07 May
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D R A F T

Differences between U. S.
and Mariana Positions

I. Section 105.

1. Mutual Consent Requirement.

U.S. Limited to Articles I, II, III, and section 501.

MPSC. Mutual Consent requirement includes additional sections 503, 702, 805, and 806.

a. Section 503. Section 503 provides that certain laws of the United States will not apply to the N.M.I. except in the manner and to the extent made applicable by the U.S. Congress by law after termination of the Trusteeship Agreement. MPSC wants this section included in the mutual consent list to insure that these laws will not be extended to N.M.I. prior to termination.

Our view is that the inclusion of section 503 in the mutual consent requirement would lead to ambiguities. It could be argued that these statutes may be extended to NMI only with consent of Northern Marianas. If NMI really wants to make certain that these laws will not be extended to them prior to termination, other

formulations would have to be sought. In any event, the nonapplicability to the NMI of the laws listed in section 503 prior to termination does not appear to the U.S. to be so fundamental a provision as to justify their inclusion in the mutual consent clause.

b. Section 702. Multi-year grant assistance. MPSC has indicated that it would drop these provisions, if the Department of Justice would furnish to it a written opinion to the effect that if, after the approval of the Agreement Congress sought to reduce or withdraw the assistance provided for in the section, the NMI could recover it in the Court of Claims.

We felt that it would not be wise to give such written opinion since it would be based on the theory that the grant assistance provided for in section 702 is of a contractual nature and that the U.S. is bound by it, beyond the congressional power of repeal. We felt that the same argument might be made with respect to other provisions of the Agreement, and that it would be undesirable to furnish the MPSC with a document which concedes that

point with respect to section 702. The ultimate practical result might be that most of the Agreement is subject to the mutual consent requirement.

Our position is that if there should be any disagreement about section 702, the matter is to be handled pursuant to sections 902 and 903, which provide for consultation and ultimate submission to the courts.

c. Section 805. Limitations on alienation. This section is of some importance to both sides. It would make it possible for the NMI to impose limitations on the alienation of land to outsiders. If our version of the section is adopted, it would require the NMI to impose such restrictions and also to regulate the disposition of public lands. Still we do not believe that this provision is so fundamental as to require its inclusion in the mutual consent list.

d. Section 806. Acquisition of land in U.S. and eminent domain. Subsections (a) and (b) are not controversial but not so fundamental as to require inclusion in the mutual consent list. Inclusion of policy statement

contained in section 806(a) would do no harm, as a fall-back, but is again not of such fundamental importance as to warrant its inclusion.

Subsections (c) and (d) are still in dispute. They involve the exercise of right of eminent domain. Basically, it would seem unwise to tie the hands of Congress in this delicate area by agreeing to mutual consent. On the other hand, our failure to do so might be considered an indication of bad faith. Hence, inclusion of section 806 in the mutual consent list might be part of a package deal effecting a substantive compromise on section 806.

2. MPSC subsection (a). There is no corresponding U. S. provision.

This subsection would provide that the power of Congress under Article IV, section 3, clause 2 of the Constitution could be exercised over the NMI only with respect to legislation which could also be made applicable to a State, unless such legislation--

(a) specifically provides that it should apply to the NMI; and

(b) if taking into account the right of local self-government of the people of the NMI, there is a compelling national interest in the application of such legislation to the NMI.

This subsection does not appear acceptable in this form. It ~~specifically~~ expressly seeks to limit the power of Congress under Article IV, section 3, clause 2 of the Constitution. There is whatever Senate Committee staffers indicate no dispute every indication that Congress will never consent to this/ that it constitutes both a limitation of its plenary power & another exception to the Moreover, this express provision may well jeopardize the more diplomatic language of the Mutual Consent Clause.

On the other hand, it should be realized that this is a dispute over form rather than over matter. Congress now rarely enacts legislation applicable to territories which could not be made applicable to States. The enactment of legislation which MPSC section 103(a) seeks to bar therefore does not constitute a very substantial threat to the self-government of the NMI. The problem is how to satisfy both sides. The best way probably would be to place a pertinent note in the legislative history. Another more difficult method would be a clause in the agreement to the effect that the approval of the agreement

constitutes an expression of the sense of Congress that it is not likely that future Congresses will enact legislation with respect to the NMI that could not be made applicable to a State of the Union.

3. MPSC subsection (c). There is no corresponding U. S. provision. The purpose of this subsection is to forestall the possibility that during the period of transition the mutual consent could be given by a U.S. official, or an official under U. S. control rather than a representative of the people of the NMI.

While we agree with the substance of this subsection, we feel that it need not be expressly incorporated in the agreement A note to that effect in the legislative history should be sufficient.

