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MARIANAS POLITICAL STATUS COMMISSION

DECEMBER 6, 1973

POSITION PAPER
REGARDING THE FUTURE POLITICAL STATUS
OF THE
MARIANA ISLANDS

Subject: Limitation of Federal Authority in the Marianas to Assure "Maximum Self-Government" in Regard to Local Affairs

At the May 1973 session of the U.S.-Marianas status negotiations, the United States agreed in principle that the future government of the Marianas would exercise "maximum self-government" in regard to local affairs. At the same time, the United States insisted that "sovereignty" over the Marianas be vested in the United States and that the U.S. Congress be authorized to legislate for the Marianas under Article IV, Section 3, Clause 2 of the U.S. Constitution ("IV-3-2"). The Marianas Commission agreed tentatively to these terms. With respect to Article IV, Section 3, Clause 2, however, both parties recognized that the Commission would explore means to reconcile the plenary powers of Congress under IV-3-2 with the exercise of "maximum self-government" by the people of the Marianas.

This position paper sets forth the results of the Commission's study and deliberations on this subject since the last session of the negotiations. The paper is divided into four main sections: Section I consists of an introduction in which the problem of securing local self-government for the Marianas is placed in its proper perspective. Section II analyzes the extent to which Article IV, Section 3, Clause 2, is necessarily inconsistent with local self-government for the Marianas. Section III explores means to reconcile the IV-3-2 authority of Congress with the need for adequate assurances of local autonomy. Finally, Section IV sets forth the Commission's proposal for assuring local self-government for the Marianas under the future status arrangement.

Summary of Conclusions

(1) The unqualified application of Article IV, Section 3, Clause 2, in the future status relationship would leave the Marianas without adequate assurances of local self-government. The existence of plenary and unlimited power in the U.S. Congress to legislate for the Marianas would raise serious questions as to the validity and binding effect of basic commitments made by the U.S. in the Joint Communique of June 4, 1973. Specifically, plenary

power under IV-3-2 would be inconsistent with the principle of "maximum self-government" because Congress would retain the power to enact strictly local legislation for the Marianas -- even to annul otherwise legitimate acts of the future Marianas government. Indeed, wholesale application of IV-3-2 would cast doubt on the enforceability of the U.S. commitment to refrain from amending fundamental provisions of the status agreement without the consent of the Marianas.

(2) Without impairing any legitimate U.S. interests in the Marianas, the application of Article IV, Section 3, Clause 2 can be limited in a way that provides adequate assurances of local self-government for the Marianas. Appropriate legal mechanisms to achieve this result can be devised which will eliminate ambiguity, protect the interests of both parties, and satisfy the requirements of the U.S. Constitution.

(3) The Marianas Commission proposes that, with specific exceptions to be mutually agreed upon, United States authority in the Marianas should be coextensive with its authority in the 50 states. The Commission does not propose that IV-3-2 should not apply. Congress would exercise authority under IV-3-2 but this authority would not be plenary; it would be restricted to legitimate areas of federal or national interest. Such a limitation of Federal authority would be wholly consistent with the principle that sovereignty over the Marianas would be vested in the United States

I. INTRODUCTION

"Local self-government" in the American political system describes the type of authority that the States exercise over internal affairs. Under the United States Constitution, the federal government is a government of specific and limited powers. These powers were delegated to the central government by the States at the time of formation of the federal union. The delegated powers relate exclusively to matters of national concern such as defense, interstate and foreign commerce, currency and the like. Although the scope of the national powers has expanded over the years, the States retain broad powers to regulate subjects of "local" concern within their borders. The powers of self-government, enjoyed by the States, include the power to tax, the power to regulate intrastate commerce, the power to regulate the use of property within the State, and the power to provide for the general well-being of the residents of the State.

The Marianas are prepared to accept the quality of local self-government enjoyed by the States. The Commission recognizes that, as a practical matter, it is most unlikely that the United States would agree to accept less federal authority in the Marianas than it exercises in a State. Coupled with specific restrictions on the application of certain federal laws, the Commission believes that

effectively limiting federal authority as if the Marianas were a State would provide the people and the future government of the Marianas with a meaningful measure of self-government in regard to matters of internal concern.

