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June 24, 1976

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SPECIAL MEMORANDUM TO THE PRESIDENT

From: The National Security Council, Under Secretaries Committee

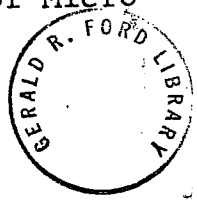
Subj: Micronesian Status Negotiations: LOS and related foreign relations issues

Background

The U.S. Government's preferred future status alternative for Micronesia (Carolines and Marshalls) has been and continues to be Free Association. A Compact of Free Association incorporating and satisfying all of the U.S. negotiating objectives including full U.S. authority over foreign affairs and defense, access and denial and the survivability of U.S. defense rights in the event of the termination of the Compact, has recently been initialled by the Congress of Micronesia's Joint Committee on Future Status and Ambassador Williams. It is a complete document except for two sections. The one remaining issue between Micronesia and the United States concerns the question of which one will have authority and control over Micronesia's waters and ocean resources once the Trusteeship has been terminated. (The term "Micronesian waters" as used in this memorandum refers to Micronesia's territorial sea and economic zone as may be defined by international agreement.) The other issue remaining to be resolved is largely an internal but a potentially difficult one, concerning the formula for the allocation of future U.S. grant assistance among the districts of Micronesia.

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The leadership of the Congress of Micronesia and some district leaders are seeking an early resolution of both issues. They hope that a signed Compact can be presented to the Congress of Micronesia this summer and then to the people of Micronesia late this fall or early next year in an internationally observed plebiscite. They are of the opinion that an early agreement will enhance the chances of the Free Association Compact clearing the Congress of Micronesia and that this approval will help to blunt the separatist movement in Palau and the Marshalls.

Agreement was reached in Saipan earlier this month that negotiations on the Micronesian marine resources question would be resumed as soon as possible with the hope that final agreement could be reached prior to the opening of the Congress of Micronesia's Special Session on July 19. The new Micronesian Commission on Future Status and Transition seems to be prepared to move ahead with these talks. The United States cannot resume the negotiations, however, until new instructions have been approved for Ambassador Williams on the issues presented in this memorandum.

The Problem

Basically the problem revolves around the question of the extent of Micronesia's jurisdiction over Micronesia's waters and ocean resources under the Compact.



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- The Micronesians have taken the position that the question of their ocean resources is an internal matter and that therefore the future Government of Micronesia should have complete jurisdiction and sole authority over the living and non-living, seabed and subsoil resources in an exclusive economic zone to the full extent that such rights are or may be recognized by international law or by international treaties or agreements.
- The U.S. position has been that control over Micronesian waters is an external matter and that the U.S. under the provisions of the Compact would have full foreign affairs authority and responsibility for Micronesia's ocean resources and Law of the Sea matters so long as Micronesia is in Free Association with the United States.



The fundamental issue centers then on the question of United States foreign affairs authority under the Compact and how this authority relates to the future administration and control of Micronesia's marine resources. In the negotiations to date the United States has opposed ceding any foreign affairs responsibilities or authority to the future Government of Micronesia other than in those areas already provided for in Annex A of the Compact. On the other hand Micronesia has taken the position that it must preserve essential Micronesian jurisdiction over its own ocean resources because of a fundamental conflict

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of interest between the United States and Micronesia over tuna. Micronesia believes that an exception should be made to U.S. authority over foreign affairs to enable Micronesia to act in its own name internationally with respect to its own waters and ocean resources. The Micronesians agree that such authority should not infringe upon necessary U.S. Government powers and responsibilities in the field of defense, or of foreign affairs generally.

Discussion

1. The Micronesian View

The recent series of informal and formal talks with the Micronesian Joint Committee on Future Status and other Micronesian leaders and the strong stance taken by the Micronesians at the LOS Conference have underlined the critical importance which they attach to control over their territorial seas and beyond in an exclusive economic zone. Since the marine resources off the coast of Micronesia offer one of the few potentials for their meaningful economic development the Micronesians are requesting that, in effect, the United States, recognize Micronesia's special need to protect and to control the development and exploitation of their ocean resources for their own benefit.

