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TALKING POINTS ON STATUS AGREEMENT

1. When we departed from Saipan at the end of our last round we left with you a draft Covenant based on agreements actually reached and on tentative understandings. We anticipated that you would study that draft during the interval between the third and fourth sessions, and that it would serve as the basis for discussion on the status agreement at this round. We also assumed that if you should have serious difficulties with any part of our draft Covenant you would let us know in time so that we could consider your objections and meet them, if possible. Indeed we believed that the joint legal working group provided for in the Joint Communique of December 19, 1973, would be the proper vehicle for such discussions.

2. Unfortunately, things did not work out that way. On the second day of this round shortly before our departure for Rota and Saipan we were presented with one set of a formidable stack of papers: A status agreement of 62 pages, almost three times as long as our draft Covenant, and a commentary on the status agreement containing 136 pages. Those papers were

supplemented by [illegible] which added up to approximately 160 pages. Altogether you submitted to us some 360 pages of complex legal documents.

This raised a number of technical problems quite apart from the necessary legal analysis. First, we had to reproduce those papers so that more than one person could work on them at the same time, and while they were being xeroxed they were not available for study. Second, there was the time problem. The lawyers on our staff are fully occupied with the preparation of our own legal papers, and it became a difficult problem to enable them to study your proposal without neglecting work crucial for the regular work of our delegation. Actually, in order to give the lawyers an opportunity to study your papers we had to take the undesirable step of asking them to curtail their work on their regular assignments. Moreover, we had to ask them not to attend some of the plenary meetings. Consequently they are not as well informed of the activities of this round as they should be.

you was rendered even more difficult by the circumstance that you felt it necessary to depart from the arrangement of our draft covenant. Hence, it became extremely difficult to compare the provisions of our covenant with those of your agreement. The 136-page commentary furnished by you, it is true, helped to some extent in this process. But your own lawyers will tell you that no lawyer worth his salt may rely on the work of another. That is not so much because he does not trust him, and that definitely is not the cause here, but because there is always the possibility that the other one may have made a mistake or overlooked something. And that danger is especially present in anything as complex and detailed as the documents given to us.

4. Our lawyers have reported to me that they examined your draft agreement on the basis of the 136 page explanatory paper as carefully as possible. In some instances this required the examination also of explanatory materials referred to in the commentary. They advised that it is very difficult to give me a final evaluation of your document, because virtually every sentence of our draft covenant has been modified. In the hurried circumstances under which they had to labor

they have not been able ~~to~~ in all circumstances to appreciate all the implications of these changes. They realize that many of them are merely a matter of style and detail, but others seem to go to the very heart of the nature of the agreement. In these circumstances I am unable to discuss your counterproposal in the detail I would have like to and which your counsel's efforts deserve. You realize of course that this unfortunate result could have been averted if your paper had been submitted to us at a reasonable time before our departure for Saipan, even if that had required a postponement of the date of this meeting.

5. On the basis of conversation with my attorneys I wish to make a few general observations which in my view are fundamental. First, there is the length of your Agreement, almost three times that of our draft Covenant. The relative shortness of that document was no accident, indeed we still fear that even it is too long for the purposes it is to serve.

6. Our Covenant and your Agreement both state in their titles that they are designed to establish a political union between the Mariana Islands and the

United States. Such document, traditionally and necessarily is short. Look at the Constitution of the United States, and the various statehood and organic acts. As a Supreme Court Justice has said the function of such agreements is not to serve as a code of law which nails down every imaginable detail, but to give the basic outline of a future relationship with sufficient elasticity to meet future unforeseeable developments. The United States never would have been able to survive if the Constitution had been a seventy-page document. The constitutions of some states suffer from excessive detail. Louisiana recently remedied that mistake by adopting a new constitution about one tenth as long as the old one.

