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UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

Attachment 9

TO : Captain William J. Crowe, Jr.
Office of Status Negotiations

DATE: May 19, 1972

FROM : Herman Marcuse

SUBJECT: Alleged power of Congress of Micronesia to prevent the Mariana Islands District from conducting separate negotiations with the United States, or to authorize such negotiations.

In a letter dated April 11, 1972, addressed to Senator Salii, Messrs. Warnke and White expressed the view that a Mariana Islands Political Status Delegation could not conduct separate status negotiations with the United States without the prior authorization by the Congress of Micronesia. The gist of their argument is that the adoption by the Congress of Micronesia of the Joint Resolutions establishing the Joint Committee on Future Status preempted the field of status negotiations and precluded the several district legislatures from authorizing separate status negotiations.

You have asked for comment on the legal validity of that contention. It is concluded, first, that the Congress of Micronesia did not enact any legislation which purported to preclude the districts from conducting separate status negotiations; second, that the Congress of Micronesia lacks the power to enact legislation which would have that effect; and third, that the prior consent by the Congress of Micronesia to separate status negotiations by the Mariana Islands District is not required and that, moreover, the Congress of Micronesia does not have the power to grant such consent. Messrs. Chapman and Stowe concur in those conclusions.

1. The Congress of Micronesia did not enact any legislation which purported to preempt the entire field of status negotiations. The basis of the Warnke-White position is--

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"Micronesian laws and constitutional customs make it clear that, once Congress has entered a field by its legislation, it preempts the right of other legislative bodies, including the district legislatures, to enact valid legislation in such field." (Emphasis added.)

The short answer to this argument is that the Congress of Micronesia has not enacted any legislation in this field. The Joint Resolutions establishing the Joint Committee on Future Status did not receive the approval of the High Commissioner; hence they do not have the status of legislation. 2 TTC 163(1). They constitute merely internal regulations of the Congress of Micronesia without any external effect; specifically, they do not bind the Mariana Islands District and prevent it from entering into separate status negotiations with the United States.

The enactment of legislation, the prerequisite for legislative preemption, thus is lacking. This point is not a legalistic formality. It is one thing to say that the actual enactment of legislation by the Micronesian Congress precludes the Districts from taking action which is inconsistent with that statute. It is something quite different to claim that the mere authorization by the Congress of Micronesia of status negotiations, which may never succeed, precludes the Districts from attempting to seek other solutions of the status problem, especially if a particular District feels that the negotiations are conducted in a manner prejudicial to its cultural, economic, and political interests.

2. The Congress of Micronesia lacks the power to enact legislation precluding the districts from conducting separate status negotiations. Section 2 TTC § 102, which sets forth the limitations on the legislative power of the Congress of Micronesia, provides in pertinent part that no legislation may be inconsistent with--

"(1) treaties or international agreements of the United States;

"(2) laws of the United States applicable to the Trust Territory;

"(3) Executive Orders of the President of the United States and Orders of the Secretary of the Department of Interior; or

"(4) Sections 1-12, Chapter 1, Title 1 of this Code."

a. Action by the majority of the Micronesian Congress which would preclude a separate negotiation by a district with the United States and a separate future status of that district would be in violation of an international agreement of the United States, and the laws of the United States applicable to the Trust Territory. Article 6(1) of the Trusteeship Agreement enjoins the administering authority to--

"* * * promote the development of the inhabitants of the trust territory 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 peoples concerned; * * *." (Emphasis added.)

The use of the word "peoples" rather than people demonstrates that the inhabitants of the trust territory are not to be considered a monolithic unity where the majority can impose its will upon a geographically and ethnically identifiable minority. Rather, Article 6(1) of the Trusteeship Agreement requires that if there are definite cultural, ethnological, and linguistic groups in the trust territory their specific circumstances and their freely expressed wishes must be respected. This consideration is of particular importance here since the trust territory has never possessed a political identity of its own, but constituted at best an artificial unit for the purpose of administration. The Marianas unquestionably have a different cultural, linguistic, and ethnological background than the inhabitants of the rest of the Trust Territory.

If the Joint Resolutions of the Congress of Micronesia setting up the Joint Committee on Future Status had the effect of preempting the field and precluding the Marianas from entering into separate negotiations they would interfere with the right of the people of the Marianas--as distinguished from the peoples of the Trust Territory--that effect be given to their particular circumstances and to their freely expressed wishes. The preemption contended for in the Warnke-White memorandum thus would violate the Trusteeship Agreement, an international agreement of the United States, as well as the Joint Resolution of July 18, 1947, 61 Stat. 397, authorizing the President to approve the Trusteeship Agreement. Consequently, it would be beyond the legislative power of the Congress of Micronesia pursuant to 2 TTC § 102(1, 2).

b. According to 2 TTC § 102(3), legislation of the Micronesian Congress may not be inconsistent with the orders of the Secretary of the Interior. Hence, if the Secretary of the Interior invites the Mariana Islands District Legislature to appoint delegates for separate status negotiations, the Congress of Micronesia does not have the power, either by the passage of legislation, or by the preemption of the field, to prohibit the district legislature from complying with that request.

c. Finally, according to 2 TTC § 102(4) the legislation of the Congress of Micronesia may not be inconsistent with the Bill of Rights, incorporated in 2 TTC §§ 1-12, which include a prohibition against laws abridging the right to petition the Government for a redress of grievances. The term "Government" in the TTC usually is used in the sense of Government of Micronesia. However, if the Congress of Micronesia cannot prevent the presentation of grievances to the Government of Micronesia, it can even less prevent their presentation to the Government of the United States. The negotiation to change the status of the Mariana Islands District is, to a large extent, if not essentially, a petition for the redress of grievances, i.e., dissatisfaction with the present status of the Mariana District and with the conduct of the status negotiations by the Joint Committee on Future Status. An attempt by the Micronesian Congress to

prevent separate status negotiations by the Mariana Islands District therefore would constitute a violation of the right to petition and would be beyond the legislative powers of the Congress of Micronesia.

3. Consent by the Congress of Micronesia to separate status negotiations is neither required nor within the legislative competence of the Congress of Micronesia. The Warnke-White memorandum suggests that the Congress of Micronesia could authorize the conduct of separate negotiations by the Mariana Islands District. This proposal, of course, is based on the fallacy that the Congress has preempted the entire field of status negotiations by setting up the Joint Committee on Future Status. Since this is not the case, there is obviously no need for any approval by the Congress of Micronesia of separate status negotiations by the Mariana Islands District. Indeed the Congress lacks the power to do so since under 2 TTC § 1(1) its legislative jurisdiction is limited to problems of territory-wide concern.