At the last session of the negotiations, the parties made significant progress toward recognizing a measure of genuine self-government for the Marianas. The United States agreed in principle (1) that the future Marianas government would be organized under a locally drafted and approved Constitution, and (2) that "fundamental" provisions of the formal agreement creating the new political status for the Marianas could not be changed by Congress without the consent of the people of the Marianas. These provisions, taken together, would seem to protect the Marianas against unilateral Congressional interference with the organization and powers of any future Marianas government.

United States insistence on the apparently unqualified application of Article IV, Section 3, Clause 2, however, seemed to undercut these assurances of relative local autonomy in at least two important respects. First, retention by Congress of plenary power under IV-3-2 could render the mutual consent provision of the status agreement unenforceable; thus, Congress would be free to amend the status agreement in much the same way it can amend the

organic acts for Guam and the Virgin Islands. Second, even if Congress could not unilaterally amend the status agreement, retention of plenary power under IV-3-2 could mean that federal authority in the Marianas would extend to matters of purely local concern -- even though authority over such matters is explicitly vested in the future government of the Marianas by the locally drafted Constitution. In other words, by passing inconsistent legislation, Congress could nullify acts of the local legislature that relate merely to internal affairs.

The Marianas Commission expressed these concerns at the last round of the negotiations. As a result, the United States agreed that the Commission would explore means to reconcile the plenary powers of Congress under IV-3-2 with "maximum self-government" by the people of the Marianas. This position paper sets forth the results of that exercise.

II. ARTICLE IV, SECTION 3, CLAUSE 2, AND LOCAL SELF-GOVERNMENT FOR THE MARIANAS

This section of the position paper considers whether acceptance by the Marianas of the unqualified application of Article IV, Section 3, Clause 2 in the Marianas would necessarily undercut the extent to which the Marianas could exercise a right of local self-government. It also addresses the question whether a mutual consent provision that freezes the applicability of certain federal laws, as well as the basic structure of the U.S.-Marianas relationship, would be enforceable under such circumstances. It appears that the unqualified application of Article IV, Section 3, Clause 2 to the Marianas would cast serious doubt on the right of local self-government in that Congress would retain the power to enact local legislation for the Marianas -- even to annul otherwise legitimate acts of the future Marianas government. Indeed, wholesale application of Article IV, Section 3, Clause 2 might mean that the status agreement itself could be amended unilaterally by Congress notwithstanding the mutual consent requirement.

Article IV, Section 3, Clause 2 of the United States 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. . . ."

The apparent reason for the inclusion of this 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.

Article IV, Section 3, Clause 2 is not limited in application to "territories" in any formal sense, however.*/ It applies in U.S. "possessions" and, as described below, IV-3-2 probably applies to some extent in the Commonwealth of Puerto Rico. It also has been held to apply in certain land areas ceded by a State to the Federal Government such as those used for national parks. In short, it

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*/ There does not appear to be a precise definition of "territory," as used in IV-3-2. 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).

appears that IV-3-2 was designed to fill what would have been a void in the allocation of powers between the States and the Federal Government -- to provide a constitutional basis for the exercise of federal authority in land areas not otherwise subject to the jurisdiction of a particular State.

The western territories of the continental United States and the insular territories acquired from Spain and other foreign powers near the turn of the century were not subject to the jurisdiction of any State. When these territories were acquired, they became the "absolute property and domain" of the United States government. Morman Church v. United States, 136 U.S. 1, 42 (1890).

The Supreme Court cases dealing with these territories uniformly upheld the plenary power of Congress to provide for their governance. See, e.g., Sere v. Pitot, 10 U.S. (6 Cranch) 332 (1810); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840); Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945). Chief Justice John Marshall provided the classic statement of the scope of federal power in such territories in Sere v. Pitot:

> "The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position 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." - 10 U.S. (6 Cranch) 332, 336-37 (1810). (Emphasis supplied.)

