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

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In reply refer to:
I-15129/71

4 December 1971

MEMORANDUM FOR CAPTAIN GORDON J. SCHULLER,
EA&PR/ISA

SUBJECT: The Legal Issues Relating to the Proposed
Relationships with the Trust Territories
of the Pacific Islands

A. Introduction

This memorandum, in the form of questions and comments to be forwarded to the Department of State, is primarily concerned with the positions taken by the Department of State's Legal Adviser's office on the Trust Territories of the Pacific Islands. The questions raised here overlap, since the issues cannot in every case be readily isolated.

The legal issues themselves are interrelated inextricably with political and policy issues - their "resolution" depends upon the positions to be taken upon these extra-legal factors. It is evident that unless the political factors are effectively managed, the various legal "positions" or assumptions may become largely inoperative or irrelevant.

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M.J. C. Alva

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The comments noted here will apply subject to the further proviso: if the Micronesians remain under the territorial controls of the United States, then the United States will maintain its "controls" through its existing power to legislate and to execute its laws. If the Micronesians become independent, then the United States will preserve its powers and control through appropriate provisions in its agreement with the Micronesians. Both of these questions however derive from one of the major issues raised in this analysis, i. e., the means and modality by which the Micronesians are to determine for themselves whether they will be under United States territorial controls or free, independent and sovereign, and the extent to which the Strategic Trust Agreement with the United Nations Security Council affects this process of determination.

B. Questions and Issues Raised.

1. Should the United States attempt in its negotiations to identify specific legislation to be applicable to Micronesia?

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Comment. Alternative approaches are (a) United States Federal laws to apply generally to Micronesia unless exception is specifically made to particular laws or to a class of laws; (b) United States federal emergency or crisis legislation, presently enacted, or to be anticipated in connection with any future emergency, shall be applied. The Department of State proposes that specific legislation be identified - this I believe will raise more issues in negotiation than can be resolved, and is unnecessary to secure United States objectives.

2. Whether the United States should have separate and exclusive authority and competence (and power) over its armed forces deployed or stationed upon Micronesia, or whether the Micronesians shall maintain some of these powers.

Comment. The issues and alternatives raised are (a) whether any Micronesia law is to apply, and to what

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extent (e. g., taxation, conduct outside official duty or outside the bases, etc); (b) whether United States law is to be modified to benefit or provide particular protection for the Micronesians; (c) whether the United States must or even should enter into a "SOFA" with the Micronesians - which in any event would be substantially modified from that used with foreign countries, and specifically adapted to the United States-Micronesia relationship. (The separate issue is whether the "SOFA" appears in United States legislation or in an international "compact" with the Micronesians).

3. The extent to which the United States must provide for the defense of Micronesia.

Comment. The authority of the United States to provide for the defense of the territory depends upon how far the United States is to undertake the management

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of Micronesian foreign relations since both are inter-related. Providing for defense and security interests under present-day conditions tends to reach beyond the stationing of Armed Forces and making them available into political areas, e. g., where the fundamental security of the islands might be endangered by encroachments and activities of a foreign power.

The specific issues here are the extent to which the defense of the islands will provide (a) for the defense and security interests of the United States, (b) for the defense and security interests of Micronesia apart from those of the United State's (c) for the defense and security interest associated with the commitments under the United Nations Charter, i. e. maintaining international peace and security, and hence (d) the extent to which access might be given to United Nations forces should they be called to serve in the area in a future crisis.

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4. The extent to which the United States in providing for its defense and security interest must provide for the total exclusion of other countries, subject to its prior approval (a form of veto) over their access to the islands."

Comment. This issue is the question of denial of access of all and any other country to the area unless the United States approves. Alternatively, the United States might be empowered to veto any proposal of Micronesia to grant access to other countries or to their citizens, particularly in areas of defense significance (e.g., communications, shipping, etc.) Separate categories of concern are whether such countries are United States allies or the United Nations.

5. How far the United States intends to assert its claims, and the extent of those claims, to Micronesian land or territory, including territorial waters and the seabeds beneath those waters.

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Comment. These are primary issues for the United States to resolve at the outset. The time of asserting the claims is two-fold; claims to be made in the present negotiations where present or anticipated needs can clearly be identified, and the express protection or preservation of rights to assert claims in the future, commensurate with the needs which only the future emergency or crisis can dictate. If the United States cannot protect itself via eminent domain (which would be exercisable in any event if the islands retain a territorial status), then a provision to protect these rights will be needed - one which will legitimize any such assertion and enable a taking without delay. Claims such as those analogous to the establishment of an ADIZ may be included in this aspect of the negotiations.

