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POSITION PAPER: SIX VS. FIVE DISTRICTS

Subject: JCFS Negotiations for six rather than five districts

With the strong probability that before the next elections to the COM the Marianas will request to be administered separately from the rest of the Trust Territory, I have been asked to review the JCFS position that they are negotiating for six rather than five districts.

SUMMARY

The Joint Committee on Future Status is bound by SJR 38 of February 26, 1973, and HJR 102 of August 5, 1970, from the Congress of Micronesia to negotiate for six districts. Moreover, the Congress of Micronesia cannot change this mandate because to exclude one district from legislation of "territory-wide concern" may violate the equal protection of the laws clause in the Trust Territory Code. Interior Secretary Order 2918 as amended which provides for a popular elected legislative body in the Trust Territory prohibits it from enacting legislation inconsistent with the Micronesian Bill of Rights which includes the right to equal protection of the laws. This right has been held to guarantee that all persons will be treated alike under like circumstances, and therefore to obligate legally the Congress of Micronesia to include the Marianas in legislation of "territory-wide concern". Status negotiations, the Constitutional Convention, return of public lands, and the Education for Self-Government Program are all of "territory-wide

concern". It follows, therefore, that the Congress of Micronesia's legal responsibility for the Marianas can end only if action is taken by the United States. This action may be taken by the President or the Secretary of the Interior. The U.S. legal action would be based on the requirement in the Trusteeship Agreement to promote the development toward self-government of the "peoples" of the Trust Territory.

#### DISCUSSION

The Mariana Islands with the exception of Rota were separated from the rest of the Trust Territory from November 10, 1952 (EO 10408 and EO 10470) through May 7, 1962, and the Trust Territory was administered as though it contained five rather than six districts. In 1962, by Executive Order 11021, President John F. Kennedy established the Trust Territory Government and provided for a popularly elected legislative body.

After two rounds of formal negotiations for a future political status, the Congress of Micronesia recognized that the United States had a radically different plan for Micronesia's future than that shared by the Congress of Micronesia. Wishing to forestall consideration of the desires of the Mariana Islands for a close association with the United States as expressed in plebiscites in 1961, 1963 and 1969, passed House Joint Resolution (HJR) 90 of August 20, 1970 which declared in face of strong opposition by the Mariana Islands:

"Be It Resolved...that the Congress of Micronesia hereby declares that the offer of Commonwealth status for Micronesia in the form that it was presented to the Congress of Micronesia through its Political Status delegation during the discussions in May with representatives of the Executive Branch of the U.S. Government is not acceptable to the Congress of Micronesia."

The COM realizing that this only gave reason to the Marianas to seek a separate status, passed Senate Joint Resolution (SJR) 99 of August 24, 1970. SJR 99 states in part

"...Be It Resolved...that this Congress hereby declares that the United States and the United Nations should take no action on any matters relating to the future political status of Micronesia without first obtaining the consent and approval of the Congress of Micronesia."

This resolution was a far-sighted move to hold the United States to ransom for the COM's own inability to compromise and trade-off cherished positions for a greater good.

The Congress of Micronesia had by these resolutions, severely limited the options of its Joint Committee on Future Status which could now negotiate only a compact of Free Association. After the 4th round of negotiations at Washington, the COM passed SJR 117 of September 2, 1972, in which the JCFS was "authorized and directed to conduct negotiations with the United States regarding the establishment of Micronesia as an independent nation..." because it was now considered a "sacred duty and responsibility of the Congress of Micronesia to explore fully the alternative of independence...". It is clear that the Congress of Micronesia was under intense pressure to pre-

serve its mandate for "territory-wide concerns". Its action in passing SJR 117 may have been a childish reaction to the United States acceptance in April 1972 of a request by the Mariana Islands for separate negotiations. It also may have been a serious attempt to stop further Marshallese efforts at fragmentation, such as, the defeated HJR 100 put forward at the last COM meeting in January which stated:

"Each district of the Trust Territory has the right to enter into and conclude negotiations between it and the United States regarding its own particular future status."

In any event, the resolution effectively torpedoed the status negotiations three weeks later at Barbers Point, and led the United States to formulate a firm position on the rapid entry of the Marianas into the United States political family.

The Congress of Micronesia then at its next session, placed on record its opposition to fragmentation. The COM passed SJR 38 on February 26, 1973, which states:

"Be It Resolved...that it is the sense of the Congress that the Trust Territory of the Pacific Islands is one single and indivisible political unit, and the Trusteeship may not be terminated or modified as to one part thereof while another part or parts thereof remain under such Trusteeship; and

Be It Further Resolved that it is the sense of the Congress that the Congress of Micronesia, through the Joint Committee on Future Status, is the sole authority in the Trust Territory of the Pacific Islands which is legally authorized and empowered to conduct negotiations with regard to the future political status of the Trust Territory, including all parts thereof, and the Congress has the sole responsibility to negotiate on behalf of and provide for the future political status of the entire Trust Territory; and

Be It Further Resolved that the Joint Committee on Future Status is hereby directed to continue its negotiations with the United States of America based on

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the guidelines set forth in this Senate Joint Resolution."

Once said, the Congress of Micronesia could not now recognize the unique status of the Marianas to conduct negotiations in spite of the fact that these negotiations were already going on. The Congress of Micronesia and its agent the Joint Committee on Future Status now have no flexibility nor options. They have abandoned all attempts to control events. They are apparently depending on the Trusteeship Council and the United Nations to force the unification of the Trust Territory.

