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VISIONS OF E.O. 12356 BY  
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Subject: EVOLUTION OF U.S. FOREIGN AFFAIRS POSITION IN TITLE II

You asked that I review Title II of the draft compact in order to develop a thesis on how our view of our responsibility for the conduct of foreign affairs in Micronesia evolved. You asked also that the views of various agencies be included and all fall-back positions be listed and explained.

SUMMARY

More than anything else, complete and plenary authority over foreign affairs defines from a political viewpoint an independent country. When any foreign affairs authority is given to another political entity then the resulting situation may be defined as "association". When foreign affairs authority is delegated and able to be unilaterally terminated then the association is between independent countries. However, the United States position has been that any "delegation" of foreign affairs authority would constitute an association between independent countries, and has consistently held in the Micronesian talks that to have a Free Association the United States must retain full and plenary authority in foreign affairs or the resulting association is not that of free association. All situations other than retention of foreign affairs authority especially that of "one instant of independence", constitute a delegation of authority to the United States and would define the relationship as one between independent countries.

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Fall-Back Position: On Foreign Affairs, the only fall-back position is that of Position IV, which is full foreign affairs authority to the United States defined by treaty and able to be terminated only by mutual consent.

## BACKGROUND: 1969-1973

The National Security Council approved a draft political status act on August 28, 1969 which envisaged Micronesia as an unincorporated part of the United States similar to Guam. In October of that year, Assistant Secretary of the Interior Harrison Loesch presented this view of a future status to an astonished Micronesian Political Status Delegation which had proposed a status "close to independence with some treaty ties to the United States". Responding to Micronesian concern, Secretary Loesch hurriedly put together a new proposal that the United States would agree "to forego the right of eminent domain in Micronesia" if the Micronesians would agree to permanent association. This particular attempt at salvaging the negotiations was rejected at the next round.

The Micronesians initial position on foreign affairs was contained in their draft compact which they presented at this first meeting as follows:

"SEC. 2; after the formation of the Government of Micronesia, no existing treaties, executive agreements or other international obligations to which the United States is a party shall apply to and be binding upon Micronesia unless and until the Micronesian government expressly indicates in formal writing its accession thereto," and "SEC 3. Upon the request of the Government of Micronesia, and only during such time as the request is not withdrawn, the United States shall: (a) represent Micronesia, without cost to Micronesia, in all United Nations and international agencies; and (b) conduct

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such external (international) affairs as Micronesia may assign to the United States, on behalf of the Micronesian government". The United States delegation was limited in its response at this time by its instructions to offer an unincorporated status, called commonwealth for want of a better term.

At Round II, held in Saipan on May 4, 1970, the Micronesians retreated from their earlier position on foreign affairs and in a report on that meeting, recognized that

"the responsibility for external affairs and defense would be handled by the United States and it would therefore be necessary for the United States to retain sufficient powers in those areas to enable it to fulfill its responsibilities. The Compact should provide, however, that in discharging its responsibilities in external affairs and defense, the United States would act in close consultation with the government of Micronesia on all matters which affect Micronesia. It should also provide that the government of Micronesia, subject to any exceptions, limitations or conditions that may be appropriate, has the authority to deal on behalf of Micronesia in certain specified matters in the field of external relations".

The Micronesian delegation then went on to list seven delegations of power by the United Kingdom to its free associated states. The United States delegation again hampered by its instructions could not respond to the Micronesian public retreat on the foreign affairs issue. Besides, the United States delegation still believed that their offer of a close union containing the added assurances that the United States would not exercise its eminent domain authority within Micronesia would bring the Micronesians around to signing a U.S. draft agreement. The Micronesians, however, stated unequivocally that they wished either free association or independence. Free association, they insisted, could be had only on the basis

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of United States recognition of their four principles. The four principles were and for that matter still are:

1. That sovereignty in Micronesia resides in the people of Micronesia and their duly constituted government;
2. That the people of Micronesia possess the right of self determination and may therefore choose independence or self government in free association with any nation or organization of nations;
3. That the people of Micronesia have the right to adopt their own constitution and to amend, change or revoke any constitution or government plan at any time; and
4. That free association should be in the form of a revocable compact, terminable unilaterally by either party."