II. Sections 202 and 1002.

The second sentences of section 202 and section 1002 deal with the manner in which the constitution of the NMI is to be approved. They are not acceptable to us.

The MPSC seeks to avoid the approval of the NMI constitution by Congress, and in any event to prevent any delays in

its approval by the U. S. It does not seem feasible to comply with these wishes. It is likely that Congress will wish to pass on the NMI in one way or the other. There is a substantial possibility that it will disapprove any agreement which expressly precludes that possibility. The desire of the NMI is understandable in view of the certain incidents which occurred during the approval of the constitution of Puerto Rico, where at least one Senator abused his power and almost torpedoed that constitution in order to do a favor to a constituent.

III. Sections 301(b) and (c).

The brackets are of a technical nature and will be removed once the terms of the new arrangement is finally resolved

IV. Section 504.

The last two sentences of the section. The U. S. has no corresponding provisions.

1. The penultimate sentence.

This sentence would provide that the report of the Commission on Federal Laws would have the force and effect of law unless one House of Congress disapproves the report in part or in its entirety. This provision has been prompted by the Guam experience with a similar commission, where Congress never acted on the report as such.

We question whether provision would be acceptable to Congress. It definitely is not acceptable to the Executive branch because it would deprive the President of his veto power. In any event the Department of Justice and the Office of Management and Budget are apposed to such legislative short cuts.

2. The last sentence would provide that the U.S. would bear the cost of the Commission on Federal Laws. OMSN is still trying to ascertain whether the U. S. bore the entire cost of the Guam Commission, especially whether the fund came out of the budget of Interior or the Territory of Guam, and whether the U. S. also paid the salaries of the local commissioners.

V. Section 506.

The MPSC draft would provide that when the U. S. Immigration and Nationality laws are made applicable to the NMI they will contain certain provisions designed to discourage the residence in the NMI of resident aliens except of children, spouses, brothers and sisters of persons domiciled in the NMI.

This section is not acceptable to us. The U. S. recognizes that the application of the present Immigration and Nationality laws of the United States to the NMI may create serious problems. For

that reason we offered to provide that those laws should apply to the NMI only to the extent made applicable by Congress after termination. The reason for this was that Congress is aware that similar problems affect Guam and the Virgin Islands and pertinent legislation may well be enacted by the time of termination. 5

We do not see, however, how we can go beyond the scope of that compromise and make any commitments as to the scope of that legislation.

The tentative U.S. draft of section 506, ~~XX~~ still being reviewed by the Immigation and Naturalization Service would provide in effect that, pending the extension of the U. S. Immigration and Nationality laws to the NMI, parents, spouses, and children of residents of the NMI who are U. S. citizens may immigrate into the NMI under U. S. law and become naturalized U.S. citizens, and that the children born abroad to residents of the NMI who are citizens or nationals of the U. S. would become citizens or nationals of the U. S., respectively. We believe it will be acceptable to the MPSC

VI. Section 601e. MPSC draft.

No corresponding U. S. provision.

This subsection would give the NMI authority to modify the NMI Territorial Income Tax, i.e., the Internal Revenue Code. The NMI concedes that Congress would have the power to countermand such modifications.

In our view such power ~~would not~~ might be acceptable to Congress, he'd create havoc in our territorial tax system when combined with Moreover, it would be inconsistent with our theory of Section 602 which would integrate the NMI into the U.S. Income Tax System. Subsection (e) would enable the NMI to reduce the income tax on the U.S. source of income of a resident of the NMI.

Section 602.

The difference between the two systems is briefly that the U. S. version would assimilate the tax system in the NMI to that of Guam. This would simplify the explanation of these provisions to Congress, and also take advantage of the modern simplified and unified tax system now governing the relations between the U. S. and Guam. As the relations between the U. S. and the territories develop, a unified tax system is becoming as important as a unified commercial system.

The MPSC version of section 602 and section 601(e) is based on an emotional desire to have local autonomy in their tax

system just like the States. The States, of course, have no local autonomy as far as the Federal Income Tax is concerned; here, the Federal Income Tax is to take the place of the local tax and the reasons for local autonomy disappear.

VII. Section 603e. MPSC Draft.

No corresponding U. S. provision. This section appears to be superfluous in view of section 602(e) U.S. draft and 602(c) MPSC draft. Apparently it has been left in the text merely for precautionary reasons and will probably disappear

VIII. Section 701. MPSC draft.

Clause "to achieve a standard of living comparable to that within other parts of the United States and." This clause is unacceptable to the U.S. in its present vague form. It may be possible to find a more fortunate version. We may be able to find an acceptable compromise

IX. Sections 702, 704(b) and (d).

Clause that approval of the agreement would constitute an appropriation of funds. This clause is completely unacceptable to Congress.

