page 3 missing

D 0002

NL

R

OFFICE FOR MICRONESIAN STATUS NEGOTIATIONS

WASHINGTON, D.C. 20240

Copied per Dept. of State request

September 24, 1974

SECRET

MEMORANDUM

JAS

To: Ambassador F. Haydn Williams, The President's Personal Representative for Micronesian Status Negotiations

From: Adrian de Graffenried, Legal Adviser

Subj: Proposed JCFS changes to draft compact; additional thoughts

Lazarus Salii's letter of 9 September (signed and prepared by Mr. White) lists the rationale for the proposed changes to the Guam draft compact. The letter puts the intentions of the Joint Committee on record. This letter also supercedes our earlier working group discussion on the JCFS proposals for change and is the reason for this memorandum. I propose some additional thoughts on the JCFS rationale and suggested changes.

1. Title and Preamble. Deletion of the phrase "free association" poses several significant problems. As with Puerto Rico, the less clear and specific the agreement, the more possibility for misinterpretations and attempts to claim rights not envisioned under the agreement. The term "free association" is a term of art in international law that helps to define and delimit the rights and obligations to that particular political status relationship. Deletion of this term offers the JCFS/COM the opportunity to promote their own interpretation of the relationship. To quote the 9 September memorandum. "...you may think of it as whatever you choose to, and we will do the same". The JCFS could thus attempt to describe the new Micronesian political status as "independence" with the U.S. being delegated certain defense and foreign affairs responsibility following Mozambique and Angola precedents. This could also raise the sovereignty issue; the JCFS might take the position in international circles that all "residual" sovereignty vested with the new GOM at the end of the Trusteeship. This posture could have adverse implications on our ability to effectively exert our foreign affairs and defense authorities. Being forewarned, we should reject this proposed change as suggested in the IAG Working Group.

2. Preamble. Insertion of a new "whereas" clause to denote a "close and enduring relationship". The IAG Group recommended we hold off our decision. Although the 9 September memorandum notes that this proposed change is not substantive, the tenor of the JCFS changes (including a provision for termination due to material breach, etc.) weigh in favor of a rejection of this insertion. The new changes by the JCFS do not reflect a Micronesian desire for any "close and enduring" status relationship with the U.S.

DEPARTMENT OF STATE A/CDC/MR REVIEWED by RHZ Date 8/19/98
EO, EO or PA exemptions TS authority
X RELEASE X DECLASSIFY ( ) CLASSIFY as
( ) EXCISE ( ) DECLASSIFY in PART ( ) DELETE
( ) DENY ( ) Non-responsive info. ( ) DOWNGRADE TS to ( ) S or ( ) C, CADR

DECLASSIFIED

3. Section 101. Adoption of a requirement that the Micronesian Constitution "not be inconsistent" vice "..remain consistent.." with the Compact. The IAG Group recommended we hold our decision. The U.S. terms ("...remain consistent..") are words of art delimiting the GOM authority so as to clarify that GOM authority under the Constitution must also conform to the compact. Thus any GOM authority that conflicts with the terms of the Compact would be unconstitutional and could not be exercised. The new JCFS approach to Section 101 authorizes considerably more freedom of action in drafting a Micronesian constitution and grants greater explicit authority to its government. In this regard it must be noted that the JCFS has indicated elsewhere in COM resolutions, etc., that Micronesian sovereignty would come from the Constitution. The 9 September memorandum also states, "...the Constitution of Micronesia must be the supreme law of Micronesia". The U.S. takes the position that all rights to internal self-government flow from the Compact. The U.S. takes this position for legal and political reasons intricately connected to the foreign affairs and defense titles and to assure that no sovereignty vests with the GOM on termination of the agreement. To preclude future conflicts over the issue of where sovereignty derives and where residual sovereignty vests, I recommend we reject this JCFS proposal.

4. Section 102. Internal authority of the GOM. The JCFS proposes to vest authority with the GOM over "...all matters which relate" to the internal affairs of Micronesia. This would parallel U.S. approaches in U.S. authority in foreign affairs and defense matters. The IAG Group recommended holding action for the present. The U.S. approach to the delimitation of the three authorities (internal, foreign affairs and defense) was legally constructed to vest broad authority with the U.S. in foreign and defense affairs and restrict GOM authority over internal matters. This would prevent the GOM from taking unilateral action that had foreign affairs or defense implications so as to preserve U.S. preeminence in these matters. To protect our preeminence in these areas and to avoid future conflict as to the extent of U.S. authority in the free association relationship, I recommend this JCFS proposal be rejected.