Moreover, the Micronesians began to maintain that the U.S. authority in foreign affairs was not plenary and would require the consent of the Government of Micronesia on certain specified areas.

The President in March of 1971 appointed F. Haydn Williams to be his personal representative to the Micronesian status negotiations and gave him authority on July 20, 1971, to negotiate four positions. Position One was "An offer of a modified commonwealth relationship, with our concessions over our last negotiation position limited to restraint on the exercise of eminent domain and federal supremacy." Position Two was a modified commonwealth relationship with a provision for unilateral termination of the relationship; Position three was an offer of a modified commonwealth to the Marianas District and others, if they requested it, and an offer of free association to the remaining districts". Position Four, was an offer of free association which will include negotiation of a compact terminable

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only by consent of the United States and Micronesia." The increased latitude which the United States delegation now had permitted Ambassador Williams in Rounds III, IV and V to accede in part to the four principles and obtain preliminary agreement on a set of principles which the United States believed would satisfactorily define the future relationship between Micronesia and the United States. These principles are:

1. Authority and responsibility of the parties will be defined in and flow from a Compact.
2. The United States will exercise authority in foreign affairs and defense. The future government of Micronesia will exercise authority for internal affairs.
3. Following an initial period when mutual consent will be required to terminate the Compact, termination on a unilateral basis will be permissible.
4. U.S. defense authority and responsibilities, as well as land leases and options, would survive any termination of the Compact.

The four principles were contained in the joint communiques of Round IV and formed the basis of the draft of the first three articles in Round V. Although these principles were agreed to by the Micronesians, the Congress of Micronesia refused to consider at this time the agreements reached by their Joint Committee on Future Status. They then passed Senate Joint Resolution 117 calling for the JCFS also to negotiate an independence option. On the United States side, Defense Department and State Department took exceptions to the implied recognition of Micronesian sovereignty and its paramount interest in certain areas of foreign affairs, insisting that authority for foreign

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affairs be vested in the U.S. by the people of Micronesia and not delegated by the Government of Micronesia. It was at this time that the United States formally accepted the request from the Marianas delegation for separate talks. At the Sixth Round at Barbers Point, Ambassador Williams questioned the JCFS on SJR 117 asking if the Congress of Micronesia had approved of Free Association as its negotiating objective, and whether it sought a U.S. proposal on independence in lieu thereof. The Joint Committee responded that SJR 117 permitted but did not require at this time, the negotiation of an independence option. They added that their instructions required them to continue negotiations for a free associated status. However, they were unable to pursue the drafting of a compact and the negotiations were recessed for over a year.

During this year, the United States delegation met with some success with the Marianas Political Status Commission for a commonwealth status for the Marianas. At the next round of negotiations the seventh in four years, the Micronesian delegation balked at the level of financial assistance which the United States offered, and the unwillingness of the United States to increase this amount. The Micronesian delegation then threatened to tie the level of financial assistance to the authorities given in Title II and III to the United States in foreign affairs and defense. Five months later at Carmel, the Chairman of the JCFS agreed ad referendum on a completed draft compact which left intact the authorities contained in

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Titles II and III. Less than six weeks later, he presented several modifications to Title II for our consideration.

These modifications include the idea of a "delegation" of foreign affairs authority to the United States and independent authority for Micronesia to exercise foreign affairs responsibility in specified areas.

## UNITED STATES POSITION ON FOREIGN AFFAIRS

The United States delegation is at a certain disadvantage in reopening Title II. In 1970, in the Micronesian Political Status Committee's report to the Congress of Micronesia, the Micronesians recognized that it would be "...necessary for the United States to retain sufficient power in foreign affairs to enable it to fulfill its responsibilities". Our position papers have since assumed that short of position IV, we would retain acknowledged full authority over foreign affairs and defense and would only have to define areas where we might be willing to release some of that authority to them. The Bureau of International Organization Affairs on September 21, 1971, wrote a memorandum to Ambassador Hummel, then Chairman of the Inter-agency Group which raised the issue of foreign affairs responsibility and authority at position IV.