Although Congress itself could provide for all executive, legislative, and judicial decision-making in a territory, it is also clear that such power may be delegated to individuals and groups in the territories, i.e., territorial governments. See, e.g., American Ins. Co. v. Canter, supra; Snow v. United States, 85 U.S. (18 Wall.) 317 (1873); Simms v. Simms, 175 U.S. 162 (1899).

The cases indicate, however, 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 not an express reservation of power in Congress to amend the acts of the territorial legislature, nor was it 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. County of Yankton, 101 U.S. 129, 133 (1880).

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 Mormon Church v. United States, 136 U.S. 1 (1890).

It is not clear whether this revocable aspect of Congress' delegation of power is constitutionally mandatory. It is clear, from the foregoing cases, that Article IV, Section 3, Clause 2, has been applied to undermine the principle of inviolable local autonomy, which should characterize the future political status of the Marianas. The cases under IV-3-2 are cause for concern that its unqualified application in the Marianas would render the status agreement itself unenforceable in the face of subsequent inconsistent legislation by Congress. It is questionable whether the mutual consent requirement would be enforced as long as Congress appears to retain "plenary" power under IV-3-2. At best, the status of the Marianas would be ambiguous in this respect.

Even if the status agreement were enforceable, however, the otherwise unqualified application of IV-3-2 to the Marianas would mean that Congress could enact local

legislation for the Marianas -- even though the future government in the Marianas also possessed that power. In the case of a conflict with Commonwealth legislation, federal law would necessarily prevail under an equivalent to the "supremacy clause" which would provide for federal preemption in areas of overlapping jurisdiction. Unless the status agreement provides that federal authority does not extend to internal affairs, local self-government for the future Marianas government will not be assured.

LIMITATION OF FEDERAL POWER UNDER ARTICLE IV, SECTION 3, CLAUSE 2

With the possible exception of the Commonwealth of Puerto Rico, Congress has never attempted to limit the scope of its authority in the territories under Article IV, Section 3, Clause 2. Accordingly, none of the cases discussed above stand for the proposition that such power cannot be limited -- only that, unless it is limited, the right of local self-government is not assured.

This section of the position paper discusses the analogies available to the Marianas, including Puerto Rico that suggest a means to limit federal power under Article IV, Section 3, Clause 2. It concludes that federal authority

in the Marianas need not be plenary */ and that a meaningful right of local self-government can be assured. To this extent, the terms of the formal status agreement would be enforceable in the face of subsequent unilateral Congressional revision.

A. Compact and the Commonwealth of Puerto Rico.

An appropriate starting point is the experience of the Commonwealth of Puerto Rico, the one "territory" in which Congress arguably has sought to limit its authority under Article IV, Section 3, Clause 2.

Prior to 1952, Puerto Rico was an unincorporated territory subject to the plenary power of Congress under Article IV, Section 3, Clause 2. Balzac v. Porto Rico, 258 U.S. 298 (1922). In 1952, Puerto Rico became a Commonwealth with its own locally drafted and approved Constitution and with its relationship to the United States spelled out in a new Puerto Rican Federal Relations Act. This

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*/ Although not discussed below, it is clear that Congressional authority in the territories is restricted by the due process clause of the Constitution. Moreover, certain Congressional action extending Constitutional protections or providing other personal rights in the territories has been held to be irrevocable. Under the Insular Cases, the action of Congress "incorporating" a territory into the United States and bringing to bear the full force of the U.S. Constitution in the territory cannot be revoked. Downes v. Bidwell, 182 U.S. 244, 270-71 (1901). More recently, in Afroyim v. Rusk, 387 U.S. 253 (1967), the Supreme Court held that United States citizenship, once granted, cannot unilaterally be withdrawn by the federal government.

transition to a new political status occurred pursuant to "Public Law 600" which was adopted by Congress in 1950 "in the nature of a compact" that required the approval of a majority of the voters in an island-wide referendum.

Under the Commonwealth arrangement, Puerto Rico has enjoyed a practical measure of local self-government unique among U.S. territories. This fact has been recognized and supported in judicial decisions, executive branch statements and Congressional legislation.*/ Nevertheless, under the surface, the status of Puerto Rico is not so secure.

