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This memo will explore one model of a close political relationship between the U.S. and the Marianas. The structure suggested is an attempt to incorporate the two fundamental characteristics contemplated by the Joint Communique: (1) Maximum self-government with respect to the internal affairs of the Marianas and (2) a relationship that cannot be unilaterally altered by either party.

Since the Federal government is a government of limited powers one must consider as to any political relationship that is established the constitutional source of the power to enter into the relationship, the source of the power to act within the bounds of the relationship once established, and the means by which the bounds can be maintained.

This memo will first outline the theory of the model and then consider the means by which the model can be implemented consistent with the Constitution.

I. The Split Sovereignty Structure

The basis of the model is essentially the same as that of the relationship that exists between the individual states and the United States. In the License Cases, 46 U.S. 504, 587-88 (1947), the Supreme Court described that relationship as follows:

> Before the adoption of the constitution, the States possessed, respectively, all the attributed of sovereignty.
>
> . . .

> [Now, after the Constitution] the States, resting upon their original basis of sovereignty . . . exercise their powers over everything connected with their social and internal condition.
>
> . . .
>
> Over these subjects the Federal government has no power. They appertain to the State sovereignty as exclusively as powers exclusively delegated appertain to the general government.

The learned judge and professor Cooley in his Treatise on Constitutional Limitation, (p4, 8th ed.) described the relationship as a division of sovereign powers:

> In American constitutional law, however, there is a division of the powers of sovereignty between the national and State governments by subjects: the former being possessed of supreme, absolute, and uncontrollable power over certain subjects throughout all the States and Territories, while the States have the like complete power, within their respective territorial limits, over other subjects. In regard to certain other subjects, the States possess powers of regulation which are not sovereign powers, inasmuch as they are liable to be controlled, or for the time being to become altogether dormant, by the exercise of a superior power vested in the general government in respect to the same subjects.

In the context of the Marianas, the islands as a sovereign state possessed of all sovereign powers would surrender certain of those powers to the U.S. in an act of political union analagous to that which formed the United States. All that is not surrendered would be retained by the Marianas people and, through the vehicle of their own con-

stitution, their newly organized government. The U.S. in relation to the islands would be a government of limited powers; but insofar as those powers are concerned sovereignty over the Marianas would vest in the U.S. The single, most important characteristic of the relationship, then, is that the source of the Marianas' authority to govern their internal affairs is not a congressional or executive grant or delegation; rather, it is the same power and authority that is inherent in any State or state.

The initial objection to this theory is, of course, the use of the idea of "split sovereignty." The Joint Communique specifically states that "[s]overeignty over the Marianas would be vested in the United States," and negotiators for the U.S. are apparently sensitive to the potential problems of U.S. control of or even responsibility for an "independent sovereign" a few thousand miles out in the Pacific. It is difficult to anticipate the exact reasons for U.S. objection to "split sovereignty" but one evident example, the Marianas relations with sovereign nations, illustrates how they can be met. In this instance the Constitution provides the model for the solution: as in the Constitution the agreement establishing the relationship would clearly stipulate that all foreign affairs are to be conducted by the national entity (with whatever exceptions the two parties can agree upon). I don't see why each U.S. objection to split sovereignty could not be met in the same way up to granting the U.S. complete

power to intervene with the local affairs of the Marianas. Moreover, it should be made clear to the U.S. representatives that terms such as "residual sovereignty" and "split sovereignty" do not indicate a separate country; the analogy of the states makes this clear. The Marianas would clearly be a part of the U.S. and would surrender many of the fundamental attributes of sovereignty. Thus, in the international sense of the word the Marianas would not be "sovereign" after the relationship had been established. See, e.g., Kelsen, The Principle of Sovereign Equality of States as a Basis for International Organization, 53 Yale Law Journal 207,208 (1944) ("Sovereignty in the sense of international law can mean only the legal authority or competance of a State limited and limitable only by international law not by the national law of another State").

Before discussing the constitutional means by which the theory can be implemented I think it is important to note two of the problems this kind of relationship solves.

First, it is more likely to satisfy the United Nations. The political status is in the first instance an act of self-determination, i.e., a choice by a sovereign state of political association with another sovereign state. Moreover, the relationship allocates a degree of continuing "independence" to the Marianas. Rather than being a territory, as that

term has been used in the past, and subject to congressional plenary power, the islands would be a free, but associated state; free in the sense of control over internal affairs and associated in terms of surrendering certain important powers to the U.S.

Second, and more important, the relationship contains a natural limitation on U.S. action. The U.S. cannot legally exercise powers it does not have. The objection concerning subsequent, inconsistent legislation is, I believe, applicable only to those areas in which the U.S. can legitimately act. Where no power is conferred, no legislation can be passed. If, on the other hand, the Marianas were a territory with powers of local government granted by the U.S. there is no doubt in my mind that the U.S. could legally alter or interfere with that government at will. Since a territory is subject to the plenary power of Congress no single Congress can use that power in a way that would foreclose subsequent, inconsistent use; the power continues to exist and the courts look to the latest congressional action to determine how Congress has chosen to exercise it. But under the split sovereignty structure the only prior action of Congress is acceptance of whatever the Marianas surrender. Congress has given nothing to the Marianas and it has received no power to act with respect to the local government of the islands. Thus, if interference were attempted it would not be a question of legislation inconsistent with treaties or statutes of prior Congresses, but an intrusion into an area

that was explicitly reserved by the Marianas. Plenary or not, the territorial clause is not a source of congressional powers to legislate, for example, concerning the internal affairs of Scotland or the Bahamas. The reason, obviously, is that these political entities have not surrendered or have not been surrendered to U.S. authority. In the same manner the Marianas would not surrender the power to govern its local affairs. Thus, there is no attempt to unconstitutionally limit future congressional action by prior legislation; rather, the limit is simply that only certain powers are being surrendered to any Congress, present or future. The question, then, before a court would be not what one Congress can do with respect to the acts of other Congresses, but what any Congress can do with respect to an associated political entity.

II. Implementation of the Theory

A. Sovereignty of the Marianas.

The first barrier to implementing the theory is the question of the Marianas' current status; i.e., are the islands now, or will they be on termination of the trusteeship agreement, a sovereign state. The importance of this issue cannot be overemphasized since the essence of the split sovereignty structure is that the source of local autonomy is not a grant by the U.S. One easy way out of the problem we are

attempting to present future courts would be to hold that the Marianas did not have the power to control its internal affairs independent from U.S. interference and therefore that power could not be reserved.

The uncertainty inherent in the concept of sovereignty coupled with the additional uncertainty that surrounds the status of a trust territory makes it difficult, if not impossible, to draw any firm conclusions concerning the current political status of the Marianas. I suspect that "authorities" in international "law" can be found to support theories putting sovereignty in the Marianas, the U.S., the U.N., or any combination of the three. In any event, one thing is clear: the Marianas currently exercise few, if any, of the attributes of sovereignty. The question, then, is largely one of "residual sovereignty," a question that is not answered by this memo.

The few cases in U.S. courts that have dealt with the question of trust territory sovereignty appear to support the proposition that sovereignty over the trust territory is not now vested in the U.S. See, Callas v. U.S., 253 F. 2d 838 (2nd Cir.), cert. denied 357 U.S. 936 (1958); Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958), aff'd. 278 F. 2d 252 (D.C.Cir. 1960), cert. denied 364 U.S. 835 (1960); Brunell v. U.S., 77 F. Supp. 68 (S.D.N.Y. 1948). These cases, however, are by no means conclusive. In Brunell the court clearly implied that all that was lacking to make the trust

territory a conventional territory or possession of the U.S. was legislation indicating a congressional intent to accept the area as part of the U.S. The case rests on the proposition that territory cannot be acquired solely by the war power; Congress must exercise the treaty or legislative power as well. This continuing possibility of unilateral annexation does not support the idea that the Marianas maintain a residual sovereignty.

The Callas case holds only that the trusteeship agreement did not confer on the U.S. sovereignty over the trust territory. Callas did not decide any issue of residual sovereignty or of power in the U.S. to acquire the trust territory. Moreover, dictum in Pauling indicates that legislation inconsistent with the trusteeship agreement (including, presumably, legislation "annexing" the territory) would prevail. Thus, Pauling contemplates a source of U.S. power independent of the trusteeship agreement.

In sum, the current status of the Marianas is a highly uncertain one and any agreement based on the split sovereignty model should include a clear indication that the U.N. and the U.S. recognize that the Marianas are entering into the relationship as a sovereign entity.

B. Acquisition by the U.S.

Assuming, then, that we can establish or create a Marianas will full sovereign powers, there must be a

mechanism by which some of the powers can be surrendered by the islands and accepted by the U.S. The treaty power is the conventional means by which politically foreign entities are acquired, see e.g., American Ins. Co. v. Canter, 26 U.S. 511, 540-41 (1828) (Marshall, C.J.), and should be used in this case despite Brewster Chapman's objections. Even he acknowledges that a "treaty of cession" is necessary before Congress can organize a territorial government under 4-3-2. Of course, a treaty would not be necessary if one accepts the proposition that the U.S. has the right or power to acquire the trust territory as a U.S. territory by merely legislating to that effect, but that involves the most fundamental point we should not concede. The basis of the whole relationship is a submission by the Marianas to the partial control of the U.S., i.e., a movement from the "outside" to the "inside" and in order for this to occur the islands must be "outside" to begin with. Moreover, use of the treaty would support the proposition that the Marianas are a sovereign entity and establish some concrete legislative history on that matter.

The treaty power, then, would be used by the U.S. to establish the relationship in the same way it was used to accept the cession of the Phillipines, Puerto Rico, Alaska, etc. The difference would be in what is ceded, i.e., partial rather than full sovereignty or control.

Use of a treaty, however, does not solve a problem common to any structure: how can the entire relationship be made irrevocable? "Split sovereignty" only assures that the

area of local control retained by the Marianas cannot be invaded by the U.S., it does not and cannot provide certainty that the U.S. will not "dispose" of the territory (e.g. by "granting" it independence) as it clearly has the constitutional power to do. Attempts to limit this power run into the problem of subsequent, inconsistent legislation. We can, however, make it relatively difficult for Congress to dispose of the islands by tying the existence of the basic relationship to the contracts granting the U.S. land for military purposes and by using the nearly irrevocable right of citizenship. See, Afroyim v. Rusk, 387 U.S. 253 (1967). It should be noted also that if Marianas' residents are only given or only take national status, that status can be legislatively revoked as was done when the Phillipines became an independent country. See, Cabebe v. Acheson, 183 F. 2d 895 (9th Cir. 1950)

In the unlikely event that the U.S. does attempt to dispose of the Marianas an analogical argument can be made from the post-Civil War cases concerning an indestructible union or from cases involving incorporated territories. See, Texas v. White, 74 U.S. 700, 724-26 (1868). See also, Downes v. Bidwell, 182 U.S. 244, 260-61 (1900).

C. The Source of and Limitations on U.S. Power to Act in the Marianas.

The constitutional source of U.S. power would be 4-3-2. On the question of whether and how that power can be

limited there are a number of cases in different contexts indicating that the split sovereignty method of limitation is constitutionally valid.

First, there is the analogy of split jurisdiction under Art. I, § 8, cl. 17. Part IV of Jim Moyer's memo adequately explores the analogical force of these cases.

Second, there is a group of cases that apply the reasoning of split jurisdiction to the territorial clause. Faced with the restriction of enumerated purposes in I, 8, 17 a number of courts have used 4-3-2 as the source of federal jurisdiction over federal land located within the various states. See, U.S. v. Cassiagnol, 420 F 2d 868 (4th Cir.), cert. denied, 399 U.S. 1044 (1970); Robins v. U.S., 284 F. 39 (8th Cir. 1922), U.S. v. Dreos, 156 F. Supp. 200 (D. Md. 1957).

In Robbins, the Eighth Circuit, in discussing federal power to control the use of highways in Rocky Mountain National Park, relied on 4-3-2 and stated that

> "The highways in the park . . . became subject to federal control unless excluded [by the act authorising acquisition] or by prior authority of the state of Colorado." 284 F. at 44.

The Robbins court went on to find that Colorado had ceded to the federal government "jurisdiction and control" of the area. Three years later, however, in Colorado v. Tull, 268 U.S. 228 (1925), the state itself, not a party to the earlier litigation, raised the question of whether full jurisdiction over the highways had, in fact, been ceded. Writing for the Court, Justice Holmes held that the state's allegation of retained control made out a good cause of action. Implicit

in the holding is the proposition that the state can retain some powers over lands ceded to the "jurisdiction and control" of the federal government and administered by federal authority under 4-3-2.

The analogy of the split jurisdiction cases is limited by the fact that they deal with and ultimately rest upon adjustments to the federal-state relationship, i.e., the original division of sovereign powers that was made in the Constitution. But the reasoning of the cases can, I believe, be generalized to support the proposition that power under the territorial clause does not extend ex proprio vigore to jurisdictional areas retained by the political unit surrendering part of its authority to the federal government. Although cases concerning territories as political units (unlike "territory" as a geographical unit) hold that Congress has plenary powers under 4-3-2, there has been no case in which the submission to U.S. powers has been limited ab initio.

Third, dictum in at least one decision indicates that limitations on the extent of U.S. powers over newly acquired territories are permissible:

> "The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to those territories." Morman Church v. U.S., 136 U.S. 1, 42 (1889).

In sum, past decisions not only do not foreclose use of the split sovereignty model but they also indicate that such a structure is consistent with the Constitution. More-

over, a major policy consideration also supports the structure: to confine the U.S. to an "all or nothing" relationship with acquired territories is to impose a rather severe restriction on the sovereign power to acquire territory. Thus, unlike the irrevocable delegation, which operates to limit sovereign powers, the split sovereignty model introduces an element of flexibility into the exercise of those powers and thus increases the number and kind of situations in which they can be exercised.