The Micronesians see a fundamental conflict of interest between themselves as a coastal state and the U.S. as predominantly a distant fishing state so far as highly migratory fish are concerned. They feel that because of this conflict (which



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is recognized by U.S. experts on the subject) their interests cannot be adequately protected by the United States. The Congress of Micronesia has taken the position that:

"During their four years of effort and struggle, the Joint Committee on the Law of the Sea and its successor the Micronesian Delegation, have learned one thing if they have learned nothing else, that because of opposing domestic interests, the United States will not now and cannot be expected in the future to protect Micronesia's sea resource interests..." (Report of COM Committee, February, 1976)

The minimum Micronesian requirement for completion of the Compact may be a full acknowledgement by the United States of Micronesia's jurisdiction over their own waters to the extent that such authority is or may be established by international law or treaty or agreement. Compromises may then be possible in the other areas of contention regarding the foreign affairs aspect of the problem.

2. International Considerations

Some mini-island states in the Pacific perceive that undisputed Law of the Sea rights are important to their interests as independent states and their prospects for economic self-sufficiency. Micronesia shares these perceptions and in essence seeks to enjoy the status of an "independent state" with respect to its ocean resources while enjoying all of the benefits of "Free Association".

Micronesia now has the status of an "official observer" at the Law of the Sea Conference and has participated actively in the Caracas, Geneva and New York sessions. It has formally

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petitioned the Conference for signatory status (which could be granted by a majority vote of the Conference even over the objections of the United States). Whether or not Micronesia becomes a signatory, the final language of Article 136 of the draft Law of the Sea Convention could, regardless of the terms of the Compact, vest in Micronesia certain important Law of the Sea rights. (This would be true even under the revised U.S.-proposed language).

Another session of the Third United Nations Conference on the Law of the Sea will convene in New York in August. A number of issues which separate Micronesia and the United States at the Conference remain to be resolved, including Micronesia's desire to sign the Law of the Sea Convention in its own name, and Micronesia's support for a provision (old Article 136) which among other things would vest ocean resource rights in the inhabitants of dependent territories and possessions, and Micronesia's desire to have access to the dispute settlement mechanisms of the Convention. The United States has gone on record with Micronesia in opposition to their desires on these issues.

If the ocean resources issues between the United States and Micronesia can be resolved between now and August in such a way that the Micronesians agree not to insist upon becoming a signatory and to drop support for the present Transitional Provision, as well as their request for direct access to dispute settlement machinery, then a substantial problem and one



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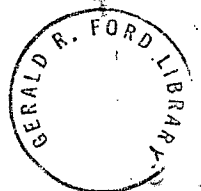
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of some embarrassment to the United States at the Conference will have been removed.

With the Micronesians having already been given with U.S. concurrence their own voice at the Law of the Sea Conference and with strong indications that, under Third World sponsorship, they would be given the right to sign an eventual Convention in their own name, it would be extremely difficult to persuade them to pull back from their present stance. An attempt on our part to do so at the next Law of the Sea session could prove abortive. Such a situation underscores the value of reaching a prior agreement with the Micronesians on Law of the Sea matters within the context of a Compact of Free Association if at all possible before August.

Micronesians have petitioned the Council for its support of the petition to become a contracting party to the Law of the Sea Treaty. It appears likely that in the forthcoming Trusteeship Council session this issue and the more general question of control over marine resources will be aired publicly. Additionally, the Committee of 24 reports on Micronesia despite its lack of jurisdiction over the Trust Territory. Recent attempts to further involve the Committee in Micronesian affairs suggest that the United States may have an increasingly serious problem in the United Nations if it is not possible to achieve an early resolution of the future status question, including control of marine resources.

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3. U.S. Domestic Considerations

a. U.S. Commercial Interests

There are no known exploitable mineral or petroleum resources within the Micronesian waters. There are known quantities of marine resources, primarily tuna, which are significantly underfished. At the present time, U.S. commercial fishing interests are interested in increasing their activities in the waters off the Mariana Islands but have only limited interests in Micronesia (the Caroline and Marshall Islands).

Under the present Trusteeship and the current U.S. approved foreign investment policies of the Trust Territory Government, United States commercial interests concerned with the exploration and exploitation of Micronesian ocean resources do not enjoy preferential treatment over other foreign commercial interests. U.S. commercial interests likewise would not enjoy preferential treatment under the Compact unless otherwise provided for. The Compact does, however, provide for most favored nations treatment in terms of trade between Micronesia and the United States.

