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APR 25 1988

Office of the  
Deputy Assistant Attorney General

Washington, D.C. 20530

Mr. James G. Hergen  
Assistant Legal Adviser for  
Consular Affairs  
United States Department of State  
Washington, D.C. 20520

Dear Mr. Hergen:

Thank you for your letter of April 12, 1988, relating to your opinion request of January 12, 1988, concerning citizenship issues in the Northern Mariana Islands. In that letter you suggest that the State Department will issue passports to certain residents of the Northern Mariana Islands unless you receive our written opinion by April 26, 1988, explaining why such action would be legally impermissible. As you know, complaints were filed on March 18, 1988, in the District Court of the Northern Mariana Islands by Mrs. Tenorio, and Mrs. Palacios, et al. which involve the very issues that are covered by your request. We have deferred the issuance of the opinion you requested because the Department of Justice as a rule does not render opinions with respect to matters that are in litigation.

Moreover, I should like to draw your attention to Section 5 of Executive Order No. 6166 of June 10, 1933, 5 U.S.C. 901, note, which provides in pertinent part:

"As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

\* \* \* \* \*

"Nothing in this section shall be construed to affect the function of any agency or officer with respect to cases at any stage prior to reference to the Department of Justice for prosecution or defense.

The Tenorio and Palacios complaints have been referred to the Department of Justice for defense. To grant full validity passports to the plaintiffs in those cases and the classes represented by them would have the effect of compromising the litigation or of abandoning the defense. Such action would infringe on the exclusive control vested in the Attorney General over every case after it has been referred to the Department of Justice. 38 Op. A.G. 124 (1934). You will understand that in these circumstances the Department of State could not issue any passports to plaintiffs and persons represented in these class actions without the consent of the Department of Justice.

As I have discussed with you on the telephone, I have asked the Civil Division to hold a meeting with representatives of your Department, the Department of Interior, and this Office to discuss fully all the legal options open to the government in these lawsuits. I trust that this meeting can take place within the next two weeks.

Sincerely,



John O. McGinnis  
Deputy Assistant Attorney General  
Office of Legal Counsel