstract:* This comment examines the problem of foreign worker abuse in the U.S. Commonwealth of the Northern Mariana Islands ("NMI"). The United States and the NMI have a unique relationship governed by an agreement known as the "Covenant." The Covenant creates fundamental barriers which will limit the effectiveness of federal efforts to resolve the foreign worker abuse problem in the NMI. This comment demonstrates that a balanced effort of prosecutions by both governments under U.S. federal labor law and NMI criminal law is needed to protect the well being of foreign workers in the NMI.

## I. INTRODUCTION

In 1994, U.S. newspapers ran articles detailing human rights abuses against non-resident foreign workers in the Northern Mariana Islands ("NMI").<sup>1</sup> Even though the NMI is a chain of fourteen small islands 3300 miles southwest of Hawaii and ten time zones away from the U.S. capital,<sup>2</sup> the stories were particularly disturbing to the American public because the NMI is a commonwealth of the United States. The unique relationship between the NMI and the United States is governed by a "Covenant"<sup>3</sup> giving the NMI control over its minimum wage and immigration policy.<sup>4</sup> These policies helped fuel a massive expansion of the NMI economy by attracting large numbers of foreign workers.<sup>5</sup>

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<sup>1</sup> William Branigin, *Filipino Rapes Decried In Appeals to Clinton; Legislators Protest Worker Abuse in Islands*, WASH. POST, Dec. 18, 1994, at A44 [hereinafter Branigin, *Filipino Rapas Decried*]; Eric Pianin, *U.S. Appalled by Abuse on Tiny Island; Administration Threatens Crackdown for U.S.-Affiliated Commonwealth*, WASH. POST, Sept. 23, 1994, at A32; David Judson, *Tenorio Acknowledges "Subhuman" Labor Conditions*, GANNETT NEWS SERVICE, Sept. 22, 1994; William Branigin, *U.S. Pacific Paradise Is Hell For Some Foreign Workers; Filipinos Report Beatings, Rapes, Lockups*, WASH. POST, Aug. 29, 1994 at A1 [hereinafter Branigin, *U.S. Pacific Paradise*].

<sup>2</sup> Another acronym often used for the NMI is "CNMI." The three largest islands in the NMI are Saipan, Tinian and Rota. In 1992, approximately 48,000 people inhabited the forty-seven square miles of Saipan, while Rota and Tinian each had an estimated 2500 inhabitants. CENTRAL STATISTICS DIVISION, DEPT. OF COMMERCE AND LABOR, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS STATISTICAL YEARBOOK 4 (1993). The islands are closer to Asia than to the Continental U.S.: Saipan and Tinian are 1800 miles from Shanghai, 1260 miles from Tokyo, and 1480 miles from Manila, but are 3300 miles from Honolulu and 5400 miles from San Francisco. *The Covenant to Establish a Commonwealth of the Northern Mariana Islands: Hearing Before the Senate Comm. on Interior and Insular Affairs*, 94th Cong., S. Rep. 94-433 at 24 (1975) [hereinafter *Senate Report Analysis*].

<sup>3</sup> 48 U.S.C. § 1801 (1996).

<sup>4</sup> *Senate Report Analysis*, supra note 2, at 78.

<sup>5</sup> Marybeth Herald, *The Northern Mariana Islands: A Change in Course under its Covenant with the United States*, 71 OR. L. REV. 127, 147-8 (1992). NMI officials testified before the U.S. Congress that non-resident workers provide the labor necessary to sustain the NMI economy. *The Omnibus Territories Act: Testimony on H.R. 602 Before the House Comm. on Resources and Subcomm. on Native American and Insular Affairs*, 104th Cong. (Jan. 31, 1995), 1995 WL 6620823 at \*11-12 (prepared testimony of Froilan C. Tenorio, Governor of the Commonwealth of the Northern Mariana Islands) [hereinafter Tenorio Testimony]; *U.S. Territories Legislation: Testimony on S. 1804 Before the Senate Comm. on Energy and*

During this economic expansion, the basic human rights of foreign workers have been abused within the NMI's borders.<sup>6</sup> NMI employers abuse foreign workers in a number of ways, ranging from nonpayment of wages and false imprisonment to assault and rape.<sup>7</sup> While insisting that many reports of abuse have not been corroborated, NMI Governor Friolan C. Tenorio confirmed that foreign workers have been raped, assaulted, cheated out of wages and forced to live in subhuman conditions.<sup>8</sup>

In response, the U.S. Congress introduced House Resolution 602—the Omnibus Territories Act.<sup>9</sup> H.R. 602 would have transferred control of the NMI's minimum wage and immigration policy to the U.S. federal government in an effort to protect foreign workers from abuse.<sup>10</sup> However, this legislation would not have resolved the NMI worker abuse problem by itself. Legislation like H.R. 602 will not have any significant impact unless the U.S. federal government and the NMI increase efforts to enforce other laws.

This comment identifies and analyzes the difficulties in solving the NMI's foreign worker abuse problem. Part II of this comment details the NMI's historical background and legal structure. Part III explains the dilemma faced by the NMI's foreign workers that results from their political powerlessness and existing fundamental barriers to their legal claims in federal court. Part IV analyzes why the U.S. Occupational Safety and Health Act of 1970 ("OSHA")<sup>11</sup> has a limited impact on resolving the foreign worker abuse problem. Part V sets forth the United States' response, H.R. 602, and explains why its effectiveness would have depended on enforcement of OSHA and NMI criminal law. Part VI explains how NMI criminal laws prohibit many of the abuses suffered by foreign workers in the NMI. Finally, Part VII concludes that the NMI's foreign worker abuse problem can only be resolved if aggressive prosecution of abusive employers under NMI criminal laws accompanies increased efforts to enforce federal laws.

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*Natural Resources*, 104th Cong. (June 26, 1996), 1996 WL 10829118 at \*5 (testimony of Sebastian Aloat, acting Attorney General of the NMI) [hereinafter Aloat Testimony].

<sup>6</sup> Tenorio Testimony, *supra* note 5, at \*4.

<sup>7</sup> Branigin, *Filipino Rapes Decried*, *supra* note 1, at A44; Pianin, *supra* note 1, at A32; Judson, *supra* note 1; Branigin, *U.S. Pacific Paradise*, *supra*, note 1, at A1.

<sup>8</sup> Tenorio Testimony, *supra* note 5, at \*4-5; Pianin, *supra* note 1, at A32; Judson, *supra* note 1.

<sup>9</sup> While H.R. 602 died in committee at the end of 1996, it represents an important effort by the United States to combat human rights abuses in the NMI. The bill prompted candid discussion before the U.S. Congress between the U.S. and the NMI about the need for change in NMI immigration and labor policies. Pianin, *supra* note 1, at A32; Judson, *supra* note 1; Branigin, *U.S. Pacific Paradise*, *supra*, note 1, at A1. Moreover, H.R. 602 is a blueprint from which to fashion a future solution for the NMI foreign worker abuse problem.

<sup>10</sup> H.R. 602, 104th Cong. §§ 201-204 (1995).

<sup>11</sup> 29 U.S.C. §§ 651-678 (1996).

