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INTRODUCTION

Our client wants to structure a relationship between the Marianas and the United States which is consistent with the United States Constitution and which accomplishes the following goals:

1. The agreement must be binding on both parties, so that neither side may make a unilateral change. Joint Communique, p. 2, cl. 2.

2. The Marianas must have a maximum amount of self-government. The United States Congress must not have the power to override acts of the Marianas which deal with matters of internal self-government. Joint Communique, p. 2, cls. 1, 3.

3. The United States must have control over all matters of defense and foreign affairs for the Marianas. Some major areas of federal legislation would apply to the islands. Finally, a United States District Court in the Marianas would have as much jurisdiction as it would in a state. Joint Communique, cls. 5, 6, 11.

The territorial clause of the United States Constitution, Art. IV, § 3, cl. 2, is the major constitutional obstacle to the success of the proposed relationship,

since it apparently would give Congress full control over the islands. This memo will discuss the history and interpretation of the territorial clause, and then suggest possible means of limiting the power of Congress which are consistent with the Constitution.

I. Origin and History of the Territorial Clause

Art. 4, § 3, cl. 2 of the Constitution provides:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The apparent reason for the inclusion of the provision in the Constitution was to quiet territorial disputes among the states by vesting responsibility for territorial government in the federal government. In the Federalist, No. 43, Madison wrote:

> The proviso annexed is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public.

Similarly, Hamilton, writing in the Federalist, No. 7, remarked that territorial disputes would be a cause of war among the states if they remained disunited.

The great bulk of Supreme Court cases dealing with the powers of Congress and the powers of territorial legislatures occurred in the nineteenth century during the westward expansion of the nation. Not surprisingly, these cases

uniformly uphold Congress in the exercise of plenary power over the territories. See, e.g., Sere v. Pitot, 10 U.S. (6 Cranch) 332 (1810); American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511 (1828); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840); Hoover & Allison Co. v. Evatt, 324 U.S. 652 (1945). Congress by itself may provide for all executive, legislative, and judicial decision-making for a territory. See, e.g., Sere v. Pitot, 10 U.S. (6 Cranch) 332 (1810). There is some confusion in the cases as to the precise source of congressional power, and the accepted analysis is that there are two sufficient and independent sources of congressional authority over territorial areas: from the express enumeration of power in Art. 4, § 3, cl. 2, and in the implicit powers of the sovereign state. One of the earlier and more comprehensive explications of this aspect of the territorial clause comes from John Marshall:

> The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this situation be contested, the constitution of the United States declares that "congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively. Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336-37 (1810).

Unfortunately, there does not appear to be a precise definition of "territory." A mid-nineteenth century case dealing with the territorial clause construed the term in a general sense:

> The term "territory," as here used, is merely descriptive of one kind of property, and is equivalent to the word "lands." United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840).*/

While the Congress itself has full power over territories, it is also clear that the power may be delegated. As the above quotation from John Marshall indicates, the Supreme Court has traditionally held Congress may grant executive, legislative, and judicial decision-making authority to individuals and groups in the territories. See, e.g., American Ins. Co. v. 356 Bales of Cotton, supra; Snow v. United States, 85 U.S. (18 Wall.) 317 (1873); Simms v. Simms, 175 U.S. 162 (1899). Moreover, in delegating authority to govern territories, Congress apparently need not concern itself with the strictures ordinarily associated

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*/ It might be possible to approach the problem of the U.S. - Marianas relationship by asking whether the territorial clause is applicable at all to the proposed relationship -- in other words, by questioning if the Marianas fall outside the definition of territory. Such an approach has been rejected for two reasons. First, the vagueness of the definition makes it difficult to argue that an associated land area over which the United States exercises a substantial amount of sovereign authority is not indeed a territory. Second, the joint communique, at p. 2, provides: "Article IV, section 3, clause 2 of the United States constitution would apply to the future political relationship between the Marianas and the United States . . . ." Thus, a major premise of the negotiating parties is that Art. IV, § 3, cl. 2 is applicable.

with a delegation of authority: setting out the subject matter and standards for the decisions and acts of the congressional agent. The delegation may apparently be carte blanche.

The cases indicate that the delegation of power has always been regarded as revocable, and that Congress has always maintained the authority to override a particular action of a territorial government:

> In the organic Act of Dakota there was no express reservation of power in Congress to amend the Acts of the territorial Legislature, but none was necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial Legislatures, but it may itself legislate directly for the local government. It may make a void Act of the territorial Legislature valid, and a valid Act void. In other words, it has full and complete legislative authority over the People of the Territories and all the departments of the territorial governments. First National Bank v. Yankton, 101 U.S. 130, 133 (1880) (emphasis supplied).

Perhaps the most famous exercise of congressional power to override territorial acts was Congress' repeal of the charter of the Mormon church, upheld by the Court in Church of Jesus Christ of the Latter-Day Saints v. United States, 136 U.S. 1 (1890). In short, the territorial clause seems to undermine the principle of inviolable local autonomy, which is the keystone of the proposed Marianas-United States relationship.

The language in the quotation above from the Yankton case hints at the problem which the cases on the

revocability of delegated power raise: Can Congress indeed "grant away" its power to revoke a territory's act? Can the Congress delegate power permanently, with no hope of recall? Or, to put it another way, does Art. IV, § 3, cl. 2 permit the United States and the people of a territory to enter into a binding agreement permanently to split control of the territory? The highlighted language in Yankton tends to indicate that such an agreement is constitutionally permissible, but the statement is completely gratuitous, and far too slender a reed on which to base our negotiating position. No case has ever directly or even tangentially discussed the problem in a meaningful fashion. The Puerto Rican experience of an agreement establishing a measure of local autonomy may be the best analogy, and I refer you to the work Gil Kujovich is presently doing on that. The remainder of this memo will discuss various possible means of limiting Congress' apparently plenary power under the territorial clause.

II. The Treaty Power

The constitutional history of treaties clearly indicates that treaties do not act to circumscribe the powers of Congress. On the contrary, since treaties and federal legislation are on an equal footing as part of the supreme law of the land, Congress may pass later legislation which effectively vitiates the treaty provisions. See Thomas v.

Gay, 169 U.S. 264 (1898); Stephens v. Cherokee Nation, 174 U.S. 445 (1899). Congress cannot actually repeal a treaty; when it passes a subsequent law inconsistent with a treaty, the federal courts will simply follow the latest provision. The remedy for such a "breach," then, is not in the federal courts, but rather must be in an international forum. Clearly, a purely international remedy is unacceptable to either the Marianas or the United States. In sum, the treaty power approach appears to violate one of the fundamental goals of the proposed relationship -- that no unilateral changes be possible.

Another problem with the use of a treaty to limit congressional authority is that the Supreme Court has held that the treaty power may not be used to seriously tinker with the fundamental structure of our government:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in the instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of the States, or a cession of any territory of the latter, without its consent. Geofroy v. Riggs, 133 U.S. 258, 267 (1890) (emphasis supplied).

The entry of Congress into an agreement whereby the Marianas have autonomy in local matters probably would not be such a major structural change; nevertheless, it is another argument

against the treaty power. There have been no cases further detailing where the limits might precisely be with the treaty power.

In summary, the history of the treaty power provides some discouragement as to its use as a vehicle to effect the U.S.-Marianas relationship. Still, the courts have never dealt with a case which is truly similar to the proposed relationship: the one of a treaty to divide jurisdiction permanently over a single area. To the extent that there is no precedent square against us, we are in luck. To the extent that general principles of congressional ability to pass valid, enforceable, inconsistent legislation govern, we will have difficulty using the treaty to effect our purposes.

Since an examination of Art. 4, § 3, cl. 2, and an examination of the treaty power provide no direct precedent for such a binding limitation of congressional power, it then becomes a question of whether there are any persuasive analogies in our constitutional law. The area which comes to mind is our own federal system, and this memo will proceed to examine agreements between the states and Congress to see if there is any precedent for a compact, contract, or other agreement limiting congressional authority.

III. The Obligation of Contract

If we could successfully construe the agreement between the United States and the Marianas as a contract,

would the contract clause of the Constitution bar either side from tampering with the agreement, thus freezing the rights of the two governments over the Marianas? Art. I, § 10, cl. 1 provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." The federal government, however, is not restricted by the language of the contract clause. I have searched through the library, including government contract services, to try to uncover any authority for the proposition that Congress may not pass valid legislation contrary to a contract they have entered into. While some case law addresses the problem of disturbing vested property rights in bonds and insurance policies, see, e.g., Lynch v. United States, 292 U.S. 559 (1934), nothing addresses a problem similar to the problem of the Marianas, or provides any useful analogies. In conclusion, a contractual theory of the U.S.-Marianas agreement does not help us accomplish the goals outlined at the beginning of the memo.

IV. The Entry of New States into the Union

I have researched to see if upon entry into the United States, any state has been able to condition its admission upon an agreement altering the normal balance of powers between the states and the federal government. The law seems to be just the opposite: that each state must enter the Union on an equal footing with all the other states.

