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14 DEC 1971

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

SUBJECT: TTPI: Federal Powers in the Field of Defense - Review and Update of 4 October 1971 Memorandum For the Chairman, Interagency Group.

INTRODUCTION.

1. Pursuant to your request, the following comprises a brief review of the 4 October 1971 memorandum, noted in the subject above, and proposals for updating that memorandum on the basis of the Statement by Ambassador Williams to the Territorial and Insular Affairs Subcommittee, Monday, November 15, 1971.

Review of 4 October 1971 Memorandum

1. The proposed compact. The first matter raised is whether from the bargaining or trade-offs point of view in negotiations with the Micronesians

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the United States can make defense and security interests so attractive that the compact which will probably be entered into between Micronesia (as a sovereign State) and the United States will fully embrace United States defense and security interests.

The United States is in a position to promote as a major interest of the Micronesians their need to seek a guarantee of their defense by the United States, which would operate in part by denying all other States, except allies of the United States, access to their territory during times of crisis or emergency. This position may be reinforced by the fact that no other Pacific power is able to establish a similar position, and that should a major conflict occur, Micronesia necessarily would be drawn in and occupied even should it seek to remain neutral.

2. Opposing this position, some Micronesians might seek to have a "neutrality compact" perhaps comparable to that enjoyed by Austria, with neutrality "guaranteed" by the major Pacific States. The argument rebutting neutrality, however is for United States negotiations to show trends in past conflicts of a major scale - neutrality failed to protect any State from being brought into conflict or being occupied when the area of the conflict envelops their territory. Conflicts occurring in the Southern Pacific would appear prima facie to be conflicts of major scale, engaging the security interests of the United States and Micronesia alike.

3. Consultation with Micronesia "Precedents".

The second question raised in the 4 October 1971 Memorandum relates to implementing United States defense measures through consultation with the Micronesian government. The Micronesian delegation

has sought this procedure in exchange for turning over defense and security interests to the United States. Article 4 of the North Atlantic Treaty (NATO) (a collective defense agreement) has the following provision for consultations:

ARTICLE 4

"The Parties will consult together whenever, in the opinion of any of them, the territorial integrity, political independence or security of any of the Parties is threatened."

A similar provision is to be found in Article III of the ANZUS treaty. Article IV of the Southeast Asia Collective Defense Treaty is more lengthy:

ARTICLE IV

"1. Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations.

"2. If, in the opinion of any of the Parties, the inviolability or the integrity of the territory or the sovereignty or political independance of any Party in the treaty area or of any other State or territory to which the provisions of paragraph 1 of this Article from time to time apply is threatened in any way other than by armed attack or is affected or threatened by any fact or situation which might endanger the peace of the area, the Parties shall consult immediately in order to agree on the measures which should be taken for the common defense.

"3. It is understood that no action on the territory of any State designated by unanimous agreement under paragraph 1 of this Article or on any territory so designated shall be taken except at the invitation or with the consent of the government concerned."

Article V of SEATO contains a provision for consultation that reads:

ARTICLE V

'The Parties hereby establish a Council, on which each of them shall be represented, to consider matters concerning the implementation of this Treaty. The Council shall provide for consultation with regard to military and any other planning as the situation obtaining in the treaty area may from time to time require. The Council shall be so organized as to be able to meet at any time."

4. Consultation with Micronesia - New Formulation.

To what extent should the "precedents" of other treaties be followed in the compact with Micronesia? The difficulty

arises with the meaning to be ascribed to the terms "consult" or "consultation." Crises or emergencies may cause delays to be seriously prejudicial to undertaking defense as security measures. One possibility is to use the existing consultation provisions of an agreement such as that in the NATO agreement. Then, apart from the published formal agreement, the two Parties might enter into an implementing agreement concurrently with the formal agreement (which can be classified). This arrangement would cover action by "prior" consultation, - said consultation in other words to be the result of the implementing arrangement.

5. The Question of Definition. To what extent is it necessary to "define" the kinds of emergency or crisis which would necessitate United States action in Micronesia? The NATO, SEATO and ANZUS agreements call for collective defense action in case of "armed attack," and SEATO, as noted above, provides for consultation if

a crisis occurs other than by armed attack (see Article IV (2) cited in Paragraph 3).

