

DEPARTMENT OF STATE
THE LEGAL ADVISER

(COPY IN COMMONWEALTH
FILE) 03

MEMORANDUM

December 31, 1970

TO: S/PC - Mr. Claus W. Ruser
FROM: L/EA - Kristine Strachan
SUBJECT: Constitutional Viability of Expanded Commonwealth
Proposal -- Future Political Status of Micronesia

You have asked for an explanation of the legal limits upon modifying the Commonwealth proposal to accommodate Micronesia's four "non-negotiable" principles.

I. Eminent Domain

The Commonwealth proposal means US sovereignty over Micronesia; it is therefore correct to speak in terms of eminent domain -- a sovereign state's right to take property without the owner's consent upon just compensation. Without the extension of US sovereignty, one can only speak of rights equivalent to eminent domain. Consent to the taking must come from somewhere: under the trusteeship, consent probably derives from the UN under Article 3 of the Trust Agreement (right to apply US laws); under Free Association, a limited form of consent could be embodied in the Compact.

There actually is no federal condemnation law. The federal government has delegated its power of eminent domain to various agencies. DOD and Interior's present powers in this area (40 USC 257, 10 USC 2663) would have to be expanded by Congress to specifically cover Micronesia. Thereafter, DOD and Interior could agree to certain restrictions upon their exercise of such powers; however, it must be understood that any agreement would be revocable at will by the departments, by Congress and possibly by Executive Order.

II. Unilateral Termination

Making Commonwealth status unilaterally terminable is legally possible. Under Article IV, Section 3 of the Constitution, Congress has plenary power "to dispose of and make all needful Rules and Regulations respecting Territory or other Property belonging to the US." Under a Commonwealth arrangement, Micronesia would be "other property belonging to the U.S." In effect, Article IV, Section 3 empowers Congress to enter into an agreement with Micronesia which permitted a unilaterally terminable Commonwealth. Such agreement would be valid until modified or repealed by subsequent federal legislation, treaty or Executive Order (because of its impact upon US foreign affairs, the Executive probably also has power regarding the matter).

03-033108

III. Federal Supremacy

Because of US sovereignty, the Constitution would apply to Micronesia. This statement has little significance until it is determined which parts of the Constitution apply. (Making such determinations has been the subject of 70 years of litigation regarding Puerto Ricans).

If US citizenship is conferred upon Micronesians, recent Supreme Court cases would probably require application of all Constitutional guarantees respecting US citizens and "the people". The guarantees for "the people" are for the most part embodied in the first nine amendments to the Constitution. The privileges of US citizenship (as distinguished from State citizenship) are roughly: freedom to travel throughout the US, federal protection and care of life and property, freedom to assemble peaceably and petition for redress of grievances, habeas corpus, right to use navigable waters, rights gained through treaties with foreign powers, and access to the offices of the federal government and the federal courts.

Absent US citizenship but with US nationality status, it may be that only the most basic Constitutional guarantees would apply, such as due process, just compensation and unreasonable search and seizure. It is unclear whether it is citizenship or the distinction between incorporated and unincorporated territories is what triggers full Constitutional protection.

It is also unclear whether US citizenship is automatically conferred upon persons born in territory at the time of its acquisition by the US, regardless of Congressional action. The question has been generally avoided by the Supreme Court; the usual holding is that such persons are at least not "aliens" for purposes of various statutes, such as immigration regulations.

Application of federal laws and regulations and Executive Orders depends upon Congressional or Executive intent with respect to each law or order. Unless specifically provided against, a large body of law would automatically apply to Micronesia at the time US sovereignty is extended. Statutes designed to cover all persons under US jurisdiction would be applicable, while statutes which specifically listed certain territories and exempted others from their application would probably not be held to cover Micronesia. The application of federal statutes, regulations and Executive Orders should be clarified by an Omnibus Act (viz. Hawaii) specifically listing statutes and orders deemed applicable. Considerable parts of the US Code could be applied merely by changing the definition of "United States."

Restricting the exercise of federal supremacy is difficult if not impossible. The impact of federal supremacy is best described as follows: any state may legislate in its domestic area; however, any legislation inconsistent with federal legislation or which conflicts with a federal scheme of uniform regulation, or which places an undue burden on interstate commerce or other areas committed to federal control is unconstitutional. Even if the federal government agreed not to exercise federal supremacy with respect to Micronesia, the agreement would be revocable at will. This means any time the federal government enacts legislation which implicitly or explicitly conflicts with Micronesian laws, the federal government has, in effect, revoked its agreement with Micronesia. In order to honor its agreement to refrain from exercising federal supremacy, Congress would have to specifically exempt Micronesia from practically every subsequent law it passes.