DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

In reply refer to:
I-23451/69
23 July 1969

MEMORANDUM FOR CDR. EDWIN A. KUHN, USN
OSD/ISA/EA & PR

SUBJECT: Organic Act for the Territory of Micronesia, Request for Comments

Introduction.

We do not provide here a detailed review of the Organic Act proposed for the territory of Micronesia. This act, it will be noted, provides the governing machinery for Micronesia and closely parallels the Organic Act for the unincorporated territory of Guam (Title 48 USC, Section 1421-1426 inclusive). When territories are declared to be "an unincorporated territory of United States", the United States has taken the view that the territory shall be administered in part by the United States but it shall not be considered a territory preparing for statehood. This has been the case with Puerto Rico, the Virgin Islands, Guam, and the Philippine Islands. Therefore, the present Organic Act of Micronesia calls for a territorial status falling short of territories which will be ultimately incorporated within the United States, but there is nothing to prevent ultimate repeal of the Organic Act and the reconstitution of the territory of Micronesia as an incorporated territory to allow statehood as was the case with Hawaii and Alaska.

Secondly, it will be noticed that the Organic Act contains a number of provisions affording closer - and lasting - ties to the United States:

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(1) It declares inhabitants of the Trust Territory to be citizens of the United States and further declares (by implication) that the territory itself comprises lands over which the United States exercises sovereignty.

(2) The Organic Act incorporates a Bill of Rights taken from the United States Constitution. This Bill of Rights is given constitutional authority in the sense that it shall not be repealed or circumvented by legislation inconsistent with them (see last sentence of Subsection (t), of Sec. 103).

(3) The Government of the proposed territory shall be administered by executive, legislative and judicial bodies established under the Act. However, the executive's authority is qualified by Section 104(a) which declares it "shall be exercised under the supervision of the Secretary of Interior." In this sense his authority appears to be less than the authority vested in the executive officer of Guam.[1]

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1. Sec. 104(b) declares in part:

> "(b) The Governor shall have general supervision and control of all executive agencies and instrumentalities of the government of Micronesia. He shall faithfully execute the laws of the United States applicable to Micronesia, and the laws of Micronesia. . . . He shall annually, and at such other times as the President or the Congress may require, make official report of the transactions of the government of Micronesia to the Secretary of the Interior, and his said annual report shall be transmitted by such Secretary to the Congress. He shall perform such additional duties and functions as may, in pursuance of law, be delegated to him by the President, or by the Secretary of the Interior. . . . ."

(4) The legislative power is reposed in the "Congress of Micronesia" comprising a Senate and House of Representatives. It is not entirely clear how this bicameral legislature is to operate, and it should be noted that the legislative power of Guam is vested in a unicameral house and does not create the same problem. In other words, it is not clear what the separate, concurrent, or dominant functions of the two houses might be, if any, and the further question is raised as to whether this legislature satisfies (or must satisfy) the apportionment cases commencing with Baker v. Carr (369 U.S. 186, 1962).

(5) Finally, it should be noticed that by implication the Organic Act, may be amended by the United States Congress.[1]

The proposed Organic Act in Section 143 vests the power in the United States President to recommend to the United States Congress, within 12 months after the enactment of the Organic Act, which of the United States statutes shall be applicable to and shall not be made inapplicable to this territory. Section 143, it is evident, can lead to tying the Micronesians very closely to the United States.

General Remarks.

The Organic Act proposed for the Territory of Micronesia is not a "constitution" in the sense in which that term is currently used in Anglo-American common law political theory. A "constitution" acquires its legitimacy or authoritative character from a consensus by the people who are to be governed, setting forth the restraints to be imposed

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1. See also Sec. 118 relating to the U.S. President's residuary power over matters concerned with "the National Defense" and "National Interest" of the United States.

upon their government and also, in the more liberal and modern view, the restraints to be placed upon the majority of citizens when they act or represent the people as a whole. It also includes restraints to be placed on persons in their conduct with one another.