I therefore firmly believe that any basic document of a political relationship fails in its purpose and invites serious trouble if it becomes overly ambitious and seeks to do more than to sketch out the general outlines of the political relationship. We tried to do this in our draft Covenant. As I mentioned before we still have serious misgivings as to whether we succeeded in achieving that goal. Your draft as you know is far more detailed and many parts of it seek to provide for the unforeseeable.

7. [illegible] fundamental consideration that political documents should be short and adaptable to future crises. There is also the practical point that while Congress may accept a general outline of a political relationship, it will balk at a plan containing as much detail as the Agreement proposed by you. Quite apart from the deterring effect of a sixty-two page document containing highly legalistic language, Congress just will be irresistably tempted to insist on amendments to the agreement. The complications resulting from that action cannot be foreseen and may become a stumbling block to our entire undertaking. We should do everything to avoid that contingency, and the best way to do this is to keep the agreement as short and uncomplicated as possible.

In this context a very influential Congressman gave us a warning and I believe he impressed the same consideration on you. He told in substance: "Make the agreement as short and simple as possible and wherever possible use the precedent of Guam or follow the legislation applicable to Guam. That will shorten the document, and above all will make it easier to explain it to my Committee and to Congress."

model in your draft agreement raises serious doubts as to agreement on the nature of the political arrangement between the United States and the Northern Marianas. These misgivings are multiplied by the reasons given for these departures in the explanatory commentary on your draft agreement.

When the Mariana Islands District indicated to us two years ago that it wanted to join the United States political family we assumed quite naturally that you wished to assume the status of one-of the various types of self-governing units which comprise that family. We did not believe that as a newcomer you would seek to obtain an entirely different and untried relationship with the Federal Government.

In the course of our past rounds we thought we made it abundantly clear to you that we could not give you the status of the Commonwealth of Puerto Rico. That relationship had been found to be unsatisfactory because the claims made by Puerto Ricans that their status inherently constituted a limitation on United States sovereignty and on the applicability of certain laws. We advised you that the status arrangement with the Northern

Marianas would have to provide for unquestionable

[illegible] United States laws would have to be express and not to be implied from the nature of the relationship. Our proposal therefore was that the Northern Marianas would have a status similar to that of Guam and the Virgin Islands which have broad self-governing powers. The status of the Northern Marianas, however, would differ from that of Guam and the Virgin Islands in two important aspects. First, in that the Commonwealth would have a Constitution of its own adoption, and, secondly, that "specified fundamental provisions of the Status Agreement, including certain provisions designed to assure maximum self-government to the future Commonwealth ... may not be amended or repealed except by mutual consent of the parties". These exceptions from the Guam model were to be exclusive and not to form the basis of a whole set of new departures by way of extrapolation or inference from a special status the Northern Marianas had acquired from those two concessions. It seems to us that your draft agreement as explained by the commentary has not kept within those limits.

9. Section 207 (b) of your proposal contains the provisions which are not to be amended or repealed except

[illegible] Covenant. It does not list specific provisions but lists five out of thirteen titles and four individual sections which add up to 38 of the 62 pages of the Covenant. There is a crucial difference between the text of the Joint Communique that specified fundamental provisions of the Status Agreement, including certain provisions designed to assure maximum self-government shall be subject to the mutual consent agreement, and Your proposal which subjects nearly 2/3 of the agreement to those requirements. This is not the spirit of the agreement we reached last December. Moreover our instructions are quite specific in prohibiting us from committing the United States to such substantial departures from the provisions of Article IV, Section 3, Clause 2 of the Constitution.

Parenthetically I may add that there seems to be no need to provide a mutual consent requirement where financial obligations of the United States are concerned. There is no question that Congress cannot modify such agreements and that they are enforceable in the United States Court of Claims.

10. Another point which gives us great concern is the great number of instances in which your draft agreement

departs from the corresponding rules applicable to Guam, and above all the reasons given for those departures.