## II. THE NMI'S HISTORICAL BACKGROUND AND LEGAL STRUCTURE

### A. *Historical Background*

The principal indigenous peoples of the NMI are the Chamorros and the Carolinians.<sup>12</sup> Explorer Ferdinand Magellan landed in the NMI during the sixteenth century.<sup>13</sup> Prior to the Second World War, the islands were controlled in succession by Spain, Germany and Japan. In June of 1944, the United States defeated the Japanese in the NMI and established control of the islands.<sup>14</sup> Subsequently, the U.S. Navy administered the NMI under a military government.<sup>15</sup>

Following the Second World War, the United States was instrumental in ensuring that a trusteeship system be included in the newly formed United Nations Charter.<sup>16</sup> A United Nations Trusteeship Agreement for the Former Japanese Mandated Islands was enacted on July 18, 1947 with the United States as the administering authority of the trust territory.<sup>17</sup> Under this Trusteeship, the United States agreed to promote: (1) self governance or independence, as may be appropriate; (2) economic advancement and self-sufficiency of the inhabitants; (3) social advancement of the inhabitants; and, (4) the educational advancement of the inhabitants.<sup>18</sup> The NMI, as part of the Trusteeship, remained a responsibility of the U.S. Navy until 1951.<sup>19</sup> After a number of arrangements, the U.S. Department of the Interior eventually assumed administrative responsibility for the entire NMI in the early 1960s.<sup>20</sup>

The United States administration of the Trust Territories was criticized for not encouraging economic development.<sup>21</sup> In response, the United States increased funding to the various territories.<sup>22</sup> In 1965, by order of the U.S. Secretary of the Interior, the Congress of Micronesia was established to serve as the legislative body for the Trust Territories.<sup>23</sup> Four

<sup>12</sup> NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS, WELCOMING AMERICA'S NEWEST COMMONWEALTH 6 (1985) (Second Interim Report to the Congress of the United States) [hereinafter NMI COMMISSION].

<sup>13</sup> *Id.* at 13.

<sup>14</sup> The NMI was strategically critical for the United States during the Second World War because American B-29 bombers could reach the Japanese mainland from Saipan, Tinian, and nearby Guam. *Id.* at 9.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 10.

<sup>17</sup> Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, U.S.—N. Mar. L., art. 2, 61 Stat. 3301.

<sup>18</sup> *Id.* art. 6, 61 Stat. at 3302.

<sup>19</sup> NMI COMMISSION, *supra* note 12, at 10.

<sup>20</sup> NMI COMMISSION, *supra* note 12, at 11.

<sup>21</sup> James A. Branch, Jr., *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?*, 9 DENV. J. INT'L L. & POL'Y 35, 54-5 (1980); Howard P. Willens & Deanne C. Siemer, *The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in a Pacific Setting*, 65 GEO. L.J. 1373, 1378-79 (1977); Herald, *supra* note 5, at 132.

<sup>22</sup> Herald, *supra* note 5, at 133; NMI COMMISSION, *supra* note 12, at 11.

<sup>23</sup> NMI COMMISSION, *supra* note 12, at 11.

years later, the Congress of Micronesia created the Micronesian Political Status Delegation to negotiate the future political status of the Trust Territories with the United States.<sup>24</sup> By 1972, however, the NMI decided that its objectives did not coincide with those of the other Trust Territories. The NMI desired a closer relationship with the United States.<sup>25</sup> Therefore, on April 12, 1972, the NMI began to negotiate separately its political status with the United States.<sup>26</sup>

Representatives from the NMI and the United States signed the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America" ("Covenant") on February 15, 1975.<sup>27</sup> Four months later, the people of the NMI approved the Covenant in a plebiscite observed by the United Nations.<sup>28</sup> After extensive hearings, the U.S. Congress approved the Covenant by joint resolution on March 24, 1976.<sup>29</sup> Subsequently, the NMI enacted its own Constitution in 1978.<sup>30</sup> The United States granted citizenship to NMI residents and the Covenant took full effect when the United Nations Trusteeship Agreement officially terminated in 1986.<sup>31</sup>

## B. *The Legal Structure*

### 1. *The Covenant*

The Covenant establishes a unique relationship between the NMI and the U.S. federal government that is "somewhere between that of a state and a territory."<sup>32</sup> Under the Covenant, the NMI established a degree of autonomy and control over its internal political and societal structure.<sup>33</sup> Portions of the U.S. Constitution and a number of federal laws do not apply in the NMI.<sup>34</sup> Through this structure, the Covenant attempted to balance two conflicting goals: developing the NMI's economy while simultaneously protecting its culture from outside influences.<sup>35</sup>

The Covenant consists of ten articles which govern the NMI's relationship with the United States.<sup>36</sup> Under Article I, Section 101, the NMI

<sup>24</sup> *Id.* at 15.

<sup>25</sup> *Id.* at 11.

<sup>26</sup> *Id.* at 11, 15; Herald, *supra* note 5, at 134; Willens & Siemer, *supra* note 21, at 1378.

<sup>27</sup> NMI COMMISSION, *supra* note 12, at 11, 15.

<sup>28</sup> *Id.* at 12; Willens & Siemer, *supra* note 21, at 1373.

<sup>29</sup> NMI COMMISSION, *supra* note 12, at 12, 16.

<sup>30</sup> N. MAR. I. CONST.

<sup>31</sup> 48 U.S.C. § 1801, art. III; Willens & Siemer, *supra* note 21, at 1382.

<sup>32</sup> 48 U.S.C. § 1801; Herald, *supra* note 5, at 135.

<sup>33</sup> *Senate Report Analysis*, *supra* note 2, at 78. See also Willens & Siemer, *supra* note 21.

<sup>34</sup> 48 U.S.C. § 1801, art. V.

<sup>35</sup> Herald, *supra* note 5, at 137; *The Omnibus Territories Act: Testimony on H.R. 602 Before the House Comm. on Resources and Subcomm. on Native American and Insular Affairs*, 104th Cong. (Jan. 31, 1995), 1995 WL 6620828 at \*4 (prepared testimony of Juan N. Babauta, resident Representative to the United States from the NMI) [hereinafter Babauta Testimony].

<sup>36</sup> 48 U.S.C. § 1801; *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682, 685 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984).

is a self-governing commonwealth under the sovereignty of the United States.<sup>37</sup> The rest of Article I (Sections 102-105) give the NMI control of its local affairs, while the United States has authority over matters relating to foreign affairs.<sup>38</sup> In particular, Section 105 provides:

The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II, and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.<sup>39</sup>

Article III of the Covenant ensures U.S. citizenship for NMI residents. Article IV outlines the framework for federal judicial authority in the NMI.<sup>40</sup> The NMI is a separate district within the Ninth Circuit.<sup>41</sup> Its jurisdiction is governed by 48 U.S.C. § 1822, and includes diversity jurisdiction under 28 U.S.C. § 1332. Moreover, 48 U.S.C. § 1822(b) provides:

The district court shall have original jurisdiction in all causes in the Northern Mariana Islands not described in subsection (a) jurisdiction over which is not vested by the Constitution or laws of the Northern Mariana Islands in a court or courts of the Northern Mariana Islands. In causes brought in the district court solely on the basis of this subsection, the district court shall be considered a court of the Northern Mariana Islands for the purposes of determining the requirements of indictment by grand jury or trial by jury.<sup>42</sup>

The NMI may grant appellate jurisdiction to the Federal District court over cases in the local trial courts.<sup>43</sup>

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<sup>37</sup> 48 U.S.C. § 1801.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> 48 U.S.C. § 1823 (1996).