Retention by the United States of foreign affairs control over Micronesian marine resources under Free Association would enable the United States to assure protection for U.S. commercial activities vis-a-vis non-Micronesian firms, whose proposed commercial activities conflict with basic U.S. foreign policy or security interests. This would also be true if Micronesians



had jurisdiction over Micronesian waters under the protections of the Compact.

United States maritime economic interests might be further protected by extending most favored nation treatment to the exploration and exploitation of Micronesia's ocean resources. In addition to these protections, the United States could seek to obtain preferential economic access to Micronesian ocean resources in the Compact or in a separate protocol in return for consideration by the United States for favorable trade treatment for Micronesian goods, including tuna products.

If Micronesia has jurisdiction over Micronesian waters, U.S. commercial interests would be protected to the extent described above. If the United States exercises jurisdiction over an exclusive economic zone off the coast of Micronesia, the tuna question (whether regulated by the coastal state or regulated by international agreement), would be resolved to the United States' advantage although Micronesia would still have the freedom of entering into commercial agreements (including tuna) with private foreign enterprises as long as there was no conflict with basic U.S. security interests and international obligations.

b. Micronesia and the Puerto Rican Comparison

There is a clear, basic legal and political distinction between the status of Micronesia and the States and Territories of the United States. The United States has never had sovereignty over Micronesia, nor will it be sovereign under

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the terms of the Compact. In contrast to the States and Territories (including Puerto Rico) over which the United States has sovereignty, the United States Constitution, laws, judicial system, power of eminent domain, the rights of American citizenship will not be applicable to Micronesia under the Compact of Free Association. In the future, the Government of Micronesia will have complete and exclusive control over Micronesia's internal affairs. Simply put, Micronesia is not now a United States territory nor will it become one by the terms of the Compact of Free Association. Solution of status-related issues between the United States and Micronesia will not therefore set a precedent for the U.S. Federal Government's relations with its Territories or States with respect to ocean resources.

c. Enforcement (Surveillance and Regulation) in the Coastal Waters of Micronesia.

To date, Micronesia has not pressed for and the United States has not made any commitment with respect to surveillance or enforcement. In the future, the Government of Micronesia will have full responsibility for and authority over its "internal affairs", which will presumably include control and enforcement of its laws in its territorial waters. Further, the Government of Micronesia under the Compact, will be required to enact whatever domestic legislation is appropriate or required to enforce or implement those treaties and international agreements applicable to Micronesia.

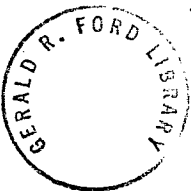
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If Micronesia were to have sole authority over and responsibility for an exclusive economic zone, as recognized under international law or international treaty to which the United States was a party, the Government of Micronesia under the Compact would also be required to enact appropriate domestic legislation to enforce such treaties. Pending the enactment of such Micronesian legislation, the Government of Micronesia would be required by the Compact to apply and enforce as internal law the principles of the implementing legislation enacted by the United States Congress.

On the other hand, if the United States Government should retain full authority and responsibility for their economic zone, the U.S. Government would be expected to assume responsibility for enforcement of international treaties and agreements within Micronesia's economic zone. This would require U.S. enabling legislation to provide for U.S. enforcement within the economic zone. In addition, there would be an undesirable division of responsibility resulting from Micronesia having jurisdiction over its territorial waters and the United States having jurisdiction over the waters in an exclusive economic zone.

At present, the Micronesians do not have a local capability for enforcement of their waters. If the U.S. Coast Guard were to perform any enforcement function under the Compact of Free Association, U.S. enabling legislation to permit the Coast Guard to provide such service would be required. At present the U.S. Coast Guard has neither personnel nor resources available for



the enforcement of Micronesia's territorial waters and/or an exclusive economic zone. Additional funding and resource capability would have to be provided.