We would be not so much concerned about this aspect of the draft agreement if those divergences were based on the consideration that the Guam rules are defective or inadequate. In most instances, however, that does not appear

the reason for your departure from the Guam precedent. The explanatory commentary furnished to us indicates thatthose variances were usually based on the ground that the status of Guam and the one governing the Commonwealth are so essentially different that a rule proper for Guam is inherently unsuitable for the Commonwealth.

To select an example: Section 1101(a) to (e) deals with the status of a delegate of the Northern Marianas to the U. S. Congress in the event that the population exceeds 50,000 inhabitants. Congress passed a statute relating to the delegates from Guam and the Virgin Islands only two years ago, and it would have been simple to incorporate that statute by reference. Instead your agreement contains 1 1/2 pages of pertinent

provisions. The explanatory notes indicate that this approach was not taken because it was felt that the 1972 statute did not take sufficient account of the more independent status of the proposed Commonwealth as compared to that of Guam and the Virgin Islands.

This is inconsistent with our understanding that the difference between Guam and the Northern Marianas would be basically limited to the two concessions made by us, and the latter would not give rise to a new set of divergencies.

11. Similarly we have difficulties in understanding the passage to be found on page 59 of the explanatory notes that it would infringe on the Commonwealth right of self-government, if in exchange for the financial assistance given to it by the United States, it would assume the obligation to enact non-discriminatory and comprehensive internal revenue laws. The Supreme Court has stated that even a sovereign has the power to obligate himself. Obviously such undertakings are not below the dignity of a self-governing area.

12. Even more serious is an observation found on page 39 of the commentary. That passage is directed at the provisions found in Section 307 of our draft covenant pursuant to which the executive branch of the Commonwealth

Government would be responsible for the faithful execution of the laws of the United States applicable to the Northern Mariana Islands. Similar provisions apply to the Governors of Guam and the Virgin Islands, but apparently not to the Governor of Puerto Rico. Your draft does not contain that clause and the commentary explains that omission on the ground "that it would be inappropriate to charge one government entity like the Commonwealth with executing the laws of another".

In all friendship, I have to advise that such a conception of the political relationship between the United States and the Northern Marianas will not do. No amount of local self-government can justify an assertion that the governments of the United States and the Commonwealth are equals, and that it would be below the dignity of the Commonwealth Government to enforce the laws of the United States. In this connection it should be remembered that the laws of the United States applicable to the Marianas are generally limited to those also applicable in the several states and therefore do not impinge on the Commonwealth's right of self-government.

Statements of this kind raise serious doubts as to whether there is actual agreement on the fundamental point that the Marianas will be under the sovereignty of

[illegible] Trusteeship Agreement. [illegible] the United States shall have sovereignty in the Commonwealth "in accordance with the terms of the Commonwealth Agreement". That clause was not included in our draft Covenant. Your explanatory notes do not explain the meaning of this clause which more than puzzles us. We hope that it merely refers to the provision pursuant to which the United States will acquire sovereignty only after the termination of the Trusteeship. We prefer to assume that they do not stand for the view that the provisions in the status agreement for local self-government somehow affect the sovereignty of the United States. There can be no equivocation, and not even an appearance thereof, about the fundamental requirement that the United States will have unquestioned sovereignty over the Northern Marianas. If you feel otherwise it would appear that we have not reached agreement about the nature of the political relationship and we will be required to start all over again on that issue.

13. In my preceding remarks I have not limited myself to the provisions of the draft agreement, but discussed also the explanatory commentary. The reasnn for that procedure is that those explanations have been made available to us. Consequently they constitute a part of the legislative history and explain your thinking to us. We therefore may be considered to have acquiesced in them. I want to

make it [illegible] with a large portion of the philosophy on which they are based, and that they do not constitute any part of the understanding reached by the parties.

Indeed I fear that a serious negotiation problem has been created by your transmittal to us of your internal explanatory notes, thus putting us on notice of intentions and motives not disclosed in the draft agreement.

