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MEMORANDUM TO THE MARIANAS POLITICAL STATUS COMMISSION

Subject: ~~Self-Government and a Binding~~
~~Agreement Prior to Termination~~
of the Trusteeship Agreement

The U.S. draft Covenant^{*/} provides that the Govern-
ment of the Commonwealth of the Mariana Islands shall not be
established until after termination of the United Nations
Trusteeship Agreement. Accordingly, the provisions of the
Covenant which determine the political relationship between
the United States and the Marianas, including the provision
which would make portions of the Covenant mutually binding
between the parties, would not become effective until after
termination. In contrast, the present draft of the Common-
wealth Agreement^{**/} provides that the Commonwealth of the
Mariana Islands will be established after approval of the
Commonwealth Agreement by the United States and the people of
the Marianas, and after the Constitution of the Commonwealth
has been adopted and certified as consistent with the Common-
wealth Agreement. The Commonwealth Agreement also provides

*/ The "U.S. draft Covenant" refers to the December 1973
"Covenant Establishing a Political Union Between the Northern
Mariana Islands and the United States of America."

**/ The "present draft of the Commonwealth Agreement" refers
to the May 1974 "Agreement to Establish a Self-Governing Common-
wealth of the Mariana Islands in Political Union with the United
States of America."

that, with the exception of the provisions granting citizenship to the people of the Marianas and providing for United States sovereignty in the Marianas, all provisions of the Commonwealth Agreement become effective by the time of establishment of the Commonwealth and prior to termination of the Trusteeship Agreement. This includes the provision making the Agreement mutually binding according to its terms, which would become effective at the time of approval by both sides.

Although we have no explanation from the United States concerning why it has provided that the Commonwealth should not be established or why the Agreement should not be binding until after the termination of the Trusteeship Agreement, it appears likely that the U.S. decision was based upon a fear that establishment of the Commonwealth at an earlier date and making the provisions of the Covenant effective and binding at an earlier date would conflict with the obligations of the United States under the Trusteeship Agreement. An examination of this question, however, has led us to conclude that, ~~with the exceptions of the citizenship and sovereignty provisions, and other sections of the Commonwealth Agreement can become effective and binding prior to termination.~~ Moreover, we believe that far from conflicting with U.S. obligations under the Trusteeship Agreement, this approach fulfills those obligations.

I. The Grant of Commonwealth Status Prior to Termination.

The basic obligations of the United States as the administering authority of the Trust Territory of the Pacific Islands are set out in Articles 5-8 of the U.N. Trusteeship Agreement.^{*/} An examination of those Articles shows that the grant of self-government to the Marianas prior to termination of the Trusteeship Agreement is completely consistent with these obligations. Further, even the United States recognizes that it would be appropriate to make additional provisions effective prior to termination. Section 801 of the Covenant gives the President the power to do so.

We believe that Article 6, paragraph (1) of the Trusteeship Agreement gives the United States specific authority to allow self-government in the trust territory, provided that arrangement conflicts with no other U.S. obligations under the Trusteeship Agreement. Article 6, paragraph (1) requires that the United States shall:

"foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward self-government or independence, as may be appropriate to the particular circumstances of the trust

^{*/} Article 4 requires the administering authority to apply the objectives of the international trusteeship system, as set forth in Article 76 of the U.N. Charter, to the people of the trust territory. Articles 5-8 provide in more detail how the objectives set forth in Article 76 should be obtained and place specific obligations on the administering authority.

territory and its peoples and the freely expressed wishes of the peoples concerned; and to this end shall give to the inhabitants of the trust territory a progressively increasing share in the administrative services in the territory; [and] shall develop their participation in government"

The right given to the people of the Marianas under the Commonwealth Agreement to create and approve their own Constitution should "foster the development of such political institutions as are suited to the trust territory." The operation of the government itself during the Trusteeship Agreement serves to "develop [the people's] participation in government" and to promote the development of the people toward self-government. The act of self-determination expressed in the approval of the Commonwealth Agreement complies with the U.S. obligation to provide the people with an opportunity to "freely express their wishes for self-government or independence."

