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To: Honorable Patsy T. Mink

From: American Law Division

Subject: Termination of the Trust Territory of the Pacific Islands -- Legality of the Possible Secession of the Marianas Islands from the Trust Territory

This memorandum is submitted in response to your letter of February 4, 1971 inquiring as to a legislative approach toward implementing the desire of the people of the Trust Territory of the Pacific Islands for free association with the United States, and your letter of April 15, 1971 requesting information as to whether it is legally possible for the Marianas Islands to secede from the Trust Territory and, if so, what action must be taken by what governmental jurisdiction. It would seem that any discussion with respect to the questions raised in each of your letters must start with a description and analysis of the legal status of the Trust Territory itself.

The Trust Territory of the Pacific Islands is divided into three major island groups -- the Marshalls, the Carolines, and the Marianas. The islands form part of Micronesia, a zone of the Pacific which also includes the Gilbert Islands, Ocean Island, and Guam.

although the term "Micronesia" tends to be incorrectly used synonymously with "Trust Territory of the Pacific Islands." Trust Territory of the Pacific Islands, 1960, 13th Annual Report to the United Nations (Department of State publication 7103, 1961) at 1. The Trust Territory is a "strategic area" trust created under the international trusteeship system spelled out in Chapter XII of the United Nations Charter which the United States administers under the terms of a Trusteeship Agreement between the United States and the Security Council. The Agreement for the Trust Territory of the Pacific Islands which is formally referred to as the Trusteeship Agreement for the former Japanese Mandated Islands, approved by the Security Council on April 2, 1947 (61 Stat. 3301, TIAS 1665, 8 UNTS 189), and approved by the President of the United States on July 18, 1947, under authority granted by Joint Resolution of Congress, July 18, 1947 (61 Stat. 397, 48 U.S.C. §1681 note). The Trust Territory is the only "strategic area" trust now in effect under the trusteeship system, and this status has at least two important characteristics which are relative to our discussion here. First, from the viewpoint of the United Nations, all of the functions with regard to such an area are exercised by the Security Council while the functions regarding a non-strategic area are exercised by the General Assembly. Art. 83 of the Charter provides as follows:

> 1. All functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council.

> 2. The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area.
>
> 3. The Security Council shall, subject to the provisions of the trusteeship agreements and without prejudice to security considerations, avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas. (emphasis added)

Second, from the United States position: "The designation of the islands as a strategic area means that the administering authority will be entitled to establish naval, military, and air bases and to erect fortifications in the trust territory." S.Rep. No. 471, 80th Cong., 1st Sess. 4(1947). The basic objectives of the trusteeship system are set forth in Art. 76 of the Charter. The most pertinent objective with respect to our discussion reads as follows:

> b. to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement;

Art. 79 of the Charter provides: the terms of trusteeship "including any alteration or amendment" shall be agreed upon by the states directly concerned. Art. 78 provides that the trusteeship system shall not apply to territories which have become Members of the United

Nations. As can be seen, there is no specific provision in the Charter for the termination of a trusteeship over a territory, and the only applicable provisions would seem to include, with respect to the Trust Territory, the provision in Art. 78 that trusteeship cannot apply to a territory that has become a Member of the United Nations, the provision in Art. 79 that any state directly concerned shall agree to any alteration or amendment of the terms of trusteeship, and the provision in Art. 83 that the Security Council must approve all alterations and amendments of the trusteeship agreements relating to strategic areas. Of course, it could be argued that termination is impliedly included in the phrase "alteration or amendment." Marston, Termination of Trusteeship, 18 Int'l. & Comp. L.Q. 1(1969) [hereinafter cited as "Marston"] at 14. A copy of this informative law review article is furnished herewith.

The United States position as to the Trusteeship Agreement is that it is in the nature of a bilateral contract between the United States and the Security Council. Marston, at 9. Art. 2 of the Trusteeship Agreement designates the United States as the administering authority of the trust territory. Full United States authority over the territory is provided for in Art. 3. Art. 4 reads:

> The administering authority, in discharging the obligations of trusteeship in the trust territory, shall act in accordance with the Charter of the United Nations, and the provisions of this agreement, and shall, as

> specified in Article 83(2) of the Charter, apply the objectives of the international trusteeship system, as set forth in Article 76 of the Charter, to the people of the trust territory.

