

MEMORANDUM

DATE: Sept. 5, 1972

TO: Ambassador F. Haydn Williams

FROM: Herman Marcuse

SUBJECT: Correction of Draft Compact

I have gone over the Draft Compact and have found several spots which may need correction to the extent that this is possible without jeopardizing the agreement already reached.

Section 101. Last line; add "representative." This would be consistent with the 1970 Report of the Political Status Delegation, pp. 14-15.

Section 201(c). First line, substitute "this" for "Section 201."

Section 202. Page 4, lines 1 and 3, insert "international before "agreements." Line 2, insert "Government of the" before "United States."

302(a); 303(c), (e); 304(b), 307. Substitute "Government or the United States" for "United States Government," or "United States."

Annex A. Par. I(a). Third line from the end, insert "Government of the" before "United States."

Par. III. After the first sentence, insert "Upon the issuance of such notification the Government of Micronesia will refrain from or promptly terminate such activity."

Par. IV. Omit this paragraph.

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DATE: Sept. 5, 1972

TO: Ambassador F. Haydn Williams

FROM: Herman Marcuse

SUBJECT: Title V of Draft Compact

I am attaching a draft of Title V of the Compact.

Earlier stages of this draft have been discussed with representatives of the Departments of State, Interior, and Defense. This draft has incorporated many of the suggestions made by those Departments but has not as yet been seen or cleared by them.

Attachment

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TITLE V

Applicable Laws

SECTION 501.

(a) The laws of the Trust Territory of the Pacific Islands in force on the day preceding the effective date of this Compact shall be applicable to Micronesia, except to the extent that they are inconsistent with this Compact and with the Constitution of Micronesia. They are subject to amendment or repeal by the appropriate legislative authority provided for in the Constitution of Micronesia.

(b) The treaties, international agreements, and other rules of international law applicable to the Trust Territory of the Pacific Islands on the day preceding the effective date of this Compact shall be applicable to Micronesia.

(c) The statutory law of the United States applicable to the Trust Territory of the Pacific Islands on the day preceding the effective day of this Compact shall be applicable

to Micronesia only to the extent and in the manner provided for in this Compact and in other agreements between the United States and Micronesia.

SECTION 502.

(a) Treaties, international agreements, and other rules of international law applicable to Micronesia shall constitute the internal law of Micronesia without the need of implementing legislation if they are self-executing, regardless of whether such treaties, international agreements or other rules of international law became applicable to Micronesia prior to or after the effective date of this Compact. A treaty, international agreement, or other rule of international law shall be presumed to be self-executing, if the United States has not enacted implementing legislation at the time of its proclamation by the President.

(b) The Government of Micronesia agrees to enact whatever domestic legislation is appropriate or required to enforce or implement those treaties, international agreements, and other rules of international law applicable to Micronesia pursuant to sections 202 and 501(b) of this Compact, which are not self-executing. Such implementing legislation shall follow the corresponding legislation enacted by the United States as closely as possible, consistent with local conditions.

(c). (1) With respect to the treaties, international agreements, and other rules of international law which are applicable to Micronesia pursuant to section 501(b) of this Compact, the implementing legislation enacted by the United States shall constitute the internal law of Micronesia pending the enactment of the Micronesian legislation provided for in subsection (b) of this section.

(2) If Micronesia fails to enact the legislation provided for in subsection (b) of this section with respect to a treaty, international agreement, or other rule of international law which is applicable to Micronesia pursuant to section 202 of this Compact, within a period of \_\_\_\_\_ after the enactment of implementing legislation by the United States, the latter shall constitute the internal law of Micronesia, pending the enactment of implementing legislation by Micronesia.

(d) The Government of Micronesia undertakes to comply with and to enforce faithfully the treaties, international agreements, and rules of international law set forth in subsections (a), (b), and (c) of this section.

[NOTE: The State Department draft of August 18, 1972 would combine subsections (b) and (d). I would suggest keeping those subsections apart at least during the present drafting stage so that we can keep apart the notions of legislation and enforcement. The State Department draft is more elegant than my proposal, but it is more difficult to sort out the ideas contained in it.]

SECTION 503.

[PRELIMINARY NOTE: This section is closely related to the proposed SOFA. It is assumed that the latter will determine whether and to what extent the legislation required to be enacted and enforced pursuant to this section will apply to--

1. Persons subject to U.S. military law and their dependents;
2. U.S. civilians stationed in Micronesia and their dependents;
3. Other citizens of the U.S.
4. Persons subject to the military law of an allied country. See section 304(b).]

(a) The Government of Micronesia agrees to enact whatever domestic legislation is required (1) to protect the personnel, property, installations, services, programs, and official information maintained by the Government of the United States in Micronesia pursuant to this Compact, and (2) to implement such services and programs. Such legislation shall follow the corresponding legislation enacted in the United States as closely as possible, consistent with local conditions. Such legislation shall include appropriate and adequate civil and criminal remedies against:

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1. Fraud against the Government of the United States.
2. Theft, embezzlement, and destruction of property belonging to or in the custody of the Government of the United States.
3. Interference with the operation of installations, programs, or services maintained by the Government of the United States in Micronesia pursuant to this Compact.
4. Theft, unauthorized duplication and unauthorized disclosure of official information of the Government of the United States.

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[NOTE: This paragraph was inserted at the request of the Department of Defense. I have some misgivings as to the desirability of the prosecution of security violations by Micronesian authorities. This may require us to give the Micronesian authorities more information about those matters than we care to. Cf. Note (1) to subsection (c).]