<sup>42</sup> 48 U.S.C. § 1822(b) (1996).

<sup>43</sup> The Ninth Circuit held that the NMI could determine the appellate jurisdiction of the district court over all cases involving issues of local law, including those originating in the district court. *Sablan v. Santos*, 634 F.2d 1153 (9th Cir. 1980). However, the court found *Sablan v. Santos* superseded by statute,

Article V of the Covenant, entitled "Applicability of Laws," details what U.S. federal law applies to the NMI. Section 501 enumerates which portions of the U.S. Constitution are applicable. The Eleventh Amendment, granting immunity to the State, and the jury trial provisions of the Sixth and Seventh Amendments are missing.<sup>44</sup> They do not apply in the NMI.

## 2. *NMI Immigration and Labor Laws*

The NMI and the United States designed the Covenant to give the NMI control over its internal political and social development.<sup>45</sup> To accomplish this objective, the NMI retains control over its immigration and labor laws under section 503 of the Covenant.<sup>46</sup> Section 503 states, in pertinent part:

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 except in the manner and to the extent made applicable to them by the Congress by law after termination of the Trusteeship Agreement:

(a) except as otherwise provided in Section 506, the immigration and naturalization laws of the United States;

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(c) the minimum wage provisions of Section 6, Act of June 25, 1938, 52 Stat. 1062, as amended.<sup>47</sup>

Originally, the purpose of NMI control over immigration laws was to reduce fears of a flood of immigrants which would overwhelm the indigenous population and destroy local culture.<sup>48</sup> However, the NMI uses its immigration power to reach the Covenant's economic objective by

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holding that the NMI could not determine the courts to which cases in the federal district court could be appealed. *Gioda v. Saipan Stevedoring Co. Inc.*, 855 F.2d 625, 628 (9th Cir. 1988). See *Wabol v. Villacrusis*, 908 F.2d 411, 418 n.9 (9th Cir. 1990) (finding that the Ninth Circuit had jurisdiction to hear appeal), *cert. denied sub. nom. Philippine Goods, Inc. v. Wabol*, 506 U.S. 1027, 113 S.Ct. 675, 121 L.Ed. 2d 598 (1992).

<sup>44</sup> 48 U.S.C. § 1801; The Ninth Circuit has held these exemptions constitutional. *Fleming v. Dep't of Pub. Safety, Commw. of N. Mar. I.*, 837 F.2d 401, 407-08 (9th Cir. 1988) (Under the Covenant, the NMI waived its sovereign immunity from suits arising under federal law in the federal courts provided by the Eleventh Amendment), *cert. denied*, 488 U.S. 889 (1988); *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682, 689 (9th Cir. 1984) (upholding exemption from jury trial provisions in the Sixth Amendment), *cert. denied*, 467 U.S. 1244 (1984).

<sup>45</sup> *Senate Report Analysis*, *supra* note 2, at 78.

<sup>46</sup> *Id.* at 78 (The Covenant allows the NMI to set its own minimum wage). Additionally, the United States granted manufactures in the NMI duty free status in order to facilitate economic expansion. *Herald*, *supra* note 5, at 140.

<sup>47</sup> 48 U.S.C. § 1801.

<sup>48</sup> *Senate Report Analysis*, *supra* note 2, at 78. Babauta Testimony, *supra* note 35, at \*4. See also *Herald*, *supra* note 5, at 141.

allowing an influx of foreign laborers to fuel economic expansion.<sup>49</sup> NMI immigration laws essentially create a free entry policy by allowing employers to use foreign labor with few restrictions.<sup>50</sup> Alien workers commonly work in jobs which are low paying and involve poor working conditions. These jobs include garment production, construction labor, cooks and bakers, maid service, farming, bar waitressing, and nightclub hostessing.<sup>51</sup>

No serious limits are placed on NMI employers for hiring foreign workers. In 1994, the law required that an employer have only twenty percent of its work force be U.S. citizens.<sup>52</sup> While the NMI apparently limits some job categories for foreign workers, these do not include garment work, farming, construction, and housekeeping.<sup>53</sup> Moreover, an employer only needs to change the job description to employ foreign workers in a "limited" position. Thus legal limitations on job categories are essentially meaningless.<sup>54</sup> Additionally, no time limit exists for foreign workers in the NMI. As long as foreign workers have a valid contract with an employer, these "non-resident" workers are allowed to remain under a "Non immigrant Entry Permit."<sup>55</sup>

Similar to its use of immigration laws, the NMI uses its labor laws to facilitate the Covenant's goal of economic growth.<sup>56</sup> Accordingly, minimum wage provisions of the Fair Labor Standards Act ("FLSA") do not apply in the NMI.<sup>57</sup> The minimum wage required in the United States was originally considered too high for the NMI.<sup>58</sup> Therefore, the Covenant has enabled the NMI to set its own minimum wage and exclude certain workers from that wage.<sup>59</sup> The exemptions provided by the NMI's minimum wage law are for jobs typically filled by non-resident foreign workers.<sup>60</sup>

### III. THE DILEMMA FACED BY FOREIGN WORKERS IN THE NMI

#### A. *The NMI's Economic Need for Foreign Workers*

After the Covenant's enactment, the NMI's economy boomed. "Gross Island Product" increased from \$45 million in 1978 to \$445 million in 1988.<sup>61</sup> This remarkable economic development resulted from increases

<sup>49</sup> Tenorio Testimony, *supra* note 5, at \*11-12; Aloit Testimony, *supra* note 5, at \*5; Babauta Testimony, *supra* note 35, at \*5.

<sup>50</sup> 3 N. MAR. I. CODE §§ 4411-14 (Supp. Feb. 1988).

<sup>51</sup> Herald, *supra* note 5, at 150.

<sup>52</sup> 3 N. MAR. I. CODE § 4436(a) (Supp. Mar. 1994).

<sup>53</sup> 3 N. MAR. I. CODE § 4434(e) (Supp. June 1992).

<sup>54</sup> Herald, *supra* note 5, at 153.

<sup>55</sup> 3 N. MAR. I. CODE § 4434 (Supp. June 1992).

<sup>56</sup> Herald, *supra* note 5, at 139.

<sup>57</sup> 48 U.S.C. § 1801.

<sup>58</sup> *Senate Report Analysis*, *supra* note 2, at 78.

<sup>59</sup> 4 N. MAR. I. CODE §§ 9221, 9223 (Supp. Mar. 1994). NMI law sets the 1997 minimum wage at \$3.35 per hour. 4 N. MAR. I. CODE § 9221(d) (Supp. Mar. 1994).

<sup>60</sup> Herald, *supra* note 5, at 151.