Art. 5 gives the administering authority the right to, inter alia, establish naval, military and air bases, erect fortifications, and station and employ armed forces there. Art. 6 provides that the United States is to "foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants. . . toward self-government or independence, as may be appropriate to the particular circumstances of the trust territory and its peoples and the freely expressed wishes of the people concerned. . . ." It also provides that the United States shall promote economic, social and educational advancement. The words "or independence, as may be appropriate to the particular circumstances of the trust territory and its people" were not in the proposed text by the United States. In 1947, the United States Representative stated with regard to the term "independence" to be included in the Agreement, and adding the qualifying words thereafter:

> . . . To be free and independent, a community of people must have acquired at least some of the attributes of a sovereign State. Until this community of persons becomes an integrated community, capable of undisputed and exclusive control over all persons and things within the trust territory, and can regulate its internal affairs independently and give a sufficient guarantee of stability, this area must continue to be maintained by an outside Power capable of providing for its needs and interests.

Art. 7 guarantees civil rights to the inhabitants. Art. 8 pertains to the "most favored nation" concept. Art. 9 allows for the administering authority to constitute the Trust Territory into a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction. Art. 10 deals with international organizations. Art. 11 provides for the status of citizenship on the inhabitants and affording them diplomatic and consular protection when outside the Trust Territory or the territory of the administering authority. Art. 12 deals with the enacting of implementing legislation. Art. 13 provides that Articles 87 and 88 of the Charter -- relating to reports, petitions, visits and questionnaires concerning non-strategic areas -- are applicable, except that the administering authority may determine the extent of their applicability to any areas which may, from time to time, be specified as closed for security reasons. Art. 14 is concerned with the application of United States treaties. Art. 15 reads:

> The terms of the present agreement shall not be altered, amended or terminated without the consent of the administering authority.

Art. 16 deals with the entry into force of the agreement. See M. M. Whiteman, Digest of International Law, Vol. 1(1963) at 769-839.

Now that we have set forth the basic documents involved, we will address ourselves to the particular information that you seek. As to the secession of the Marianas Islands, this will involve

a closer look at various aspects of the alteration or termination of trust agreements set against a background of United Nation's General Assembly Resolutions dealing with the self-determination of peoples. Before addressing ourselves to that analysis, let us suggest some approach to the termination of the trusteeship itself. It is assumed that such a termination would be based on the consent of the United States, for as will be brought to light later, if the United States actively opposed such a termination it could not be accomplished.

One commentator suggests that the Trusteeship Agreement can be terminated by a presidential declaration of termination, by a presidential declaration of termination followed by either Senate or congressional approval, or by a Senate or congressional request for termination followed by a presidential declaration of termination. Note, Constitutional Law -- Executive Agreements -- International Law -- Executive Authority Concerning the Future Political Status of the Trust Territory of the Pacific Islands, 66 Mich. L. Rev. 1277, [illegible]. A copy of this law note is enclosed herewith.

As to a possible legislative program by the Congress which might lead to the termination of the trusteeship, one approach might be to create a commission to study and assess all factors bearing upon the future of the Trust Territory. Such a commission was, for example, proposed in S.J.Res. 106, 90th Cong. and H.J.Res. 629, 91st Cong. A copy of S.J.Res. 106, 90th Cong. and the Senate Report thereon,

S.Rep. No. 1153, 90th Cong., 2d Sess. (1968), as set forth at 114 Cong. Rec. 15586-15587(1968) are furnished. Depending on the study made thereby, a Congressional resolution could be employed to authorize or request the President to terminate the trusteeship agreement in accordance therewith by submitting a petition or other document to the Security Council requesting same.

