



DEPARTMENT OF DEFENSE
OFFICE OF GENERAL COUNSEL
WASHINGTON, D. C. 20301

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In reply refer to:
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April 25, 1973

MEMORANDUM FOR CAPTAIN GORDON SCHULLER, USN
ISA/EAPR

SUBJECT: Land Negotiations - Micronesia (Marianas) -
Eminent Domain and the Police Power

Introduction

United States land requirements are directly associated with United States security and strategic interests in the South Pacific. Accordingly, some of those requirements can be specified at this time, while other requirements are contingent upon changing developments affecting those interests in that area. The Draft Compact, prepared by the Inter-Agency Group with respect to protecting United States interests, establishes the following inter-relationship:

-Defense powers to be granted to the United States, enabling the United States to act, and respond to emergencies with promptness and effectiveness commensurate with the emergency or crisis to be faced.

-Specification of existing United States land requirements, reflecting immediate or current United States needs in the territory.

-Provision by means of eminent domain to satisfy future needs both in land requirements and emergency military powers to meet with armed attack or other threats to United States interests in the territory and in the South Pacific.

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The scope of this memorandum:

- Assess the means wherein the United States might secure and protect its land requirements and the uses of land commensurate with future needs in the Marianas in terms of United States practices.
- Establish the criteria and justification for United States land requirements to be secured in the future.

In this memorandum, these two questions are joined and answered together.

Eminent Domain and the Police Power - Introduction

1. The power to exercise eminent domain is inherent in the notion of sovereignty and under United States practices is largely a matter for the legislative branch. The United States is currently seeking to "divide" sovereignty so that in large measure it will be reposed in the territory authorities for domestic purposes, while sovereignty in the international sense, will be exercised by the United States, under the sections in the Draft Compact relating to Foreign and Defense Powers. Accordingly the power to exercise eminent domain - a domestically oriented power - appears to overlap across the interests of the United States which will be seeking to secure land relating to defense and strategic interests and the interests of the territory which will be seeking to maintain competence and authority over all domestic matters. The tensions that this may create are readily foreseen.

2. In the United States federal practices eminent domain is a power exercised in conformance with the protection of the "due process of law" provisions of the Fifth Amendment of the United States Constitution. Property is to be taken under these practices for a public use, is subject to just compensation and just compensation is determined by proceedings in the courts. Under United States practices the Congress may decide what type of taking is for a public use, but the role of the courts in such matters was left in doubt (see United States ex rel. T. V. A. v. Welch, 327 U. S. 546 (1946)). Compensation extends only to the direct appropriation and not to consequential injuries associated with the taking.

3. Associated with the power of eminent domain is the "police power" of the Federal and primarily of the State governments. This power, vested in the legislature under the United States Constitution, justifies the legislature in enacting all laws "either with penalties or without, not repugnant to the Constitution . . . for the good and welfare of the (State). It is much easier to perceive and realize the existence and the sources of this power than to mark its boundaries, and prescribe the limits to its exercise. (See Commonwealth v. Alger, 7 Cush. 53 (Mass., 1853)).

Another leading case (Thorpe v. Rutland R. R. C., 27 Vt. 140, 1855) declared:

"We think the power of the legislature to control existing railways . . . may be found in the general control over the police of the country which resides in the law-making power in all free States . . . This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state."

4. The police power is therefore much more generalized in its effects, and the authority for exercising that power goes to the heart of sovereignty perhaps to a greater degree than does the power to exercise the right of eminent domain. On the other hand, it is essential that the United States have access to such power, either directly or through the willing cooperation of the territorial government. The United States must have in the event of emergency an unhampered use of such power. It enables the authorities to establish the legitimate basis for regulating the use of property, and therefore is important to the United States in assuring access to its bases, protection from hostile conduct on adjacent lands, and the use of the adjacent lands or other lands in the territory commensurate with an emergency or crisis. It should be distinguished from eminent domain under United States practices, since if through such regulation, the property is depreciated or destroyed, no compensation need be recovered. It is evident from the above that the territorial government will not willingly part with this power, and it appears that restrictive rights may need to be accepted by the United States (depending however upon the bargaining position).

5. Both the powers over eminent domain and the police power would therefore be more effectively exercised - in the legal sense - if the territory is part of the United States, and if the right of self-government in the territory is subordinate to the United States with respect to both of these powers. This would provide the necessary foundation for the most unqualified right with respect to both powers in the United States.

6. But if the United States must fall back to a more qualified right to exercise either the eminent domain, or police power, or both, then, it would (a) be exercising a power normally reposed in the domestic sovereign authority and (b) would have to have safeguards in the Draft Compact or other status agreement with the territory to ensure its right to exercise such powers. Moreover, these safeguards must be expressed in general language so that detailed directives or mandates will not hamper the exercise of such a right. If the safeguards are not expressly provided, then the United States would be compelled to seek the cooperation and assistance of the territorial government, and this raised uncertainties that will impinge upon our security interests unless closely channeled. In any event it will be seen that the conflict between the "interests" of the United States Congress and the Congress of the territorial government can be foreseen, and steps taken to accommodate it or make it readily resolved.

The Exercise of the Right of Eminent Domain

As already indicated, under United States practices the right of eminent domain may be exercised for a public use (in this case for defense or strategic interests), such use defined by the United States Congress, subject to just compensation to the landowners to be determined in accordance with proceedings in the courts. The taking may be in fee (conveyance of title) or by way of lease.