First, despite the provision for a local constitution the Federal Relations Act provides, with some exceptions, that federal laws "not locally inapplicable . . . shall have the same force and effect in Puerto Rico as in the United States. . . ." Although much of the debate over this provision has concerned the applicability of federal legislation that would apply in Puerto Rico as it would in a State,**/

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*/ See authorities cited in Liebowitz, The Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219, 223-24, 233 (1967).

**/ E.g., Moreno Rios v. United States, 256 F.2d 68 (1st Cir. 1958) (Narcotic Drugs Import & Export Act); Mitchell v. Rubio, 139 F. Supp. 379 (D.P.R. 1956) (Fair Labor Standards Act).

there is continuing uncertainty over whether Congress can pass federal statutes to govern purely intra-Puerto Rico activities under circumstances where it could not reach intra-state transactions. See generally, Liebowitz, The Applicability of Federal Law to the Commonwealth of Puerto Rico, 56 Geo. L. J. 219, 230-32, 234-39 (1967).

Second, despite the use of the word "compact" in the legislation creating the Commonwealth, there is continuing uncertainty whether some or any of the provisions of the Federal Relations Act, including those governing the applicability of federal laws, would be enforced in the face of subsequent inconsistent acts of Congress. Although the District Court of Puerto Rico has issued broad statements that the U.S.-Puerto Rico relationship rests on a binding and therefore unilaterally irrevocable compact,*/ the Courts of Appeals that have reviewed such decisions have refused to adopt the rationale that the "compact" has restricted the scope of federal power in the Commonwealth.**/ The Supreme Court has yet to address authoritatively the question of

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*/ E.g., Mora v. Torres, 113 F. Supp. 309, 319 (D.P.R. 1953); United States v. Valentine, 288 F. Supp. 957, 981 (D.P.R. 1968); Alcoa Steamship Co. v. Perez, 295 F. Supp. 187, 197 (D.P.R. 1968), vacated, 424 F.2d 433 (1st Cir. 1970).

**/ See, e.g., Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953); cf. Davis v. Trigo Bros. Packing Corp., 266 F.2d 174, 179 (1st Cir. 1959).

Puerto Rico's relationship to the federal government. Moreover, Congress has amended the Federal Relations Act, albeit in minor respects, four times since 1952, and only once did Congress first provide for securing approval from the Commonwealth government. */

Finally, it appears that several court decisions have relied on Article IV, Section 3, Clause 2 as a continuing source of federal authority in Puerto Rico after Commonwealth status. See, e.g., Detres v. Lions Bldg. Corp., 234 F.2d 596, 603 (7th Cir. 1956); Americana of Puerto Rico Inc. v. Kaplus, 368 F.2d 431, 436-38 (3d Cir. 1966), cert. denied 386 U.S. 943 (1967). Although none of these cases involved an explicit intrusion on Puerto Rico's right of local self-government, there is no suggestion in the decisions that IV-3-2 has been limited in this regard. If IV-3-2 applies without limitation in Puerto Rico, both the enforceability of the "compact" and the validity of any right of local self-government must be subject to question.

Although in many respects Puerto Rico enjoys a "political settlement" that generally recognizes its right of local self-government, it is questionable whether the

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*/ The three changes that were unilateral involved the abolition of a Model Housing Board, eliminating one ground of jurisdiction in the U.S. District Court for Puerto Rico, and changing the qualifications for jurors in the District Court. The bilateral change related to debt ceiling limits for the Commonwealth and its municipalities.

terms of the "settlement" would be enforced in a court of law. Indeed, it is questionable what the terms of the settlement are: the Federal Relations Act may be internally inconsistent on the issues of local self-government and the application of federal laws. The legislation creating the Commonwealth is silent on the relevance of Article IV, Section 3, Clause 2 -- leading some courts to conclude that it continued in force after Puerto Rico became a Commonwealth. If so, there may be no explicit and enforceable limitation on the scope of Congressional power in Puerto Rico and, as a matter of law, Puerto Rico may be no different from any other unincorporated territory of the United States.