6. What - in detail - should be the United States position regarding the future status of the islands.

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Comment. Associated with the previous questions it is necessary to raise specific issues over which the United States will have direct concerns. Will these concerns extend (and how far will they extend) over foreign trade and commerce engaged in by the islands (including the extent of most-favored-nation treatment, national and equitable treatment of United States and foreign commerce), over domestic affairs which are related in any way to foreign affairs (immigration, naturalization laws, laws relating to domestic security) and in particular over specific areas such as communications, shipping, certification of air line routes, banking, etc.

7. What, considering the United States Congress - must be resolved in terms of the powers and expectations of the Congress to (a) veto new legislation of the Micronesian congress; (b) consult and advise with the government of Micronesia, or appoint

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committees, or operate through United States agencies
such as the Department of Interior to carry out
these functions; (c) to make final decisions over
applicable Micronesian legislation; (d) to make or
revoke compacts with the Micronesians, mutually
or unilaterally; (e) to supervise or oversee activities
and legislation applicable to the territory in general.

Comment. The issues raised here relate to the role which the United States Congress may seek to retain. The Department of Defense will be concerned that the actions proposed or being undertaken by the Congressional relations offices in the Departments of State and Interior do not lead to an impasse in the negotiations, nor run counter to Congressional expectations.

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8. What specific limits will be imposed upon
Micronesia and what in general will be the reach of its
government - assuming it is to become a self-governing
territory of the United States - in terms of its power,
authority and competence?

Comments. The specific issues to be raised are (a) whether the Micronesian legislative body is to be subjected to the United States Congress and if so how; (b) whether — subject as a legislative body to a "compact" or agreement with the United States, and if so, of what duration, subject to what process of amendment and termination, and to what separate powers, if any, to be reposed in the United States Congress; and (c) whether subject to and under the supervision of any United States agencies. Cf. members of the British Commonwealth at the turn of the century, and Hong Kong and Bermuda (self-governing Parliaments in the United Kingdom).

The issue associated with the questions raised here is whether Micronesia is intended to be a self-governing territory, and secondly, whether the status of that territory is determined, in the constitutive sense, by United States legislation, or by some form of "agreement" reached by the "sovereign authority"

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of Micronesia and its people and the United States. (See also Question 9).

9. With the possibility of a "compact" (international agreement, or treaty) between the United States and Micronesia in view, what is the basis by which Micronesia exercises the "sovereign" powers required to enter into such an arrangement?

Comment. Any compact of this kind will be entered into either before or after the termination of the Strategic Trust Agreement between the United States and the United Nations Security Council. The termination might take place "unilaterally" - raising both legal and political issues, in other words by the United States unilaterally treating its obligations toward the territories as completed (and presumably in satisfaction of those obligations under the United Nations Charter and the Agreement). But then the issue is raised whether such a "termination" is legally effective or whether the "consent" of the United Nations is required, and secondly, whether the United Nations might also raise political concerns, jeopardizing the

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United States objectives in terminating the Agreement and in entering into a new relationship with the Micronesians. (See Question 10)

The termination might otherwise be effected by reaching an understanding with the Security Council, raising the problem of a veto (exercised by either the Soviet Union or China). In either case, the issue may further involve who legitimately represents the Micronesians, and whether the representatives have been properly chosen, and are vested with "sovereign powers" in order to proceed with entering into a compact with the United States. Or whether the United States is able to confer upon the Micronesians "sovereign powers," which in turn are exercised by them, or whether such powers automatically become vested in the Micronesians concomittant with the act of unilateral termination by the United States, or whether those powers call for participation in termination by the United Nations.

N. B. that under international law, to have "sovereign powers," the Micronesians must be a "state" in the sense

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that there is some identifiable territory, embracing a population, under a recognizable form of government, which governs those persons and is able to represent them in international affairs.

10. What role is vested in the United Nations Security Council relating to termination?

Comment. First, does the Security Council monitor the obligations by the United States under the Strategic Trust Agreement? If so, what criteria are applied under the Agreement or under the Charter? Second, apart from whether the Security Council monitors the obligations, must the United States meet any criteria as to satisfying its obligations? Can another member State raise this issue before the Security Council? Is there any possibility of this taking place?

See also question 9 as to whether the Security Council must participate in the act of termination, and whether it must provide its consent.