Moreover, the modern view generally calls for an effective process of review wherein legislation, made under the authority of the constitution can be tested to ascertain whether it is valid or null and void. In other words, it would afford a means to test the "constitutionality" of legislation.[1]

The Organic Act proposed for the territory of Micronesia is being drafted by agencies of the United States Government. It follows quite closely the Organic Act for the Territory of Guam. (Title 48 USC, Sec. 1421 et. seq.). It appears that the proposed act is not one which was the result of deliberations made by the Micronesians or their own duly authorized representatives. Presumably, however it will be submitted to them and subject to their "approval".

Furthermore, the proposed Organic Act reserves the power to revise the act, to administer and to interpret it, to a very substantial degree, in the United States Government. Therefore, the adoption of an Organic Act of this kind would be at least for a transitional period the adoption of a political and legal policy in which the peoples of Micronesia will not be entirely self-governing.

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1. This process - in the United States - was found by the Supreme Court to exist by implication.

Assuming that such a policy is adopted, tendencies for it to freeze in place will take effect, obstructing the movement and process toward self-government. Unless a process towards self-government is positively channeled in this direction, a fair reading of the proposed Act suggests that these peoples will become more irrevocably tied with the United States as time goes on.

1. United Nations Charter Commitments.

The question is therefore raised whether adoption of Micronesia as an unincorporated territory would be contrary to United States commitments with the Security Council of the United Nations and with the United Nations Charter. Although this is a separate question from the proposed Organic Act, which we are addressing here, we must call attention to the fact that it is a preliminary question which must be fully decided.

Although the adoption of a constitution or a policy for self-government is in large measure a question of policy with political rather than legal implications, it is important to bear in mind that United States might - in this case - be subject to constraints with legal effect, stemming from the United Nations Charter, to formulate an Organic Act more closely addressed toward ultimate independence and self-government of the peoples of Micronesia rather than toward some closer tie to the United States. The case of Puerto Rico which was an unincorporated territory must be distinguished since no such commitments and no such political pressures were present.

2. Other Considerations.

It must further be noted that although the Organic Act provides for a legislature representing the people, vesting their representatives with the power to promulgate laws as to their affairs, that power is subject to the supervision and

overriding authority of the executive branch of the United States and there in the Act legal limitations imposed upon the legislature's power to legislate as well. Again, the fundamental question governing this matter is whether the Organic Act falls within the expectations of the United Nations Charter and the United States commitments to the Security Council in providing a structure within which the process toward self-government and autonomy can take place or whether, in the alternative, no such obligation is imposed upon the United States.

If the answer to this question calls for increasing self-government, the Organic Act as drafted would appear to fall too far short of these objectives, and an attempt to press for it would not seem to be in the best interests of the United States. It would appear wiser to take a position that is much more fluid, viz. to press for the continuance of the present status of the Micronesians. In other words, a political move at this time looking toward the adoption of the proposed Organic Act must be one that considers the possibility of failure. For if the Micronesians are unwilling to accept the proposed Act in their plebiscite, the abortive attempt to secure their approval may backfire and lead to United Nations and internal pressures for rapid self-government, independence and real autonomy.

These fundamental questions also require us to address whether the United States has the exclusive power to terminate its Trusteeship Arrangement with the peoples of Micronesia and enter into a new arrangement with them without the concurrence of the Security Council.[1] In view of the specific

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1. Alteration and amendment of the Trusteeship Agreement shall be exercised by the United Nations Security Council, according to Article 83(1) of the United Nations Charter. A fortiori it would appear that termination would require approval as well. We do not however attempt to provide our opinion on this matter here.

questions which we have been asked to answer, I have not attempted here to deal with these very fundamental constitutional issues.[1]

Specific Observations Relating to the Organic Act.

In addition to the general remarks which have just been made, the following specific observations are pertinent.

