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SEP 21 1972

Honorable Mitchell Melich
Solicitor
Department of the Interior
Washington, D. C. 20240

Dear Mr. Melich:

This is in response to Acting Solicitor Coulter's letter of September 15, 1972, which asks for our review and approval of your Office's views relating to two questions which have arisen in connection with the request for separate status negotiations made by the Mariana Islands District of the Trust Territory of the Pacific Islands.

The import of those questions is best understood against the background of the presently pending negotiations to change the status of the Trust Territory of the Pacific Islands. That Territory has been administered by the United States since 1947 as a Strategic Trust under an agreement with the Security Council of the United ~~States~~ Nations; 1/ it consists of six Districts, one of which is the Mariana Islands District.

The Congress of Micronesia has by a number of Joint Resolutions established and continued a Joint Committee on Future Status and authorized it to conduct negotiations with the United States designed to establish a Compact of Free Association, i.e., a fairly loose relationship between the United States and Micronesia. The negotiations envisage the calling of a Convention charged with the drafting of a Constitution which would govern Micronesia under the Compact of Free Association with the United States.

1/ 61 Stat. (Part III) 3301. The Joint Resolution of July 18, 1947, 61 Stat. 397, authorized the President to approve this Agreement.

When the negotiations for the Compact opened in 1969, it was assumed that the Free Association would cover all six Districts. In April 1972, during the Fourth Round of Negotiations, however, the delegates from the Mariana Islands on the Joint Committee on Future Status submitted a statement indicating that the people of the Mariana Islands desired a close political relationship with the United States, and inquired whether the United States was willing to consider separate negotiations with the Marianas with regard to their political future. This statement was consistent with earlier actions of the people and leaders of the Marianas who had indicated through referenda, petitions to the Trusteeship Council of the United Nations and to the United States Government, and repeated resolutions of their District legislature that they desired a much closer political relationship with the United States than the other Districts. 2/ The reason for this preference of the Mariana Islands District is probably that it is located nearer to the U. S. Territory of Guam than to any of the Districts of Micronesia, 3/ and that the historical, cultural, and ethnological background of the Marianas differs substantially from that of the other Districts of Micronesia.

The request of the Mariana Islands District for separate status negotiations gives rise to the two questions posed in Mr. Coulter's letter: (1) whether the Mariana Islands District may, without specific authority from the Congress of Micronesia, hold separate discussions with the United States Government with respect to their future political relationship; and (2) whether the Congress of Micronesia can enact legislation calling for a Constitutional Convention which would not be applicable to the Marianas. It is the view of your Office (1) that the Mariana Islands District has the authority to hold separate discussions with the United States concerning its future

2/ Trust Territory of the Pacific Islands, Working Paper Prepared by the Secretariat [of the United Nations] dated July 5, 1972, A/AC 109/L. 802. par. 195.

3/ Geographically, Guam constitutes a part of the Mariana Islands group and was separated from them politically only as the result of the Spanish American War.

political status, and (2) that the Congress of Micronesia cannot enact legislation which would apply only to five Districts, which would render it advisable for the Secretary of the Interior to issue an Order enabling the Congress of Micronesia to enact Constitutional Convention legislation which would not be applicable to the Marianas. We understand that the Department of State has informally concurred in those views.

For the reasons hereafter set forth in detail we agree in substance with the conclusions reached by your Office.

I.

The authority of the Mariana Islands District to conduct separate status negotiations with the United States has been challenged on the ground that the field of status negotiations was preempted by the Congress of Micronesia when it established its Joint Future Status Committee and directed it to conduct status negotiations with the United States on behalf of all six Districts.

We need not examine the general question whether a Joint Resolution of the Congress of Micronesia, adopted without the approval of the High Commissioner required for the enactment of legislation (2 T.T.C. § 163(1)), can preempt any field. Whatever the answer to this general question may be, the Joint Resolution here involved cannot preclude the Mariana Islands District from conducting separate status negotiations with the United States.

The powers of the Congress of Micronesia are derived from Order No. 2918 of the Secretary of the Interior, dated December 27, 1968. 4/ Part III, section 2 of that Order confers upon the Congress of Micronesia the power to legislate with respect to all rightful subjects of legislation, except that no legislation may be inconsistent with--

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

4/ Order No. 2918 was issued under the authority vested in the Secretary of the Interior by Executive Order No. 11021 of May 7, 1962, 48 U.S.C. 1681, note.

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

* * * * * *

"(d) Sections 1 through 12 of the Code of the Trust Territory [The Bill of Rights, now 1 T.T.C. Sec. 1-12]."

