

OFFICIAL USE  
ONLY02  
5  
Marianas  
Mutual

June 17, 1974

## MEMORANDUM

To: James M. Wilson, Jr., U.S. Deputy Representative for  
Micronesian Status Negotiations

From: A. deGraffenried, Legal Advisor, Office for Micronesian  
Status Negotiations

Subj: Marianas Status Agreement and Mutual Consent Provisions

I. ISSUE

Which provisions of the Marianas Political Status Agreement shall be declared so fundamental to the political relationship and to local autonomy as to require that they may be changed only by mutual consent.

II. BACKGROUND

A. In round two, the United States agreed that

*"...fundamental provisions of the status agreement establishing the commonwealth relationship would be subject to modification only by mutual consent".*

This agreement was given primarily on the basis of the MPSC working session discussions relating to their desires that Article IV, 3, 2, while applicable to the Marianas would be limited when it came to the fundamental provisions of the status agreement affecting the political status of the Marianas. The MPSC lawyers noted in this regard that they were concerned that the United States might, without prior local approval, (1) merge the Marianas with Guam, (2) make it a separate unincorporated territory, or (3) incorporate it fully into the American political system. Additionally, the MPSC desired that the U.S. Congress not be empowered to enact legislation affecting the internal affairs of the Marianas. The MPSC, and Willens in particular, agreed that if the MPSC could be given a "mutual consent" clause whereby changes in the basic areas of the political arrangement would be made only by the consent of both parties, that the MPSC would have no difficulty in accepting explicit application of Article IV, 3, 2 power and would additionally agree to refrain from calling the status agreement a "compact". In later working sessions the IV, 3, 2 issue again arose; the MPSC noted substantial difficulties in accepting the explicit application of IV, 3, 2 to the Marianas without explicit protection of local self-government against U.S. Congressional interference. The MPSC suggested that this concern might be avoided

401715

by deletion of specific reference to IV, 3, 2 applicability. The MPSC, however, now wanted an "exclusive area" where local authority would have "primacy" and inviolability even against federal legislation. The MPSC felt that Puerto Rico had achieved this and that the Marianas deserved no less.

The U.S. noted that the U.S. agreed to the "mutual consent" provision on the premise that IV, 3, 2 would apply fully, and that if the authority of the U.S. Congress under IV, 3, 2 were not now to apply fully then the U.S. would have to retract agreement to the "mutual consent" provisions. The U.S. noted that the IV, 3, 2 powers were the "cornerstone of our relationship" because (1) the power applied to all other U.S. territories without exception and (2) the matter was essentially political in that Congress had stated that it did not desire to approve another political status relationship as ambiguous and contradictory as the Puerto Rican model which challenged its plenary powers to extend legislation to Puerto Rico under Article IV, 3, 2.

In the closing meetings of round two the members of the MPSC noted that it was not their intent to avoid legislation applicable to the states and territories generally, but rather they were concerned as to how the Marianas could have local control over matters such as land, economic development, education, etc., and how Congress could yet retain its Constitutional powers. Willens then shifted his position as to the concern of the MPSC on the applicability of IV, 3, 2: the MPSC was not so concerned about the basic structure of the political relationship between the United States and the Marianas as they were about the need for a specific limitation on the power of the Congress under Article IV, 3, 2.

It was felt that this problem could be overcome by working it into the mutual consent provisions of the status agreement and by agreeing that the Marianas would have the maximum possible control over its internal affairs but subject to the supremacy of the federal government, e.g., that the United States would retain full federal authority but would agree to refrain from exercising it in specified areas so as to enhance maximum local self-government consistent with other territorial relationships.

B. In round three, the United States agreed that

*"...specified fundamental provisions of the Status Agreement including certain provisions designed to assure maximum self-government to the future commonwealth of the Marianas may not be amended or repealed except by mutual consent of the parties. To this extent United States authority in the Marianas would not be plenary".*

It was also agreed that the joint legal group would begin to draft

*"...those provisions of the Status Agreement most directly relating to self-government to which the mutual consent provisions will apply".*

*check paper*

The MPSC position paper regarding the future political status of the Mariana Islands noted that the MPSC had tentatively agreed that the U.S. Congress "be authorized to legislate for the Mariana Islands under Article IV, 3, 2" and set forth its basic rationale for the need to assure "maximum local self-government". Basically, the paper and the MPSC discussions noted that the extension of the plenary power of the Congress under IV, 3, 2 to the Marianas would be "inconsistent with the principle of maximum self-government because Congress would retain the power to enact strictly local legislation for the Marianas". It was noted further that the application of IV, 3, 2 could be limited in such a way that provides adequate safeguards to the Marianas and in such a way that it would not be plenary but restricted to "legitimate areas of federal or national interest". The paper then went on to specify in some detail that the MPSC desired that the Commonwealth have local autonomy equal that found in the several states.