1. The Question of Amendment.

The question of amendment of the Organic Act should first be examined. The question of who may amend, and what procedures must be followed, are important because the amending power lends flexibility and it is therefore in part the means to bring about either increased self-government or closer ties to the United States. A "constitution", generally speaking, is not readily amended, and usually requires more than a majority for amendment. The proposed organic act differs from a constitution even though it is similar to a constitution in two respects. In other words, although it includes a Bill of Rights, the Organic Act, in effect, is primarily intended to set up the necessary governing machinery. The machinery set up in the proposed Organic Act, the legislative, executive and judicial bodies, have as noted above, powers more limited than the corresponding governmental machinery in the United States. Since the Organic Act sets up governing machinery which is subordinate to the United States Congress

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1. See generally 48 USC Section 1681, et. seq., providing for present governmental arrangements of the Trust Territory. Section 1681, et. seq., is of course transitional legislation. See also Balzac v. People of Puerto Rico, 258 US 298 (1922) to the effect that the United States District Court created in the Territory of Puerto Rico, was construed to be a court created under the sovereignty of the United States Congress and although the court was said to have independent competence, it still was deemed to be a territorial court, seemingly without that degree of independent competence associated with a self-governing people governed under a constitution of their own choosing.

and the United States executive, it is more likely that the Organic Act will require revision if it is intended that the territory of Micronesia shall move toward self-government and independence.

Secondly, for the same reason amendment of the Organic Act will be needed because that act reserves the power in the United States to impose United States Federal Law on the territory and if the territory moves towards self-government this additional federal law (which might be extensive) may need to be repealed by territorial government.

2. Independence of the Courts.

It is important to note that the courts set up under the Organic Act are also subjected to controls administered by the United States and to this extent they are not fully independent. If the territory moves toward self-government, it will be necessary for the Organic Act to be modified in that direction and therefore ultimately to provide for courts competent and empowered to declare null and void legislation inconsistent with the Organic Act.

Responses to Inquires Made in Your Letter Dated 11 July 1969.

1. Eminent Domain Authority.

Two provisions of the Organic Act are pertinent to the eminent domain authority of the proposed territory.

The first is to be found in the Bill of Rights Sections 103(e) and (f). These two sections indicate that no person owning property on the island may be divested of his property "without due process of law", which means that he is entitled to appropriate procedures, including an opportunity to resist claims should claims be made for the acquisition of his property, Section 103(f) provides that property taken for "public use" shall be reimbursed by payment of "just compensation". United States law to the same effect has already been interpreted to mean that acquisition for military

purposes of any kind would constitute a public use and therefore no legal disability is raised by these provisions. Section 140 of the Act provides:

> "SEC. 140. The title to all property, real and personal, owned by the Government of the Trust Territory, and all interests in property, held by the Government of the Trust Territory, are hereby transferred to the Government of Micronesia, except that whatever right, title, or interest the Government of the Trust Territory has in particular tracts of tidelands, submerged lands, or filled lands in or adjacent to the islands of Micronesia are hereby conveyed to the United States. The term "tidelands, submerged lands, or filled lands" shall have the meaning ascribed to it in section 1(a) of Public Law 88-183 (77 Stat. 338)."

This section in effect provides that the public property of the island, i.e., property owned by the present Government of the Trust Territory, shall be transferred to the Government of Micronesia.

Section 141 in addition provides the following:

> "SEC. 141. The Public Land Laws of the United States shall not apply to land ceded to the United States, but the Congress of the United States shall enact special laws for their management and disposition, except that all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil or national defense purposes of the United States or may be assigned for the use of local government purposes, shall be used solely for the benefit of the citizens of Micronesia."

This section reserves in the United States Congress the power to enact "special laws" for the management and disposition of United States owned lands within Micronesian territory - regardless of when ceded, i.e., before or after the Organic Act is enacted - and further provides that if the United States makes payment for those lands or secures revenue from them where the lands are used for national defense purposes of United States, such funds need not be "used solely for the benefit of the citizens of Micronesia."

Comment.

These provisions as written would not inhibit the acquisition of land by the United States for national defense purposes and require only that adequate compensation be paid and the lands taken after appropriate proceedings have determined "public use" to justify United States claims.