<sup>61</sup> *Id.* at 144.



in the tourist industry, the garment manufacturing industry, and from U.S. financial assistance.<sup>62</sup> Tourism accounted for thirty seven percent of the 1988 Gross Island Product.<sup>63</sup> Increases in tourism fueled a dramatic increase in construction. The NMI has gone from 740 hotel rooms in 1980 to 2651 in 1990.<sup>64</sup> Likewise, the garment manufacturing industry supported the NMI's economic expansion. Saipan has over twenty garment factories employing over 6000 workers.<sup>65</sup>

Because the NMI's resident population is not large enough to supply labor for such a large economy, non-resident foreign workers increased from approximately 3000 in 1980<sup>66</sup> to over 23,000 in 1992.<sup>67</sup> Construction labor, garment manufacturing, farming, and maid service is performed mostly by foreign workers. These workers are typically from China and the Philippines.<sup>68</sup> Unfortunately, the NMI has met its need for labor with alien workers without taking legal and moral responsibility for their welfare.<sup>69</sup>

### B. *The Political Powerlessness of NMI Foreign Workers*

Foreign workers have no political representation in NMI society. The NMI classifies these workers as "non-residents," and strictly limits any opportunity for foreign workers to gain admission as permanent residents under the NMI Constitution.<sup>70</sup> A number of problems arise because of the imbalance created by the foreign workers' lack of power. First, in industries dominated by politically powerless non-resident workers, the "constituency for enforcing fair, safe, and reasonable pay and working conditions in those industries disappears."<sup>71</sup> Second, many permanent NMI residents depend financially on the supply of cheap labor. Therefore, those with political power have an economic incentive to keep the supply of foreign workers available at low wages.<sup>72</sup> Third, the NMI's small setting may make sympathetic residents unwilling to support reform efforts on behalf of alien workers because interests of family or friends may be adversely affected.<sup>73</sup> Lastly, foreign workers often become "scapegoats" for the NMI community's mixed feelings regarding development and change.<sup>74</sup>

Practically, the political powerlessness of foreign workers manifests itself in NMI labor and immigration law procedures. These policies

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> CENTRAL STATISTICS DIVISION, DEPT. OF COMMERCE AND LABOR, *supra* note 2, at 70.

<sup>65</sup> Herald, *supra* note 5, at 145.

<sup>66</sup> *Id.* at 148 (citing CNMI Office of Planning & Budget, Economic Development Strategy 30 (1990)).

<sup>67</sup> CENTRAL STATISTICS DIVISION, DEPT. OF COMMERCE AND LABOR, *supra* note 2, at 42.

<sup>68</sup> *Id.* at 42.

<sup>69</sup> Herald, *supra* note 5, at 155.

<sup>70</sup> N. MAR. I. CONST. art. II, § 5(d).

<sup>71</sup> Herald, *supra* note 5, at 155.

<sup>72</sup> *Id.* at 156.

<sup>73</sup> *Id.* at 157.

<sup>74</sup> *Id.*

essentially create a two-tiered legal system in the NMI—one for residents and the other for foreign workers.<sup>75</sup>

As previously mentioned, the NMI's minimum wage is not applicable to certain classes of workers. Exempted jobs are those typically filled by non-resident workers: garment manufacturing, construction, farming, housekeeping, and food service.<sup>76</sup> NMI residents refuse to work in jobs that have these low wages, further increasing the demand for foreign labor.<sup>77</sup> For foreign workers covered by the NMI minimum wage, remedies for recovering from defaulting employers are limited. Resident workers have six years to sue for violations under the act.<sup>78</sup> Non-resident foreign workers have only thirty days from the time of the alleged violation.<sup>79</sup>

In addition to low wages, foreign workers must sign a mandatory contract that provides that either party may terminate "without cause." The contract also details ten "for cause" grounds for termination. Eight of them provide for the alien worker's dismissal. Two give the worker a right to terminate if there is: (1) "extreme cruelty or abuse"; or (2) "unreasonable delays" in payment of wages or "repeated breach of any provision of the Employment Contract."<sup>80</sup> It is against the law for a foreign worker to be paid over a job's advertised rate.<sup>81</sup>

Another obstacle created by NMI law is the limited forum for non-resident foreign worker claims. After a non-resident worker files a complaint with the NMI Division of Labor, there are two methods of resolution.<sup>82</sup> The first is for Labor to issue a warning and request to correct.<sup>83</sup> The second is for Labor to issue a Notice of Violation and conduct a hearing.<sup>84</sup> Simultaneously, the worker may seek a transfer to another employer in an attempt to remain in the NMI. However, transfer determinations are at the discretion of the NMI Division of Labor and contingent upon consent by a new employer.<sup>85</sup> Non-resident workers denied transfer are left without a valid employment contract. Without a valid employment contract, a non-resident worker's "Non-immigration Entry Permit" expires.<sup>86</sup> Accordingly, non-resident workers without a current

<sup>75</sup> *Id.* at 158-160.

<sup>76</sup> For example, construction industry jobs are exempt from the NMI minimum wage—paying between \$1.35 and \$1.75 per hour. Maids are exempt as well. They earn approximately \$1.00 to \$1.25 an hour. Herald, *supra* note 5, at 151.

<sup>77</sup> *Id.* at 158.

<sup>78</sup> 7 N. MAR. I. CODE § 2505 (Supp. Mar. 1994).

<sup>79</sup> 3 N. MAR. I. CODE § 4434(f) (Supp. June 1992).

<sup>80</sup> Herald, *supra* note 5, at 160 (citing § K of the mandatory employment contract imposed by the Commonwealth of the Northern Mariana Islands).

<sup>81</sup> 3 N. MAR. I. CODE § 4437(k) (Supp. Mar. 1994).

<sup>82</sup> Office of the Attorney General of the Commonwealth of Northern Mariana Islands v. Paran, No. Civ. A. 93-014, 1994 WL 725954, at \*3 (N. Mariana Islands 1994). The NMI Supreme Court upheld the deportation of a non-resident worker who filed a claim of assault, battery, and non-payment of wages against her employer. The court found that the NMI Division of Labor appropriately gave a warning to the employer; and, the foreign worker's entry permit expired. *Id.*

<sup>83</sup> 3 N. MAR. I. CODE § 4444(a)(1) (Supp. Feb. 1988).

<sup>84</sup> 3 N. MAR. I. CODE § 4444(a)(2) (Supp. Feb. 1988).

<sup>85</sup> 3 N. MAR. I. CODE § 4444(e)(5) (Supp. Feb. 1988).

<sup>86</sup> 3 N. MAR. I. CODE § 4434(g) (Supp. June 1992).

entry permit must return to their country of origin. Those workers who choose to seek redress against a former employer are only allowed to remain in the country for twenty days to initiate their claim.<sup>87</sup> Claimants may return five days before their scheduled trial date.<sup>88</sup>

These laws led to widespread abuse of foreign workers by some NMI employers. The abuses received international attention, and have been covered by the U.S. media.<sup>89</sup> Many workers were beaten, forced into prostitution, and treated as virtual slaves.<sup>90</sup> One documented case involves a twenty five year old woman who was forced to work as a maid in her employer's secluded ranch house where she was held against her will, repeatedly raped, sodomized, and beaten for three weeks until she managed to escape.<sup>91</sup> NMI Governor Froilan C. Tenorio acknowledged that reports of foreign worker abuse are true.<sup>92</sup> Newspaper articles in the United States allege that while the NMI government insists changes have been made to correct the problem, abuses have continued.<sup>93</sup>

### C. *Barriers to Foreign Worker Claims in Federal District Court*

#### 1. *Cost and Cultural Barriers*

Foreign workers seeking relief through civil claims in the NMI face cultural and cost barriers to bringing and maintaining suit. Foreign workers earning minimum wage are at a large economic disadvantage against employers. Employers who are being sued civilly can stall foreign worker claims and increase the length and cost of the suit by requesting a jury trial in United States Federal District Court. Cost barriers are seriously prohibitive to foreign workers who are often in debt from employment placement fees and send earnings back to dependent families in their countries of origin.<sup>94</sup> Additionally, foreign workers culturally may not understand that they have the right to sue employers under United States federal law based on job conditions and abusive employer behavior.<sup>95</sup> Foreign workers also receive little or no assistance from their home governments.<sup>96</sup>

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Branigin, *Filipino Rapes Decried*, *supra* note 1, at A44; Pianin, *supra* note 1, at A32; Branigin, *U.S. Pacific Paradise*, *supra* note 1, at A1.