The U.S. responded by noting this proposal would establish, by coupling this approach with other requested preferential treatment as a territory, a political status reflecting autonomy in local self-government far in excess of that enjoyed by the States and other territories. As such we had some difficulty with the MPSC paper. The U.S. went on to note that the U.S. had no quarrel with local self-government concepts per se but that a blanket limitation on U.S. federal authority would raise questions of residual sovereignty in the Marianas which would be very serious; therefore the U.S. needed complete federal authority but would be willing to make specific exceptions where the federal power would not be plenary.

In response, the MPSC agreed that they would accept the U.S. position that: (1) the exercise of IV, 3, 2 authority would be limited so it could be used only by mutual consent in areas of "local concern"; (2) the political status relationship provisions of the compact would be subject to the same requirement; and (3) that the status agreement would refer to Congressional forbearance in those enumerated areas. With this, the MPSC attorneys were to begin identifying which of the provisions of the U.S. draft "covenant" would be subject to modification only by mutual consent.

C. In round four, the MPSC forwarded its version of a draft status agreement incorporating the concept of the requirement for "mutual consent". However, that section [Section 207(b)] incorporates provisions unrelated to the initial MPSC positions regarding their concerns about the fundamental status relationship and desires for local autonomy. The MPSC draft proposes that the following areas could not be changed except by mutual consent: the political relationship, citizenship, taxation and customs authority, immigration and shipping and fishing laws, financial assistance, public property and U.S. land requirements, Resident Commissioner rights, effective date of the establishment of the Commonwealth, and provisions of the agreement which shall become effective upon establishment of the Commonwealth.

The U.S. responded that the MPSC draft contained many variances with earlier agreements as to U.S. sovereignty and as to what would be considered to be "fundamental" to the political relationship. The U.S. could not accept a qualification on U.S. sovereignty. The U.S. also noted that the plenary powers of the federal government cannot be limited except to the extent that Congress may be willing to do so in certain very specific and basic respects, otherwise Article IV, 3, 2 would apply in undiminished form. There was earlier agreement on a simplified formula for the immediate application of U.S. laws called the "Guam" formula, that now appeared to be substantially modified. There were other significant proposals in the Marianas draft agreement that the U.S. could not agree should be included in the basic political status agreement. Finally, there were repeated analogies to the Puerto Rican system which the U.S. had repeatedly noted it could not accept because of the ambiguities of that relationship.

#### ANALYSIS

The MPSC approach to "mutual consent" reflects their support of the Puerto Rican interpretations of a Commonwealth status. The Puerto Rican positions are currently in dispute among both Congressmen and Constitutional scholars as to whether the Puerto Rican Commonwealth is or is not a U.S. territory and is or is not under Congressional plenary powers which deal with the territories. This dispute has arisen because the precise allocations of powers between the federal government and Puerto Rico under the commonwealth were not clearly defined. Puerto Ricans have used this ambiguity to expand upon what they consider to be local self-government that is free from federal interference.

Puerto Ricans argue: First, local self-government in Puerto Rico no longer comes as a consequence of Congressional enactment under the Organic Act approach but from a locally drafted Constitution which only they can alter and amend. This gives rise to

allegations of local sovereignty. Second, the commonwealth agreement contains language and follows the procedure associated with the process whereby territories become states of the union. Thus, "...in the nature of a Compact", contains special significance to indicate that the commonwealth status is permanent in nature and can be changed only by local consent. This emphasizes to local groups that Congress intended a larger degree of local autonomy than previously held as a territory of the United States. Third, by establishing a local sphere of influence in which Puerto Rico is free to act without prior consultation with the federal government, there has been some argument that Congress has relinquished a significant portion of its plenary powers to legislate for Puerto Rico; extremists argue that this in fact indicated that Puerto Rico has a right to veto federal legislation and buttress this position with Section 9 of the federal relations act which states that "...statutory laws of the United States NOT LOCALLY INAPPLICABLE...shall have the same force and effect in Puerto Rico as in the United States..."

