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In reply refer to:
I-13954/69

1 December 1969

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

SUBJECT: Trusteeship Agreement for the Pacific Islands.

The recent Memcon on the termination of the Trusteeship Agreement of the United States Pacific Trusteeship Territories leaves unsettled three major questions each of which is crucial to United States defense concerns. These, briefly, are:

1. The Power to Take Land for United States Security Purposes.

At present this question has not been resolved, and it must be resolved for the United States to satisfy the taking of land in the Trust Territory area in anticipation of future needs. The power to take land on the basis of crisis powers is clearly insufficient, particularly under present day conditions. The power to take was the sine qua non in the formation of the strategic trust arrangement in the first place.

2. The Question of Territorial Seas.

The Micronesian proposal rejects the United States position on territorial seas. It is crucial to United States defense interests that this position be resolved in accordance with United States practices. The United States can offer no compromise on this point.

3. Termination of the Trusteeship Agreement. 3

Reference has been made in the Memcon dated November 21, relating to points raised by the First Secretary

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of the Australian Embassy concerning termination of the Trusteeship Agreement. Although termination may be characterized as a "political question", the legal factors that underline that question are so intimately related, that the political question cannot be resolved without resolution of the legal factors as well. We therefore emphasize that a Trusteeship Agreement, in spite of the language used, bears only a little resemblance to the common-law trust, while the distinctions between the two are crucial. Our arrangement involves very complex relationships between the United Nations, represented by its Security Council, and in part by interested organs such as the General Assembly and Trusteeship Council, the Micronesian people and their Government, and the United States Government. Relationships of this kind unlike those in the common-law trust are politically intricate, dynamic and fluid. Although United States duties are encompassed under the rubric of a "Trusteeship Agreement", termination of that Agreement requires that each of these groupings be made part of the decision relating to termination.

We recognize that a loose legal case can be made out using the doctrine referred to as rebus sic stantibus - i. e., the doctrine to the effect that a fundamental change underlying the reason for the continuation of the Agreement may be adopted to support or even "justify" the position of one party to an agreement to the effect that the agreement has terminated. It thus is used to "support" a unilateral declaration to this effect. But if this doctrine is examined closely and if its application is addressed to the Trusteeship Agreement, it would appear that the fundamental underlying change, i. e., the achievement of self-government or independence by the Micronesian people, is being actively brought about in large measure with United States participation.

Secondly, it is reasonable to argue that one of the fundamental purposes for the undertaking was for the Trust Power - the United States - to assist the Micronesians in reaching self-government and the power freely to choose the nature of their government or their future associations. There is then the danger of United States security interests - which was the basis of a United States interest in the strategic trust territory moving at cross purposes with UN/Micronesian interests

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in very wide autonomy with the power to "veto" incursions made by the United States in the name of a "security interest." Clearly, much depends upon the political attitudes exhibited by the Micronesians.

Since the United States has an interest in establishing such a change to meet with its own strategic needs and since that interest is in part somewhat different from the political interests of others (i. e., some groupings in the United Nations, and a sizable element in the Micronesian population) who may also look for self-government and independence on differing "terms", it would appear to us that using the doctrine of rebus sic stantibus will be very tenuous support for the United States position and even boomerang against us. With these factors in mind, we believe that this stage in moving ahead with the Micronesian people requires our closest concern to these sensitive areas.

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Office of Assistant General Counsel
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cc: RADM Tazewell T. Shepard, Jr.

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