At position IV a precise definition of the scope of our authority would probably be required. Even if the Micronesians did not insist, the treaty setting forth the terms of the association would have to be clear as to those powers the Micronesians were agreeing that we might exercise. For the purposes of the October talks, however, even if we should get as far as Position IV, a more general description of our authority should suffice. We would say that we would have authority to enter into treaties on behalf of Micronesia and to include Micronesia under the provisions of international agreements

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which we accepted; we would have the authority to represent and speak for Micronesia in international forums and on a bilateral basis; we would have the authority regarding foreign entry of trade, investment, individuals, ships, planes and so on, into Micronesia; we would likewise have certain authority related to Micronesian contacts and relations with foreign countries - the extent of our authority being limited in large areas by the rights of individuals. We would in short have the same authority with respect to Micronesia that we have with the fifty states and territories - none of which would rule out consultation with Micronesia on the exercise of that authority or even the delegation of that authority to Micronesia in specified areas under established conditions.

"...In general we would stress, that in exercising our responsibility for Micronesia's foreign affairs we have a responsibility towards the American people and to the rest of the world as well as towards Micronesia. In delegating authority to Micronesia we could not delegate that responsibility. We would also stress the inter-relationship between foreign affairs and national security; one of the central limitations we would have to place on any grant of authority to Micronesia would relate to dealings with powers presently or potentially hostile to the United States."

At Position IV United States would be given full foreign affairs authority much of which would be released to the Micronesians. This authority would flow from the treaty and be superior to their constitution. The United States would have a veto over any foreign affairs action or initiative that the Micronesians may wish to take if that action is contrary to our responsibilities "towards the American people and to the rest of the world" or to our sense of national security. This view requires that even under a treaty relationship full unrestricted authority over foreign affairs must be given to the United States and is reinforced in a memorandum by John Armitage, IO/UNP, to Ambassador Hummel on December 15, 1971. Mr. Armitage states in part:

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"Unless we are at the stage of negotiating Micronesian independence we cannot agree to a Micronesian veto in foreign affairs or to any assertion that the United States can exercise only those foreign affairs powers specifically delegated by the Government of Micronesia. As was borne out at Hana, however, we will probably do better to focus the discussion on specific modalities and avoid precipitating matters by arguing about underlying principles. While we will have to make it clear that we must retain full plenary responsibility in foreign affairs, nevertheless, we should focus more attention on what we are prepared to grant rather than what we must withhold".

What we must withhold is the ability of Micronesia to either veto any United States agreement or to enter into any agreement with a foreign entity without our implied or stated consent. What we are prepared to grant is all authority in foreign affairs "excepting with specific countries where questions of national security become involved as well as limitations arising from obligations already incurred under international instruments" for example, economic sanctions against Rhodesia under Article 25 of the United Nations Charter or certain types of monetary obligations under the Breton Woods agreement. Therefore, it is the Department of State's opinion that an associated state is defined by the fact that its foreign affairs responsibility and authority is exercised by another state. This means that the United States takes the position that it cannot be expected to enforce rights with which it may disagree and which may even be contrary to its own international interests and obligations. Ronald Stowe L/UNA states succinctly in a memorandum of March 17, 1972 titled Draft Talking Points on Foreign Affairs to Captain Crowe of this office "...in the view of the United States, the

matter of foreign affairs authority must be clearly and satisfactorily resolved if we are to accept the obligations and burdens which you request we assume in a new relationship. In short our position is that full authority over matters relating to foreign affairs must remain with the United States." In the covering memorandum, Mr. Stowe writes "...we strongly recommend that our first approach be focussed unequivocally on our insistence on full control over foreign affairs".