5. Section 202. Applicable Treaties. The JCFS proposes the future GOM have the right to consent (veto or approve) international treaties "..which have a particularly pronounced effect on Micronesia"...The 9 September memorandum notes that although a multinational treaty might be of general applicability to all nation states, it might have "...such a primary and pronounced effect on Micronesia as to make our (GOM) consent imperative for the protection of our interests". This proposal significantly expands the approval/veto power of the GOM over applicable treaties under Section 202 and is so vague in the standard it seek to apply to these treaties warrant its rejection as suggested by the IAG.

16-432111

3. Section 101. Adoption of a requirement that the Micronesian Constitution "not be inconsistent" vice "..remain consistent.." with the Compact. The IAG Group recommended we hold our decision. The U.S. terms ("...remain consistent..") are words of art delimiting the GOM authority so as to clarify that GOM authority under the Constitution must also conform to the compact. Thus any GOM authority that conflicts with the terms of the Compact would be unconstitutional and could not be exercised. The new JCFS approach to Section 101 authorizes considerably more freedom of action in drafting a Micronesian constitution and grants greater explicit authority to its government. In this regard it must be noted that the JCFS has indicated elsewhere in COM resolutions, etc., that Micronesian sovereignty would come from the Constitution. The 9 September memorandum also states, "...the Constitution of Micronesia must be the supreme law of Micronesia". The U.S. takes the position that all rights to internal self-government flow from the Compact. The U.S. takes this position for legal and political reasons intricately connected to the foreign affairs and defense titles and to assure that no sovereignty vests with the GOM on termination of the agreement. To preclude future conflicts over the issue of where sovereignty derives and where residual sovereignty vests, I recommend we reject this JCFS proposal.

4. Section 102. Internal authority of the GOM. The JCFS proposes to vest authority with the GOM over "...all matters which relate" to the internal affairs of Micronesia. This would parallel U.S. approaches in U.S. authority in foreign affairs and defense matters. The IAG Group recommended holding action for the present. The U.S. approach to the delimitation of the three authorities (internal, foreign affairs and defense) was legally constructed to vest broad authority with the U.S. in foreign and defense affairs and restrict GOM authority over internal matters. This would prevent the GOM from taking unilateral action that had foreign affairs or defense implications so as to preserve U.S. preeminence in these matters. To protect our preeminence in these areas and to avoid future conflict as to the extent of U.S. authority in the free association relationship, I recommend this JCFS proposal be rejected.

5. Section 202. Applicable Treaties. The JCFS proposes the future GOM have the right to consent (veto or approve) international treaties "..which have a particularly pronounced effect on Micronesia". The 9 September memorandum notes that although a multinational treaty might be of general applicability to all nation states, it might have "...such a primary and pronounced effect on Micronesia as to make our (COM) consent imperative for the protection of our interests". This proposal significantly expands the approval/veto power of the GOM over applicable treaties under Section 202 and is so vague in the standard it seeks to apply to these treaties warrant its rejection as suggested by the IAG.

SECRET
16- 432112

is no need to issue U.S. passports as a precondition to offering U.S. diplomatic protection. I would also note to the JCFS that U.S. passports would not be issued to Micronesians unless Micronesians became U.S. nationals. The JCFS proposals for unrestricted residency and work in the mainland U.S. should be rejected; a fallback might be to accord reciprocal treatment to Micronesians on these matters. The U.S. position requiring U.S. consent to Micronesian residency in U.S. territories should continue as proposed.

9. Annex B. U.S. military land requirements. Inclusion of the Marianas in Annex B is proposed by the JCFS on the basis that the Compact of Free Association must be voted upon by the Marianas District prior to the commonwealth plebiscite. The IAG recommends rejection of this provision. I concur.

10. Other proposals as follows:

a. Section 302(b). The JCFS proposes that U.S. defense authority does not include the right to use any land and waters in Micronesia other than as specified in Annex B, except that the U.S. has a right of transit. The IAG recommends this be rejected. I concur.

b. Section 303(b). The JCFS proposes that it will seek to limit the storage and use of nuclear, chemical and biological weaponry in Micronesia. The IAG recommends rejection of this proposal on the basis the U.S. "neither confirms nor denies" the presence of CBN weapons. I concur with the recommendation but note the the United States has generally confirmed the presence of weapons in Western Europe. Further, as a practical matter all Micronesians strongly suspect that nuclear weapons are stored in Guam. The IAG rationale would this not provide a sufficience defense to avoid future discussions on the issues involved; in fact, a failure to meet this issue with the Micronesians may raise questions of candor and sincerity on the part of the United States Government. It would seem that a better approach would be for the U.S. to candidly note that the issue of CBN will not be addressed in the status agreement or the terms of the leases; because the United States Government could not permit any limitations that would affect the operational ability of U.S. defense forces. We should note at the same time that the U.S. Government will insist under any status arrangement with Micronesia that United States defense capabilities will not be impaired; this should deflect any Micronesian attempts to lean towards independence to deny protection to U.S. security interests.

c. Section 304(c). Assignability of rights under the Compact The 9 September memorandum proposes that no U.S. rights under the agreement be assignable. The IAG concurs.

d. Title XI. Termination. The JCFS memorandum takes the position that any material breach of provisions of the compact can be a basis for termination of the entire compact, e.g., that the failure of the U.S. to meet the terms of the Compact can be used by the GOM as grounds to repudiate the entire Compact notwithstanding that other titles provide for negotiations in these instances, and that a mutual security agreement be negotiated satisfactory to both parties before termination can be effected.

The IAG recommends rejection of the new JCFS position. I concur; however, I would also note that because of differences in perspectives and because many provisions are therefore capable of diverse interpretations, a material breach could be claimed for almost any U.S. action that does not meet GOM standards or expectations. Title X would, as drafted, require that both sides negotiate any dispute arising under the agreement, e.g., whether the U.S. has met its financial obligations. Title X does not, however, resolve the issue of what would occur if a satisfactory settlement in a dispute could not be negotiated; Title XI does address unilateral termination. Under international law and practice, a material breach of agreement is grounds for termination of that agreement unless the parties agree to other procedures for resolution of a breach. The Compact does address this. As a matter of reality, it would be impossible to prevent the GOM from claiming a material breach and taking action unilaterally to terminate the agreement. Reality again dictates that termination by the GOM for these reasons could occur notwithstanding the fact that Title X provides a remedy for breach (negotiation) and that Title XI specifically addresses unilateral termination and require that a mutual security agreement be negotiated prior to any termination of the agreement. To meet this new issue, I would suggest (1) that we note for the record that we hold Title X to apply to disputes as to whether there is a material breach and hold Title XI provisions to apply to any proposed action for unilateral termination, and (2) that we counter-propose to the JCFS that Title X (dispute settlement) be explicitly amended to reflect that a fail to reach satisfactory settlement of the dispute during the first fifteen years will remain governed by the provisions of Title XI, e.g., that there can be no unilateral termination until after 15 years and then only in accordance with the procedures agreed upon, e.g., negotiation of a mutual security agreement and a Micronesian referendum on whether to terminate.

11. Additional Observations

It seems the JCFS has proposed positions previously thought to be resolved. This indicates to me that the JCFS perceives this opportunity as their last to obtain their preferred positions and also indicates that the JCFS perceives the negotiations to be nearing the final stages. Nevertheless, circumstances are not

10 - 432114

in favor of the JCFS if they attempt to obtain leverage with the United States by delay, especially if the delay extends beyond late spring for an agreement. The Marshalls and Palau Groups may resolve their differences with the COM at the January COM session or at the CON CON. It would seem to be in our best interests to permit these two districts to resolve their differences with the COM prior to submitting a status agreement to the full COM for its consideration as this increased pressure may work against early ratification of our efforts. An added consideration is the need to complete the Palau land negotiations which may require two to three months as Palau is currently focused on its own CON CON and has not resolved how to internally resolve the public land entity or the U.S. military land options.

AdeG:kkc

DECLASSIFIED

10- 432115