The problem with definitions is in making them complete - or in giving them precision. Since consultation is the key-procedure, the matter of definition can be avoided in the formal compact; the implementing agreement, if used, might indicate by way of illustration the kinds of aggression that might be contemplated, but avoiding limitations to those cited. (We can discuss drafting the appropriate language).

Caveat. Discussions in the Congress, and particularly in the Senate, over the President's "war powers" suggests that this might become a domestic political issue. Bills such as that proposed by Senator Javits attempt to meet this issue by providing for Congressional participation. Such bills appear to raise the concern over the collective defense treaties in giving the President excessive powers - however, it will be noted that the rebuttal to all such bills presently before us in that the collective defense agreements enable

the Parties to act in the common defense "in accordance with their constitutional processes."

6. The West Indies Associate States Act of 1967. This Act is cited in the Memorandum to indicate that the United Kingdom can entertain the defense of the Islands involved when in its opinion "it is a matter relating to defense (whether of an associated State or of the U.K. or of any other territory for whose government Her Majesty's Government in the U.K. are wholly or partially responsible.) or of external affairs." This would be an ideal formulation, but if the Micronesians are seeking consultation, it seems somewhat inconsistent to empower them to consult over the exercise of defense authority if the United States has already decided in its opinion that defense or security interests are involved.

On the other hand, the implementing agreement, proposed in Para. 3 above, might have such language modified as follows:

"The United States shall have the responsibility and power to undertake the responsibility as to any matter, which, in the opinion of the United States, endangers her defense or security interests, provided, that, the Micronesian government shall be consulted as to all matters relating particularly to its defense and security, and as to the means best suited to undertaking all measures required."

If such a clause is followed by a specification the kinds of measures envisaged - e.g. the taking of critical areas of land, the promulgation and enforcement of specified "powers", the isolation or fortification of security zones, emergency take-overs of communications, airfields, and the like, then the undertakings by the United States would be coupled in advance (through the implementing agreement) with the way in which they are

to be taken, and consultation with the Micronesians, if any, would in effect be left to proclaiming the emergency or crisis.

7. The Interplay of Domestic Powers and the Exercise of Crisis Powers. The abbve paragraphs suggest that any problems arising over certain domestic areas which might impinge upon security or defense actions would be swallowed up during the crisis itself. If consultation is to be effective, it would then be presumed that it would carefully shape the Micronesians not to allow, during peacetime, their communications or shipping, and the like to fall into foreign control.

To some extent this can be managed by the appropriate incorporation laws, and to some extent by take-over provisions made part of the implementing agreement. The appropriate corporation laws might - in other words - provide for Micronesians to "control" all vital industries either in the management, through shareholdings, or both.

8. The Question of Unilateral Termination. Two possibilities exist: (a) that the United States persuade the Micronesians that unilateral termination is not in either Party's interest (or in Micronesia's interest), or (b) that in the event of unilateral termination by Micronesia of the compact, the United States defense and security powers remain unaffected. The difficulty with the second position is that it is unlikely that a sovereign State can be bound to maintaining defense and security ties against its will, and that termination of a compact, largely premised upon such ties, would amount to the two States giving up their shared interests in their common defense. The United States might be better off owning the lands it needs outright, but this might be undesirable to the Micronesians, if they have the Cuban - Guantanamo enclave in view.

Hence, it would appear advisable for the United States negotiators to either deny the right to

unilateral termination, or to provide that in the event of termination, the two States will agree to enter into a separate collective defense pact. The second option is still dependent upon Micronesia sharing the same interests as the United States, but is softened since new negotiations upon new terms would be envisaged. It is not altogether satisfactory to the United States - perhaps not satisfactory at all - because it would mean relinguishing an existing, and probably satisfactory arrangement for ~~defense~~.