<sup>90</sup> Branigin, *U.S. Pacific Paradise*, *supra* note 1, at A1.

<sup>91</sup> Branigin, *Filipino Rapes Decried*, *supra* note 1, at A44.

<sup>92</sup> Tenorio Testimony, *supra* note 5, at \*4; Judson, *supra* note 1; Pianin, *supra* note 1, at A32.

<sup>93</sup> Branigin, *Filipino Rapes Decried*, *supra* note 1, at A44; Branigin, *U.S. Pacific Paradise*, *supra* note 1, at A1.

<sup>94</sup> Herald, *supra* note 5, at 153, 165-166.

<sup>95</sup> *Id.* at 165-166.

<sup>96</sup> *Id.* at 169.

## 2. *The NMI Jury Trial Problem*

Perhaps the largest barrier against alien workers with legitimate claims is the "jury trial problem."<sup>97</sup> The Covenant provides that the jury trial provisions of the Sixth and Seventh Amendments are not applicable in the NMI.<sup>98</sup> Instead, the NMI legislature has the discretion "to provide for trial by jury in criminal or civil cases."<sup>99</sup> The reasoning behind this exception to the United States Constitution is rooted in the NMI's societal and cultural structure. In a small island environment, obtaining a fair jury presents a nearly impossible task. A significant number of potential jurors will not only know about disputes being tried, but will be biased—jurors are likely to know the parties and have a personal interest in the outcome of the dispute.<sup>100</sup> Furthermore, jurors in the NMI are composed of NMI residents with U.S. citizenship, and these jurors are likely to be hostile to foreign worker claims. The Ninth Circuit decision in *Commonwealth of the Northern Mariana Islands v. Atalig* upheld the NMI jury trial exemption for trials in NMI courts.<sup>101</sup> However, the *Atalig* court noted that "the NMI's elimination of jury trials is applicable only to trials in commonwealth courts."<sup>102</sup> This does not affect the defendant's jury trial right in Federal Court. Accordingly, both civil<sup>103</sup> and criminal<sup>104</sup> actions brought in Federal Court subject foreign worker claims to the same jury trial problems the covenant sought to avoid.

## IV. ENFORCEMENT OF UNITED STATES LABOR LAW—OSHA

Officials from the NMI testified that the foreign worker abuse problem would be resolved if the U.S. federal government increased its efforts to enforce U.S. federal labor law which already applies to the NMI—the Occupational Safety and Health Act of 1970.<sup>105</sup> However, the NMI's foreign worker abuse problem will not be completely resolved by increased federal efforts to enforce OSHA for two reasons. First, not all of the alleged abuses against foreign workers fall within the scope of the Act. Second,

<sup>97</sup> Herald, *supra* note 5, at 163.

<sup>98</sup> 48 U.S.C. § 1801, art. V, §501(a)(1996).

<sup>99</sup> N. MAR. I. CONST. art. I, § 8.

<sup>100</sup> Herald, *supra* note 5, at 163.

<sup>101</sup> *Commonwealth of N. Mar. I. v. Atalig*, 723 F.2d 682, 689 (9th Cir. 1984) (acknowledging that jury trials may be inappropriate in territories having cultures, traditions, and institutions that are different from those in the U.S.), *cert. denied*, 467 U.S. 1244 (1984).

<sup>102</sup> *Id.* at 691.

<sup>103</sup> Jurisdictionally, a foreign worker can bring a civil claim in United States Federal District Court under diversity jurisdiction. 28 U.S.C. § 1332 (1996). Additionally, exemption from the U.S. Constitution's Sixth and Seventh Amendment jury trial provisions does not apply for diversity action suits brought in NMI Federal District Court. 48 U.S.C. §1822 (1996).

<sup>104</sup> Criminal suits brought by the U.S. Department of Justice under OSHA's criminal provisions are heard in Federal District Court. 1 MARK A. ROTHSTEIN, ET AL., EMPLOYMENT LAW § 6.1 (1994).

<sup>105</sup> NMI Governor Froilan C. Tenorio asserts that foreign worker abuses would be eliminated if the United States enforced OSHA. Tenorio Testimony, *supra* note 5, at \*8. Other NMI officials also claim that the foreign worker abuse problem would be resolved with U.S. enforcement of OSHA. Babauta Testimony, *supra* note 35, at \*5.

cultural, economic and practical considerations make OSHA enforcement difficult.

### A. *Alleged Foreign Worker Abuses and the Scope of OSHA*

OSHA provides for the safety of workers in the United States.<sup>106</sup> OSHA section 5(a)(2) requires employers to comply with safety and health standards promulgated under the Act.<sup>107</sup> Section 5(a)(1) of OSHA, commonly known as the "general duty clause," requires employers to keep places of employment free from recognized harms that are causing or are likely to cause death or serious physical injury to employees.<sup>108</sup> This general duty clause was designed to augment the standards set forth by section 5(a)(2) of the Act.<sup>109</sup>

Some of the abuses recognized by NMI Governor Tenorio would be prevented under OSHA standards. Hazardous working conditions from faulty machinery, locked workplaces, and generally unsafe conditions are violations of OSHA under its standards<sup>110</sup> or the general duty clause prohibiting recognizable harms.<sup>111</sup> However, many abuses do not fall within the scope of OSHA. Rapes, assaults, and murders are not listed as prohibited conditions in the Act's enumerated standards<sup>112</sup> and are not likely recognizable harms under the general duty clause.<sup>113</sup> Therefore, the most egregious forms of alleged foreign worker abuse in the NMI will not fall under OSHA's protection.

### B. *Lack of OSHA Enforcement by the United States*

For the abuses that are covered by OSHA, enforcement difficulties may mitigate the Act's potential for reducing foreign worker abuses. OSHA enforcement primarily relies upon civil penalties.<sup>114</sup> The U.S. Department

<sup>106</sup> While there is no private right of action under OSHA, the Act does not preempt suits brought by workers against abusive employers under tort law. In many courts, employer violations of OSHA standards establish prima facie claims of negligence, intentional recklessness, and injurious actions. *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991), cert. denied, 502 U.S. 1082 (1992); *Ellis v. Chase Communications, Inc.*, 63 F.3d 473, 477 (6th Cir. 1995); *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799, 804-05 (6th Cir. 1984). However, fundamental barriers to foreign worker claims make this option unfeasible for most foreign workers in the NMI. See section III (C), *supra*.

<sup>107</sup> 29 U.S.C. § 654(a)(2) (1996); ROTHSTEIN ET AL., *supra* note 104, § 6.24.

<sup>108</sup> 29 U.S.C. § 654(a)(1) (1996); ROTHSTEIN ET AL., *supra* note 104, § 6.1.

<sup>109</sup> ROTHSTEIN ET AL., *supra* note 104, § 6.12.

<sup>110</sup> Standards promulgated under OSHA are listed in Title 29 of the Code of Federal Regulations, section 1910. 29 C.F.R. 1910 (1996).