5. Violation of the rules, regulations, and orders of any agency administering a service or program.

[NOTE: Most other agencies recommended the omission of this paragraph. I have been

thinking here especially of the violation of the administrative regulations of the Postal Service, CAB, FAA, HEW, etc. The need for this paragraph depends largely on the extent to which U.S. services and programs will be made applicable to Micronesia.]

(b) If Micronesia fails to enact the legislation provided for in subsection (a) of this section, the pertinent legislation enacted in the United States shall constitute the internal law of Micronesia, pending the enactment of such legislation by Micronesia.

(c) The Government of Micronesia undertakes to comply with and to enforce faithfully the laws set forth in subsections (a) and (b) of this section, provided that prosecution under subsection (a)(4) shall be instituted only at the request of the Government of the United States.

[NOTES: (1) The purpose of the proviso is to have control over the prosecution of security violations to meet those situations in which the U.S. would prefer not to prosecute, e.g., in order to protect informers or other sources of intelligence. The Department of Defense does not favor the proviso.

(2) The State Department Draft would combine subsections (a) and (c). In this context compare Note to section 502.]

SECTION 504.

[PRELIMINARY NOTE: Most agencies recommend the omission of this section since it accentuates the weakness of our position in the event that the Micronesians violate their duties under sections 501-503. I would keep the section for the time being so that we can analyze the various types of violations and see whether we want to or are able to impose any sanctions, other than consultation.]

(a) The Government of the United States may issue formal notifications to the Government of Micronesia in the following circumstances:

(1) If it is the conclusion of the Government of the United States that legislation enacted by the Government of Micronesia pursuant to section 502(b) fails to implement adequately a treaty, international agreement, or other rule of international law applicable to Micronesia, and that such failure prejudices, or is likely to prejudice, the international commitments or responsibilities of the United States. Upon such notification the laws of the United States implementing the treaty, international agreement, or other rule of international law involved shall constitute the internal

law of Micronesia until Micronesia enacts adequate implementing legislation.

(2) If it is the conclusion of the Government of the United States that the Government of Micronesia or an agency thereof has failed to carry out its undertakings and responsibilities under section 502(d) and that such failure prejudices, or is likely to prejudice, any international commitment or responsibility of the United States.

Upon such notification the Government of Micronesia will promptly take such action or refrain from taking any action as may be required to comply with its undertaking under section 502(d). [Alternative sanctions: Reduction of financial contribution, or assumption of enforcement of treaty, etc. by U.S.?)]

(3) If it is the conclusion of the Government of the United States that the laws enacted by the Government of Micronesia under section 503(a) do not adequately protect the personnel, property, installations, services, programs, or official

information set forth in that section, or fail to implement such services or programs adequately, and that such failure jeopardizes, or is likely to jeopardize, the safety of any such personnel, property, installation, service, program, or official information, or the proper operation of such service or program. Upon such notification the laws of the United States set forth in section 503(b) shall constitute the internal law of Micronesia until Micronesia enacts legislation adequately complying with the requirement of section 502(a).

(4) If it is the conclusion of the Government of the United States that the Government of Micronesia or an agency thereof has failed to carry out the undertakings of the Government of Micronesia under section 503(c), and that such failure jeopardizes, or is likely to jeopardize, the safety of any of the personnel, property, installations, services, programs, and official

information or the proper operation of a service or program set forth in section 503(a). Upon such notification the Government of the United States may take such action as necessary to protect the safety of the installation referred to in that notification, or discontinue or curtail the affected service or program, or reduce the amount of the financial contribution until it is satisfied that the Government of Micronesia will perform its responsibilities under section 503(c).

[NOTE: The Department of Defense wants to delete this paragraph with respect to defense establishments, since it would by implication limit the powers to the sanctions provided for in it.]

(b) The Government of the United States will seek to consult with the Government of Micronesia before issuing a notification pursuant to this section. It will consult as requested with the Government of Micronesia after issuance of such notification and in order to determine whether the circumstances which lead to such notification have been remedied.

SECTION 505.

[INTRODUCTORY NOTE: This section is closely connected with Lindsey Grant's Memo of August 25, 1972, Appendix B, Point B, viz., the question whether there might be a judicial remedy for Micronesia if the U.S. should diminish its annual contribution as a sanction for a breach by Micronesia of the Compact. Subsection (a) is devised to bar any remedy in the courts of Micronesia. Subsection (b) is based on 28 U.S.C. 1502. Under that section the Court of Claims does not have jurisdiction over any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations. Under our theory the Compact is not a treaty and Micronesia is not a foreign nation. 28 U.S.C. 1502 therefore would not on its face bar suits against the U.S. in the Court of Claims.

This brings up the question whether we want this type of judicial forum to settle disputes between the U.S. and Micronesia, possibly coupled with a clause that any delinquency on the part of Micronesia shall constitute a good defense on the part of the United States. If we want this forum we should be explicit, since the Court of Claims may take the position that the Compact comes within the spirit if not the letter of 28 U.S.C. 1502. If we do not want this forum we would also have to be explicit to forestall the possibility that the Court of Claims interprets 28 U.S.C. 1502 narrowly.]

(a) Nothing in this Compact shall be construed as constituting a submission of the United States to the jurisdiction of any of the courts of Micronesia.

(b) The United States Court of Claims shall [not] have jurisdiction over any claim by Micronesia based upon

Title IV of this Compact. [If the word "not" is omitted,  
add: In such litigation any violation by Micronesia of  
any of its obligations under this Compact shall constitute  
a complete defense for the United States.]