On the other hand if the Micronesians can no longer suffer the presence of the United States, there is little to be gained by any of these proposals: the best compromise might be to provide for consultation relating to the compact, a review periodically of its terms and their implementation, and procedures that will enable the United States, at least, to shape and head off hostile views of Micronesians that would seek the termination of their agreement.

But it must be concluded that "unilateral termination" is one of the attributes of a independent

and sovereign State - it is difficult to suggest that a State cannot, under any circumstances it seeks to propose, terminate an agreement with another State. The United States must therefore act in such a way as to make friendly relations a part of the operating conditions of their compact with Micronesia.

9. United States Law and Judicial Proceedings. This is a subject that draws in the question of domestic affairs, and might best be examined by the Department of Justice. Neither are essential to establishing United States defense and security interests, but they would if introduced, reinforce these interests.

10. The Question of "Sovereignty." Micronesia would be sovereign in both the internal and external senses upon receiving its independence; however, it would lose its "international sovereignty" if it makes the United States master of its defense, security and external or foreign affairs. On the other hand, once

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the compact it enters into is dissolved or terminated, it will regain its sovereignty.

The matter tends, in any event, to become academic: the Micronesians, if they retain the right to unilaterally or ~~were~~ mutually with the United States to terminate the compact, are clearly retaining their ~~real~~ sovereignty - and once they exercise this sovereignty, even if said to be exercised on the domestic level, they will at that time regain their international sovereignty.

If the Micronesians can terminate their sovereignty only with the mutual agreement of the United States, the question becomes more complex - but then the facts relating to their status would have to be examined more closely than is possible here. For if they sought to terminate, and the United States refused, the question might arise whether the Micronesians were then prevented termination simply by the exercise of naked power by the United States, or whether or not they had a "legal" right to terminate even if the United States unjustifiably refused to terminate.

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Updating the 4 October 1971 Memorandum

1. Updating the above remarks and the 4 October 1971 Memorandum, in the light of Ambassador Williams Statement in executive session November 15, 1971:

- page 4 et seq., the Micronesians spoke of their direct concern with independence: we have already concluded that they will and probably must proceed in their relations with the United States as a sovereign people.

- page 6 et seq., the Micronesians were concerned with the control of land, and commitments to be assumed by them in providing land to the United States for defense measures: the Ambassador's statement does not affect the earlier memorandum, but indicates that the Micronesians want to terminate existing land agreements with termination of the Trusteeship, prior to entering into new agreements: this problem should be reviewed by Mr. Briskin, OGC/I&L, as to the impact it might have.

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- page 8 et seq., the Micronesians were concerned with control of laws, assuming their own laws and statutes, and judicial proceedings, but foreign affairs and defense to reside in the United States: in general this would not change the United States position.

- page 10 et seq., that such a Compact with the Micronesians as proposed would not be a treaty but would be approved by the Congress of the U.S. and Micronesia, the President and the people of Micronesia: it is difficult to say this would not be a treaty simply because the procedures as thus detailed have been required. Whether or not it is a treaty depends upon whether two sovereign States are bound to obligations under international law. All the earlier papers indicate that we are moving in the direction of a Treaty in this sense of the term.

- the consent of the Micronesians (page 10) as to all responsibilities associated with foreign affairs and defense may raise a confusing issue, in view of my comments earlier concerning the modalities of

consultation in matters of defense. We are seeking a qualified consent - and this statement appears to be moving away from that direction.

- page 11 et seq., the Micronesians concern with fiscal matters - financial affairs - not resolved in the Ambassador's statement, and not subject to comment.

- page 12 et seq., the question of termination remains somewhat sticky - but may have to be resolved on the basis of sovereignty, as already indicated in prior comments on the 4 October draft: it is difficult to see why a State that can enter into a treaty (compact) cannot withdraw, and why it cannot even renounce its "obligation" not to withdraw. This seems to be of the essence of sovereignty.

The fact that renunciation of an obligation is an international wrong is not the deciding factor: the fact of sovereignty and sovereign independence is overriding. The sovereign State can commit acts which are international wrongs, but it is not thereby deprived of

the power to commit them. It is merely subject to the sanctions of international law which do not include the legal power to compel performance of an obligation.

SIGNED

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