In a dispute with the United States over the ownership of marginal sea rights, Texas argued that the joint annexation resolution between the U.S. and Texas, passed by both legislatures when Texas became a state, governed the parties and fixed Texas' rights over the marginal sea. In refusing to apply the old law of Texas, the Court said:

> The "equal footing" clause, we hold, works the same way in the converse situation presented by this case. It negatives any implied, special limitation of any of the paramount powers of the United States in favor of a state. United States v. Texas, 339 U.S. 707, 717 (1950).

Thus, the entry of new states into the Union provides no precedent for the United States and the people of the Marianas entering a binding agreement permanently splitting control over the Marianas islands. Rather, the entry of states presents an example of a rigid, unamendable set of rights and powers belonging to each party, which cannot be altered by mutual consent.

V. Compacts

The use of agreements among states, and agreements among states and the federal government, is an important and reasonably frequent practice in our federal system. Although often compacts have been used to settle disputes over rights, as for example in land boundary agreements, of late the compact has become more important in creating joint enterprises among the states and the federal government. See Grad,

Federal-State Compact: A New Experiment in Cooperative Federalism, 63 Col. L. Rev. 825 (1963). Congress maintains a power of approval over interstate agreements, as provided in Art. I, § 10, cl. 3: "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ."

It is clear that a compact circumscribes the legislative authority of a state which has entered into the agreement, and that subsequently passed state legislation inconsistent with the original compact is void. Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823); Dyer v. Sims, 341 U.S. 22, 28 (1951). The Supreme Court in the Green case construed an agreement between Virginia and Kentucky as a contract, and then argued that a subsequent inconsistent state act violated the obligation of contract protected from state infringement by the Constitution. 21 U.S. at 92-93.

However, the real problem with the Marianas-U.S. relationship is finding a way of binding the federal government to its agreement. No case I have been able to turn up has dealt with whether Congress may pass valid legislation which breaches a compact it has entered into with a state. Pennsylvania v. Wheeling & Belmont Bridge Company, 59 U.S. 421 (1856) deals with a somewhat related question: whether Congress may pass a valid law inconsistent with the terms of a compact between two states to which Congress has

assented, as required by Art. I, § 10, cl. 3? In holding that the Congress could indeed pass such a valid law, the Court said:

> The question here is, whether or not the compact can operate as a restriction upon the power of congress under the constitution to regulate commerce among the several States? Clearly not. Otherwise congress and two States would possess the power to modify and alter the constitution itself. 59 U.S. at 433.

The language of the Court is broader than it need be: the language implies that in an agreement entered into between the Congress and a state, the agreement might not bind the Congress. The issue before the Court was different, in that the case only presented the question of federal legislation inconsistent with an interstate compact to which Congress had merely assented. Arguably, the situation of congressional assent is substantially different from a federal-state agreement, for in assenting to the interstate compact, Congress is not genuinely a party to an agreement fixing rights between two states. Rather, Congress is merely exercising its constitutionally mandated function of finalizing the compacts between the states. Since Congress is not really a party to the agreement, it is not prevented from passing later acts which run contrary to the compact. Such a theory of Wheeling Bridge leaves room for the possibility that in a state-federal compact, Congress is indeed bound by its agreement.

Unfortunately, I have not found any cases which consider the state-federal compact situation.*/ There are, however, a number of cases which deal with state cession of land to the federal government, which are consistent with the theory that the federal government is bound by its agreements with the states.

VI. Split Jurisdiction in State Land Cessions to the Federal Government

Art. I, § 8, cl. 17 of the Constitution provides:

> (Congress shall have the power) to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings . . . . . (Emphasis supplied.)

It is the latter portion of the clause, dealing with purchase of lands for military reservations and other purposes, which

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*/ I have read some of the secondary literature on compacts, and that does not really illuminate the problem. I have examined one federal state compact, an agreement among Del., N.J., N.Y., Pa., and the U.S. to establish the Delaware River Basin Commission. The compact expressly provides that the United States may withdraw at any time. 75 Stat. 691, § 1.4 (1961). The reason for the provision is not apparent, but its presence suggests, at least, that if the withdrawal clause were not in the compact the U.S. would be bound for the duration of the agreement -- 100 years. Perhaps an examination of other federal-state compacts and their legislative histories would be useful.

is important here. The language, on its face, gives Congress apparently complete and sole authority over lands acquired with the consent of the state legislature. Nevertheless, the Supreme Court has consistently interpreted the clause in such a way as to give effect to agreements between states and the federal government which effectively split control over such lands.

In Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1895), the Supreme Court considered the validity of an ad valorem tax imposed by Kansas upon railroad property on a U.S. military reservation. The Kansas legislature had ceded jurisdiction over the reservation land to the United States, while expressly reserving for itself the power to serve criminal and civil process within the enclave, and the power of taxation of railroads and corporations which had property within the reservation. 114 U.S. at 528. In holding that such reservations of state jurisdiction are proper so long as they do not interfere with the purposes of the grant, the Court explained that such splitting of control is not only proper but beneficial to our federal system:

> Though the jurisdiction and authority of the general government are essentially different from those of the State, they are not those of a different country; and the two, the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution . . . . [I]f to their more effective use, a cession of legislative authority and political jurisdiction

> by the State would be desirable, we do not perceive any objection to its grant by the Legislature of the State. Such cession is really as much for the benefit of the State as it is for the benefit of the United States. 114 U.S. at 541-42.

The quotation effectively explains the Court's rationale. In pursuing its task of policing the federal system, the Court chooses not to interfere with a harmonious, consensual, and relatively minor alteration of the state-federal balance of power, even when that choice to let the two entities arrive at their own adjustments runs against the grain of a specific grant of power to Congress.

In Collins v. Yosemite Park Co., 304 U.S. 518 (1938), the Court employed even broader language:

> The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. These arrangements the courts will recognize and respect. 304 U.S. at 528.

The Court has thus repeatedly emphasized the flexibility of federalism.

Where jurisdiction is divided, the issue of subsequent legislation passed by the federal government inconsistent with the organic agreement should not be troublesome (as was the case with treaties, where Congress could pass legislation effectively vitiating treaty provisions). The question is simply jurisdictional -- if

according to the state-federal agreement the United States have no jurisdiction in an area with respect to a particular subject, then federal legislation which attempts to encroach on that pre-empted field should be regarded as void by the courts. I can see no reason why federal courts should have any more trouble holding such legislation void than they would have holding another act encroaching upon exclusive local prerogatives exceeded congressional authority.

Of course, the question remains to what extent this line of cases provides a persuasive analogy to the proposed Marianas-U.S. relationship. To a certain degree, the two situations are quite close: both deal with attempts by localities to readjust the balance of power with the federal government in a way that increases local authority in contravention of an explicit grant of the power to the federal government. In one case, it is Art. 4, § 3, cl. 2; in the other, Art. I, § 8, cl. 17. On another level, the considerations may appear to be different. Federalism is a matter of peculiar concern to our system of government and consequently to our federal courts. The Supreme Court has largely abandoned whatever role it may once have played in attempting to structure the balance of power between the states and the national government, and has left the matter to other methods of adjustment outside of the federal courts. One can question whether the same considerations

that have motivated the Court in declining to interfere in questions of federal and state power adjustments should or will apply to the proposed association between the national government and a group of islands in the far Pacific.

On the other hand, one can make the same fundamental arguments here as the Court itself made in the Ft. Leavenworth case. The arrangement between the two entities is mutually beneficial. Congress has consented to this encroachment on its apparent power, and there is no real motivation for the Court to intervene and strike down the arrangement. Felix Frankfurter said while serving in the Department of War in 1914 in connection with Territorial Affairs:

> The form of the relationship between the United States and unincorporated territory is solely a problem of statemanship. History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statemanship is to help evolve new kinds of relationships so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open. Quoted in Mora v. Torres, 113 F.Supp. 309 (P.R. 1953).

This is the view that a court ought to take toward the novel relationship proposed with the Marianas. To some extent, the analogy of split jurisdiction of land cessions may help us to convince courts, Congress, and the President's personal

representative that the details of the U.S.-Marianas agreements are to be arrived at through fluid negotiations rather than by a narrow reading of a clause of the Constitution dealing with congressional power.

CONCLUSION

The history of the territorial clause and of the treaty power are initially discouraging with respect to our ability to structure a relationship between the Marianas and the United States which accomplishes the goals set forth in the introduction and which is consistent with the United States Constitution. However, no case has directly considered the validity of such an agreement, and certain state-federal relationships provide a close analogy for this particular sort of power sharing. To the degree that individuals whom we must persuade of the agreement's validity adopt a literal, narrow approach to the territorial clause, we shall have troubles. I think, however, that the example of split jurisdiction in land cessions provides a close and persuasive example of the propriety of Congress' own readjustment with another legislature of the balance of legislative authority over a particular area.