Marianas - Mutual Consent Provision

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— Mutual Consent Provision
June 27, 1974 (new)

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MEMORANDUM

Re: Nature and Scope of the Mutual Consent Provision

The Mutual Consent provision of the proposed Covenant with the Northern Marianas constitutes essentially an undertaking on the part of Congress that it will refrain from exercising some of its plenary powers under Article IV, section 3, clause 2 of the Constitution "to make all needful Rules and regulations respecting the Territory and other Property of the United States."

Article IV, section 3, clause 2 of the Constitution does not at the present time extend to the Northern Marianas because they are not now a Territory of the United States. That provision will become applicable to them only when the United States upon the termination of the Trusteeship acquires the sovereignty over the islands. This means that the mutual consent provision of the agreement need not apply to those provisions of the Covenant which are immune under the Constitution from amendment under Article IV, section 3, clause 2.

This consideration applies especially to those constitutionally protected rights of citizens of the Northern Marianas and of the Commonwealth which come into being either prior to or at the time the United States acquires sovereignty over the Northern Marianas. Thus, if certain residents of the Northern Marianas acquire United States citizenship at the time the United States acquires sovereignty over the Commonwealth, Congress cannot deprive them of their citizenship under Article IV, section 3, clause 2, as long as the United States retains sovereignty over the islands. Hence, there is no need to include that provision in the Mutual Consent requirement. Similar considerations apply to property transfers to the Commonwealth effective prior to or upon United States acquisition of sovereignty. They are protected under the Fifth Amendment. The same is true with respect to contractual obligation of the United States, such as the agreements to furnish financial support.

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A related problem is whether Congress has the power to modify unilaterally the Covenant before the United States acquires sovereignty over the Northern Marianas. Some of the explanatory materials furnished by Willens indicate a concern to that effect.

To begin with, the power of Congress to legislate with respect to the Northern Marianas, and, indeed, to approve the Covenant and to enact it into law, is derived from the Necessary and Proper Clause of the Constitution as incident to the carrying into execution of the Trusteeship Agreement with the United Nations (Article I, section 8, clause 18; see also Article 12 of the Trusteeship Agreement).

The approval and implementation of the Covenant by Congress would carry into effect the undertaking of the United States, pursuant to Article 6(1) of the Trusteeship Agreement, to promote the development of the Trust Territory toward self-government "* * * as may be appropriate to * * * the freely expressed wishes of the peoples concerned * * *." A unilateral modification of the Covenant, after it had been approved by both parties, would be inconsistent with the requirement of the Trusteeship Agreement that the development toward self-government has to conform to the "freely expressed wishes of the peoples concerned." As indicated above, the legislative powers of Congress over the Trust Territory are limited to the implementation of the Trusteeship Agreement. It is extremely questionable whether Congress has the power to legislate for the Trust Territory in a manner which clearly violates that Agreement.

In any event, legislation designed to modify unilaterally the Covenant after its ratification would constitute legislation enacted by Congress for the Trust Territory. Under the Marianas proposal such legislation would cease to be effective when the United States acquires sovereignty over the Northern Marianas (cf. their section 401). We are not prepared to go that far but could be willing to agree that when the United States acquires sovereignty over the Northern Marianas, the laws enacted by Congress for the Trust Territory and applicable to the Northern Marianas should cease to be effective to the extent that they are inconsistent with the Covenant.

H. M.

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MEMORANDUM

June 21, 1974

TO : Interior/OMSN - Mr. James Wilson

FROM : State/L:UNA - Andre M. Surena

SUBJECT: Matters to be Listed in Mutual Consent Clause in Marianas Agreement

A. Discussion

It was agreed in Marianas II that "(f)undamental provisions of the formal agreement establishing the commonwealth relationship would be subject to modification only by mutual consent." I believe the difficulty in deciding what "provisions" to make subject to mutual consent is twofold. First we must decide what fundamental concept or principle we wish to make subject to mutual consent; and second, we must locate the Title or Article of the Agreement which best characterizes--and limits itself to--that fundamental concept or principle. Reference to the latter Title or Article could then be made in the mutual consent clause.

The first difficulty will be resolved by negotiation with the MPSC and agreement on what are "fundamental" aspects of the commonwealth relationship. As you have requested, I have indicated, in part B below, what I consider these to be.