14. I shall now enter into a brief discussion of some of the provisions of the draft agreement submitted by you. Obviously it is not possible to discuss every one of the dozens, if not hundreds, of points in which your draft differs from the draft covenant proposal which we submitted to you last December. The failure to mention a point therefore does not mean that we agree with your proposal or even that we consider that issue unimportant.

15. There is a significant differences in the form of the two documents. We chose the division between the basic political principles set forth in the Titles and the more detailed Articles implementing the Titles. We did this in order to underline the political nature of the draft covenant. We also feel that this would assist the citizens of the Northern Marianas and Congress and even the courts in understanding the fundamental principles underlying the relationship. Looking at your draft agreement

[illegible] however, we shall not insist on it if you have serious misgivings.

16. There is seemingly a substantial difference in the two proposals as to the dates on which the agreement and the Commonwealth shall become effective. According to your proposal the effective day would follow shortly adoption of the Commonwealth Constitution with the exception of the sovereignty and nationality provisions which would have to await the termination of the Trusteeship. Our draft contains a schedule of the effective dates of specified provisions, and the rest become effective upon termination of the Trusteeship, giving the President the power to put into effect other provisions, to the extent consistent with continuation of the Trusteeship. That would include parts of the Commonwealth Constitution and the establishment of an interim government for the Commonwealth. The reason for our more cautious approach is our view that the introduction of parts of the United States Constitution and the establishment of a United States court, comes so closely to the assertion of sovereignty, if indeed it does not constitute it, that it might very well be inconsistent with the Trusteeship.

Similarly, it would be difficult to introduce the large body of the laws of the United States in the absence of a court to adjudicate disputes arising under them. Again, such introduction in itself may be inconsistent with the continuation of the Trusteeship. We would, of course, be happy to have your views on these problems.

17. Section 207(a) contains a formula for the applicability of United States laws in the Commonwealth. This appears to us at first glance an acceptable approach to this problem. But, of course, before we can give you a definitive answer on this provision we would have to study the underlying explanatory memoranda in far more leisure than is possible during these negotiations.

18. Section 304, is clearly connected with the general applicability of the Immigration and Nationality laws to the Commonwealth which is to be covered in section 701. You have not as yet given us the text of this section. Consequently, we cannot comment as yet on Section 304.

19. Section 401. I do not want to go into the details of this highly technical section. I am not certain about its relation to Section 207(a) which also deals with the question of applicable laws. I assume the purpose of Section 401(a) is to define the body of federal laws applicable to the Commonwealth as of the

day [illegible], to the section 401 provisions to the legislative power of Congress over the Northern Marianas subsequent to that date.

According to Section 401(1)(ii) which is in bracket the minimum wage provision of the Fair Labor Standards Act would not apply to the Commonwealth. What is the status of that proposal?

20. Pursuant to Section 402(b) the proposals of the Commission on the applicability of Federal laws to the Commonwealth would become effective unless either House of Congress objects. The purpose of this, of course, to prevent a repetition of the fate of the corresponding Guam Commission. Mr. Marcuse advises me the Department of Justice and the Office of Management and Budget object to such clauses for constitutional reasons, although there is occasional precedent for them. In any event legislation of this type will not be introduced by the Executive Branch.

21. Title V provides in substance that the Commonwealth would have a territorial court for the first eight years of its existence, and thereafter a constitutional court, with a judge appointed during good behavior, i.e., for life We have serious misgivings of a policy nature as to the desirability to provide at this

early stage for the establishment of a constitutional court in the Commonwealth. In any event, it seems to us for technical reasons impossible to provide for the automatic transition from a territorial court to a constitutional court in the manner proposed in your draft. According to the experience of the Department of Justice this requires legislation of a complicated and detailed nature with which this agreement could not and should not be burdened.