<sup>111</sup> To establish a violation of the general duty clause, the Secretary of Labor must demonstrate that: (1) A condition or activity in the workplace presented a hazard to employees; (2) The cited employer or the employer's industry recognized the hazard; (3) The hazard was likely to cause death or serious physical harm; and, (4) A feasible means existed to eliminate or materially reduce the hazard. *Nelson Tree Services, Inc. v. Occupational Safety and Health Review Comm'n*, 60 F.3d 1207, 1209 (6th Cir. 1995).

<sup>112</sup> See 29 C.F.R. 1910.

<sup>113</sup> Under the elements in *Nelson Tree Services*, 60 F.3d 1207, these intentional crimes do not establish a violation of OSHA's general duty clause because they are not a recognized industry hazard.

<sup>114</sup> Timothy G. Gorbatoff, *OSHA Criminal Penalty Reform Act: Workplace Safety May Finally Become a Reality*, 39 CLEV. ST. L. REV. 551, 556 (1991); STEVEN L. WILLBORN, ET AL.,

of Labor enforces the Act through the Occupational Safety and Health Administration.<sup>115</sup> This administration uses compliance officers ("COs") to inspect workplaces and issue citations for violations.<sup>116</sup> Employers, employees, and authorized employee representatives (unions), may contest citations within 15 working days of issuance.<sup>117</sup> Any notice of contest undergoes Occupational Safety and Health Review Commission ("OSHRC") scrutiny.<sup>118</sup> OSHRC is an independent administrative agency which supplies administrative law judges to adjudicate OSHA cases.<sup>119</sup>

The NMI's geographical isolation and commonwealth status make civil enforcement expensive and logistically difficult. Budget constraints and economic considerations prevent regular CO inspections and timely OSHRC adjudication of contested OSHA citations, thus hampering the Act's effectiveness in the NMI.<sup>120</sup>

OSHA also provides for criminal liability in the event of a willful violation of a standard, rule, order or regulation that causes the death of an employee.<sup>121</sup> These cases are brought by the U.S. Department of Justice and prosecuted by the United States Attorney.<sup>122</sup> However, the Department of Justice has rarely prosecuted under OSHA's criminal provisions.<sup>123</sup> Moreover, the same logistical factors which hinder OSHA's civil enforcement in the NMI also limit criminal enforcement.

Budget considerations could prevent the U.S. Attorney in the NMI from actively enforcing OSHA's criminal provisions.<sup>124</sup> Before full implementation of the Covenant, the 1985 Committee Report on the NMI addressed the general enforcement problems generated by these logistical difficulties. This report made recommendations accepted by Congress about the enforcement of U.S. federal law in the NMI. The report states that in order to prevent federal law from going unenforced, the NMI has the authority to enforce federal law.<sup>125</sup> Accordingly, despite NMI Governor Tenorio's assertion that the U.S. federal government must enforce federal

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EMPLOYMENT LAW, CASES & MATERIALS 992-97 (1993) (reprinting John F. Burton, Jr., *Criminal Penalties for Safety Violations*, WORKERS' COMPENSATION MONITOR, (Feb. 1989) at 8).

<sup>115</sup> ROTHSTEIN ET AL., *supra* note 104, § 6.1.

<sup>116</sup> ROTHSTEIN ET AL., *supra* note 104, §§ 6.1, 6.16.

<sup>117</sup> ROTHSTEIN ET AL., *supra* note 104, §§ 6.1, 6.21, 6.22.

<sup>118</sup> ROTHSTEIN ET AL., *supra* note 104, §§ 6.1, 6.26.

<sup>119</sup> ROTHSTEIN ET AL., *supra* note 104, §§ 6.1, 6.29.

<sup>120</sup> OSHA does not create a private right of action. However, OSHA does not preempt injured workers from bringing civil suits against employers under tort law. *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 52 (1st Cir. 1991), *cert. denied*, 502 U.S. 1082 (1992). OSHA may be used as evidence to establish an employer's negligence. *Pedraza*, 942 F.2d at 52; *Ellis v. Chase Communications, Inc.*, 63 F.3d 473, 477 (6th Cir. 1995); *Teal v. E.I. DuPont de Nemours and Co.*, 728 F.2d 799, 804-05 (6th Cir. 1984).

<sup>121</sup> OSHA § 17(e). *See Gorbatoff*, *supra* note 114, at 551; ROTHSTEIN ET AL., *supra* note 104, § 6.1; WILLBORN ET AL., *supra* note 114, at 992.

<sup>122</sup> ROTHSTEIN ET AL., *supra* note 104, § 6.24.

<sup>123</sup> WILLBORN ET AL., *supra* note 114, at 992-93 (citing U.S. House Committee on Government Operations, *Getting Away with Murder in the Workplace: OSHA's Nonuse of Criminal Penalties for Safety Violations*, at 4.)

<sup>124</sup> *See, e.g.*, Alood Testimony, *supra* note 5, at \*3.

<sup>125</sup> The Northern Mariana Islands Commission on Federal Laws worked through a detailed analysis of case law which would enable the NMI government to assume the responsibility of enforcing federal law. NMI COMMISSION, *supra* note 2, at 192-200.

laws<sup>126</sup>, the NMI could conceivably be responsible for enforcing OSHA criminal provisions.

Therefore, while application of OSHA may help combat the foreign worker abuse problem in the NMI, the Act's impact is limited because OSHA does not protect workers against all abusive employer conduct; and, it is practically difficult to enforce OSHA in the NMI.

### C. *The OSHA Preemption Issue in the NMI*

The NMI foreign worker abuse problem presents a situation which justifies and necessitates the use of local criminal laws to protect workers in addition to federal enforcement of OSHA.

Because of the perception that OSHA has failed to protect the safety of workers due to inadequate federal enforcement, various state and local prosecutors have used state criminal laws to prosecute employers for willful conduct which has resulted in workers being killed or injured on the job.<sup>127</sup> However, many convictions under state criminal laws have been challenged or appealed on the premise that OSHA preempts state and local prosecutions for workplace injuries and deaths.<sup>128</sup>

A number of courts that have held that state criminal laws are not preempted by OSHA.<sup>129</sup> These state court decisions are supported by the U.S. Department of Justice, which issued a letter on December 9, 1988, stating:

As for the . . . issue as to whether the criminal penalty provisions of the OSH Act were intended to preempt criminal law enforcement in the workplace and preclude the States from enforcing against employers the criminal laws of general application, such as murder, manslaughter, and assault, it is our view that no such general preemption was intended by Congress. As a general matter, we see nothing in the OSH Act or its legislative history which indicates that Congress intended for the relatively limited criminal penalties provided by the Act to deprive employees of the protection provided by the State criminal laws of general applicability.<sup>130</sup>

Likewise, the U.S. Department of Labor approved of state and local prosecution efforts, acknowledging that "[s]tates should not be preempted

<sup>126</sup> Tenorio Testimony, *supra* note 5, at \*8-9.

<sup>127</sup> Gorbatoff, *supra* note 114, at 567.

<sup>128</sup> *Id.* at 568.

<sup>129</sup> *People v. Pymm*, 76 N.Y.2d 511, 520-523, 563 N.E.2d 1 (1990), *cert. denied*, \_\_\_ U.S. \_\_\_, 111 S. Ct. 958 (1991); *People v. Chicago Magnet Wire Corp.*, 126 Ill.2d 356, 534 N.E.2d 962, 965 (1989), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 52 (1989).

