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15 September 1971

MEMORANDUM FOR COMMANDER EDWIN A. KUHN, OSD/ISA

SUBJECT: Negotiating Proposals and Primary Legal Issues Concerning the Trust Territory of the Pacific Islands (S)

I have the following preliminary comments and guidelines concerning negotiations with representatives of the Micronesian people and addressed to the future status of the Trust Territory of the Pacific Islands.

1. At the outset it appears that we no longer can consider as one of the options available to the United States a continuation of the Strategic Trust Agreement with a phasedown of 20 to 40 years. If this were possible, and if the United States did not foresee its interests extending beyond this period of time, it would offer fewer political and legal difficulties than any of the other options. Moreover, if the phasedown were done effectively the Micronesians

might during that period of phasedown be conditioned and oriented into a friendlier relationship with the United States than now appears to be the case. In other words, the Strategic Trust Agreement gives us clearly expressed powers over the islands. Once that agreement becomes void, or is rendered void, our future rights or powers depend upon what we negotiate.

2. I am concerned apart from the above remarks with the possibility - which is not remote - that any negotiations will necessarily intrude either the Security Council or the General Assembly "colonial" committees (committee of 15) into the picture. The Security Council's power to enter into these matters appears to be clear from the fact that it was directly associated with entering into the Strategic Trust Agreement with the United States. The United States' "veto" power in the

Security Council is - in my view - insufficient to provide us with adequate assurance that our positions will become politically acceptable, particularly if we are then whipsawed by the committee of 15. And, in any event, the permanent members of the Security Council are free to veto United States actions (if Article 83 - UN Charter).

3. Until the positions reached between the United States and the representatives of the Trust Territory have become clear, it is premature and futile to provide a detailed legal analysis of the impact of those positions. The papers which have been submitted to me for review indicate that the negotiating positions are flexible and, therefore, the outcome of negotiations cannot be predicted. The positions to be taken and the negotiations will depend primarily upon political factors and the exercise of political judgment.

4. Two major possibilities exist in negotiating with the Micronesians. The Trust Territories may become an independent and sovereign State in the international sense which means that they would be freely able to enter into and determine their relations and undertakings with other States. The United States would then be compelled to treat the Trust Territories just as it treats other foreign countries. Alternatively, the Trust Territories may remain subject to United States sovereign authority, and, therefore, ultimate control over foreign and defense interests of the islands would reside in the United States with power in the United States similar to those powers which are exercised over other territories. Constitutional and federal practices relating to this exercise of powers of this kind are now well established.

5. The interests of the Department of Defense in the Trust Territories are twofold, i.e. both in terms of the security and protection of those territories themselves and also in terms of the role they may assume in the protection of other United States interests including but not limited to the United States mainland and United States territory elsewhere. The appropriate means for preserving the freedom and power of the United States to act in this way must be expressed in any arrangement with the Micronesians through language of a very general kind. We propose the following (without, however, attempting to suggest what legal instrument will be used until negotiations move forward):

> "The United States government may exercise any or all of its emergency powers to the extent it deems necessary for the defense and protection of the Trust Territories or of United States interests."

6. Some of the submitted papers refer to "divided sovereignty." This term has no meaning in international law. If the United States maintains sovereignty over the territories in an international sense than the United States has sovereignty over those territories even if matters resulting to domestic interests, and even if the power to regulate and control persons and territory within the islands were to be reposed in a self-governing territory of Micronesians. A variety of self-governing territories are to be found throughout the world but in each case the local governments of those territories fall short of "sovereignty" in the sense that they may independently determine their relations with other governments.

An attempt to divide sovereignty between the United States and the Trust Territories in the international sense is not only fraught with theoretical and legal difficulties but clearly with political difficulties as well.

7. The following Department of Defense interests are of major significance:

(1) Territorial needs which are presently foreseeable. As to these the United States should acquire by long term lease or outright purchase such parcels of land as are needed. As to future needs, the United States must be able through emergency powers coupled with or made part of the powers of eminent domain to acquire territory to meet with whatever requirements a crisis in the future may cause.

(2) The United States must retain such rights to exercise, implement, and impose its emergency powers (both those presently in existence and those that might be promulgated in the future) to meet with such crises as occur, without being subjected either to delay or to question in the exercise of those powers.

8. The negotiations with the Micronesians must in any event reflect what the United States can and cannot do under its Constitution in extending its power over territories. These are matters, however, which are generally to be reviewed in detail by the Department of State, Justice, and Interior. On the other hand, once those reviews have been completed they should be presented to our office for concurrence and comment. But it should be noted that as long as the Micronesians are treated as territories, the United States has the power to impose its law and executive orders as needed to meet protection, defense, and security needs.

9. Two of the enclosed memoranda call for comment at this time. First I call particular attention to the discussion of "four non-negotiable principles" which the Micronesians have insisted on, discussed in the memorandum, dated

September 9, 1971, by Mr. Chapman, Associate Solicitor of the Department of Interior. Since the comments which I have made above to a large degree differ from the views taken in that memorandum I would be pleased to provide a more detailed criticism of Mr. Chapman's memorandum if it is needed.

10. The major point upon which I take issue with Mr. Chapman relates to how he interprets "sovereignty" to apply and what he conceives sovereignty to be. On both these matters I differ with Mr. Chapman in substance.

11. For the sake of clarity let me review where these differences lie. First, Mr. Chapman refers to the "non-negotiable principle of the Micronesians to the effect:

"(a) That sovereignty in Micronesia resides in the people of Micronesia and (in?) their duly constituted government."