A secession of the Marianas Islands from the Trust Territory would, in effect, be an alteration of the trusteeship agreement. As discussed above, an alteration would appear to have to be consented to by the United States and approved by the Security Council. An argument could be made that such an action could be approved by the United Nations without the consent of an administering authority even if the consent is required in the applicable trusteeship agreement in certain cases, e.g., in the event of a material breach by the administering authority. However, in this case, even if the consent of the United States could be bypassed under the trusteeship agreement, the United States could block approval by the Security Council by exercising its veto power if necessary. Termination, alteration or amendment of a "strategic area" trust would probably not be called a procedural matter, and an affirmative vote of nine Members of the Security Council, including the concurring votes of the permanent Members, would be required as prescribed by Art. 27(3) of the Charter. Marston, at 13.

On February 5, 1961, a plebiscite was conducted among the people of the Saipan District, in which, of a total of 2,847 registered voters, 1,557 opted for unification with Guam while 887 opted for annexation by the United States as a separate territory. M. M. Whiteman, Digest of International Law, Vol. 1(1963) at 813. Saipan is part of the Marianas Islands. In the Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands covering the period from 1 July 1960 to 19 July 1961, U.N.Doc. S/4890, July 27, 1961, item 66 reads as follows:

> 66. In commenting on the apparent reasons which led the people to demand the separation of Saipan from the rest of the Trust Territory, the Mission noted that both political parties wanted to join the United States either by integration with Guam or as a separate territory and thereby become entitled to United States citizenship and all the advantages flowing from it as they see them. It understood that the comparative prosperity resulting from military expenditures was, in part, responsible for the demand. The Mission felt that, in making this move, the people of Saipan had overlooked the fact that they could not join the United States until they had achieved a greater degree of self-government and economic self-sufficiency and until all the people of the Trust Territory were ready to choose, at the same time, either self-government or independence.

G.K. Castron, Representative of the United Kingdom, in a statement at the 1154th meeting of the Trusteeship Council, June 22, 1961, U.N.Doc. T/P.V. 1154, at 31, said as follows:

> . . . I should like to make one comment on the position of the Administering Authority and the United Nations in connexion with the Saipan question. There is, of course, and this I must say sometimes gets obscured in the discussion of this question, no reason whatever in law why the Administering Authority should not come to the United Nations seeking an amendment to the Trusteeship Agreement to provide for the separate achievement of self-government by the people of Saipan, or any other district in the Trust Territory, in a form which is in accordance with their wishes. But the fact is that the United Nations which values the principle of the integrity of the Trust Territory and where there is also a feeling that the people of Saipan have something to offer to the rest of Micronesia if they remain in close association with it, is unlikely to agree to such a request. And more important still, since no one can predict with certainty what attitude the United Nations is going to adopt in any particular case, is the fact that the Administering Authority has declared that it has no intention whatever of taking any such initiative. In my delegation's view they are wise, and in my delegation's view again it is important that the people of the Trust Territory should fully understand this position. The fact is that they are part of a Trust Territory, that the Trust Territory is administered in an international context and that this context must form part of the thinking of the people of the Trust Territory, as it is of the Administering Authority, about their political future.

In 1966, the Trusteeship Council decided to dispatch a periodic visiting mission to the Trust Territory. In its report, submitted to the Secretary-General on May 12, 1967, the Visiting Mission stated the following: "The Mission takes note of the existence of, but offers no encouragement to, a sector of opinion in Saipan favouring separation

from the Trust Territory and union with Guam." M.M.Whiteman, Digest of International Law, Vol. 13(1968) at 685-686.

An argument to support the "legal" right of the Marianas Islands to secede would probably be based, in part at least, upon the principle of self-determination as set forth in the Charter of the United Nations and in various resolutions of the General Assembly. Art. 1(2) of the Charter states that one of the purposes of the Organization shall be "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples," and Art. 55 speaks of "the principle of equal rights and self-determination of peoples" as the basis for "peaceful and friendly relations among nations." "These provisions in the Charter led to an immediate drastic strengthening of the claims of self-determination to be a legal right, but it is submitted that the wording of the Charter provisions is not sufficiently definite in itself to impose a duty on member states to grant self-determination in any particular case. The Charter uses 'principle' rather than 'right!'" Marston, at 25. Further, the references to self-determination were introduced at the San Francisco Conference by the four sponsoring powers on the instigation of the Soviet Union. The committee which examined the proposal made it clear that there were divided views on its meaning:

> Concerning the principle of self-determination, it was strongly emphasized on the one side that this principle corresponded closely to the will and desires of peoples everywhere and should be clearly enunciated in the Chapter; on the other side, it was stated that the principle conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession. UNCIO, Docs., Vol. 6, at 6; Marston, at 25.

