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

In reply refer to:
I-11710/69

7 October 1969

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

SUBJECT: Department of State Memoranda -
Termination of Trusteeship Status in Micronesia

Pursuant to our request concerning the Department of State memorandum and background materials on unilateral termination of Trusteeship Status of Micronesia, I have received four reports from Mr. George H. Aldrich, Office of Legal Adviser. Mr. Aldrich points out that in effect the Department is "not entirely optimistic" "about prospects for avoiding major opposition in the Security Council." To provide you with a basis for discussing this background material, I offer the following summary of these memoranda:

- Summary.

The proposed unilateral termination of the Trusteeship Arrangement between the United States and the United Nations Security Council at the initiative of the United States is subject to mixed political and legal risks. The Department of State has sent us memoranda analyzing this question. As these memoranda indicate the political risks are of major concern but in the present case are affected by the legal risks - as our analysis will indicate. They stem from the possibility that adverse action may be taken either in the United Nations Security Council or in the United Nations General Assembly, or both, opposing attempts by the United States to assume that the Trusteeship Arrangement has unilaterally come to an end.

The political positions adverse to the United States which either organ of the United Nations might take can be reinforced in part by reference to legal consideration set forth in Article 15 of the Trusteeship Arrangement (which is discussed below) and in part by Article 76 of the United Nations Charter.

The United States will therefore be seeking to establish before the United Nations a self-governing Micronesia, the criteria of self-government to be assessed by an independent observer. In part the United States will in fact be declaring that since the purpose of the Trusteeship Arrangement was to administer the islands until self-government had been reached, and since the "independent" body and Micronesia have indicated that self-government has been reached, therefore the purposes of the Trusteeship Arrangement no longer exist and termination may therefore be presumed. And therefore consent to termination of the Trusteeship Arrangement may be implied.

Undated Department of State Paper Entitled "Termination of the Trusteeship Status."

This undated paper sets forth the proposed action for terminating the Trusteeship status of Micronesia. It helpfully indicates the area of risk involved. These include:

i. Adverse international political consequences will depend heavily on the nature of the political status act - which we are presently negotiating - and also depend upon whether the proposed Act is acceptable to the Micronesian people. A close note in a referendum may be some indication that the Act is not "acceptable". There is the further question whether a simple majority vote will be enough.

ii. In order for the people of Micronesia to accept incorporation into the United States as a territory they must express themselves in "an act of self-determination". It is arguable that they must therefore have reached a level of "sovereignty" based on international criteria to make this choice. It is possible to review this matter on the basis of

"domestic" criteria or international "criteria", but since Articles 73 and 76 of the United Nations Charter as well as Resolutions of the United Nations General Assembly use the expression "self-government and it may be presumed that the international criteria will be the criteria to which we will be subject for testing this Act of self-determination.

It is arguable that these criteria would be akin to those criteria relating to recognition under international law. There are indications in the United States proposals such as the provision for an appointed governor suggesting that the United States does not believe that the Micronesians can govern themselves through their own executive.

iii. Procedures to be taken in the United Nations indicate the following areas of risk. These, I believe, must receive the closest consideration on a policy level.

a. The Department of State memorandum dated March 22, 1967 indicates in its review of the negotiating history of the Trusteeship Arrangement that there are strong arguments against a unilateral termination. Both the negotiating history of the Trusteeship Arrangement and the practice in the General Assembly applicable to the termination of other Trusteeship Arrangements reinforce this argument.

iv. In the Security Council it is proposed to seek out via the usual diplomatic channels sufficient abstentions to avoid the use of United States veto, should the Soviet Union for example attempt to block termination action. This "preferred" procedure depends upon securing seven abstentions including that of the United States. The abstention route would thereby secure support for the United States while avoiding what would be the first use of a United States veto. It was said that at the time of the undated memorandum and based on the composition of the Security Council at that time that abstentions could be anticipated from the United Kingdom, France, China, Paraguay, Colombia, and "conceivably" from Finland, Senegal, Nepal. This of course is a determination based on judgment and our experience in the United Nations.

v. It is possible, regardless of the action taken in the Security Council, that the United States may be subjected to condemnatory resolutions of the General Assembly (even though the Security Council has the primary concern as far as the Micronesia Trust territories involved). A two-thirds majority in the General Assembly would be required for adoption of such a resolution and again a policy judgment is involved as to the possibility that such a resolution would seriously "affect" the United States, what its impact might be, and what initiatives the United States should take to alleviate this impact.

vi. The General Assembly as an organ of the United Nations or the Security Council is empowered to seek an advisory opinion from the International Court of Justice as to whether unilateral termination is improper. The Security Council perhaps would not do so either because the Soviet Union would not like to open such a precedent or possibly because the United States, as indicated above, might also block a referral. The General Assembly could secure a referral again through a two-thirds majority vote and it will be noted that should such a vote be obtained, the United States would be enabled to block - and presumably and find it politically unsound to block - such a referral.

Although an advisory opinion may not be "legally" binding on the States, it would appear to "bind" United Nations action. It is arguable that the relatively weak standing that the International Court of Justice presently has among the Members of the United Nations would render referral action unlikely.

But should the matter proceed to such an opinion, the United States would be compelled to depend upon how strongly it had established its "case" that Micronesia self-government had been reached. Once established as a "political" fact or fait accompli, an opinion similar to that of the last Southwest African Case (1965) would be favorable to the United States.[1]

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1. That case and the Cameroons Case found that completed political action was "non-justiciable".

Conclusion.

The United States subjects itself to risks by seeking a unilateral termination of Trusteeship States. These risks are on the one hand political because they are characterized by political action, policy judgments and the exercise of discretion, and they are on the other hand legal in nature because as both the United Nations Charter and the Trusteeship Arrangement point out, along with the negotiating history and practice in the termination of other Trusteeship arrangements, that the United States would be acting in the face of language which calls for bilateral duties in the Administration of the Trusteeship territory and bilateral consent to the termination.

In support of an attempt to seek unilateral termination, the United States might indicate - as is proposed - the achievement of self-government under Articles 76(b) and 6(1) of the Trusteeship Agreement. The United States might indicate that its obligations as "administering authority" under these circumstances can no longer be implied. And it might even be possible as to the legality of the unilateral termination to use the doctrine referred to in international law as "rebus sic stantibus". In other words, in accordance with this doctrine, it would have been the understanding that the Treaty had been entered into for a particular purpose, to wit: the administration of a non-self-governing territory with the further understanding that administration would move toward self-government. Once this particular purpose has been concluded, then, based on a "fundamental change of circumstances", (see Article 62 Vienna Convention on the Laws of Treaties) the Treaty may be preserved to be terminated or either party may withdraw without the formalized consent of either. The language of Article 62 is as follows:

"Article 62

Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or
(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

With these materials in view it may be appropriate for us to discuss this question in depth.

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