Moreover, in addition to the eminent domain authority which the United States Government is able to exercise within the United States, it should be noted that there is the further authority to acquire lands through the "police power" for emergency or crisis purposes. Such an acquisition of land under such a power can be made without the justification of "public use" since such a use is implied wherever that acquisition is made for the safety and welfare of the public.*

Control of Foreign Relations.

The control of foreign relations of the proposed territory remains vested in the United States Government.

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*See generally 40 USC Sec. 257 (condemnation of realty for sites, etc.) which gives authority in the executive branches of government-including the Department of Defense, to condemn; 28 U.S.C. 1358 vesting jurisdiction in U.S. Federal District to hear the claims, 10 U.S.C. 2663 concerning acquisition powers of the "Secretary of a Military Department." These laws could be preserved under Sec. 143 of the Organic Act.

As long as Micronesia remains a territory, whether incorporated or unincorporated, such would be the case and there would be no reason to devolve this authority on the territory itself.

United States Internal Security Laws.

The United States internal security laws are not expressly made applicable in the Organic Act to the proposed territory of Micronesia. But we refer again however to Section 143 of the proposed Act in which a determination shall be made as to which statutes of the United States shall apply to the territory and which shall not. It is therefore possible to make applicable all the internal security laws presently applicable to the United States itself (see Security Manual Document 126, Senate, 86 Congress 2d Session, dated August 31, 1960 and published 1961). These laws as the cited Security Manual indicates are very exclusive indeed. On the other hand, it would be difficult for us to select from these laws those which should be applied and those which should not.

Permanency of Political Relations with the United States.

We have noted above that if an Organic Act is enacted for the unincorporated territory of Micronesia, two preliminary steps must first be satisfied. It will be necessary to determine whether the Trusteeship Arrangement between the United States and United Nations Security Council must be terminated and with Security Council consent which appears to be present prevailing view - but not the present view of the Department of State, and it will be necessary to have a plebiscite wherein the "citizens" of Micronesia accept a political association with United States and United States citizenship as well. If these two steps are successfully completed, then adoption of the Organic Act will by its terms establish in Micronesia the status of unincorporated territory of United States which will not be revocable. Moreover, the territory of Micronesia would not then be free to secede even if a majority of its "citizens", or more, would seek secession.

Safeguards Provision.

Should the United States seek to protect its powers to acquire land for strategic purposes in terms that are more precise than those which are associated with the powers of eminent domain and the police power, a safeguards provision could be added.

A provision reading as follows might be adopted:

> "No legislation should be adopted under this Act, and no amendments or alternations shall be made to this Act to invalidate the power of the United States Government to acquire and use lands or adjacent seas, and their seabeds, within the Territory of Micronesia, wherever required for the maintenance of international peace and security, or for the local defense and maintenance of law and order."

This provision adopts the language of Article 84 of the United Nations Charter, and would fulfill United States security needs, in the same way the present administration of the territory satisfies those needs.

Conclusion.

We have provided here a list of the options available to the United States and a brief analysis of each. We have not, however, provided here, the list intended at this time to bring these options to your attention.

1. Full and Complete Independence.

This option would call for providing the Micronesians with full and complete independence with full powers of self-government. Variants of this option might include formal legal arrangement wherein the United States would manage the foreign affairs and foreign relations of the islands and a further arrangement preserving United States security

interests and United States duties toward the maintenance of international peace and order under the United Nations Charter. This arrangement would also include a binding agreement for the use and occupancy of lands which the United States deems to be strategic for meeting her security objectives.

2. Independence Plus Close Ties to the United States.

A further possible option to that just mentioned might be that of independence but with ties to the United States similar to those established among the members of the British Commonwealth. Ties of this kind may be weak - much depends upon policy factors and political factors - but it is possible that political considerations might show them to be sufficiently sound for meeting United States duties[1] and interests. Both this option and the previous option require a close consideration whether the Micronesians have reached that stage of political sophistication and maturity such that they might now embark upon self-government in the true sense of the term.