Two pertinent General Assembly resolutions that might be pointed to by the Marianas Islands to support their cause might be General Assembly Resolution 1514(XV) of December 14, 1960 and General Assembly Resolution 2625 (XXV) of October 24, 1970.

On December 14, 1960, the General Assembly adopted, by 87 votes to none with 9 abstentions (the United States abstained), Resolution 1514(XV), the "Declaration on the Granting of Independence to Colonial Countries and Peoples." In this resolution the General Assembly, after "considering the important role of the United Nations in assisting the movement for independence in Trust and Non-Self-Governing Territories," declared in paragraph 2:

> All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

And in paragraph 5:

> Immediate steps shall be taken, in trust and non-self-governing territories or all other territories which have not yet attained

> independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom.

At the twenty-seventh session (1961) of the Trusteeship Council, the Representative of the Administering Authority, Jonathan Bingham, informed the Council that the Administering Authority considered that the essential elements of the resolution on the granting of independence to colonial countries and peoples were applicable to the Trust Territory. M.M.Whiteman, Digest of International Law, Vol. 1(1963) at 794-795. At its 35th session (1968), the Trusteeship Council appointed a Drafting Committee "to draft that part of its report to the Security Council dealing with conditions in the Trust Territories of the Pacific Islands." Two of the recommendations of the Committee included the following:

> 25. The Trusteeship Council, recalling the conclusions of the 1967 Visiting Mission that the time is not too far distant when the people of Micronesia will feel ready to assume responsibility for deciding their own future, urges the Administering Authority to take all possible steps to reduce the economic dependence of Micronesia upon the United States, and to prepare the people for self-government or independence by more fully associating them in the direction of their own affairs and by continuing its efforts to increase their understanding of the various possibilities open to them in the process of self-determination.

> 26. The Council reaffirms the inalienable right of the people of Micronesia to self-determination, including the right to independence, in accordance with the United Nations Charter, the Trusteeship Agreement and General Assembly resolutions 1514 (XV) of 14 December 1960 and 1541 (XV) of 15 December 1960.
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> M.M.Whiteman, Digest of International Law, Vol. 13 (1968) at 687.

General Assembly Resolution 2625(XXV), the "Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations" provides with regard to the "principle of equal rights and self-determination of peoples" the following, inter alia, --

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the Charter.
>
> Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among states; and
>
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;

> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.
>
> . . . . .
>
> The establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.
>
> . . . . .

However, there does not seem to be any general agreement as to what legal significance, effect and effectiveness can be affixed to General Assembly resolutions. Their present status is probably as an adjunct to the sovereignty-dominated process of customary law creation. The Declaration on the Granting of Independence to Colonial Countries and Peoples is one of the small number of resolutions that "have received widespread acceptance, but not, at least initially, as law. This acceptance is evidence of the coming into existence of customary law which is identical to the resolutions, so that latter-day affirmations of legality refer not to the resolutions themselves but to the corresponding customary rules." Onuf, Professor Falk on the Quasi-Legislative Competence of the General Assembly, 64 A.J.I.L. 349, 352, 354 (1970). Also, see, Bleicher, The Legal Significance of Re-Citation of General Assembly Resolutions, 63 A.J.I.L. 444 (1969).

Thus, it would seem that a secession by the Marianas Islands would be illegal in the sense that without United States consent it would be a breach of the Trusteeship Agreement, and, with active opposition by the United States as a member of the Security Council it would constitute a violation of the Charter of the United Nations.

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