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11. What role did the United Nations Security Council play, if any, in vesting the United States with the powers it presently maintains over Micronesia?

Comment. In other words, at the end of the Second World War, did the Security Council provide the United States with sovereign or less than sovereign powers over the territories, or specifically with the right to administer them in accordance with certain conditions (specified or implied in the Strategic Trust Agreement)? Secondly, what were the expectations of all parties in establishing the strategic trust arrangements. Would all questions of sovereignty be determined - finally - by the participation of the Security Council (this is an issue separate from the issue of termination but related to it).

12. What role, if any, can the General Assembly play in connection with United States actions in Micronesia?

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Comment. Though lacking legal competence in the matter can the General Assembly embarrass or jeopardize United States objectives either through insisting on a role (via "human rights intervention") in the plebiscite, or otherwise? Can the General Assembly make recommendations in the guise of international peace and security alleging misconduct by the United States to this effect? To what extent can the Committee of 15 intervene?

13. Can the Security Council terminate the Strategic Trust Agreement unilaterally?

Comment. If the Security Council can terminate the Agreement, as well as the United States (assuming this to be the case), what is the nature of that Agreement? Do both parties then have separate and equal powers to determine the status of the territories? If the Council cannot do so, what then is the mutuality in its agreement with the United States?

14. What relations are envisaged between the

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United States and Micronesia as to fiscal matters
assuming that United States "controls" are in part
established?

Comment. Will the United States provide funds or subsidies, or taxing authorities, or assistance in raising revenues? Will the United States maintain separate control over expenditures by Micronesia, or over part of them or have separate taxing powers in addition to those possessed by Micronesia? Will the United States receive funds which it may separately administer as to Micronesia?

15. What judicial procedures, and what form of legal system; under what principles of law will apply?

Comment. Will there be any, or no, United States courts, and what will be their jurisdiction? Will that jurisdiction reach to the powers exercised by the Micronesian government, or resolve conflicts

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when that government exercises powers contrary to the "compact" with the United States (if any)?

16. Will there be a separate system of courts and "law" applicable to United States armed forces, or the civilian component?

Comment. Is such an arrangement acceptable to the Micronesians? Will there be a system of appeal to United States courts for United States servicemen from the courts of Micronesia? Will such appeals be final? Or will the jurisdiction be concurrent as to some cases?

17. What role is envisaged for United States constitutional procedures to apply?

18. To what extent would Micronesia be subject to the United States Constitution, or to its Bill of Rights?

Comment. The issues raised here are associated with the problems of how far the United States will act in managing Micronesian affairs.

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19-22. The critical issue turns around the status of the Micronesians at present, and the status they are to have in the future, coupled with the critical date upon which this issue of status is to be resolved.

19. Does the United States presently enjoy the power to regulate Micronesia as a United States territory:

20. If not, what is the basis of United States authority, the Strategic Trust Agreement perhaps coupled with the United Nations Charter?

21. If the Charter and Strategic Trust Agreement govern the status of the Micronesians, what in those agreements determines them to have what status under the United States administering powers?

22. What is the impact of Article IV of the United States Constitution?

Comment. These three questions raise crucial issues in determining - from a legal standpoint - what action should be taken by the United States. By way of

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preliminary consent, here, if the United States is only an "administering authority," then the United States would appear to be subjected in its administration and powers to the Strategic Trust Agreement, and cannot treat the islands as a "territory" in the sense that that term is used in the United States Constitution

If the United States presently is entitled to treat the islands as a "territory," however, then the power of the United States to act in establishing the future status of the Micronesians appears to be much greater - less subject to United Nations or Security Council Intervention. It would appear, however, that the United States is to be treated under the first alternative, i. e., as an administering power.

It might be argued - and justified by a number of considerations - that the Micronesians are, during the

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period of United States administration, moving toward the adoption of "sovereign power" in themselves. The movement toward independence and self-government might then be said to proceed during the tenure of the Strategic Trust Agreement - and when that critical time occurs - the United States would be in a position to notify the Security Council that the Micronesians are in a position to exercise their sovereign powers. Then, regardless of the United States and Security Council relationship, it would appear that the Micronesians - once the United States recognizes their sovereign powers, may freely exercise them, and the relationship of United States Administration Agreement is voided by its own terms.

