

11 September 1972

MEMORANDUM FOR CAPTAIN GORDON SCHULLER, USN
ISA/EA&PR

SUBJECT: Working Paper - United States Position - TTPI -
Interests and Rights in Leased Lands - Defense Powers.

This working paper is intended as a preliminary paper to:

- a. Indicate the fundamental legal interests of the United States on Micronesian lands and territory, and
- b. Micronesian obligations or "duties" associated with those interests.

1. The United States Defense Powers pertaining to the use of and rights in lands leased from Micronesians are set forth in the Compact, Sections 301 through 304 inclusive, and in Annex B. These provisions are attached.

Foreign Affairs Powers: Their Implications

2. The defense powers are, in part, reinforced by the foreign affairs Powers, which appear in Section 201 et seq. of the Compact. Through the exercise of the foreign affairs powers, the United States is given a qualified right to determine the relations between

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Micronesia and foreign governments.

-The right is qualified because Section 202 calls for consultation, and for accommodating the "express wishes of the Government of Micronesia." The impact of these qualifications will depend upon the extent to which consultation and the expressed wishes standard become operative. They depend, in other words, not upon a legal assessment but upon political considerations. A political judgment of their impact upon the United States power to act must be ascertained from the appropriate offices of State, Interior and Defense. (See Caveat, however, in my Para 3 below).

3. Section 203 - a foreign affairs power - is of further significance since it enables the United States to introduce and make Micronesia a party to treaties - and in particular security/defense treaties and agreements. Through its exercise, the United States will be enabled to assume security/defense obligations - and therefore by clear implication - the power to carry out those obligations. This power will and must include the right to use the bases and sites granted the United States under the defense powers.

It reinforces the defense powers. However, the defense powers operate under the Compact independently of the foreign affairs powers and are analyzed below.

-By way of caveat, the foreign affairs powers run only for the period of the Compact; thereafter the defense powers continue, but they will then be somewhat weakened - i.e. to the extent that the foreign affairs powers will no longer be in operation.

-Since the Foreign Affairs powers may run for a relatively brief time, the impact which they might make is uncertain. The impact is in large measure, however, dependent upon whether there is sufficient time to make it "stick." In my own opinion a period of less than 25 years for the Compact to run will lead to risks that the reinforcing effect of foreign affairs powers will be minimal if measured against the objectives set out here: they will not run long enough for the United States to establish a firm grip on establishing Micronesia as part of the United States defense/security and "base!"

4. The relationship between the "defense powers" and "foreign affairs" powers was discussed at length during the 1972 negotiation of the Compact in Washington. It would have been preferable, in meeting United States defense/security objectives, to make these powers operate concurrently into the future. It was understood during negotiations that this was not possible. If however for any reason the possibility of extending the foreign affairs powers appears in future negotiations, opportunity should be taken to do so. And, if they cannot be extended, every effort during future negotiations will then be required to make the defense powers - operating alone - achieve the objectives which were intended.

The Defense Powers - Their Implications.

5. Since defense and foreign affairs powers bear a close relationship upon one another, under most circumstances, it is apparent that the Compact makes an arbitrary division in providing for unilateral termination of the foreign affairs powers while enabling the defense powers to continue unchanged after such termination.

-Under these circumstances, it will be necessary to insist that all treaties and agreements relating to defense

or security or both must continue after termination of foreign affairs powers, at least to the extent that they bear upon our defense powers under Sections 301 et seq.

¶. Apart from the observations made in Para. 6, I recommend that - in making treaties and agreements applicable to Micronesia - we couple such application expressly with the defense powers of Section 301 et seq. in the official statements and instruments of application. Secondly, I recommend that we provide that such treaties and agreements shall not terminate upon any termination of the Compact or upon the cessation of any of the foreign affairs powers vested in the United States, but shall run for such term as the defense powers run, or, should the defense powers terminate for any reason, for such period as United States "denial" rights continue.

-We should consider the implications whether these recommendations should be discussed or explained during the on-coming negotiations with Micronesian representatives; I do not personally believe they need to be the subject of such negotiations.

3. The "rights" and "interests" of the United States to exercise its defense powers through the leased lands in the territory

of Micronesia are based on the following:

-primarily upon the terms of the lease themselves, and hence future leases must be drafted with United States objectives in mind; and, existing leases must be subjected to the Compact's defense power regime in its entirety.

-secondarily, they are based upon the terms in the Compact, and therefore upon the extent to which the Government of Micronesia is (a) capable of, and (b) acts to implement the defense powers.

8. The existing leases are being reviewed by the JAGN for the "interests" conveyed to the United States on a lease by lease basis. As to leases that might fall short of United States objectives (set forth in Section 301 et seq.,) it would be possible to separate out such leases that are of little significance (if there are such) that need not be changed. As to all other leases, the United States will be protected and assured of its "rights" only if they are redrafted (which is preferable), or if the Government of Micronesia is given in the Compact powers to impose its will on the lease-owners and then, only if it exercised these powers. (It does not appear that the United States can compel the redrafting of the leases at the present time, but this can be the subject of future inquiry).

16. Section 301 et seq. depend to some degree upon "good faith" on the part of the government of Micronesia. Under Section 303(a) the United States has "full and unencumbered right" to protect its military facilities. But this power to protect depends upon what it has - and this is a matter which calls for taking the steps noted in Para. 9 above.

-In other words, the Section reads that the United States has powers to protect what has been granted to it in the form of military facilities. If the use or rights in military facilities are incomplete or qualified, then the right to protect may be subject to such qualifications.

(The leases must be examined as to this point).

10. Similarly the "exclusive right" under Section 303(a) relating to the right to "establish, maintain and use military areas and facilities" is dependent upon what our leases provide in those facilities. The right to use an area solely for navigational aids, for example, does not necessarily and probably does not imply a right to make it a military base.

11. Section 303 (d) calling for all agreements to conform with the Compact does not impose any obligation upon the Government of

Micronesia. As to similar disabilities see also Section 303(b) and Annex B. I therefore recommend that an implementing provision be provided, but note that such an implementing provision will operate effectively only if the Government of Micronesia is capable of operating effectively, and if it does so operate.

Conclusion.

13. Under the above analysis United States objectives and concerns require:

- a direct obligation to be imposed upon the Government of Micronesia to ensure that United States interests are fulfilled, including the adoption of appropriate legislation and procedures by Micronesia as part of the Compact to ensure these obligations;
- if possible, a renegotiation of the leases that do not meet these objectives;
- a "carry over" or extension of such foreign affairs powers or treaty obligations as are needed for exercising defense powers, beyond any unilateral termination.

SIGNED

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