B. Enforceable Limits on the Exercise of Federal Power Under Article IV, Section 3, Clause 2; the Land Cession Agreement.

The Puerto Rico experience provides a useful precedent for structuring the future U.S.-Marianas arrangement in a formal status agreement, "in the nature of a compact," that would be approved by both Congress and the Marianas people. The question, unanswered for Puerto Rico, is whether such an agreement can serve to limit federal power in a territory. The concern is that Article IV, Section 3, Clause 2 is necessarily plenary and that to limit it would conflict with the United States Constitution.

At the outset, it should be noted that calling the status agreement a "treaty" may not help the situation; indeed, it may be affirmatively harmful. A formal treaty between the United States and a foreign power cannot 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. However, 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. It is assumed that a purely international remedy would be unacceptable to the Marianas or the United States.

A "compact" is like a treaty in that it runs between political bodies or between governments. However, in American law, this term is usually reserved for bilateral agreements between entities within the federal system. Compacts between States and between one or more States and the federal government are reasonably common.*/ In

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*/ See Grad, Federal-State Compact: A New Experiment in Co-operative Federalism, 63 Colum. L. Rev. 825 (1963).

describing the new Commonwealth of Puerto Rico to the United Nations in 1953, the U.S. Representative stressed the fact that the relationship was based on a "compact," which he described as

> "far stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other." */

Even if "compacts" are generally enforceable while "treaties" are not, a compact will not be enforced if Congress could not constitutionally agree to it. As a general matter, the action of one Congress cannot restrict the powers of a subsequent Congress. In this regard, the Supreme Court has been vigilant to ensure that Congressional action -- whether in a treaty, interstate compact or legislation admitting a new State -- does not change the character of or allocation of powers within the government or effectively modify the Constitution itself. See Geofroy v. Riggs, 133 U.S. 258, 267 (1890); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856); United States v. Texas, 339 U.S. 707, 717 (1950).

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*/ "United States Mission to the United Nations," Press Release No. 1741, August 28, 1953, at 2, cited in "Liebowitz," supra, at 56 Geo. L.J. at 224.

A line of precedent does exist, however, which recognizes that Congressional power under Article IV, Section 3, Clause 2 need not be plenary and that an agreement by the federal government restricting the scope of Congressional authority otherwise available under IV-3-2 will be enforced. These precedents relate to the power of the federal government over land areas ceded by a State. When a State cedes land to the federal government for a military base or a national park, the area becomes subject to federal jurisdiction and authority. Two provisions of the Constitution authorize Congress to legislate for such areas in matters of purely internal concern.

Article I, Section 8, Clause 17 gives Congress power:

> "To exercise exclusive Legislation in all Cases whatsoever . . . 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. . . ."

With respect to other areas purchased for other purposes, such as for a national park, courts have used Article IV, Section 3, Clause 2 as the source of federal jurisdiction and authority in the area: See United States v. Cassiagnol, 420 F.2d 868, 874 (4th Cir.), cert. denied, 397 U.S. 1044 (1970); Robbins v. United States, 284 F. 39 (8th Cir. 1922), United States v. Dreos, 156 F. Supp. 200 (D. Md. 1957).

The Supreme Court has held that a State may impose conditions upon a cession of land to the United States and can retain jurisdiction over various subjects of legislation. In this way, the authority of the federal government, even if exercised under Article IV, Section 3, Clause 2, can be limited.

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

> "The highways in the park . . . became subject to federal control unless excluded [by the act authorizing 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. Toll, 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 Supreme Court, Justice Holmes held that the State's allegation of retained control made out a good cause of action. Thus, the Supreme Court has recognized that the plenary Congressional power under IV-3-2 is permissive, not mandatory, and that limitations on such power do not violate the Constitution and will be respected by the Courts.

The rationale for this approach to IV-3-2 is more fully set forth in the cases under Article I, Section 8, Clause 17. Indeed the cases under I-8-17 are even stronger precedent for the split jurisdiction approach because I-8-17 provides that federal power is to be "exclusive . . . in all cases whatever" and yet the Courts have held that such power can be limited.