22. Section 601 (a). Upon further examination we would like an explanation why in your proposal the exemption from the U. S. income tax from Commonwealth generated income is limited to those who acquire U. S. citizenship pursuant to Title III of the agreement and not extended to all who are bona fide residents of the Commonwealth as is provided with respect to Puerto Rico under Section 933 of the Internal Revenue Code. Under your proposal this tax benefit would not accrue to the residents of the Commonwealth who are U.S. citizens on the day preceding the termination of the Trusteeship. This would include some of the children of your chairman.

Section 604 governing the applicability of the Social Security laws of the Commonwealth is in brackets. What is the status of that proposal?

Section 608 deals with the customs treatment of imports from the Northern Marianas into the United States. Section 501 of our Covenant totally assimilates those imports to those from Guam. Your section 608 is limited to the 50% provision of Headnote 3 of the Tariff Schedules. Under our formula imports from the Commonwealth would also benefit from the $200 customs exemption and one gallon spirits allowance on imports from Guam. These provisions would be of considerable importance if the Commonwealth seeks to compete with Guam for the U. S. tourist trade.

24. In the past you had indicated especially your wish that the shipping laws of the United States should be modified with respect to the Northern Marianas. We repeatedly asked for details. We have now received your proposal in Section 702 supported by a commentary of 13 pages. Obviously, we can not respond to this complicated proposal and the underlying materials on such short notiee and with the limited research facilities available here. We shall, of course, study this matter carefully on our return and seek the advice of the agencies concerned.

25. We shall not comment on Titles VII and IX dealing with financial Assistance. U.S. [illegible] because these topics have been thoroughly discussed during this round.

However, as a matter of drafting we have serious misgiving about technique to distribute the various types of assistance throughout the agreement instead of concentrating them in one part of the agreement as done in our proposal.

We believe that it is important that the voters passing on the Agreement will be aware of the totality of the United States contribution to the economy of the Northern Marianas without having to scan the entire lengthy document.

26. Section 1101 deals with a delegate to the Congress for the Northern Marianas. We have indicated to you in the past that this is a matter totally in the discretion of Congress. For that reason we did not include it because there is the danger that Congress might delete any provision relating to that topic.

Section 1102 would provide a statutory basis for an unofficial Resident Commissioner to the United States for the period preceding the establishment of a delegate. We understand that Samoa has such a representative in Washington and that Guam had one prior to the election of a Delegate in 1972. There was, however, no statutory basis for such representatives. Moreover, it is our definite understanding that the United States does not foot the bill for these unofficial representatives. We do not quite understand the cogency of the remark on page 116 of your commentary that the United States should assume the financial burden of the representation

because the Commonwealth is a self-governing territory. We would believe that self government entails corresponding financial responsibilities.

27. Chapter XII deals with questions of Transition. I notice that the procedures proposed by you varies considerably from the proposal in our Covenant. I assume, however, that you will bring up the problem of most concern to you at the session reserved especially for the Transition question.

I wish to make a few brief remarks on two of these provisions. Section 1206(a) would commit the United States to make efforts in good faith to terminate the Trusteeship Agreement at the earliest practical date, in its entirety or insofar as it affects the Commonwealth. The stress of this undertaking would be on the separate termination of the Trusteeship Agreement with respect to the Marianas. We have indicated to you repeatedly that such separate termination is not feasible. Hence, the United States cannot give such undertaking.

Section 1206(d) would provide for the contingency of a further plebiscite. We consider it inappropriate even to try to provide for anything as contingent and unforeseeable as the plebiscite envisaged in this subsection. Furthermore, while the provision is phrased in terms of giving the people of the Commonwealth an opportunity to reaffirm their commitment to the Commonwealth, there is always the possibility that the vote would result in a repudiation of the agreement. We must object to any provision which has the slightest connotation of unilateral repudiation.

This concludes my presentation relating to the status agreement.

To avoid any misunderstanding let me repeat that my failure to refer to any provision of your proposed agreement does not mean that we agree with it. It merely means that we felt that we had not analyzed it sufficiently for comment, or that for some other reason we prefer to discuss it at some other time.