DELEGATION OF FOREIGN AFFAIRS RESPONSIBILITY

More than any other right, including rights under agreements for common defense, the right to exercise complete and plenary authority over foreign affairs defines an independent country. When this authority is not exercised by a government, that government is normally said not to be fully independent. However, a government which retains residual rights to exercise foreign affairs may be considered independent, for example, in a protectorate, full and plenary authority over foreign affairs is delegated by the government of the protectorate to the protecting power. As early as April 1972, the Micronesians began to insist that United States authority in foreign affairs be "delegated". Senator Sali stated on April 6, 1972, the Micronesian position at Koror:

"It is essential that the Compact and the new relationship which it brings into existence recognize the fundamental sovereignty of the State of Micronesia. Intrinsic to the concept of sovereignty is the authority of a country over both its internal affairs and its foreign relations. Recognizing the security interest of the United States which are not identical to those of Micronesia, the Micronesian delegation is prepared to

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recommend to the Congress of Micronesia that full authority be delegated to the United States for conduct of the external relations of Micronesia which bear significantly on international security matters. On the other hand the Government of Micronesia must reserve to itself the authority to negotiate and consummate arrangements that relate to matters of trade, economics, foreign investment and cultural affairs that are not directly relevant to security and defense matters".

Ambassador Williams answered this on April 8, stating:

"You it seems to us, have described a sovereign state with full authority over internal and external affairs, which might delegate certain limited and circumscribed authority in foreign affairs and defense to the United States. What you are outlining is not Free Association but Independence. The term Free Association is not a precise legal term but in international practice it has meant a division of authority with one party being responsible for internal affairs and the other for foreign affairs and defense".

The issue was not confronted by the Micronesians here. On April 12, the Micronesian delegation again raised the idea of delegation of authority. In an attempt to obtain an agreed summary of the proceedings the delegation offered the following language on foreign affairs:

"The Compact will delegate to the United States Government responsibility to act as agent of the Government of Micronesia in all government-to-government relations..."

The final joint communique, however, had language acceptable to the United States as the authority over foreign affairs and defense would be "vested" in the United States presumably by the people of Micronesia, under the Compact of Free Association. "Under it, the people of Micronesia will vest in the Government of Micronesia authority over their internal affairs while authority over and responsibility for foreign affairs and defense will be vested in the Government of the United States".

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At issue here is the question whether authority over foreign affairs and defense would be vested in the United States by the people of Micronesia or whether the future government of Micronesia would receive these powers and would then delegate some or all of them to the United States. This question is important as "delegation" implies setting up of a trust arrangement with the Government of Micronesia. Even delegation of full authority in foreign affairs may then bind the United States to promote the interests and welfare of Micronesia and avoid those actions contrary to the interests of the Micronesians. The Government of Micronesia could then argue that a specific action taken by the United States in the field of foreign affairs abused the delegation of authority contained in the compact as, in the opinion of the Government of Micronesia, it was not in the best interests of Micronesia.

Although conceptually we tend to identify a delegation of authority with a right to withdraw this authority, legally this may not be the case, unequivocal authority may be legally delegated for the life of an agreement. U.S. instructions for the United States delegation require "U.S. responsibility for and authority over all matters which related to foreign affairs of Micronesia and to defense in Micronesia." which might legally be achieved within the most recent draft language of the Joint Committee, especially if that delegation of authority is said to be "full and plenary" and the clause "notwithstanding any other provision of this compact" is added. However,

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politically, acceptance of a delegation of authority may be construed as a retreat by the United States on the question of full authority in foreign affairs, and encourage other interested territories such as Guam and Puerto Rico to request similar concessions.

FALL BACK POSITIONS

A retreat on the exercise of full foreign affairs responsibility and authority in Micronesia results in either Position IV or one of three qualified independence options. These options are: one independence with base rights in Kwajalein, two independence with a prenegotiated defense treaty, and three, independence with a prenegotiated agreement or treaty giving the United States effective authority over Micronesian defense and foreign affairs. The Department of Defense is opposed to all the qualified independence options as it believes that none would guarantee the United States security interests in the Pacific area. The Departments of State, Justice, Interior and OMB in varying degrees support the concept of an independence option but all except the Department of Interior believe that the odds are against the Micronesians accepting such an option. Interior believes we should study the independence option more carefully. Therefore the only fall back position acceptable to all interested U.S. government agencies and with any likelihood of success is Position IV which establishes a Free Associated State by treaty, permits the delegation of authority but requires that the delegation be full and plenary authority in and responsi-

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bility for foreign affairs and defense in Micronesia. The most recent language of the Joint Committee suggests that this may be their new negotiating objective.

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