4. U.S. Foreign Policy Considerations

a. Foreign Affairs Authority

Although Title II of the Compact as initialled provides that the United States Government shall have "full responsibility for and authority over the foreign affairs of Micronesia", the Government of Micronesia has proposed that it be given primary jurisdiction and authority over marine resources beyond its territorial sea as may be defined by international agreement subject only to the protection of basic U.S. security interests as provided for in Title III of the Compact. In the exercise of such authority, the Government of Micronesia seeks to negotiate and sign treaties and international agreements in its own name, to participate as a full member in international organizations and conferences, to exercise all dispute settlement procedures with foreign nations as provided for in the Law of the Sea Convention (including access to the International Court of Justice), and to decide in its own right whether to recognize and apply the provisions of treaties and international agreements having a substantial impact on Micronesian marine resources.

These Micronesian proposals raise an important foreign policy issue. Permitting the Government of Micronesia to exercise what amounts to a broad range of attributes and powers of



a fully independent nation even within a limited and prescribed area of activity, would be inconsistent with the principle of full United States foreign affairs authority under the terms of the Compact. This could exacerbate rather than minimize the practical friction points in United States-Micronesian relations under a free association arrangement. Full United States authority in this area, however, could on the other hand, engender continuous friction between ourselves and the Micronesians and this in turn could have a harmful effect on the entire relationship.

Issues relating to Micronesian marine resources will continue to be, as they are now, of the greatest interest to the Micronesians; they also promise to be the focal point of any foreign affairs activity involving Micronesia. Deleting this area from the scope of U.S. authority could enhance the possibility of conflict between the United States and foreign countries over Micronesian actions which might be in conflict with U.S. policies or other international obligations, although the potential for disputes would be existent even if the United States had full authority over Micronesia's marine resources. Foreign nations may well seek to hold the United States liable (financially or otherwise) for Micronesian actions within Micronesian waters, notwithstanding the language of the Compact. However, the United States, under the terms of the Compact will also be liable diplomatically for Micronesian actions within the land areas of Micronesia and, by logical extension, within their territorial sea.

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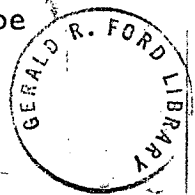


b. Diplomatic Responsibility

It must be presumed and accepted that the United States will be viewed as the residually responsible party in any international dispute over Law of the Sea matters between Micronesia and a third country because of the ultimate U.S. responsibility for the foreign affairs of Micronesia. This would be true whether or not Micronesia would have enforcement responsibilities. If the Micronesians, for example, were to confiscate a foreign flag fishing boat this could result in third country appeals to the United States Government for redress or even outright diplomatic protest. This risk and other possible international complications, such as diplomatic problems if Micronesian waters become a major poaching area for other nations, are inherent in the free association relationship. These disadvantages of free association must be weighed against the political and security advantages which would accrue to the United States under the Compact.

5. The Marine Resources Issues and Over-all Long Term United States Interests in a Future Political Status Agreement with Micronesia

The Under Secretaries Committee's approved policy paper on Micronesia dated April 30, 1976 reaffirmed the importance of attaining an agreement with a united Micronesia (Carolines and Marshalls) so as to protect and further U.S. political and strategic interests in the area. In order to further these basic objectives the paper recommended that arrangements be



sought to establish a close and enduring relationship with Micronesia--one which would promote stability in the region and would protect and promote Micronesia's legitimate economic goals and eventual self-sufficiency as well as U.S. interests.

The basic negotiating objectives of the United States have been satisfied by the initialled provisions of the Compact. It is unlikely, however, that a final agreement which protects and preserves these basic U.S. interests can be arrived at unless the foreign policy marine resources jurisdictional questions are satisfactorily resolved. The negotiations for free association with a united Micronesia could falter and fail over these related questions. The Congress of Micronesia and the Districts of Micronesia will probably take a hard line that Micronesia should fully control marine resources in an economic zone as a minimum position and that the prospects of an early agreement short of a U.S. acknowledgement of this minimum position are nil. The prospects for an eventual agreement short of full independence for Micronesia are not much better if the United States refuses to compromise and seek accommodation on these issues.