-a qualification on this right might be made if the public use is defined in the Compact, rather than being left open to the United States Congress: such a qualification would not be advisable since it would be difficult at the drafting stage of the Compact to establish what such a use might be, while if left open, the Congress can determine over time what the use might be and legislate, or delegate this determination, as needed. Accordingly,

the Compact might preferably refer only to "the right of eminent domain exercisable for a public use, including in particular those uses related to defense and security interests of the territory," or

-the power to determine or assess "public use" might be vested in the territorial Congress; but this is not advisable on account of the uncertainty it creates, or

-the above power might be subjected to advisory or consultation procedures with the territorial Congress; but this raises some political uncertainty especially as to the willingness of the U. S. Congress to such procedures and must be separately assessed,

-the above power might be jointly exercised by the Congress of the United States and the territorial Congress, but the problems of political uncertainty raised above are not resolved,

-a further qualification might be made with respect to the judicial proceedings; under United States practices the matter would be referred to the Federal Courts, and therefore presumably to the Federal District Court in Hawaii. This procedure might be qualified by:

-referring the matter to a local court in place of the Federal District Court of Hawaii: but this would not be advisable or desirable since the local court proceedings might be irregular or inconsistent with established proceedings in the Federal system, or at best uncertain and appeals to higher courts in such event may be restricted or denied under the territorial judicial practice,

-referring the matter to administrative determinations by territorial bodies. But this would run counter to United States

practice, would be inconsistent with the use of judicial proceedings, and would subject United States needs and requirements to administrative irregularities and discretion, or to possible administrative error, not readily remedied through subsequent judicial proceedings,

-referring the matter to political determinations (e. g. , referendum or petition) by the people whose lands are affected, or to determinations by their representatives: but this qualification, like the others mentioned above, would be inconsistent with existing practices and may fail to afford sufficient safeguards to the United States that it will get its land needs promptly, or at a reasonable compensation, or for the desired period of time, or for the desired use.

The Exercise of Police Powers

As indicated earlier, under United States practices the police power is a right exercised in the interest of the public to regulate the use of lands as opposed to a "taking" such regulation or use, not subject to compensation. In the context of Micronesian territory such a right would be used in such situations where land adjacent to United States bases must be subject to emergency regulations as to their use or as to access in times of emergency, or where the regulated use might amount to restricted access across adjacent lands to military vehicles, and the like.

The exercise of the right of police power is essential in United States interests, and therefore the preferable legal position would be to ensure that the United States has the power to exercise the right without qualification. In the event that United States positions call for qualifications, the following may be considered:

-a qualification on this right might be demanded emphatically by Micronesian representatives (or representatives from the Marianas) unless it is qualified to their satisfaction in the Compact. Accordingly the Compact itself might provide for

such a right to be exercised by the United States only in the event of national emergencies and then to be strictly observed (the Compact's Defense Powers presently imply these powers).

-a further set of qualifications on the right may be that the police power right shall operate only if:

- a. the territorial government declares that the appropriate emergency, crisis or other situation calling for its exercise exists, and then exercises the right itself, under an exclusive right to exercise vested in the territorial government;
- b. the territorial government upon consultation with the United States determines an emergency or crisis to exist, and following such consultation either determines for itself the right to exercise the power, or following such consultation immediately proceeds without separate determination to exercise it;
- c. the United States declares upon determination that such an emergency or crisis exists, calling for the exercise upon (1) prior consultation with the territorial government, or (2) upon advising the territorial government without the right of consultation, or (3) without the obligation to consult or advise, and, the territorial government implements the police power right or the United States has the power and implements the police power right.

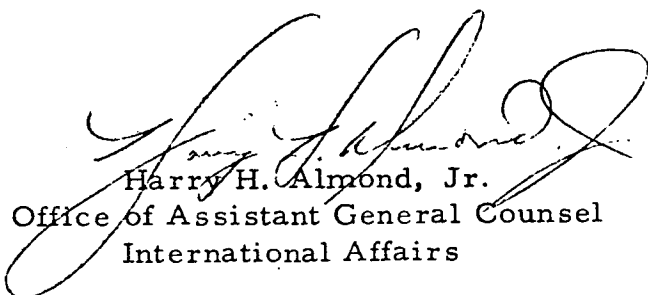
Conclusion

All of the above qualifications are set forth in terms of legal options. They clearly call for political and policy assessments. The United States will have more control if it has the power and right of both eminent domain and the police power without qualifications, but

the determining criteria must be whether the United States will in the given case be able to have the benefits from the exercise of those rights.

As indicated there will be conflicts or tensions in this matter between the legislative bodies in the United States (supplemented under our proposal by support from the Federal judiciary system) and the territorial government unless the territorial government is fully subordinated to the United States. On the other hand, it would not be advisable in any of the cases to provide for judicial proceedings or administrative proceedings, to be lodged in the territory. Apart from these observations however is the fact assumed here that the United States has carefully reviewed and now can specify its current land needs, commensurate with security and defense interests. If these assumptions are correct, and if we are only looking at the short-term needs, then the existing land should meet the minimum needs, while future needs related to a serious crisis or emergency might be met - even if the rights of eminent domain and police power are not fully specified - simply because they will be recognized at that time. But if long-term interests are involved, then closer consideration must be given to adequate protection to ensure the acquisition of future land and bases.

It should also be noted that the question of who decides and who implements the eminent domain and police power rights raises separate considerations. If these decisions go to persons within the territorial government, and if the United States is unable to be assured that such persons will decide or act upon demands made by the United States, it is self-evident that the United States would be frustrated in getting the benefits it seeks. And it would also be placed in a position where tensions between the government "in Washington" and the territorial government will arise.


 Harry H. Almond, Jr.
 Office of Assistant General Counsel
 International Affairs

cc: Mr. Barringer, ISA/FMRA
 Col. William Kenty, JCS-J-5

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