The MPSC has refined these basic Puerto Rican positions by proposing that U.S. authority in the Marianas flow not from its inherent powers as the ultimate sovereign, but only from the status agreement and only in a carefully circumscribed manner that enhances local autonomy following Puerto Rico's example. This is a concept that is diametrically in opposition to current U.S. territorial relationships.

To avoid the issues arising from the Puerto Rican model the United States draft version of the commonwealth agreement clearly establishes the relative powers of the federal government and of the territorial government in the Marianas. U.S. sovereignty was to be clearly established with the consequence that all the attributes and inherent powers of sovereignty were to rest with the federal government. Specific constitutional provisions were to be extended to establish federal supremacy over the territory. Plenary powers of the Congress were to be fully held but agreement would be made that these powers would not be exercised in a well defined area to permit maximum local self-government. There could consequently be no challenge to U.S. supremacy or to the nature of the political relationship. The Marianas would fall within the broad guidelines now formulated for federal-territorial relationships and would be less precipitous a factor for change of status in the other U.S. territories.

#### CONCLUSION

The MPSC version of what constitutes the "fundamental provisions" of the status agreement is excessive but does serve to give some negotiating leverage to the MPSC vis-a-vis the United States. Perhaps this is their objective since the MPSC has proposed approaches which are so opposed to the U.S. position and

since the MPSC is familiar with the U.S. Congressional approval process, the practice in acquiring land to meet defense needs, and with the practice of forbearance by the U.S. Congress in the other territories so as to promote self-government.

The MPSC also seems to have retained its desire to obtain the kind of local governmental autonomy that is attendant to Puerto Rico. The U.S. has repeatedly noted it cannot accept this approach for local self-government in the Marianas. Apparently, it is the desire of the MPSC to make a last attempt to negotiate for a Puerto Rican type local autonomy before acceding to the U.S. Commonwealth offer.

#### RECOMMENDATION:

To insure that the sovereignty of the United States will remain unchallenged in the Commonwealth and to maintain maximum federal authority over the new territory while promoting local self-government, it is recommended that only the following provisions (contained in the U.S. draft "Covenant" for the Marianas Commonwealth) be subject to change by mutual consent:

a — 1. Article I, the Political Relationship

This provision establishes U.S. sovereignty and plenary powers and clarifies that the Commonwealth will be subject to these powers. It is also recognized that the plenary powers will not be exercised in certain enumerated areas.

c — 2. Article II, Citizenship and Nationality

This provision establishes the common loyalties of the residents of the Commonwealth and the United States and the procedure by which the residents will become U.S. citizens. The rights and obligations of U.S. citizenship are attendant to this Article, and adds to the confirmation of U.S. sovereignty over the commonwealth.

b — 3. Article III, The Constitution of the Northern Mariana Islands

The right of the residents to establish a local government consonant with separation of powers doctrine and with elected, representational government is recognized; however, the provisions of the constitution establishing the commonwealth government are required to be consistent with the status agreement and applicable provisions of the U.S. Constitution and federal law. This confirms federal supremacy over local government because the agreement, in other provisions, clearly establishes U.S. sovereignty and plenary powers.

4. Sections 401 and 402 of Article IV, Applicable Laws

These sections make specific application of provisions of the U.S. Constitution essential to establish U.S. sovereignty and to insure that residual rights of sovereignty do not vest with the commonwealth government after a change in status. They also establish the local right to control the alienation of local lands.

-----  
Although not "fundamental" to the status relationship, the following provisions could be considered subject to change only by "mutual consent" in the event local political considerations so dictate:

1. Sections 501 and 502 of Article V, Revenue and Taxation

These provisions create a local customs territory consistent with that of Guam and permit the Commonwealth to impose tariff duties but consistent with international obligations of the United States and excluding goods from other U.S. territories. This recognizes that the Commonwealth is so far removed from the metropolitan U.S. that it should receive special privileges in the area of trade and commerce.

2. Sections 701, 703 and 704 of Article VII, Public Property of the Commonwealth

These provisions transfer title to public property that will be held by the trust territory government at the end of the trusteeship in the Marianas, establish that the land use and purchase agreements entered into by the U.S. Government will be consistent with other similar agreements in other U.S. territories, and reaffirm more precisely that the U.S. will hold unlimited eminent domain authority so as to reestablish U.S. sovereignty over the commonwealth.

+ Eminent Domain

A. deGraffenried

AdeG:kkc

401721