In Ft. Leavenworth R.R. Co. v. Lowe, 114 U.S. 525 (1885), 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.

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. (Footnotes omitted)

Where jurisdiction is so divided, subsequent legislation passed by the federal government inconsistent with the land cession should be struck down. The question is simply jurisdictional -- if according to the federal-state agreement the United States has no jurisdiction with respect to the particular matter, then federal legislation which attempts to encroach on that field should be regarded as void by the courts.

If the authority of the federal government over federal "property" acquired from a State can be limited and need not be plenary, there would seem to be little reason why federal power in a "territory" acquired outside the 50 States cannot also be restricted. Indeed, disturbing the

allocation of power between the States and the federal government would seem to be a more serious "tampering" with the Constitution than merely allowing a territory to enjoy a meaningful right of local self-government.

C. U.S. Sovereignty and limited federal authority in the Marianas.

The Joint Communique of June 4, 1973, reflected the tentative agreement of both sides to the negotiations that, under the future status arrangement, sovereignty over the Marianas would be vested in the United States. The United States has emphasized the international significance of clarifying the question of sovereignty over the Marianas.

The United States has also suggested that U.S. sovereignty has a bearing on the IV-3-2 question. The U.S. position is somewhat unclear but appears to be that U.S. sovereignty will be in doubt if there is any limitation on the plenary power of Congress under IV-3-2. For the reasons set forth below, the Commission believes that any concern along these lines is unwarranted and that U.S. sovereignty can, in fact, "coexist" with a limited application of IV-3-2.

Under the United States Constitution, the people are sovereign. "Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary

and proper to carry out the specifically granted ones." Afroyim v. Rusk, 387 U.S. 253, 257 (1967). The United States government exercises "sovereignty" only with respect to those powers that the people have delegated to it.

In the American federal system, the central government is sovereign in its areas of authority, the State governments are sovereign in regard to authority over strictly internal affairs, and residual sovereignty with regard to all other rights, including the right to change the Government by election and constitutional amendment rests with the people. In the License Cases, 46 U.S. (5 How.) 504, 587-88 (1847), the Supreme Court described the federal-state relationship as follows:

> "Before the adoption of the constitution, the States possessed, respectively, all the attributes of sovereignty.
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> * * *
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> "[Now, after the Constitution the] States, resting upon their original basis of sovereignty,. . . exercise their powers over every thing connected with their social and internal condition.
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> * * *
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> "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 the Constitutional Limitations, (p. 4, 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." */
> (Footnote omitted.)

Thus, although U.S. sovereignty applies in the States, it does not carry with it unlimited authority. Rather, the powers of the federal government are limited under the Constitution, and the States exercise a meaningful right of self-government as to matters of internal concern.

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*/ To eliminate any doubts as to the limited authority of the federal government, the Tenth Amendment to the United States Constitution provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is true that federal power in the territories has been held to be "plenary and absolute" and that Supreme Court decisions have described such power as an "incident of sovereignty." See First National Bank v. County of Yankton, 101 U.S. 129, 133 (1880); Sere v. Pitot, 10 U.S. (6 Cranch) 332, 336-37 (1810). But the plenary power of Congress in the territories flows, not from U.S. sovereignty, but from the fact that the U.S. acquired such territories by conquest and purchase from foreign powers. Upon acquisition, the territories became the "absolute property and domain" of the United States, Morman Church v. United States, 136 U.S. 1, 42 (1890), and Congress exercised unlimited authority over this "property" under Article IV, Section 3, Clause 2.

In this sense, "sovereignty" follows and is defined by "authority" -- not vice versa. Thus, when the western territories became States and federal authority was restricted under the Constitution, the United States continued to possess "sovereignty" but federal authority was limited to matters of national concern. As to internal affairs, the States -- and ultimately the people -- were sovereign.

The foregoing suggests that U.S. sovereignty is an amorphous concept that is defined only by reference to the authority that the Federal Government can exercise.

