January 29, 1974

MEMORANDUM TO MIKE HELFER

Re: ~~Initial Legislative Package For the Mariannas and~~ States Entering the Union With Special Provisions

I. States Entering the Union With Special Provisions

Following the ratification of the Constitution by the thirteen original states, it was settled that equality of rights and privileges existed among those states. The Northwest Territorial Government Act of 1787 supposedly established the fact that states would be admitted on equal terms. The requirements for statehood established by the Act were 1) 60,000 inhabitants, 2) no slavery.

Ohio was the third new state to be admitted to the Union and the first to be admitted by an enabling act. (The previous states, Vermont and Kentucky, had been created from the territories of established states; New Hampshire and Virginia, respectively.) Ohio was admitted on conditions which were offered to the state for acceptance or rejection. The conditions were that the federal government would 1) grant Ohio certain lands for schools, 2) grant Ohio certain salt-springs and sufficient land to work them and 3) that the state would receive 5% of the proceeds from public lands sold in the state to apply to the building of

roads and canals. If the conditions were accepted by the state, they would be binding on the United States provided acceptance was accompanied by an ordinance, irrevocable without the consent of the United States, which would exempt lands sold by Congress from taxation for five years. (Thorpe, Vol. 5, p. 2897).

The Ohio Enabling Act (7th Congress, 1st Session, April 30, 1802) served as a model for later states. It also served as the basis for subsequent Congressional claims to place conditions on applicants for admission to the Union. (Hagard, p. 328-9).

From the admission of Ohio to the admission of Hawaii restrictions have to varying degrees been imposed on every state. Concessions have been granted to a few.

Louisiana's Enabling Act was passed in 1811. The conditions were very similar to those offered Ohio. In Louisiana's case, however, the conditions were demanded, not offered for acceptance or rejection. See Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. 589 (1845) and The Mayor, Alderman & Inhabitants of New Orleans v. U.S., 35 U.S. 662 (1836) for conditions of Louisiana's admission and the powers of the federal government in relation thereto.

States from lands in the Northwest Territory south of the Ohio River were given a concession upon

admission. The states were admitted to the Union subject to the conditions and restrictions of the Northwest Ordinance except for the restriction on slavery. (Seaman, p. 137). Thus slavery was forbidden by the Northwest Ordinance in states north of the Ohio River. The enabling act of the southern states lifted this restriction and allowed the state itself to decide to allow or prohibit slavery.

Missouri applied for admission to the Union and submitted a constitution which prohibited slavery. Following a lengthy Congressional battle the Missouri Compromise excluded slavery in territories west of the Mississippi River and north of 36°30', except in Missouri. Missouri was then admitted to the Union on the condition that she amend the state constitution to permit slavery.

It then became the practice to consider states for admission in pairs of one northern and one southern state in order to maintain the equality of slavery and anti-slavery votes in the U.S. Senate. Iowa applied for admission when no southern state met the requirements for admission. A concession, however, was granted to Florida and the population requirement was waived.

Texas was admitted with unprecedented concessions which have never since been granted. ". . . Concessions granted, gave the state some advantages no state before or

since has possessed. . . . Texas was the only state admitted to the Union with the privilege of controlling most of the public lands in the state. The provision allowing the state to decide when new states should be formed, gave the state the power to make its own decisions when it should split up." (Hagard, p. 400).

The treaty 'Consent of Texas to Annexation' provided: "New states of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said state, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the federal constitution." (Thorpe, Vol. 6, pp. 3544-3546).

Nowhere was the term "on equal footing with the original states" included in the Consent of Texas to Annexation. The phrase was in the third paragraph of the Joint Resolution to admit Texas. The Consent to Annexation, however, only referred to paragraphs one and two of the Joint Resolution.

Utah was admitted with a restriction on polygamy.

The courts, however, have struck down most of the restrictions imposed on states, if litigation has been brought ~~up~~ concerning them. (Hagard, p. 526). Coyle v. Oklahoma, 221 U.S. 559 (1944) held that the legislature of

Oklahoma had the power to locate its own seat of government, to change the same, and to appropriate its public money therefore, not with standing any provisions to the contrary in the Enabling Act of June 16, 1906, 34 Stat. 267, c. 3335, and the ordinance irrevocable of the convention of the people of Oklahoma accepting the same. This court referred to what seems to be the accepted rule regarding new states entering the Union:

> The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of Congressional legislation after admission. [See also Escanaba Co. v. Chicago, 107 U.S. 678, 688 (1882); Van Brocklin v. Tennessee, 117 U.S. 151, 160 (1885); Bolln v. Nebraska, 176 U.S. 83, 87 (1900).]

In Texas v. White, 7 Wallace 700, 726 (1868) the court discussed the secession of Texas from the Union, and held it to be null;

> When, therefore, Texas became one of the United States, she entered into an indissoluble union, and all the guaranties of republican government in the union, attached at once to the state . . . . The union between Texas and the other states was as complete, as perpetual, and as indissoluble as the union between the original states. There was no place for reconsideration, or revocation, except through revolution, or through consent of the states.

In U.S. v. Texas, 339 U.S. 707 (1950) the Supreme Court held that Texas did not own an area claimed by Texas which lay under the Gulf of Mexico beyond the low-water mark on the coast of Texas. The court reasoned;

> The "equal footing" clause prevents extension of the sovereignty of a state into a domain of political and sovereign power of the United States from which the other states have been excluded, just as it prevents a contraction of sovereignty (Pollard's Lessee v. Hagan, supra) which would produce inequality among the states. For equality of states means that they are not "less or greater, or different in dignity or power." [See Coyle v. Smith, 221 U.S. 559, 566 (1911)].

Texas argued that the annexation agreement allowed them to retain all of the lands, minerals, etc. underlying that part of the Gulf of Mexico within the original boundaries of the Republic. However, this court reasoned that as an incident to the transfer of her sovereignty when entering the Union, she relinquished all claims to the marginal sea because of the "equal footing" provision.

Thus it seems unlikely that a court would hold that allowing Texas to subdivide into five states is consistent with the "equal footing" clause.

Sources

Principally an unpublished doctoral dissertation:
Luther Guy Hagard, The Quest for Constitutional Equality Equality Among States in the U.S. Microfilm AC-1 No. 22,454 - Library of Congress, Washington, D.C.

Francis Newton Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories and Colonies, Now or Heretofore Forming the United States of America. 7 Vols. (59th Congress, 2d Sess., HR Doc. 357) Washington, D.C.: Government Printing Office, 1909.

Ezra C. Seaman, Commentaries on the Constitutions and Laws, Peoples and Histories of the United States. (Ann Arbor: The Author, 1863).