Less than two months later, in April 1973, the Marshall Islands established a political status commission. The uproar it caused between Senator Salii and Amata Kabua led Kabua to resign from the JCFS a few months later and appoint the firebrand Ataji Balos in his place. During the public controversy, The Pacific Daily News of April 18, 1973 carried some of Senator Salii's remarks about the Marshalls action in which Salii states clearly that he believes a plebiscite is necessary prior to conducting separate negotiations:

"Salii is reported as having challenged legality of Marshalls action, referring to passage of COM resolution declaring JCFS sole authority to negotiate for Micronesia. He declared separate negotiations justified only if plebiscite were conducted in Marshalls giving authority for separate negotiations and constituting act of self-determination. On those grounds, Salii is reported to have said, separate negotiations for Marianas were justifiable since plebiscite had been held with petitions and resolutions directed to COM, U.S. Congress and U.N. during past ten years.

Story says Salii charged that Nitijela's actions were prompted by Amata Kabua who, in Salii's reported opinion, should not have joined JCFS if he intended to initiate separate negotiations.

Salii reportedly felt U.S. had no legal basis for accommodating Marshalls move to separate from rest of TT since 'a few men making noise and attracting attention cannot be considered an act of self-determination'."

This statement explains the reasons why the JCFS appears in private to accept the fact that they are negotiating for five rather than six districts even though in public they do not have any flexibility.

#### THE LEGAL POSITION

Under Article 6 of the United Nations Trusteeship Agreement, the United States Government has the duty to

"promote the development of the inhabitants of the Trust Territory towards 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."

This Article has been held to mean that the United States "holds broad authority and full discretionary powers to establish an administrative system to effect a government for the Trust Territory as may be appropriate to the particular circumstances in Micronesia. This authority includes, inter alia, the power to establish separate administrative entities apart from or within the general Trust Territory Government infrastructure..." However, although the United States holds broad authority in this area, the authority of the Congress of Micronesia is very much limited. In a memorandum from Adrian deGraffenried to Ambassador Haydn Williams of March 11, 1974,

quoted from above, the legal obligation of the Congress of Micronesia to include the Mariana Islands is stated as follows:

"The COM was legally obligated to include the Mariana Islands District in legislation calling a Micronesian Constitutional Convention. The COM holds legislative power extending to 'all rightful subjects of legislation' (Part III, Section 2, Secretarial Order 2918, as amended) and is '...primarily responsible for... problems of territory-wide concern', (Title 2, Trust Territory Code, Section 1). Clearly, a Constitutional Convention bill is such a concern. Furthermore, the COM is prohibited from enacting legislation inconsistent with the first twelve sections of the Trust Territory Code (The Micronesian Bill of Rights). Part III, Section 2(d), Secretarial Order 2918, as amended. The Micronesian Bill of Rights includes, inter alia, the right to equal protection of the laws. That right has been interpreted as a right that guarantees that all persons will be treated alike under like circumstances. This concept is a part of the law of the Trust Territory (Ichiro vs. Bismark (1953), 1 TTC 57, 60-61; Mesechol vs. Trust Territory (1959), 2 TTC 84, 87-90).

Residents of the Mariana Islands would be treated in a significantly different and unequal manner than the residents of those other districts participating in a constitutional convention if the Marianas would be excluded by legislation from participating in a constitutional convention particularly if any Marianas resident shared the political aspirations of the other Micronesian districts. This view is supported by legal opinions from the Attorney General of the Trust Territory and the Office of Legislative Council of the COM."

The important word here is "territory-wide concerns" of which not only the Constitutional Convention is an example but also the Education for Self-Government Program, the return of public lands issue, and status negotiations, especially considering that the Trusteeship Agreement must end at the same time for the entire Trust Territory. According to Salii's April 18 state-

ment, the Congress of Micronesia may be willing to approve separate negotiations when there is a plebiscite by the people of a district requesting it. The Marianas had such a plebiscite in November of 1969, in which 1,942 people voted for reunification with Guam, 1,116 for Free Association, 107 for unincorporated territorial status and 40 for independence. This desire to integrate with Guam seems to have since evolved into a desire to be a separate commonwealth after local political leaders had a chance to review the U.S. commonwealth proposal of May 1970.

In any event, the Congress of Micronesia, under the present Secretarial Order 2918 of December 1968 which establishes and governs the COM, has legislative jurisdiction over all districts of the TTPI, and does not have the authority to discriminate against any one or several of the districts. However, the COM has not extended to the Marianas its permission to conduct separate negotiations, but has passed SJR 38 and HJR 102 requiring the JCFS to negotiate for all six districts.

#### ISSUES

1. JCFS inability legally to negotiate for five districts rather than six complicates the negotiations and confuses the public.

2. The COM inability to authorize the JCFS to negotiate for five districts forces the Marianas delegation to participate in "territory-wide" problems which do not concern them.



OPTIONS

1. Separate the Mariana Islands from the Trust Territory by amending Secretarial Order 2918 to remove the COM authority from matters concerning the Marianas.

PRO

a. This is the logical next step in the process of negotiations with the Marianas and is expected by all concerned.

b. It removes the problem from the shoulders of the COM at exactly the time when the dilemma occurs.

c. It keeps the COM in the corner where they have backed themselves.

CONS

a. It is contrary to SJR 38 and SJR 99 in that no approval of the COM is sought.

b. It may complicate final approval of the termination as the United States will have gone against the expressed wishes of the representatives of the people of Micronesia and of the United Nations.

2. Amend Secretarial Order 2918 giving the COM authority to approve the separation of a district under special conditions in lieu of a plebiscite.

PRO

a. It would answer SJR 38 and 99 and United Nations objections thereby putting the Marianas on more secure relationship.

b. It would bring the COM back into the arena, thereby demonstrating again our efforts to lead them, kicking and screaming, into self-government.

CONS

a. The amendment would lead to further fragmentation of the other districts.

b. It may lead to condemnation by the United Nations of a "policy to divide and conquer".