The Commission concludes, therefore, that limitations on the exercise of federal power in the Marianas under IV-3-2 need not conflict with the principle that sovereignty over the Marianas will be vested in the United States. U.S. sovereignty would be no more inconsistent with local self-government in the Marianas than it is today in any one of the 50 States.

IV. PROPOSAL FOR ASSURING LOCAL SELF-GOVERNMENT FOR THE MARIANAS

In order to assure local self-government in the Marianas and to guarantee the enforceability of the status agreement, federal power under Article IV, Section 3, Clause 2, must be limited. The Commission does not suggest that Congress shculd have no authority under IV-3-2, only that its authority should not be plenary and should be restricted to legitimate areas of federal or national interest.

With specific exceptions to be mutually agreed upon, Congress would have authority under IV-3-2 only to the extent that the federal government has authority (under other provisions of the Constitution) in the 50 States. By giving Congress this authority, the Marianas would not be prejudging questions as to which federal laws, currently applicable in the States, would necessarily apply -- only which types of laws could be applied.

By using the existing federal-state relationship as the touchstone or model for the Marianas status agreement,

the Commission is proposing a realistic allocation of powers that respects both the Marianas need for local self-government and the federal government's need for supremacy in matters of national interest.*/ The Commission is prepared to recognize exceptions to this model, however, in areas of special concern. Indeed, the Marianas wish to be exempted from certain federal laws that are applicable in the States. If the U.S., for its part, can identify specific U.S. interests in the Marianas that could not be protected if the Marianas were a State, the Commission stands prepared to consider special exceptions to meet such needs.

In addition to the foregoing general limitation on Congressional power under IV-3-2, the United States has already tentatively agreed that the status agreement will specifically circumscribe the power of Congress to pass legislation inconsistent with the "fundamental" provisions of the status agreement itself (i.e., without mutual consent). There must be no ambiguity as to whether the status agreement is merely another organic act, amendable at the will of the U.S. Congress.

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*/ This position paper does not address the problem of federal preemption, the doctrine under which legitimate local legislation must give way before inconsistent but equally legitimate national legislation. This doctrine applies in the States and is necessary and beneficial in resolving disputes between the national government and the States in areas of overlapping jurisdiction. Because the federal government may very well choose not to apply many of its laws in the Marianas, it may be necessary to develop a unique rule of preemption for the future U.S. - Marianas relationship.

The federal-state split jurisdiction cases discussed above suggest that the method by which federal power is restricted may be important to insuring the enforceability of the arrangement. The federal government cannot regulate traffic on the roads in Rocky Mountain National Park because the State of Colorado, which originally exercised this power, retained that right when it ceded the land to the United States. The Commission proposes that the Marianas will limit U.S. authority by providing in the status agreement for a fairly explicit grant of powers by the people of the Marianas to the Government of the United States and by making clear that the people of the Marianas retain, and do not give up, the residual powers of local self-government. It may seem strange that the Marianas would "retain" something they do not now enjoy, i.e., the right of local self-government. But the present situation under the Trusteeship is unusual.

The Trust Territory of the Pacific Islands is not a U.S. territory and "sovereignty" over the Trust Territory is presently not vested in the United States. See Callas v. United States, 253 F.2d 838 (2nd Cir.), cert. denied, 357 U.S. 936 (1958); Brunell v. U.S., 77 F. Supp. 68 (S.D.N.Y. 1948); cf. People of Enewetak v. Laird, 353 F. Supp. 811

(D. Hawaii 1973). Although the question has not squarely been decided, it would appear from the foregoing that the United States does not now exercise authority in the Trust Territory under Article IV, Section 3, Clause 2. Rather, U.S. authority in the Trust Territory flows from the Trusteeship Agreement which is in the nature of a treaty. That document has been interpreted (by the United Nations) to require a plebescite of the peoples concerned before any future political status, including that of a U.S. commonwealth or territory, can be implemented.