12. Mr. Chapman declares that "we can readily agree that sovereignty in Micronesia resides in the people of Micronesia," this being a "basic foundation stone" of democracy." This position does not apply to sovereignty in the international sense, which is of primary concern with us here. It must be noted at the outset that the United States must have sovereignty in the international sense - and this appears to call for territorial status of the islands. In order to deal with this sensitive point - with the Micronesians - it is important to avoid references to "sovereignty" - and instead to simply declare that in the best relationship with the United States, which we are negotiating, they shall be "self-governing," subject to those qualifications which we might make for foreign affairs or security interests - described above.

13. Secondly, the Micronesians declare the following to be non-negotiable:

> "b. That the people of Micronesia possess the right of self-determination and may, therefore, choose independence or self-government in free association with any nation or organization of nations."

Mr. Chapman notes that "if we can agree that sovereignty is in the people of Micronesia, how can we disagree that they have freedom to choose whatever form of government or association they wish?" This second condition has been taken from Article 76 of the Charter of the United Nations, and finds repetition in the Strategic Trust Agreement. But Article 76 is an objective intended in the administration of the islands, and is worded in terms of "self-government" or "independence," which simply means towards self-government which may be subject to United States control over

foreign affairs and security interests as I have noted above, or toward independence and sovereignty in the islands. Article 76(b) makes this clear: The United States is:

> "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;"

14. This point is of importance in the negotiations because the United States - if it wants to maintain sovereignty in the international sense - must condition its negotiations to shape this position into being. Mr. Chapman's line or approach would move away from this direction.

15. Thirdly, the Micronesians demand:

"(c) That the people of Micronesia have the right to adopt their own constitution and to amend, change, or revoke any constitution or governmental plan at any time."

16. Mr. Chapman's discussion of this point - in terms of "human rights" - misses the main thrust of what our negotiations are all about. The United States' negotiating posture (supported by the arguments discussed above) call upon us to respond to the Micronesian "demand" directly. We must emphasize that the Micronesians might best adopt a (territorial) self-governing status, with United States control over foreign and security affairs. If the Micronesians move in the direction of the "non-negotiable principles" discussed here, it is my view that they will not only move toward complete independence and sovereignty, but also toward relations with the

United States which will not ensure that control.

17. Hence the right of the Micronesians to act and decide their affairs under their "own constitutions" is acceptable - subject to the "supremacy" to be reserved in the United States to protect its interests. If this major point is lost in the negotiations, the islands lose their strategic significance for the United States, (which was the sole objective in entering into a Strategic Trust Agreement) and any attempt to retrieve that significance with an independent Micronesia is in light of the present trends outlined in the submitted papers remote.

18. The fourth "non-negotiable principle" is:

> "(d) That free association should be in the form of a revocable compact, terminable unilaterally by either party."

19. Mr. Chapman recognizes this as "the most difficult of the four principles," but also recognizes it as "a fundamental principle of Free Association." He supports his view by a reference to Resolution 1541 of the 15th General Assembly. But Resolution 1541 is founded upon Article 73(e) of the Charter of the United Nations. That Article is to be found in Chapter XI of the Charter devoted to "Declaration Regarding Non-Self-Governing Territories," commencing with Article 73. The International Trusteeship System, appearing in Chapter XII and commencing with Article 75 covers an entirely different regime. If the United States has not taken the position that Micronesia is a "non-self-governing territory" under Chapter XI, it should not do so at this time. (This is a very complex subject and reference must be made to the thorough discussion in Goodrich, Hambro and Simons, CHARTER OF THE UNITED NATIONS, 1969 at 448 through 543). Such a position

would, moreover, be inconsistent with the United States legal position, which is an "agreement" with the Security Council, not with the General Assembly (upon which Resolution 1641 and others are premised).

20. More relevant to the negotiating posture of the United States this "principle" simply calls for independence and sovereignty upon the part of the Micronesians, amounting to the territory becoming an independent (foreign) State. Any arrangement made on this basis would be comparable to those made with other States throughout the world - and would be subject to the same considerations of good faith and the possibility of revocation.

21. The United States it appears is compelled to meet this "principle" head-on, and to provide persuasive reasons why the Micronesians should be a self-governing "territory" (whatever particular form is taken) of the United States. Whether the means to provide such persuasion is through

economic considerations, continued friendly relations, or other measures will depend upon the exercise of political judgment.

22. The other document calling for comment is that of July 28, 1971 entitled "Trust Territory of the Pacific Islands--Negotiating Scenario and Dr. Williams' Terms of Reference," designated NSC-U/DM 62A. (Copy attached) Here are set forth under Mr. Irwin's signature four positions for the purpose of negotiation - authority given Dr. Williams to proceed through all four, and if seeking a position apart from these to seek authority to do so "from the President."

It is only necessary to point out that in all four of these - United States sovereignty in the international sense remains intact. If termination of that sovereignty is to take place, or does take place, by agreement, in the future, that act does not change the basic foundation of the undertakings.

In none of the options is there a "divided sovereignty" in the international sense. There is - instead - an undertaking by the United States (proposed within several of the options) that the United States will divest itself of its sovereignty at some future time, subject to whatever conditions are made part of that divestiture. But - for the purposes of these options - the United States has not decided (in the way they are formulated) to divest itself of that sovereignty at this time. That would occur if our negotiations take Position IV to the point where Micronesia becomes independent and sovereign.

SIGNED

Harry H. Almond, Jr.
Office of Assistant General Counsel
International Affairs

Attachments:
Chapman Memorandum
Irwin Memorandum

cc: LtCol N. C. Kenyon, OSD/ISA
GC
Master Chron
File: ILP Trust Territories
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