02
7

A COMPARISION AND CROSS-ANALYSIS OF THE CONSTITUTION OF THE FEDERATED STATES OF MICRONESIA AND THE DRAFT COMPACT OF FREE ASSOCIATION, JUNE, 1976, DRAFT

Prepared for the Commission on Future
Political Status and Transition
July 23, 1976
By: Michael A. White, Esq.

INTRODUCTION

The Constitution of Micronesia, as adopted by the Convention, is philosophically and fundamentally inconsistent with the political status of free association, as defined by the United States. In that sense, the Draft Compact of Free Association, as such, cannot be amended to conform to the Constitution. Ambassador Williams has stated the position of the United States, at the Eighth Round of Political Status Negotiations, and again in his letter to Chairman Amaraich dated July, 1976, that if the Commission wishes to negotiate a future political status which would be in strict conformity with the Constitution, that political status would take the form of independence, and the document which defined the future relationship between the two countries would take the form of a treaty.

Stated another way, the philosophical problem is this. The status of free association implies a direct agreement between the people of Micronesia and the Government of the United States, in a document -- a Compact -- which is supreme to the extent of

its scope. It does not contemplate an agreement between two sovereign, constitutional governments, which is the nature of a treaty. Thus, there cannot be a Compact of Free Association which is consistent with a supreme Micronesian Constitution by which the people of Micronesia endow their government with the same powers delegated elsewhere by the Compact; this would be a contradiction in terms.

By the same token, the Constitution does not permit any inconsistent agreement at all, and does not permit any limitation on the exercise of the powers of government except by treaty.

The matter can be resolved in only two ways: (1) The Commission on Future Political Status and Transition can forego the status of free association, whateverits advantages or disadvantages may be, and negotiate a treaty to be ratified by the sovereign governments of Micronesia and the United States. In such a treaty, all possible conflicts could be avoided, and the integrity of the Constitution preserved intact. (2) Alternatively, the Commission can recommend a constitutional amendment which impliedly recognizes the supremacy of the Compact of Free Association. The amendment would provide for the suspension of certain of its provisions which are in conflict with the Compact. The sole remaining choices, and probably the best from a legal point of view, are to amend the Constitution extensively, or to scrap the Constitution entirely and start over.

The consequences of these choices are not dealt with herein, and no value judgments are intended to be made hereby.

This Analysis cross-references the Draft Compact of Free Association with the Constitution of the Federated States of Micronesia. It does not list sections where there is no inconsistency between the two; these sections deal primarily with the internal affairs of Micronesia, which the Compact recognizes as the sole responsibility of the Government of Micronesia. "Conflict" is indicated whenever the two documents, as now written, are inconsistent -- either directly or latently contradictory, or where the provisions of the Compact represent a limitation upon the exercise of the powers conferred on the Government of Micronesia by the Constitution. Nor does it attempt to indicate the relative merits or demerits of the Compact provisions.

ANALYSIS OF CONSTITUTION AGAINST COMPACT

(Citations at beginning of each paragraph refer to Constitution.)

ARTICLE I

Section 1 provides for the geographical boundaries of Micronesia. The limits of territorial waters are established and will be in force "unless limited by international treaty obligations assumed by the Federated States of Micronesia." The question of treaties is discussed below.

The Joint Committee on Future Status, the predecessor of the Commission, informed Ambassador Williams that in the absence

of an international treaty on the law of the sea which would be binding upon Micronesia, the Government of Micronesia would consider the extent of its territorial jurisdiction as an internal matter, and therefore solely within the province of the Government of Micronesia as provided by Section 102 of the Draft Compact. This position poses a potential conflict with the provisions of Article II, which provides that the U.S. will have "full responsibility and authority over the foreign affairs of Micronesia", and of Article III which grants the United States similar authority and responsibility with regard to defense matters, should the United States attempt to define territorial jurisdiction as a matter of foreign affairs or defense. The position expressed by the Joint Committee represents a declaration that the Government of Micronesia would not accept such an interpretation.

Section 3 deals with the acquisition of foreign territory. While this process has foreign affairs implications, and could probably result in the invocation, at some stage, of the powers of the United States under Article II of the Draft Compact, the Section deals primarily with internal procedure for the admission of new territory. A conflict could not occur except, if for some reason, the United States had a foreign policy or defense interest in not permitting the new territory to be added.

Section 4 deals with the admission of new states, and in a sense is complementary to Section 3. Except as noted above, this provision is entirely consistent with the provisions of Section 102.