But if this line of argument is pursued, then the Micronesians, in the exercise of their sovereign powers, are free either to enter the United States upon agreed terms, such as seeking a territorial status, or by becoming a

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territory, subject to agreed upon conditions, or to remain a free and independent sovereign State, with a separate agreement (an international agreement) with the United States. They may agree to give the United States, in place of territorial rule, the right to manage defense, security and foreign affairs, and couple with this right, the outright grant of land to the United States for fulfilling these commitments. They might agree that additional land will be granted in the future commensurate with defense or security needs (as determined by them, or by the United States, or both).

The problem that remains unresolved, however, is whether this arrangement, or any of them, can be adopted without the Micronesians being in a power to exercise in their own name, through their own representatives or directly, their sovereign powers. This is a crucial problem, because if the United Nations or third States, or the Micronesians determine that whatever arrangement adopted with the United States was achieved without their consent, and not by their exercise of their own sovereign powers, that arrangement might become null and void.

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It appears that:

(a) The Micronesians must receive the sovereign power to determine their own affairs and relationships with the United States and other foreign powers.

(b) When they receive this power, the Strategic Trust Agreement becomes null or is voided, and will then no longer be in force and effect.

(c) The Security Council should then be notified that the Micronesians then have sovereign power and will exercise them in their own behalf, and that the United States views its obligations under the Strategic Trust Agreement as completed.

(d) The United States must have prepared the Micronesians for a future relationship with the United States which will meet with its strategic, defense and security needs.

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(e) The Micronesians must have entered into their relationship with the United States concurrently with or immediately after the Strategic Trust Agreement has become void or "executed" in order to avoid jeopardizing the new relationship by the Security Council or otherwise.

N.B. The United States Constitution (Article IV) provides only that "The Congress shall have Power to dispose of and make all needful Rules and Regulations¹¹ respecting the Territory or other Property belonging to the United States." This is the reach of the Constitutional powers as expressed. The administration of the Micronesians appears, at least, to be an administration based not on the Consitution, but on an international undertaking with the Security Council of the United Nations. It is not in other words a power to administer a "territory" under the Constitution but an international arrangement for powers to administer the Micronesian archipelago, in accordance with the Agreement's own provisions. And what the Consitution appears to say is that Congressional powers over "territories" not made a part of the United States

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by congressional action may be relatively free (the extent is undefined) from certain Constitutional guarantees.

23. What participation is the United Nations Security Council entitled to demand in a Micronesian claim (through plebiscite) to its sovereignty?

Comment. This issue should be addressed by the Department of State. Its importance is self-evident.

24. How should the Micronesian status be characterized, assuming that it enters into relations with the United States meeting United States objectives?

Comment. It would appear advisable to avoid the use of traditional terms such as "protectorate;" and the notion of "condominium" does not apply since there would only be one external State having some control over Micronesian affairs. The notion of "divided sovereignty" is meaningless and confusing and should not be used: either the Micronesians control their foreign powers or they don't.

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25. Suppose that the United States Congress or United States agencies maintain control ("legislate") over domestic affairs, over and above those relating to foreign affairs and defense, what would be the impact of such a reach of United States control?

Comment. Once the Micronesians have secured, and then freely exercised their sovereignty, it would appear that the resulting relationship depends upon the mutually agreed upon provisions of the compact made with the United States. But it would then seem that unless Micronesia is a "territory" Article IV of the Constitution does not apply. Regardless of the areas of United States control, unless Micronesia chooses to become a territory (even if unincorporated) it remains a sovereign State which has delegated its foreign powers to another State, and has also, in the assumption made above, turned over some of its domestic concerns. The possibility that this might lead to Micronesia becoming a territory exists, but calls for an exercise of

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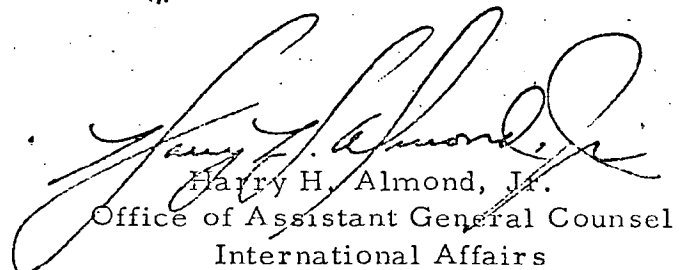
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political choice by the Micronesians.

26. Can Micronesia then become a member State
of the United Nations?

Comment. The above line of comments in the earlier questions suggests that Micronesia might choose to remain free and independent at the time of making its arrangements with the United States. As long as it does not become a territory of the United States, it would appear that Micronesia could become a member State of the United Nations.


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