<sup>130</sup> Thomas N. Boyd, Assistant Attorney General, Letter outlining the Justice Department's response to U.S. House Committee on Government Operations, Dec. 9, 1988, *cited in* WILLBORN ET AL., *supra* note 114, at 993.

from enforcing criminal laws of general applicability, such as those dealing with murder, manslaughter, or assault."<sup>131</sup>

The foreign worker abuse problem in the NMI presents a situation in which the proper resolution of the OSHA preemption issue is necessary. OSHA does not, and should not, preempt prosecution of local criminal laws against offending employers.

## V. THE U.S. RESPONSE

Because a majority of publicized cases involve Filipino workers, Philippine legislators demanded U.S. intervention to solve the human rights and labor abuses in the NMI.<sup>132</sup> In December 1994, Philippine Senator Gloria Macapagal-Arroyo sent a letter to President Bill Clinton urging that the United States resolve these abuses by taking over the NMI's immigration and labor policy.<sup>133</sup>

### A. House Resolution 602

The United States responded to the NMI foreign worker abuse problem with House Resolution 602—the Omnibus Territories Act.<sup>134</sup> Title II of the bill would have modified the Covenant, bringing the NMI under United States labor and immigration laws. The motivation behind Title II of the Omnibus Territories Act was to "assure the protection of fundamental human and civil rights."<sup>135</sup>

Sections 201 and 202 amended the Fair Labor Standards Act of 1938 ("FLSA") to apply its minimum wage provisions to the NMI. These additions would have brought the NMI within the full scope of the FLSA. Section 203 took control of immigration policy away from the NMI and gave it to the U.S. federal government. Section 203 provided:

(1) For purposes of entry into the Northern Mariana Islands by any individual (but not for purposes of entry by an individual into the United States from the Northern Mariana Islands), the Immigration and Nationality Act shall apply as if the Northern Mariana Islands were a State. The Attorney General, acting through the Commissioner of Immigration and Naturalization, shall enforce the preceding sentence.

(2)(A) Notwithstanding paragraph (1), with respect to an individual seeking entry into the Northern Mariana Islands for

<sup>131</sup> Gorbatoff, *supra* note 114, at 572, citing Gerald F. Scannell, Assistant Secretary, Occupational Safety and Health Administration, United States Dept. of Labor, before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources 8-12 (May 1, 1990).

<sup>132</sup> Branigin, *Filipino Rapes Decried*, *supra* note 1, at A44.

<sup>133</sup> *Id.*

<sup>134</sup> Introduced by Representative Elton Gallegly, the legislation died in committee when session ended. H.R. 602, 104th Cong. (1995).

<sup>135</sup> Tenorio Testimony, *supra* note 5, at \*2.



purposes of employment in the textile, hotel, tourist, or construction industry (including employment as a contractor), the Federal statutes and section 101(a)(15)(H)(ii)(B) of the Immigration and Nationality Act shall apply. Such statutes and regulations shall be so applied by substituting the term 'the Northern Mariana Islands' for the term 'Guam' each place it appears, and by substituting the term 'United States citizen, national, or resident workers' for the term 'United States resident workers.'

(B) Notwithstanding any other provision of this section, the Attorney General shall not admit into the Northern Mariana Islands, in any calendar year, a greater number of individuals for purposes of employment in each of the textile, hotel, tourist, and construction industries (including employment as a contractor) than the immigrant workers limit for such industry. For purposes of the preceding sentence, the term 'immigrant workers limit' means, with respect to any industry, the number of individuals admitted into the Northern Mariana Islands in calendar year 1992 for purposes of employment in such industry. The Attorney General, acting through the Commissioner of Immigration and Naturalization, may increase, for any calendar year, the immigrant workers limit or any industry (as determined under the preceding sentence) by the same percentage as the percentage, if any, by which the population of the Northern Mariana Islands in such calendar year exceeds the population of the Northern Mariana Islands in the calendar year 1992.<sup>136</sup>

The section would have brought the NMI under the U.S. Immigration and Nationality Act of 1954 ("INA") as applied to the U.S. Territory of Guam. Section 203 imposed an industry-by-industry cap on the number of foreign workers admitted into the NMI based on 1992 levels and subsequent NMI resident population increases. Under H.R. 602, the U.S. Immigration and Naturalization Service ("INS") would have been responsible for enforcement and interpretation of these immigration laws in the NMI.

Essentially, H.R. 602 would have modified the Covenant between the United States and the NMI. Section 503(a) of the Covenant gives the United States the authority to assume control of the NMI's immigration laws, applying the INA. Section 503(c) of the Covenant allows the United States to set the minimum wage in the NMI pursuant to the FLSA.

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<sup>136</sup> H.R. 602, 104th Cong. (1995).

### B. *The NMI Response to H.R. 602*

Officials from the NMI generally did not support H.R. 602. Throughout 1995 and 1996, NMI government officials testified to the U.S. Congress about the potential impact of H.R. 602 on the NMI. In testimony to the U.S. House of Representatives in 1995, NMI governor Froilan C. Tenorio claimed:

[T]he imposition of U.S. immigration laws will not accomplish your stated purpose in introducing H.R. 602. I must tell you in all candor that H.R. 602 will not prevent a single rape; it will not stop a single assault; it will not improve working conditions; it will do nothing to protect fundamental human or civil rights for anybody.<sup>137</sup>

Tenorio also insisted that the imposition of a minimum wage under the FLSA would ruin the NMI's economy, assuring that "our Commonwealth will remain permanently dependent on federal assistance."<sup>138</sup>

In June 1996, NMI Attorney General Sebastian Aloat testified to the U.S. Senate about the possible effects of imposing U.S. immigration and minimum wage requirements. Like NMI Governor Tenorio, Aloat contended that such action is unnecessary and would not resolve the problem of foreign worker abuse.<sup>139</sup> He alleged that two recent measures taken by the NMI government will stop the problem. The first is the creation of an immigration tracking system which will "facilitate enforcement efforts."<sup>140</sup> However, Aloat did not discuss any actual changes in immigration policy.<sup>141</sup> The second measure Aloat discussed was local minimum wage reform.<sup>142</sup> He argued that the NMI's unique situation requires minimum wages to be determined by local government.<sup>143</sup>

The NMI's resident representative to the United States, Juan N. Babauta, supported sections 201 and 202 of the Omnibus Territories Act.<sup>144</sup>

<sup>137</sup> Tenorio Testimony, *supra* note 5, at \*2.

<sup>138</sup> *Id.*

<sup>139</sup> Aloat Testimony, *supra* note 5, at \*7.

<sup>140</sup> *Id.* at \*4.

<sup>141</sup> This "computerized alien tracking system" is known as the Labor and Immigration Identification and Documentation System ("LIIDS"). LIIDS, Aloat testified, has enabled the CNMI to issue entry permit cards and capture information about the arrival and departure of foreign workers. However, Aloat did not describe how the system will assist monitoring of workers while they are legally in the NMI. Aloat Testimony, *supra* note 5, at \*4.

<sup>142</sup> The NMI local government recently set an automatic schedule of increases to the minimum wage. These call for 30 cent increases for all job classifications, and will be phased in over a "period of years" until they reach the federal minimum wage. *Id.* at \*8-9; 4 C.M.C. § 9221.