Accordingly, it is fair to characterize any authority which the United States will possess in the Marianas after termination of the Trusteeship as flowing from the consent of the people. In this respect, the people of the Marianas possess residual "sovereignty" to the same extent as the citizens of the 50 States. The Commission's proposal is that the people of the Marianas would grant limited federal authority to be exercised under IV-3-2 but would retain the power and right of local self-government for themselves and for their local constitutional government. To assist the analogy to the split jurisdiction cases, the United States should formally recognize that this grant of authority in the status agreement represents a "sovereign" act of self-determination by the people of the Marianas and constitutes the legitimate source of U.S. authority in the Marianas under the new relationship. Finally, to avoid any

ambiguity, the status agreement should recite that the United States shall have sovereignty over the Marianas "to the same extent as it does in a State."

The Commission's proposal should satisfy the legitimate interests on both sides of the relationship. Coupled with appropriate restrictions on the applicability of certain federal laws, the proposal will allow for a genuine measure of local self-government for the people of the Marianas. The United States, on the other hand, should be satisfied if it has the same authority that it enjoys in a State: the Marianas will clearly be under U.S. sovereignty for international law purposes, and all other legitimate national interests should be equally well-protected. Finally, the proposal has the advantage (for both sides) of being relatively clear and unambiguous; there exists a great body of precedents involving the federal-state relationship that will be applicable in defining the future relationship between the Marianas and the United States.

The proposal is not only mutually advantageous, it is also legal and enforceable. Ultimately, the arrangement is based on the original formation of the federal union. It is also analogous to the splitting of jurisdiction between a State and the federal government for lands ceded to the United States and administered by the

Congress under Article IV, Section 3, Clause 2. There is every reason to believe that the arrangement would be held constitutional and enforceable by the courts.

Finally, the proposal provides for a relationship of dignity and respect between the future commonwealth and the United States Government. The measure of genuine self-government afforded by our proposal is not only consistent with the basic tenents of American democracy, it is required by the Trusteeship Agreement and the United Nations Charter, as interpreted by resolutions of the General Assembly.

The Trusteeship Agreement speaks of "self-government" as the only acceptable post-termination status alternative to independence. Unless federal power under IV-3-2 is limited as we have proposed, self-government cannot be assured for the people of the Marianas. The United Nations has sought to define "self-government" in its General Assembly resolutions. Resolution 1541 (XV) recognizes that a territory can achieve self-government in three ways: by emergence as a sovereign independent state, by free association with an independent state, or by integration with an independent state. The Marianas people have evidenced a desire not to become an independent state. The future political status alternative preferred by the people falls somewhere between the United Nations definitions of free

associated state and integrated territory. The Marianas will not be a freely associated state because their ties to the U.S. will not be subject to unilateral revocation. The Marianas will not be "integrated" into the United States because the people of the Marianas, not being citizens of a State, will be unable to elect federal officials or voting representatives to the U.S. Congress.

Because of this inability to participate in the federal government, we believe the United Nations would view the existence of plenary federal power in the Marianas under IV-3-2 as wholly inconsistent with the idea of self-government. Unless the Marianas has assurances that it will exercise a right of local self-government equal to that of one of the 50 States, it is likely that the United Nations would characterize the future commonwealth arrangement as that of a "non-self-governing territory" within the meaning of Article 73 of the Charter. Since the Trusteeship Agreement requires the United States to move the Marianas toward "self-government or independence" and since the United Nations will view any post-termination status other than independence with extreme suspicion, the United Nations may well refuse to approve the termination of the Trusteeship unless the Marianas are afforded the kind of assurances of local self-government that the Commission's proposal would provide.

CONCLUSION

As long ago as 1914, Felix Frankfurter, who was later to become one of the most distinguished Justices of the United States Supreme Court, wrote of the need for flexibility in fashioning and administering territorial relationships:

> "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 (D.P.R. 1953).

The Commission recognizes that its proposal for a future U.S.-Marianas relationship is unique and its acceptance by the United States Congress will require all the "inventive statesmanship" that can be mustered. Nevertheless, we believe it promises to be a mutually beneficial arrangement that would respect all of the legitimate interests on both sides. Most importantly, it would provide the framework for a successful and dignified association between the people of the Marianas and the people of the United States.

MARIANAS POLITICAL STATUS COMMISSION

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