ARTICLE II

Section 1 provides that the Constitution "is the supreme law of the Federated States of Micronesia", and that no act of government may be inconsistent with it. Section 101 in the Draft Compact provides that "the Constitution and laws of Micronesia shall not infringe upon the responsibilities and rights vested in the Government of the United States. . . as a result of the approval of this Compact." Thus arises the basic conflict between the two documents, discussed in the Introduction.

Conflict is theoretically, if not philosophically, resolvable only if the Government of Micronesia suspends or otherwise refrains from exercising its constitutional powers in a manner inconsistent with the Compact.

ARTICLE IV

Section 1 deals with the right to vote in national elections. This is a purely internal matter and within the exclusive responsibility of Micronesia as provided in Section 102 of the Draft Compact. Note the effect of this provision on Section 1201 of the Draft Compact, however, which provides for the plebiscite on the Compact. The plebiscite would certainly be a "national election" within the meaning of Section 1 of Article VI of the Constitution, if the Constitution had been ratified by the people prior to the plebiscite on the Compact. To the extent that the Congress of Micronesia could not provide qualifications for voting different from those which are provided for membership in the Congress itself (which the Compact requires), a conflict would result. See the analysis of Section 1201 of the Draft Compact.

ARTICLE IX

Section 2 enumerates the powers especially delegated to the Congress:

(a) To provide for the national defense. The national defense is, of course, the responsibility of the United States according to Title III of the Draft Compact.

(b) To ratify treaties. Under Section 201 of the Draft Compact, treaties could be applied to Micronesia without any requirement for ratification, although the national government could object to application in certain cases. There is no requirement of the Constitution that all treaties require ratification by the Congress, except by implication.

Conflict will, however, arise in the event that the United States applies to Micronesia under Section 201 a treaty which was inconsistent with the Constitution. The provisions of Article II of the Constitution would hold the treaty void, at least to the extent of such conflict. Micronesia could, however, object to the application of such treaty, and it is possible to avoid the occurrence of a conflict in this manner.

(c) Regulation of immigration and emigration. This paragraph is essentially consistent with the provisions of Section 801(a) of the Draft Compact. The authority of the FSM under this section, however, is subject to limitation by treaty obligations which, if transgressed by the Congress in its regulation of immigration and emigration, could result in a conflict with the Compact.

(d) Taxation, duties and import tariffs. The authority of the Congress of Micronesia in this respect is consistent with Section 601 of the Draft Compact. This section of the Compact, however, limits Micronesia's authority to the extent that limitations are imposed by the United States under Articles II and III of the Draft Compact.

(e) Taxation of Incomes. The authority of Micronesia in this respect is totally consistent with the authority of Micronesia over its internal affairs as specified in Section 102 of the Draft Compact. The authority of Micronesia would, however, be limited by the provisions of Annex C, which prohibits each government on certain taxation of certain wages and employees of the other.

(f) Issuance and regulation of currency. This is a matter within the internal affairs responsibility of Micronesia, as provided by Section 102 of the Draft Compact. Note, however, that while no conflict is apparent, the provisions of Section 604 of the Draft Compact, which provide that until Micronesia does establish its own currency, United States currency will be legal tender. Also to be noted is the unspecified but nevertheless present obligation to protect the currency of the United States under Micronesia law.

(g) Regulation of banking and commerce. Consistent with Section 102; however, in the area of foreign commerce, a possible conflict with United States treaty powers could arise, as noted above; however, Annex A gives Micronesia broad powers in this

area. Possible conflicts could also arise regarding patents and copyrights.

(h) Regulation of navigation and shipping. Section 603(a) limits Micronesia authority in this area to wholly domestic air and maritime commerce.

(j) National postal system. Similar to provisions concerning use of United States currency, Section 403 of the Draft Compact provides that the United States will provide to Micronesia the services of United States postal service. It should be noted that Micronesia may be compelled to enact laws to protect the regulation of the system by virtue of Section 503(a).

(k) Acquisition and governance of new territory. This was discussed in the analysis of Section 3 of Article I. The acquisition of new territory would have foreign affairs implications, and the authority of the Government of Micronesia to acquire new territory would be limited accordingly by the Compact. The governance of the newly acquired territory, would, however, be a matter solely relating to the internal administration of Micronesia, and would therefore be consistent with Section 102 of the Draft Compact.

(m) Regulation of marine resources within territorial limits and beyond 12 miles. See also discussions on Article I, Section 1. A possible conflict would arise if the proposed regulation conflicts with treaties applicable to Micronesia by Title II and Section 501(a) of the Draft Compact.

Section 3 enumerates concurrent powers of the national and

state governments. All are generally consistent with Section 102 of the Draft Compact. Note, however, that certain types of borrowing on the public credit may be regulated by treaty, such as an agreement with the United States whereby the United States would guarantee repayment of ADB loans as required by the ADB charter.

Section 4 provides for the ratification of treaties. This creates a latent conflict with Sections 202 and 501(a) of the Draft Compact.

The conflict arises in the case of a treaty applied to Micronesia which was inconsistent with the Constitution's supremacy clause. Section 202 of the Draft Compact, however, authorizes the Government of Micronesia to object to the application to Micronesia of certain treaties. Assuming that the Government of Micronesia were diligent in the matter, it is difficult to conceive of an instance in which a treaty inconsistent with the Constitution could effectively be applied to Micronesia. Thus, a conflict may be avoided.

ARTICLE X

Section 2 delineates the powers of the President.

(b) receive ambassadors and conduct foreign affairs and defense: to the extent that foreign affairs and defense powers are delegated to the United States by the Compact, there would be a conflict if the President exercised such powers. Note also that Section 203(b) of the Draft Compact provides for joint U.S.-Micronesian approval of the establishment

of foreign consulates and accreditation of foreign consular officials in Micronesia. As long as the exercise of the President's authority goes only to the extent of receiving ambassadors (and consular officials) already jointly accredited, no problem would appear to arise.

(d) Appointment of officers: consistent with Section 102 of the Draft Compact. Note, however, that the section contemplates the appointment of Micronesian ambassadors. The exercise of this power might conflict with United States foreign affairs authority under Title II of the Draft Compact. Note also that the Constitution is silent upon the question of whether the resident commissioner to the United States, as contemplated by Annex C of the Draft Compact, is an "ambassador" within the meaning of this section of the Constitution.

ARTICLE XIII

Section 2 prohibits the testing, storage, use or disposal of radioactive, toxic chemical and other harmful substances in Micronesia without the consent of the Government of Micronesia. This presents a latent, but direct conflict with United States' authority under Title III of the Draft Compact, under which the United States would have authority to test, store, use and dispose of such substances within Micronesia. United States policy is not to indicate where nuclear weapons are stored, and the storage of such weapons in Micronesia cannot be excluded as a possibility. This will permit the United States, in essence, to violate the Micronesian Constitution.

Section 5 prohibits indefinite use rights agreements, and voids existing agreements of this nature five years after the effective date of the Constitution. It was historically the position of the Joint Committee on Future Status that it intended to negotiate the termination of all existing leases and use rights, and the renegotiation of leases of and use rights in areas specified in Annex B, but there has been no specific agreement by the United States on the point. If this is not done, a conflict results.

At least as far as renegotiated leases and use rights agreements, Section 303(f) of the Draft Compact provides that a specific term may be set forth. If the lease or agreement has a specific term, it cannot be indefinite. This must be done to avoid conflict.

Section 6 requires renegotiation of land use agreements with the United States. Its implications are noted above.

ARTICLE XV

All the sections of this Article deal with internal matters, and are fully consistent with Sections 101 and 102 of the Draft Compact. There are some minor problems of constitutional consistency and possible conflict with the authority of the United States under the Trusteeship Agreement, but there are no conflicts with the Draft Compact.

ARTICLE XVI

Section 1 provides that the Constitution takes effect

not later than one year after ratification. While there is no conflict with the Compact of Free Association, there would appear to be a latent conflict with powers of the United States under the Trusteeship. The United States Government which has full powers of civil administration in Micronesia is not bound by the provisions of this section.

ANALYSIS OF COMPACT AGAINST CONSTITUTION

(Author's note: To a great extent this material will be duplicative of material appearing in the previous section. This section of the analysis is presented, however, in the effort to provide a ready cross-reference. All references to sections and titles appearing at the beginning of each paragraph refer to the Draft Compact of Free Association.)

PREAMBLE

The Preamble, as noted above, is not law. The Preamble of the Draft Compact of Free Association, therefore, while somewhat different in emphasis, is not inconsistent with the Preamble of the Constitution. Note, however, that the Draft Compact refers to the "sovereign right of self-determination" of the Micronesian people, while the Constitution refers to the inherent sovereignty of the Micronesian people.

TITLE I

Section 101 recognizes the "sovereign and inherent right" of the Micronesian people to adopt their own Constitution and form of Government. The Constitution has, of course, already been drafted, and will be placed before the people in a referendum in accordance with its terms. Note, however, that Section 101 also provides that the Constitution and laws of Micronesia "shall not infringe upon the responsibilities and rights vested in the Government of the United States" under the Compact. As pointed out in the earlier section, this creates a conflict between the two documents which is resolvable

only through constitutional amendment.

Section 103 recognizes Micronesia's right to amend or terminate the Compact of Free Association, and to choose its own future political status. Problems of general compatibility of the Constitution and the political status of free association have been discussed in the Introduction. Note that the Constitution is silent upon the subject of the termination of treaty obligations, while the provisions of Title XI of the Draft Compact provides a specific procedure for the termination of the Compact. There is no inherent conflict, however, with reference to Section 103.

TITLE II

Section 201 delegates certain authority in foreign affairs to the United States. The Constitution, in several instances, provides for foreign affairs powers in Micronesia.

Section 202 permits the United States to apply certain treaties to Micronesia without its consent. This power is inconsistent with the Constitution. Note that the Section authorizes the Government of Micronesia to object to the application of certain treaties, and thereby avoid such application. The judicious exercise of this power on the part of the Government of Micronesia should result in the avoidance of conflicts between the Compact and the Constitution in this respect.

Section 203(b) provides for joint approval of consular officials. Contrast the powers of the President of Micronesia under Article X, Section 2(b), discussed earlier.

TITLE III

Section 301 delegates to the United States "full responsibility for and authority over defense matters in Micronesia." As is the case with regard to foreign affairs, the Constitution grants powers to the Government of Micronesia in the field of defense; Article X, Section 2(b) and Article IX, Section 2(a).

Section 302 deals with specific defense responsibilities of the United States, and provides that, in the exercise of its authority, the United States may use Micronesian lands, waters, and airspace "necessary" therefor. This Section contemplates the use of lands, waters and airspace in addition to those set forth in Annex B, although the United States has indicated that such use will be limited to transit and other temporary or emergency uses. However, since the Compact could theoretically have an indefinite term, the rights vested in the United States under this section of the Draft Compact could possibly violate the provisions of Section 5 of Article XIII of the Constitution, which prohibits agreements for the use of land for indefinite term.

Section 303(e) requires that the land leases and use agreements not be in conflict with the Compact or U.S. defense

responsibilities under Title III as noted in the earlier section of this analysis, q.v.; this raises the prospect of the violation by the United States of Section 2, Article XIII of the Constitution. Section 303(f) provides that United States' rights and uses extend for their respective terms, or if no term is specified, then for the life of the Compact. First, the section contemplates some continuation of some existing agreements, which may be in conflict with Section 5 of Article XIII of the Constitution prohibits indefinite use agreements, or with Section 6 of the same Article, which requires renegotiation of existing agreements. Second, newly negotiated leases would have to specify a term, because the Compact could continue in force indefinitely and Section 5 of Article XIII prohibits indefinite agreements, Otherwise, a conflict would result.

Section 304(a) prohibits countries other than the United States to conduct military activities in Micronesia. Query: Does this prohibition include Micronesia itself?

Section 305 provides for a Status of Forces Agreement. There is no inherent conflict; note, however, that the agreement will have to be binding upon the States, which would otherwise have considerable jurisdiction over such personnel within their boundaries.

TITLE IV

Section 403(a) obligates the United States to provide to

Micronesia, without charge, certain U.S. programs and services. Many of these programs are programs which can be exercised by the national government under the Constitution. Note that the section also obligates the Government of Micronesia for its states to provide lands necessary for these programs. This assumes that some method of acquiring land for public purposes would exist at the state level, at least. Section 403(c) limits Micronesian taxing powers on U.S. property and personnel supplied under a Section 403(a) program. This represents a limitation on the powers of Congress and the states to tax under Article IX, Section 2(d) and (e).

TITLE V

Section 501 provides that two classes of treaties would be applicable to Micronesia: those which are applicable on the day before the effective date of the Compact, and those which are applied to Micronesia under Section 202. The problems associated with the application of treaties to Micronesia without the consent of the Government of Micronesia are detailed elsewhere in this Analysis. Section 501(b) provides that U.S. statutory law applicable to Micronesia under the Trusteeship shall no longer be applicable to Micronesia except as otherwise provided in the Compact or in other agreements between the United States and Micronesia. A conflict could arise in the event that applied legislation were inconsistent with the Constitution.