<sup>143</sup> Aloat testified that the "one size fits all" approach to the minimum wage requirement considered by the U.S. federal government is inappropriate to the NMI because of cultural, geographic, and economic considerations. He argues that the approach taken by the U.S. in American Samoa, where Congress relied on local "industry committees" in setting the minimum wage, is appropriate for the NMI. Aloat Testimony, *supra* note 5, at \*7.

<sup>144</sup> Babauta Testimony, *supra* note 35, at \*4.

He endorsed enforcing a federal minimum wage in the NMI set by a "wage review board system" similar to the system used in the U.S. Territory of American Samoa.<sup>145</sup> However, Babauta opposed section 203 giving control of the NMI's immigration policy to the United States.<sup>146</sup> While he agreed with the concept of limiting the number of foreign workers with a "cap" system, Babauta argued that these determinations should be made by the NMI.<sup>147</sup> He explained that he supports a "cap" system because it would make enforcement of laws a "finite problem."<sup>148</sup>

Officials from the NMI testified that the foreign worker abuse problem would be resolved if the U.S. federal government increased its efforts to enforce OSHA.<sup>149</sup>

### C. *The Likely Effect of Federal Legislation like H.R. 602*

If passed, the implementation of H.R. 602 would have helped alleviate the problem of foreign worker abuse in the NMI. However, the proposed legislation could not have resolved the problem by itself. H.R. 602's federally imposed minimum wage requirement and immigration policy would merely assist efforts to enforce other federal and local laws by reducing the number of foreign workers exposed to abuse and eliminate the two-tiered legal structure in the NMI. This would have occurred for three reasons.

First, the uniform application of U.S. federal labor and immigration laws in the NMI would supersede the NMI policies that effectively create the two-tiered legal system separating foreign workers from residents.<sup>150</sup> Second, the increased minimum wage would increase the number of resident workers in jobs typically dominated by foreign workers and reduce the demand for foreign workers in the NMI.<sup>151</sup> Abuses caused by the availability of cheap labor would also be reduced, such as the practice of hiring a live-in maid for \$150 a month.<sup>152</sup> Lastly, the immigration cap proposed by H.R. 602 would create a finite number of foreign workers in each industry, making enforcement of laws easier. U.S. federal immigration laws would also work in conjunction with federal labor laws to provide a forum for foreign workers to raise legal claims.<sup>153</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at \*4-7.

<sup>147</sup> *Id.* at \*6-7.

<sup>148</sup> *Id.* at \*6.

<sup>149</sup> Tenorio Testimony, *supra* note 5, at \*8; Babauta Testimony, *supra* note 35, at \*5.

<sup>150</sup> In the article *The Northern Mariana Islands: A Change in Course Under its Covenant with the United States*, author Maybeth Herald suggested that the NMI wage be raised to federal levels for two reasons: (1) the remedies available to foreign workers would be the same as those offered to resident workers under United States federal law; and, (2) higher wages would attract more resident workers to jobs typically filled by foreign workers. Herald, *supra* note 5, at 199-200.

<sup>151</sup> *Id.* at 200.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Yet the effectiveness of H.R. 602 would have depended on the subsequent enforcement and application of U.S. federal OSHA laws and NMI criminal prosecutions. Reducing the numbers of foreign workers and eliminating the NMI's discriminatory two-tiered legal structure alone will not solve the problem of foreign worker abuse because the rights of remaining workers still need to be protected under U.S. federal civil and criminal OSHA provisions and NMI criminal laws.

## VI. PROSECUTION UNDER NMI CRIMINAL LAW

Because of barriers created by the fundamental structure of the Covenant relationship between the NMI and the United States, the most effective solution to the foreign worker abuse problem is aggressive prosecution of abusive employers under NMI criminal law. While legislation like H.R. 602 and application of OSHA could help resolve the problem, federal solutions will have limited impact. The safety of foreign workers in the NMI is best protected by aggressive prosecution under local NMI criminal laws because: (1) NMI criminal laws cover abuses outside the scope of OSHA such as kidnapping, assault, rape, forced prostitution and murder; (2) foreign workers lack the financial resources and cultural knowledge to initiate actions against abusive employers; and (3) prosecution under NMI criminal laws in NMI courts eliminates the potential prejudice against foreign workers presented by the jury trial problem.

Title Six of the NMI's Commonwealth Code covers homicide, assault, sexual offenses, robbery, kidnapping, and other crimes.<sup>154</sup> This criminal code prohibits many of the actions of abusive NMI employers: assault,<sup>155</sup> rape and sodomy,<sup>156</sup> prostitution (forced or otherwise),<sup>157</sup> kidnapping,<sup>158</sup> and criminal coercion.<sup>159</sup> Penalties for each of these offenses include incarceration and fines.<sup>160</sup>

The NMI must take responsibility for the safety of its foreign workers and prosecute abusive employers under these laws to deter future abuse and punish criminal behavior. OSHA is not likely to preempt enforcement of the NMI's criminal code in this situation.<sup>161</sup> In fact, prosecution under NMI criminal law will protect foreign workers from egregious abuses not covered by OSHA. Moreover, NMI criminal prosecutions avoid the prejudicial jury trial problem faced by foreign worker claims.

<sup>154</sup> 6 N. MAR. I. CODE Div. 1 (Supp. Mar. 1984).

<sup>155</sup> 6 N. MAR. I. CODE §§ 1201-1204 (Supp. Mar. 1984).

<sup>156</sup> 6 N. MAR. I. CODE §§ 1301-1305 (Supp. Mar. 1984).

<sup>157</sup> 6 N. MAR. I. CODE §§ 1341-1348 (Supp. Mar. 1994).

<sup>158</sup> 6 N. MAR. I. CODE § 1421 (1984).

<sup>159</sup> 6 N. MAR. I. CODE § 1431 (1984).

<sup>160</sup> 6 N. MAR. I. CODE Div. 1 (1984).

<sup>161</sup> The NMI foreign worker abuse problem could present an opportunity for the Ninth Circuit to correctly resolve the OSHA preemption issue. See section IV (C), *supra*.

## VII. CONCLUSION

The foreign worker abuse problem in the NMI can best be resolved by a combination of federal and local efforts. While federal measures, such as H.R. 602 and increased OSHA enforcement, can help alleviate the problem, a solution to the foreign worker abuse problem can only be reached through aggressive prosecution of abusive employers under the NMI's criminal laws.

The U.S. Congress should consider reintroducing legislation like H.R. 602. Additionally, the U.S. federal government should commit resources to supply more OSHA compliance officers and OSHRC administrative law judges in the NMI. These personnel would facilitate stronger civil enforcement of OSHA. Moreover, the U.S. federal government should increase funding for prosecutions under OSHA's criminal provisions by the U.S. Attorney's Office in the NMI.

However, even if the U.S. federal government allocates enough resources to increase enforcement of federal law, aggressive prosecution of abusive employers under NMI criminal law is critical because: (1) civil and criminal enforcement of OSHA by the United States federal government will not protect foreign workers from all forms of abuse because of the Act's limited scope and logistical difficulties; (2) foreign workers commonly lack the financial resources and cultural knowledge to bring successful civil suits under tort law; and (3) the jury trial problem cannot be avoided by foreign workers because they must litigate in Federal District Court.

Both the NMI and the United States must take steps towards, and accept the responsibility of, protecting foreign workers within the NMI's borders.