X. Section 801.

Sections 801 U.S. and 801(a) and (b) MPSC. We are working on a satisfactory compromise for this section.

XI. Section 802.

The MPSC version of this section contains the word [by lease]. We feel that the nature of the interest of the U. S. should be described in section 803. Solution depends in part on ultimate formulation of section 803. To some extent this is a matter of pride.

XII. Section 803.

U. S. version short provision to the effect that the terms and conditions under which property is made available to the U. S. is to be included in a separate technical agreement which will be submitted to Marianas District legislature.

MPSC version spells out in detail many of the provisions under which the land will be made available to the U. S. Will have to be worked out.

XIII. Section 804.

1. Subsections (a) and (b) MPSC draft relating to use and occupancy agreements. Agreed to combine them in single subsection: Text tentatively agreed upon.

2. Subsection (c) of MPSC draft. This subsection deals with land to be made available to U. S. for civilian governmental

purposes and terms and conditions for joint use of Isely Field.

Not acceptable to U. S. in present form.

XIV. Section 805.

1. Regulation of alienation of property to persons of other than NMI descent: U.S. version: Mandatory on NMI Government. MPSC version: NMI Government merely authorized to do so but need not issue such regulations.

We should adhere to our version.

2. Government of NMI will regulate the extent to which lands now classified as public lands can be held by individuals.

No corresponding provision in MPSC draft.

We should adhere to our position, but might be prepared to drop our version on mandatory basis

XV. Sections 806(c) and (d). Eminent Domain.

U.S. position: Basically, U.S. will exercise eminent domain in accordance with generally applicable law.

MPSC: U.S. will not exercise eminent domain unless Congress has by law explicitly approved exercise of that power with respect to particular interest in particular real property. Pending congressional approval, and upon Presidential determination, U.S. could take an interest for not more than nine months.

Considering the importance of land in the NMI, the MPSC proposal is not ~~unreasonable.~~ understandable On the other hand it is important that the exercise of the right of eminent domain is uniform throughout the United States and that Congress is not burdened with minor matters. There may be a possibility of meeting halfways, viz, that the specific congressional approval (to the exercise of eminent domain) is not required where the Government of the NMI does not object to the exercise ~~of eminent domain.~~ thereof.

XVI. Title of Article IX and Representation of NMI in Washington, D. C.

The main differences between the two drafts are as follows:

According to the MPSC draft the NMI would be represented in Washington, D. C. by a Delegate to the House of Representatives when the population of the NMI exceeds 50,000 persons. Up to that time they would be represented by a Resident "Commissioner" who would be entitled to official recognition by all departments and agencies of the U. S. and who would be entitled to receive from the U. S. the same compensation allowances and benefits as the Delegate from Guam.

The U.S. draft would provide for a Resident "Agent" who would not be entitled to receive compensation by the U. S.

The term "Resident Agent" was chosen on account of objections from the Commonwealth of Puerto Rico. The question of whether and when the Resident Agent would have floor privileges in the House of Representatives ~~was~~ left entirely to the discretion of the House. In this we followed the precedent regarding the Resident Commissioner from Puerto Rico.

The U.S. position is based on advice received from the House of Representatives. It would be difficult to depart from it.

XVII. Section 903(c). MPSC version. There is no U.S. equivalent.

This subsection would provide for the membership of the NMI in certain regional and other international organizations. The question of the membership of U.S. Territories in such organizations is now under study. Our decision will have to depend on the outcome of those studies. We could try for a note in the legislative history, saying NMI would follow whatever decided for other territories.

XVIII. Section 1002. MPSC draft. Approval of NMI constitution. No corresponding U.S. provision.

See discussion under II.

XIX. Section 1003. Termination of Trusteeship and Establishment of Commonwealth.

Last sentence MPSC draft: U.S. to make efforts in good faith to terminate trusteeship at earliest ~~XXX~~ practicable date. No corresponding U.S. provision.

Position: This sentence is inappropriate.

XX. Section 100[4]. Effective date.

The only question open is whether the effective date of section 801 should be the approval of the agreement or the establishment of the termination of the trusteeship. Transfers pursuant to this section may begin as soon as the agreement is ~~XXXX~~ approved by both parties or even sooner, upon the establishment of separate administrations; they have to be completed at the time of termination. Split will probably also often be the case. Hence, it is largely a matter of taste whether section 801 is placed in subsection (a) [approval] or (c) [termination]. New text of Section 801 is agreed to.

XXI. Section 1007. MPSC draft. No corresponding U.S. version.

This section would provide that the U.S. would provide for separate administration as promptly as possible after the approval of the Agreement by the people of the NMI.

In our view the inclusion of this provision in the Agreement would be inappropriate. Moreover, the ~~XX~~ legislative history of the MPSC in section 1004 takes care of this point.