Legislation enacted by the Congress of Micronesia which would deny to the Mariana Islands District the right to conduct separate negotiations with the United States concerning its future status would violate those three provisions of Order No. 2918.

a. Pursuant to Article 6(1) of the Trusteeship Agreement between the United States and the Security Council, the United States has assumed the obligation 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.) 61 Stat. (Part III) 3301, 3302.

The use of the word "peoples" rather than "people" recognizes the fact that the inhabitants of the Trust Territory do not constitute a homogeneous group.

Article 6(1) of the Agreement thus requires that the specific circumstances and the freely expressed wishes of the various cultural, ethnological and linguistic groups in the Trust Territory must be respected and that a numerical majority may not impose its will upon geographically and ethnically identifiable minorities.

Legislation enacted by the Congress of Micronesia which either directly or by way of preemption seeks to

prevent the Mariana Islands District from entering into separate negotiations with regard to their political future would deny to the people of the Marianas their right that consideration be given to their particular circumstances and to their freely expressed wishes. Such legislation therefore would be inconsistent with the Trusteeship Agreement, an international agreement of the United States, as well as a law of the United States applicable to the Trust Territory, viz., the Joint Resolution of July 18, 1947, 61 Stat. 397, authorizing the President to approve the Trusteeship Agreement. Hence, it would be beyond the legislative powers of the Congress of Micronesia.

b. Order No. 2918 also provides that the legislation enacted by the Congress of Micronesia may not be inconsistent with the Trust Territory's Bill of Rights. The latter includes a prohibition against laws abridging the right to petition the Government for a redress of grievances. In Trust Territory terminology the word "Government" is ordinarily 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 negotiations for a separate status of the Mariana Islands District are essentially a petition for the redress of grievances, i.e., dissatisfaction (1) with the present status of the Mariana Islands District and (2) 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 their right to petition. This again would transcend the legislative powers of the Congress of Micronesia.

We therefore concur in the conclusion reached by your Office that the Joint Resolutions establishing and continuing the Joint Committee on Future Status do not and cannot

interfere with the right of the people of the Mariana Islands District to conduct separate negotiations with the United States with regard to their political future.

II.

As stated above, your Office has concluded that the Congress of Micronesia cannot enact a Constitutional Convention bill which would exclude the Mariana Islands District. This result flows from the argument that Order No. 2918 necessarily implies that all legislation enacted by the Congress of Micronesia must have territory-wide application, and that this implication has found its expression in 2 T.T.C. 1(1) pursuant to which the Government of the Trust Territory shall have primary responsibility for "problems of territory-wide concern."

Attorney General Miyamoto of the Trust Territory in an opinion rendered to the Chairman of the Committee on Ways and Means of the Senate of Micronesia comes to the same ultimate result. His reasoning, however, is that a statute excluding the Mariana Islands from a Constitutional Convention would violate the Bill of Rights of the Trust Territory, in particular the rights to due process of law and equal protection of the inhabitants of the Marianas, and especially of those who are opposed to separate status negotiations. Such legislation therefore would be unauthorized in view of the requirement of Order No. 2918 that all legislation of the Congress of Micronesia comply with the Bill of Rights for the Trust Territory.

Your Office and Attorney General Miyamoto both suggest that this legal issue could be obviated by an amendment of Order No. 2918, authorizing the Congress of Micronesia to enact such legislation.

Without necessarily concurring in the legal reasoning of your Office and of the Attorney General of the Trust Territory 5/ we agree that it is advisable, if only for

5/ These views of your Office and of the Attorney General of the Trust Territory on the interpretation of Micronesian law are, of course, entitled to the highest respect.

practical reasons, to amend Order No. 2918 as suggested.

Acting Solicitor Coulter's letter and Attorney General Miyamoto's opinion have raised serious questions as to the power of the Congress of Micronesia to enact a Constitutional Convention bill which would not apply to the Mariana Islands. Litigation challenging the validity of such legislation therefore may be anticipated. Even if the courts should ultimately uphold its constitutionality--which in the circumstances is doubtful--the resulting delays in convening the Convention and adopting the Constitution, as well as the uncertainty during the interim, could adversely affect the ultimate outcome of the status negotiations between the United States and the other five Districts.

Thus it appears to be more important to clarify the law than to determine what it might be absent such clarification. We therefore support the recommendations that Order No. 2918 be amended so as to provide that the Constitutional Convention legislation will not apply to the Mariana Islands District.

In those circumstances there does not appear to be any need that this Office review the legal arguments advanced by Acting Solicitor Coulter and Attorney General Miyamoto.

I am sending a copy of this letter to Ambassador Williams.

Sincerely,

Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel