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March 21, 1974

Howard:

Attached are the following:

-- A memorandum containing my thoughts on the Carnegie Foundation draft chapter;

-- A copy of the chapter on which Jay and I have scribbled;

-- An article on Self-Determination by Professor Emerson.

A memorandum by a law clerk on the British Cameroons is being typed and will be ready early tomorrow morning.

We have until April 22 to answer or move in ETS.

Mike

07563

March 21, 1974

MEMORANDUM FOR HOWARD WILLENS

Subject: Carnegie Foundation Report

You asked for my thoughts on the attached draft of a chapter of the Carnegie Foundation Report on Micronesia. This memorandum first discusses in general terms that portion of the chapter entitled "Micronesia, Self-Determination, and the Problem of Fragmentation" (pp. 19-26), for it is of the greatest potential concern to the Marianas. The memorandum then offers comments on certain specific items throughout the entire chapter.*/

I. General Comments on "Micronesia, Self-Determination, and the Problem of Fragmentation"

This portion of the draft chapter is critical of the separate Marianas negotiations, apparently on three basic grounds: the United States has encouraged the separate negotiations to protect its defense interests; the people of the Marianas do not constitute a separate "people" entitled to self-determination separate from the people of Micronesia as a whole; separate negotiations for the Marianas will lead to separate negotiations for each of the districts, creating undesirable fragmentation of all of Micronesia (and elsewhere in the world).

U. S. Encouragement: Even if the U. S. has encouraged the separate negotiations (whether because of its defense interests or otherwise), that encouragement is relevant to the legitimacy of the separate negotiations only if there is some reason to believe that the separate negotiations do not accurately reflect the desires of the people of the Marianas. U. S. encouragement of the separate negotiations, in other words, may be objectionable in principle, but it does not make the separate negotiations improper unless the views of the people of the Marianas are not fairly being represented. Yet there is no suggestion in the chapter that the people of the Marianas really do not want a separate status. Indeed, the historical record shows their repeated expressions of a desire for a close and enduring relationship with the United States. And a plebiscite on the proposed status will be held so, given any sort of fair political education program, the views of the people will fairly and finally be expressed then. Moreover, to the extent the chapter implies that the United States should have discouraged separate negotiations and encouraged Micronesian unity (see p. 21), it assumes away the very question at issue: are the people of the Marianas entitled to decide for themselves their future status?

*/ Our copy of the draft does not contain the footnotes, so an exhaustive review of the source material the draft relies on was not possible, even if it were desirable.

07564

People Entitled to Self-Determination: This is the central question: how does one ascertain the unit which is entitled to self-determination? My brief research indicates, and the chapter implicitly concedes, that there is no simple formula by which to make this decision. The chapter discusses two views: the view that only the entire population of "a generally accepted political unit" can exercise the right of self-determination, and the view that any "group of people ethnically bound together" should have that right (pp. 21-22). The former view, says the paper, is taken by those who oppose the separate negotiations; the latter, by those who support them (id.). Neither view is very satisfactory in the present context.

The "generally accepted political unit" view may be viable when the question is whether a group of persons will be permitted to secede from an independent state. But when the issue is the creation of a new state or states from a dependent territory -- especially one so arbitrarily put together as TTPI -- it is not clear why the political unit which the international community or the administering authority once thought was appropriate for its purposes must continue to be maintained. After all, the decision to create the TTPI was not made by her citizens, nor agreed to by the Marianas. If the people of the Marianas have to abide by that decision forever, they will have lost the right of self-determination permanently. Moreover, to the extent it is true, as the paper says, that fragmentation "'is incompatible with the maintenance of a stable and organized society'" (p. 22, source of original cite unknown), this is not a reason to force the Marianas to remain part of Micronesia. It is, rather, a reason that the decision as to the future status of the Marianas ought to be made by the people of the Marianas before a new political status for the TTPI is reached. If the Marianas are forced to join a political unit they do not want to be part of, the chances of "explosive and disruptive" fragmentation (by secession) will surely be increased.

Nor is the ethnic factor alone satisfactory, for there are other factors which should properly be taken into account in determining the unit which is entitled to exercise the right of self-determination. As the chapter notes, the justification for the separate negotiations is that the Marianas "are different historically, culturally, socially, politically, and economically from the other five districts" (p. 19), and these plainly are relevant factors too.*/

*/ Professor Emerson suggests that geography may also be a relevant consideration, for "[g]iven a geographically distinct territory" self-government may be possible for the particular minority which occupies it, while "a people intermingled with the dominant majority people", like blacks in the United States, cannot achieve self-determination "short of mass migration." Emerson, "Self-Determination", 65 A.J.I.L. 459, 472 (1971).

If the proper analysis of the question whether a given unit of people is entitled to exercise the right of self-determination upon termination of the trusteeship must take into account the various factors mentioned above, then the chapter's analysis is plainly inadequate. There is a brief discussion on pp. 19-20 of certain factors, but a more detailed discussion seems appropriate. Moreover, the political differences between the Marianas and the other five districts -- though acknowledged to be one of the factors the Marianas relies on -- is not discussed at all. Yet these differences (compare the Marianas' view toward a permanent relationship with the United States, United States citizenship, and a democratic government with three separate branches), for example, with the apparent views of the other districts) are critical, and provide considerable justification for the separate negotiations.

Fragmentation Elsewhere: The easy answer to the paper's argument that separate negotiations for the Marianas will lead to fragmentation elsewhere within and without the TTPI is that if it is right for the Marianas, the other groups who can make the same showing of the reasons justifying separate treatment and who want to exercise their right of self-determination should be allowed to do so. The question in each case, then, would be a factual one, whether the same showing can be made. With respect to the possibility that the rest of Micronesia will be split up, two additional points can be made. First, that this is a real possibility shows the artificiality of the political unit called Micronesia. Second, there seems to be a ~~strong~~ possibility that the desire on the part of the other districts for separate talks will be eliminated if there is agreement, perhaps at the upcoming constitutional convention, on a very loose confederation of the districts in the new nation of Micronesia. This plan presumably will not be approved in the Marianas (because of the desire for a close relationship with the United States); and this again shows the political differences between the Marianas and the other five districts which justify the separate negotiations.

Finally, one should take strong exception to the paper's statement that the U. S. is doing in the Marianas what South Africa is doing in Namibia. Both the United States and South Africa, says the paper, argue that the separation is being done at the "freely expressed request" of the people, though, the paper recognizes, "[f]ew accept South Africa's case" (p. 24). The comparison is outrageous, even aside from the inhumane treatment involved in Namibia. In the first place, the mandate under which South Africa

07566

administered Namibia (formerly Southwest Africa) was terminated in 1966 by the U. N., though South Africa has refused to relinquish control. Second, while certain tribal chiefs have said they support the policy of separation, the U. N.-recognized South West Africa Peoples Organization rejects the so-called homeland policy. Third, and most fundamentally, the U. S. and the MPSC anticipate putting the proposed new status to the people for approval in a plebiscite, so if the Marianas do separate from Micronesia, it will reflect the freely expressed views of the people, and not be forced on them as in Namibia.

II. Specific Comments on the Entire Report

This part of the memorandum reviews the entire report, and offers comments on a page-by-page basis.

Page 1: More recent statistics on population are available from the Interior Department (or from us via the newspapers).

Page 19: The use of the term "as a U. S. territory" near the end of the first paragraph is inaccurate. What is anticipated is a Commonwealth status, something quite different from territorial status.

Page 20: The first full paragraph of this page contains a multitude of problems. The first sentence of that paragraph raises the question why does it matter if the other districts think that a closer relationship of the U. S. and the Marianas is "ethnocide and a further introduction of the disadvantages of western living into the native cultures" if this is what the people of the Marianas want? The second sentence simply makes no sense as a matter of English (what are "great expanses of time . . . between the islands?"); and it seems to say that since each of the districts is different historically and ethnically, it doesn't matter that the Marianas are different from the rest of Micronesia in these respects! The third and fourth sentences are just plain wrong: the status sought by the MPSC is far different from that sought by the Joint Committee. Permanency is one and it is a critical, not an unimportant difference; other key differences include U. S. citizenship, applicability of U. S. laws, and representation in the U. S. Congress.

Pages 23-24: The attempt to distinguish the British Cameroons from the present situation is unpersuasive. First it is said that a U. N. Visiting Mission recommended separation in the Cameroons, while there is no such recommendation for the Marianas. But the fact of a recommendation itself is insignificant; the proper analysis turns on

07567

whether the reasons which lead to the recommendation in the Cameroons are present in the Marianas. The paper quotes the Cameroons Mission as having found

"'a profound difference between them both [the two portions of the Cameroons] in the administrative systems and political loyalties which were partly due to a distinct ethnical and historical development.'"

The same may be said in the present case. Second, the paper attempts a distinction based on the fact that the part which split off united with a newly formed independent country with which it had been administered prior to unification. Though the United States is hardly newly formed, in all other respects the part that is splitting off from the TTPI will also be joining an independent country with which it had close administrative ties (though admittedly not with all the rights of full participation in the government of the independent country). Third, it is argued that the cases are different because the two parts of the Cameroons were never administered as one entity. But presumably that was at the choice of the administering authority, and so is of little consequence; and the Marianas have at times been separately administered by the United States.

Page 25: It surely begs the question of what is the appropriate unit to assert the right of self-determination to ask whether "the interests of one group [the Marianas] [can] be allowed to jeopardize the interests of the whole?" As to economics generally, under the loose confederation now apparently envisioned by some leaders of the other districts, it is very possible that there will be relatively little redistribution of income from one district to another, so the economic advantages to the other districts of having the Marianas part of the confederation might be slight.

Pages 29-30: These pages raise again issues discussed in the portion on fragmentation. As to whether all of Micronesia has to approve the separate status for the Marianas, the answer must be no. If the Marianas are an appropriate entity to exercise the right of self-determination, then no other entity can have a veto power over that right. The Marianas are not an appropriate entity only if the "original political entity" theory is rigidly and blindly adhered to. That theory has serious flaws in this situation, as argued above. With respect to the issues to be presented to the people of the Marianas in a plebiscite,

the problem is one of timing, not principle, for I see no reason why we would object to including in a plebiscite an option of joining with the rest of Micronesia in whatever status they have at the time our status agreement is signed. Finally, compare the last paragraph on page 30 -- saying that the issue of the separate negotiations is "political rather than legal" -- with the statement on page 10 that in the authors' view there is "an international legal right to self-determination."

Michael S. Heifer

07569