However, the second difficulty, i.e., what provisions to plug into the mutual consent clause, involves a major problem of drafting. The language found in our Titles and Articles often covers more than one substantive item; or, where a general principle is stated, specific details are also included in the same provision. If I am correct in assuming that we wish to include in the mutual consent clause only certain narrowly drafted fundamental issues, then for the reasons stated above the present language of our draft does not lend itself to an approach whereby Title or Article numbers can simply be plugged into a mutual consent clause.

Accordingly, I believe that some modification of our draft is in order. In fact, it might be possible to pursue such

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modifications along one line suggested by counsel for the MPSC. They have argued that dividing the text into Preamble, Titles, and separate Articles (as we have done) may lead to confusion; and instead, the text should only be divided into two parts, a Preamble and Titles subdivided in sections. I think there is general merit in their proposal, and I think we might be able to accommodate their proposal to suit our "mutual consent" needs.

The language in our Titles tends to describe general principles. Under the two-part approach, as appropriate, such "general principle" language could be located in the penultimate section of a Title. Succeeding sections would deal, as they now do, with more detail. Where one of the penultimate sections concerns an item we view as "fundamental," it would be appropriate to refer to that section in the mutual consent clause. Since in any one Title there would be succeeding sections dealing with specific details on the same subject matter, it should be explicit that those sections, and hence their detail, would not be subject to the mutual consent requirement. (This could be accomplished by tightening the language of the mutual consent clause. It might state, for example, that ". . . the specific terms of the following provisions only are subject to change only by mutual consent.")

Thus we would agree to a general principle without locking ourselves in cement concerning the implementation of that principle. The difficulty with this approach is that it can be reasonably argued that if the general principle is fixed but the means of implementation may be amended unilaterally, then it is possible that the principle agreed upon can be significantly undercut. (In many regards the MPSC draft Commonwealth Agreement is drafted so that the general principle as well as the specific means of implementation are subject to change only by mutual consent.) To rebut this one could argue that what is "fundamental" is the general principle, not the means of implementation; and that our understanding would be that wherever the Federal Government found it necessary to implement a specific aspect of the Agreement in a fashion implicitly or explicitly in conflict with a provision of the Agreement, the Federal Government, as an overriding policy consideration, would not effect any implementation which would result in a unilateral modification of provisions subject to the mutual consent clause. This would constitute an admission that it is possible to do damage

to a principle by altering its means of implementation, as well as an undertaking by the US as a matter of policy, not to exercise such implementation unilaterally.

I have suggested the preceding only as one possible means of proceeding. However, I believe that before we can reach agreement on what to advance to the MPSC as appropriate mutual consent "provisions" we must undertake a serious reexamination of our draft in order to ascertain whether our Titles and Articles contain sufficiently precise and succinct statements of the fundamental items which we would be willing to see subject to the mutual consent clause.

B. Fundamental Principles

The following principles refer to those fundamental aspects of the new Commonwealth government-system, which the US would agree it cannot alter, except with the consent of the Commonwealth Government:

The references (Refs:) are to the May 9, 1974, version of the US Draft Covenant.

1. That the Marianas Islands District of the TTPI will become a self-governing commonwealth under the sovereignty of the USA.

Refs: Title I; Section 101.

2. That the Commonwealth will be governed by a constitution framed and adopted by the people of the Marianas Islands District, and subject to amendment by them.

Refs: Title II; Sections 301 and 305.

3. That the Commonwealth may establish local courts, ~~whose rulings will be subject to review by US federal courts~~.

Refs: Title III; Section 309,

4. That the people of the Marianas Islands District will have the right to become citizens of the USA, in accordance with the terms of the Covenant.

Refs: Title IV, Section 202, ~~203~~

8. That the Commonwealth will have the authority to regulate the alienation of public and private lands in the Commonwealth.

Refs: Title VII; Section 402,

2. That modification of the terms of section 102 (the present mutual consent clause) may be made only by mutual consent of the US and the Commonwealth.

Refs: Title X; Section 102.

cc:
L/UNA - Mr. Stowe
L - Mr. Johnson

L/UNA:AMSurena:eb