Moreover, there is precedent for a grant of self-government to a trust territory before termination. Before termination of the Trusteeship Agreement under which Great Britain administered Tanganyika, that territory had in effect been given complete self-government. By 1960, there was a legislative council made up of an African majority, almost exclusively elected, and responsible for appointing the chief minister. Members of the council represented the people at a constitutional convention in March 1961 with the United

Kingdom, at which both sides agreed that Tanganyika should become independent in December 1961. Geoffrey Marston in his article exploring the termination of U.N. trusteeships, uses the example of Tanganyika to show that it is possible for a territory to have reached the stage of self-government, as opposed to independence, and still remain under the trusteeship system.^{*/}

As drafted, the Commonwealth Agreement accords with the other obligations under the Trusteeship Agreement also. Article 5, for example, requires the United States as the administering authority to ensure that the trust territory plays its part in the maintenance of international peace and security. Since under the Commonwealth Agreement the United States retains full authority in the areas of international relations and defense, there is no reason to believe that the United States could not continue to fulfill this obligation after the Commonwealth was established.

Paragraph 2 of Article 6 requires the United States to promote the "economic advancement and self-sufficiency of the inhabitants." The Commonwealth Agreement specifically provides for such economic advancement by the guaranteed levels of financial assistance which are specifically geared

^{*/} See G. Marston, "Termination of Trusteeship," 18 Int'l and Comp. L.Q. 1 (1969) at 6 (hereafter cited as "Marston").

to promoting the self-sufficiency of the people of the Marianas. Paragraphs (3) and (4) of Article 6 require the United States to promote the social and educational advancement of the people. Article 7 requires the United States to protect the human rights and fundamental freedoms of the people. Article 8 requires the United States to assure other members of the United Nations equal treatment in social and economic matters. The United States can continue to fulfill all of these obligations to the people of the Marianas through the vehicle of the Commonwealth Agreement.

Moreover, the United States is given specific authority in Article 3 of the Trusteeship Agreement to administer the trusteeship in such manner as it deems appropriate, subject to its obligations under other provisions of the Agreement. Article 3 provides that the "administering authority shall have full powers of administration, legislation, and jurisdiction over the territory." The history of the debate on Article 3 in the U.N. shows that it was contemplated that the trust territory be allowed to assume as much responsibility as it is capable of exercising. The United States representative to the United Nations, Senator Warren R. Austin, stated that the United States viewed its duty toward the people of the trust territory as governing them "with no less consideration than it would govern any

part of its sovereign territory."^{*/} Since the United States has the authority to allow the territories over which it is sovereign to have full self-government, it should be able to grant the same rights to the Marianas.

II. The Binding Nature of the Trusteeship Agreement.

The present draft of the Commonwealth Agreement provides that upon approval of the Agreement by the people of the Marianas and by the United States, the provisions of the Agreement shall become mutually binding according to the terms of the Agreement. The U.S. draft Covenant would allow the provisions of the Agreement to become binding only after termination.

The present draft of the Commonwealth Agreement provides that the ~~Agreement~~ shall ~~be binding upon approval~~ because we believe that the people of the Marianas should have assurance that the sovereign act of self-determination exercised by voting to approve the Commonwealth Agreement will be respected by the United States. This is especially necessary since the period before termination of the Trusteeship is indeterminate. If during that period the United States could unilaterally modify the basic provisions, the people of the Marianas, at termination, could be confronted

^{*/} See M. Whiteman, 1 Digest of Int'l Law (1963) at 778. See also Ngodrii v. Trust Territory, 2 TTR 142, 147 (Tr. Div. 1960) ("The administering authority of a trust territory is expected to act to some extent like a trustee and show at least as careful consideration of the rights and properties of inhabitants of the trust territory as it would for those of its own citizens in the same situation."); and Yang v. Yang, 5 TTR 427, 428-429 (Tr. Div. 1971).

with an arrangement which differed substantially from the Commonwealth Agreement as approved. An agreement by the United States that the Commonwealth proposal shall be binding upon approval would demonstrate the good faith of the United States and give the people of the Marianas the appropriate assurances.

We can see no difficulties under the Trusteeship Agreement with making the Commonwealth Agreement mutually binding before termination. Article 3 of the Trusteeship Agreement, granting the United States "full powers of administration" over the territory, nowhere prohibits the delegation of such authority to the territory itself. It is instead aimed at making clear that the U.N. is not the body with the power to administer the territory. Furthermore, by making this Agreement binding, the United States is not curtailing its ability to fulfill its obligations under the Trusteeship Agreement, since it retains full power over foreign affairs and gives power to the Commonwealth only over domestic matters. Thus, the fact that the Agreement would be binding between the parties prior to termination is essentially a matter of internal administration relevant only to the United States and the Marianas. ^{*/}

^{*/} Even if there were conflicts between the present draft and the Trusteeship Agreement, which there are not, Congress would still have the authority under domestic law to enter into the Agreement. That is so because the Trusteeship Agreement is [footnote continued on next page]

Further, there is no possibility that making the Agreement binding prior to termination would change the international status of the territory. As made clear by the ~~International Court of Justice in the South West Africa case~~, an ~~agreement between an administering authority and a trust territory which does not have official U.N. approval~~ ^{*/} ~~cannot change the international status~~. In addition, Marston notes that ~~for Tanganyika and Togo, prior agreements had been entered into between the Governments of the Administering Authority and the territory, setting a date for independence. These prior agreements, according to Marston, did not have any significance in terms of international law.~~ ^{**/}

The ~~fact that the mutually binding nature extends beyond termination also raises no problems in terms of the Trusteeship Agreement.~~ It is the common practice for the people of a trust territory to determine their future political status prior to the termination of a trusteeship. ^{***/}

[footnote continued from preceding page]
 in effect a treaty (see In re Ngiralois, 3 TTR 303, 312-13 (Tr. Div. 1967); and Marston, supra at 10-11) and it is well established that ~~treaties can be overridden by a later act of Congress if a legislative intent contrary to the treaty is clear.~~ See, e.g., Good v. United States, 288 U.S. 102, 120 (1933); Reid v. United States, 232 U.S. 310, 316 (1914).

^{*/} See International Status of South-West Africa, Advisory Opinion (1950) 17 C.I.J. Rep. 129.

^{**/} Marston, supra, at 36-39.

^{***/} See UNITAR, Small States & Territories (1971) at 163-166.

If, however, after that act of self-determination, the administering authority could renege on the agreement with the people, then the act of self-determination would not have much meaning.^{*/}

III. Sovereignty.

But...
The present draft of the Commonwealth Agreement provides in Section 202(b) that the Mariana Islands shall not come under the sovereignty of the United States until after termination of the Trusteeship Agreement. The manner in which this provision is presently drafted comports with the South-West Africa case in that it recognizes that such a change in relationship between the United States and the Marianas could not take place without U.N. approval.

✓ Furthermore, the idea that the United States could exercise sovereignty prior to termination would go contrary to United States policy expressed since the formulation of the Trusteeship Agreement. In discussing a draft of Article 3 of the Agreement, the United States Representative to the U.N. Senator Warren R. Austin, stated "[Article 3] does not mean the extension of United States sovereignty over the territory,

^{*/} Moreover, the present draft of the Commonwealth Agreement provides that if the President of the United States determines that immediately prior to termination, a further plebiscite on future status is necessary, such a plebiscite can be held. This provision ensures that if the U.N. finds the Commonwealth status unacceptable and refuses to terminate, further action could be taken by the United States in accordance with the provisions of the Commonwealth Agreement.

but in fact precisely the opposite."^{*/} Judicial decisions in the United States have also been unanimous in concluding that the United States lacks sovereignty over the trust territory.^{**/} For these reasons, we recognize that it would not be appropriate to draft the agreement so that U.S. sovereignty existed in the Marianas prior to termination of the Trusteeship Agreement.

IV. Citizenship.

Making citizenship available to the people of the Marianas prior to termination would create difficulties similar to applying sovereignty during this period. Citizens are those who owe "permanent allegiance to the United States."^{***/} The Supreme Court in Afroyim v. Rusk, 386 U.S. 253 (1967), has made clear that the United States cannot

^{*/} See U.N. Security Council Off. Rec., 116th Meeting, March 7, 1947, p. 423, quoted in M. Whiteman, 1 Digest of Int'l Law (1963) at 778.

^{**/} See, e.g., Callas v. United States, 253 F.2d 838, 840 (2d Cir. 1958), cert. denied, 357 U.S. 936 (1956); Brunell v. United States, 77 F. Supp. 68 (S.D.N.Y. 1948); see also Calvo v. Trust Territory, 4 TTR 506, 512 (App. Div. 1969); Alig v. Trust Territory, 3 TTR 603, 609-510 (App. Div. 1967).

^{***/} 8 U.S. C. § 1101(a)(22) (1970).

revoke this citizenship easily. Were the United Nations to refuse to terminate the Trusteeship Agreement in favor of the present Commonwealth Agreement and should the United States and the Marianas mutually agree to a different arrangement, persons would owe permanent allegiance to the United States who in fact were not subject to its sovereignty. The complications arising from such a situation and the ultimate split that such conditions could cause within the Marianas suggests that it is unwise to grant citizenship before termination.

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