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To: Barry Carter

From: Jim Moyer

Subject: Further Research on Constitutional Problems with  
the Marianas

I have run through the series of "vested right" cases cited in the footnotes of the Micronesia note. Note, A Macrostudy of Micronesia: The Ending of a Trusteeship, 18 N.Y.L. For. 139, 191 nn. 334-39 (1972). I think that cases are narrowly confined to the context of congressional attempts to tinker with fixed economic and property interests, and consequently they are of no help in our attempt to bolster the validity of the proposed political relationship between the United States and the Marianas.

A. Reichart v. Phelps, 73 U.S. (6 Wall.) 160 (1867); Jones v. Meehan, 175 U.S.1 (1899); and Choate v. Trapp, 224 U.S. 665 (1912), all deal with the federal government's attempts to exercise control over land of which the government had previously given up control. Clearly, agreements dealing with land titles bear little relationship to agreements sharing political control over an area. In the land title situation, the government is acting in its proprietary capacity as a private individual would, and the law treats the government in a fashion

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similar to a private individual. As an example, in Jones v. Meehan supra, the Court considered the effect of a congressional resolution upon land rights previously acquired by Chief Moose under a treaty between the federal government and the Indians. The Court decided that once the Chief got his interest in the land, later congressional legislation could not alter that interest.

B. In Beecher v. Wetherby, 95 U.S. 517 (1877), two parties disputed title to land, alternatively claiming under a state and a federal land patent. In the compact between Wisconsin and the federal government upon Wisconsin's entry into the Union, the United States gave to the state of Wisconsin fee title to certain lands. Subsequently, an act of Congress attempted to dispose of the same lands in another way. In upholding the claim of the holder of the state land patent, the Court used language which broadly indicated that the compact entered into upon the entry of Wisconsin into the Union bound the federal government, and that legislation passed by the Congress inconsistent with the compact was void. Taken at its fullest, such language might be helpful to us.

However, a later case indicates the meaning of Beecher is not so broad as we might hope. In Coyle v. Oklahoma, 221 U.S. 559 (1911), the Court confronted a provision respecting the location

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\* The treatment is similar in that when the government is acting as a mere proprietor, when it gives up title to property it has no more right to the use or control of the property than would a private individual who had given up title. (Of course, the government could always exercise its right of eminent domain.)

of the Oklahoma capital in the original legislation passed by Congress admitting Oklahoma as a state. The act provided that Guthrie should be the state capital for a fixed period of time, after which the people of Oklahoma might move it if they chose. The Court dashed the hopes of land speculators and saloon keepers in Guthrie by holding that the Congress could not set such conditions upon the entry of states. Rather, the Court said, the entry of new states must be on an equal basis.

Admittedly, the Coyle case deals with an attempt by Congress to use a statehood agreement to limit the power of a state, rather than an attempt to limit its own power through such an agreement. Yet, the same result should obtain in both cases. If federalism operates to forbid the entry of states with power diminished by Congress, the same constitutional principles of equality among the states should proscribe statehood agreement which gave some of Congress' power to a state.\*

The Beecher case, then, must be viewed narrowly. It deals not with a distribution of power, but rather with title to lands. Clearly, Congress' disposing of title to lands is an entirely different matter from the redistribution

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\* This is consistent with the conclusions in my earlier memo about the entry of new states into the Union.

of power in the federal system, and agreements as to the former are properly regarded as binding upon the Congress, while \* agreements as to the latter are suspect.

C. In Perry v. United States, 294 U.S. 330 (1935), the Court had before it the problem of the validity<sup>of</sup> a particular application of a joint resolution of Congress declaring provisions for payment of gold void as against public policy. The plaintiff was seeking governmental compliance with the terms of a government bond he had purchased during World War One. The terms of the bond were for payment in gold. In holding that the government must satisfy the terms of its contract, the Court included some broad language about congressional power to enter into binding agreements:

"The argument in favor of the Joint Resolution, as applied to government bonds, is in substance that the Government cannot by contract restrict the exercise of a sovereign power. But the right to make binding obligations is a competence attaching to sovereignty. 294 U.S. at 353."

However, it is not clear that the "obligations" the Court refers to are meant as anything other than this sort of fundamental contractual agreement, or extend to the alteration of the scheme of congressional power outlined in the Constitution.

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\* The principle of equality of power among the states is to a certain degree at odds with the situation of the federal government and a state splitting jurisdiction over land ceded by the state to the federal government. The Court has apparently found the goal of preserving the balance of federal power with the states more compelling in one instance than the other.

To the contrary, other cases dealing with contractual arrangements indicate that although the government may indeed be liable in damages for breach of its contracts, that contracts themselves do not circumscribe congressional power. In both Lynch v. United States, 292 U.S. 559 (1934), and Union Pacific R. R. v. United States, 99 U.S. (9 Ott.) 700 (1879), the Court emphasized that, while Congress and the federal government are bound by their contracts, the remedies to be applied for the breach of such a contract are those generally applicable to the private citizen. Thus, a breach would normally lead to an  
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action for monetary damages.

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\* The result in Perry -- that government must pay in gold -- is not inconsistent with such a view. Perry was a situation where money damages were inadequate -- what the plaintiff wanted was gold, not cash. Thus, the requirement in Perry that the government specifically perform its promise is consistent with the view that the contract remedies against a private individual apply to the government as well.