3. Maintain the Present Trusteeship Agreement.

A third option available to the United States might be to continue with present Trusteeship Agreement and the political and legal regime under which the United States administers and promulgates legislation for Micronesia. Although the peoples of Micronesia currently and presumably on their own initiative seek to have political talks with the United States looking perhaps to closer political ties, maintaining the present regime under the existing Trusteeship Agreement would have a decided advantage. It offers the United States untrammelled power to continue to use the territories as she has over the past two decades, subjecting the use of these lands to what the United States might assess are United States duties in maintenance of international peace and security under the United Nations Charter. This option has the further advantage that it can be readily justified before the United Nations on the basis that the Micronesians have not yet reached the stage wherein they can engage in self-government.

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1. We are here referring to the "duties" imposed by United Nations Charter, Article 84.

4. Modifications of the Existing Trusteeship Agreement.

A variant of the previous option might be that in which the United States would seek actively to shape the existing Trusteeship Agreement through the laws which are promulgated and by the ways in which they are administered not only to bring the Micronesians to a further degree of political maturity, but also to channel their real interests toward association with the United States and toward a program of government in which their own representatives duly elected might represent them. In other words, this option calls for an active policy under the umbrella of the existing Trusteeship Agreement one which will more appropriately and flexibly serve United States interests as well as her commitments under the Charter.

5. Enter into New Trusteeship Agreement.

The fifth option calling for the negotiation of a new Trusteeship Agreement is mentioned here to keep our list of options complete. It does not appear that the Security Council, which would be one party to such a new agreement, would be congenial to such a revision and the Soviet Union in particular might be expected to exercise its veto.

6. Incorporated Territorial Status With the United States.

A further option mentioned here, but which again does not seem at this time politically, practicable, might call for incorporating the territory of Micronesia within the United States. An incorporated territory is one which is a candidate for statehood or is a candidate to be assimilated into another State. Political, geographical, and demographic factors all militate against this option. The territory does not lend itself even in view of improving and speedy communications toward becoming a State of the United States, particularly since it would have to reach that stage where its "equality" with the other States of the Union can reasonably be assumed.

In other words, statehood within the United States would seemingly call for higher standards than those called for should the territory seek to become fully independent because then the territory would have to meet the present, high standards of the existing several States of the United States. These, of course, are mught higher than those of the numerous lesser-developed countries. Furthermore, an assimilation into one of the United States - presumably into the State of Hawaii - would also not appear to be politically feasible because of the great distances involved and, as mentioned above, on account of the economic and political differences between the peoples of the Micronesia and those of the State of Hawaii.

7. Unincorporated Territory - The Proposed Organic Act.

When a territory is unincorporated, it is assumed that it will not be a candidate for statehood in the United States. Instead, it will have "colonial" status. The proposed Organic Act calls for the formation of the unincorporated territory of Micronesia. We have not criticized the proposed act in detail but our analysis already made indicates that this proposed Act is not adequate and would require revision. In part, the revision of the Organic Act would depend upon what the United States objectives might be in dealing with the Micronesians. In other words, if the Micronesians are to be oriented toward ultimate independence and self-government, it is our view that the Organic Act is not adequate. If instead they are to become a colony of the United States, then revisions will be needed as indicated in the analysis we have already made in our memorandum.

8. Unincorporated Territory with Revised Organic Act.

This option has already been noted in connection with the option in No. 7 just mentioned. In other words, if the United States determines that the Trusteeship Agreement can be terminated, and if the United States pursuant to a

duly-held plebiscite which has secured the approval of the Micronesians[1] for unincorporated territorial status within the United States, then an Organic Act would be required for this purpose. But such an act, in our view, would necessarily differ from the proposed Act as we have already indicated in the analysis set forth in the body of this memorandum.

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1. Caveat: It is an open question whether a "duly-held" plebiscite may require either approval or supervision by the General Assembly of the United Nations or both. If such be required, the plebiscite would raise political and legal factors requiring further review.

cc: Mr. Niederlehner
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