The pro-Compact leadership in Micronesia now sees Free Association as the best chance for preserving Micronesian unity. Failure to reach agreement on the Compact, they believe, will lead to political independence and the likely early break-up of Micronesia. The latter two prospects could pose some very serious security problems for the United States. The resolution

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of the foreign policy marine resources question must therefore be viewed in the larger political context of U.S. Pacific Ocean policies and interests and against the possible consequences of failure to attain basic long-term U.S. objectives in Micronesia.

The Options and Negotiating Approach

A. Options

Option I. Hold to the position that under the Compact, jurisdiction over all matters relating to Micronesia's marine resources in and beyond their territorial sea as may be defined by international agreement falls within the full foreign affairs authority and responsibility of the United States, and as a consequence reject all Micronesian positions and claims as set forth by the Congress of Micronesia and the Micronesian Law of the Sea Delegation with respect to Micronesian maritime jurisdictional rights.

PROS

- Would retain full U.S. authority over all international aspects of Micronesian waters and ocean resources.
- Would not dilute basic U.S. foreign affairs authority and responsibility.
- Would force Micronesia to make hard decision, to weigh advantages of Free Association versus the advantages that might accrue to them if they were to have full authority and control over their ocean resources under an independence option.



CONS

- Would probably be unacceptable to Micronesia.
- Compact of Free Association could fail over the issue.
- Would strengthen pro-independence faction in Micronesia.
- Could lead to early break-up of Micronesia.
- Would not resolve the fundamental conflict, and the issue would be a source of continuing controversy, increasing latent suspicions that U.S. desires economic benefits of Micronesia's marine resources.
- Would probably find United Nations and Law of the Sea Conference members on side of Micronesia.
- Would entail U.S. obligation for enforcement which would be costly.

Option II. Reject Micronesia's claim for full authority and sole responsibility over the ocean resources in and beyond the territorial sea as may be defined by international agreement. Recognize Micronesia's beneficial interests in an exclusive economic zone as defined by international agreement but in view of full United States responsibility over Micronesia's foreign affairs, oppose all other Micronesian positions with respect to their right to veto international treaties, to negotiate government-to-government agreements in their own name, to be members of international conferences and organizations, (unless permitted under Annex A of the Compact) and to have

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access to international dispute settlement machinery. Provide assurances of U.S. interest in assisting Micronesia in the conservation, protection and exploitation of the ocean resources off the coast of Micronesia.

PROS

- Would retain basic U.S. foreign affairs authority and responsibility over Micronesia's foreign affairs.
- Would avoid or lessen chances of international disputes over Micronesian waters because of U.S. control over international aspects of Micronesia's ocean resources.
- Would recognize Micronesia's desire to be the principal economic beneficiary from the ocean resources lying off its coasts.

CONS

- Falls short of Micronesia's minimum desire to represent itself internationally with respect to its ocean resources.
- Does not face the problem of conflict of interest and protection of basic Micronesian interests.
- Would not eliminate all potential areas of conflict between the United States and the future Government of Micronesia over Law of the Sea and ocean resource matters.

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- Unlikely to be acceptable to Micronesia. Could thus prolong negotiations to the detriment of Free Association chances.
- Could strengthen proponents of independence by making the Law of the Sea the single issue and affording them an opportunity to drive a wedge between the United States and Micronesia.
- World opinion would probably not support United States position. Could be troublesome in Law of the Sea forum and United Nations.

Options III. Recognize that Micronesia's marine resource rights and all beneficial interests to be derived from an exclusive economic zone to the full extent that such rights are or may be recognized internationally are vested in the people of Micronesia as well as jurisdiction within Micronesia's territorial sea. International treaties of general international applicability related to marine matters to which the United States is a signatory will be applicable to Micronesia. The Government of the United States in its own name will negotiate all government-to-government agreements relating predominantly or exclusively to Micronesia's ocean resources for Micronesia upon the request of the Government of Micronesia. The United States agrees that the Government of Micronesia will have the right to be represented and to participate in these negotiations as a member of the U.S. Delegation and that such agreements will be signed by the United States for Micronesia only with the consent of the Government of Micronesia. The Government of the

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United States will represent Micronesia in any international dispute involving Micronesia's marine resources or Law of the Sea matters other than disputes between the two parties to the Compact.