Section 502(a) provides that self-executing treaties applicable to Micronesia have the force of internal law in Micronesia. Once the problem of the application of the treaty itself is resolved, the provisions of this section would not create any constitutional conflict. Section 502(b) requires the Government of Micronesia to enact appropriate legislation to implement non-self-executing treaties, a provision which is somewhat philosophically inconsistent with the concept of a sovereign Micronesian government. The section also requires the Government of Micronesia, pending the enactment of such legislation, to apply as internal law the principles of the implementing legislation enacted by the United States. The meaning of this language is uncertain. Section 502(c) obligates Micronesia to comply with and enforce treaties applicable to it, creating the same problem mentioned in connection with Section 502(b).

Section 503(a) obligates Micronesia to enact laws protecting U.S. personnel, property and so forth in connection with U.S. programs and services in Micronesia. This does not create a conflict with the Constitution, again except a philosophical one. Section 503(c) permits Micronesia to utilize the services of U.S. "investigative and enforcement services" to assure compliance with the laws enacted under Section 503(a). A conflict would not result unless these U.S. agencies themselves violated the Micronesian Constitution or laws.

Section 506 obligates the United States to protect Micronesia's environment in accordance with "standards no less restrictive than those established by U.S. law." This section could, however, be interpreted as not requiring U.S. compliance with Micronesia's environment protection law which were more restrictive than those established by comparable U.S. law.

TITLE VI

Section 601 permits Micronesia to regulate and tax imports and exports, which the national government has the power to do under Sections 2(d) and (g) of Article IX of the Constitution. Note, however, that the authority of Micronesia might be limited by treaty provisions applicable to Micronesia, as Section 601 itself recognizes.

Section 602(b) requires each nation to give "most favored nation" treatment to the produce of the other. This, of course, represents a limitation upon the powers of the Government of Micronesia to regulate and tax imports and exports.

Section 603 reserves to Micronesia the right to regulate wholly domestic air and maritime commerce, subject to applicable treaties and FAA regulations. Section 2(g) and (h) of Article IX of the Constitution provide for the exercise of this authority by the national government. No conflict arises, except as the application of treaties may affect Micronesia's authority. Section 603(b) essentially

requires mutual consent for international air route authority involving Micronesia, and thus represents a limitation on the power of the national government of Micronesia.

TITLE VIII

Section 801 provides that the Government of Micronesia may regulate immigration and entry of non-citizens, subject to the limitations imposed under Titles II and III. These powers are included within the powers of national government by Article IX, Section 2(d). Section 801(b) provides for free entry and exit of U.S. citizens and nationals, but limits freedom to establish residence. This section is a limitation on the powers of the national government, as under (a) above, This section also provides for the rights of Micronesian citizens to establish residence in the U.S. and its territories, and is again a limitation on the right of the national government to regulate emigration under Section 2(c) of Article IX. Section 801(c) provides that the entry and exit of non-Micronesian citizen U.S. nationals will not be more restrictive than U.S. regulations concerning persons who hold joint Micronesian and U.S. citizenship. This again is a limitation on the powers of the Government of Micronesia under Section 2(c) of Article IX of the Constitution.

TITLE X

Section 1001 provides for the settlement of disputes either by negotiation, arbitration, or litigation. With

regard to the latter, Micronesia has agreed to submit to the U.S. courts, something which a sovereign nation does not have to do in the absence of an agreement.

TITLE XI

Section 1102(c) permits a district not agreeing to the termination of the Compact to negotiate with the United States during the two-year transition period. This latter provision is in direct violation of the Constitution, which does not expressly permit secession, and which, while it does not expressly prohibit it either, is drafted so as to create the legal impression that secession is not constitutionally permissible.

TITLE XII

Section 1201(a) provides for approval of the Compact. It is inconsistent with the Constitution, but the conflict will be resolved when the broad overall inconsistency between the two documents is resolved. Note also that this section also impliedly permits secession, apparently prohibited by the Constitution.

Section 1202 provides for the proclamation of the effective date of the Compact by the President of the United States. This provision represents no conflict with any provision of the Constitution, except that the principle of Micronesian sovereignty would seem to require a joint proclamation.