PROS

- Could satisfy Micronesia's basic political and psychological needs with respect to its marine rights.
- While retaining basic U.S. authority over Micronesia's foreign affairs the option goes a long way toward meeting Micronesia's desires to control its own waters (in a de facto sense).
- Promotes spirit of cooperation and partnership and thus the U.S. objective of a close, friendly and enduring relationship.
- Could enhance chances of early agreement.
- Would eliminate some international opposition.

CONS

- Could place heavy obligation on the United States for the negotiation and enforcement of agreements entered into by the United States pertaining to Micronesian marine matters upon the request of the Government of Micronesia.
- Could provoke controversy over extent to which Micronesia's beneficial interests in an exclusive economic zone should be protected and United States obligations in this regard.

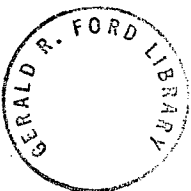
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- Could result in a number of disputes between the United States and Micronesia over implementation and enforcement.

Option IV. As a last resort in order to get a final full agreement which satisfies and protects basic United States interests, recognize that the marine resource rights and beneficial interests to and jurisdiction (including enforcement) over both the living and non-living resources of the internal waters, territorial sea, and in an exclusive economic zone of Micronesia, to the extent that such rights are or may be recognized internationally, are vested in the people of Micronesia. Reject Micronesia's right to veto the application to Micronesia of international treaties of general international applicability to which the United States is a signatory. As a limited exception to United States authority and responsibility and subject to the requirements of prior consultation, concurrence by the U.S. prior to signature, and the right of the United States to call a halt to any Micronesian action which conflicts or might conflict with basic United States security interests or international obligations, agree that the future Government of Micronesia shall be permitted to negotiate government-to-government marine resources agreements in its own name. Agree further that, as appropriate, Micronesia may represent itself in regional and international conferences and organizations, and that it shall have access to appropriate international dispute settlement machinery. The authority granted Micronesia under this option should be carefully circum-

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scribed to protect U.S. foreign policy, security and maritime economic interests in addition to the caveats and protections already built into the Compact.

PROS

- Would satisfy Micronesian minimums.
- Would offer best chance for early agreement and thereby enhance prospects for a united Micronesia under Free Association.
- While granting a major exception, would retain basic U.S. authority over Micronesian foreign affairs with respect to fundamental U.S. interests.
- Would put the burden of responsibility for surveillance and enforcement on the Micronesians.
- Could promote spirit of good will and cooperation between United States and Micronesia which is basic to U.S. long-term interests.
- Would provide most likely chances for favorable United Nations and Law of the Sea Conference response

CONS

- Would give Micronesia international status and the attributes of being an independent nation while under Free Association which could be troublesome.
- Could increase prospects of conflicts over government-to-government agreements negotiated by Micronesia if such agreements were contrary to United States interests and policies.

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- Could be disadvantageous to United States fishing and commercial interests.

B. Negotiating Approach

The options represent stages in a spectrum of possibilities. The President's Personal Representative should be provided an approved range within this spectrum on the understanding that his initial position would be at the upper end of the authorized range and that he may fall back incrementally on the various component issues within the approved range of options only as necessary in order to obtain agreement.

Recommendations

Option One is not considered to be a feasible or desirable alternative. It would in all probability be wholly unacceptable and would drive Micronesia away from the United States and toward independence.

Option Two might be used as an initial U.S. position as a tactical measure but it is unlikely that agreement could be reached on this limited acknowledgement of Micronesia's beneficial rights to its own ocean resources.

Option Three is the preferred position. While it denies full Micronesian jurisdiction, it goes further than Option II in recognizing Micronesia's basic interests and rights in the benefits to be derived from its coastal waters. It preserves U.S. authority and responsibility for foreign affairs while at the same time giving Micronesia an important and constructive international role under the U.S. foreign affairs umbrella. All basic U.S. interests are protected under this option.

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Option Four. This option is acceptable but only as a last resort. Its provisions would be used partially or in full but only if absolutely necessary to attain full agreement.

Action Requested

1. A Presidential decision on the issues raised in this paper and on the options is needed by no later than July 6, 1976 in order to proceed with and conclude the negotiations on the last section of the Compact prior to the opening of the Congress of Micronesia Special Session in Ponape on July 19, 1976.
2. Amended instructions for the President's Personal Representative on the above subject matter.

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