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Department of Justice
Washington, D.C. 20530

4 AUG 1980

MEMORANDUM FOR ROZANNE L. RIDGWAY
The Counselor
Department of State

Re: Marshallese Proposal on Permanent Denial. (U)

This responds to your request of July 28, 1980, for the Department's written response to statement on Ambassador Rosenblatt's recommendations on the four major issues raised by the Marshallese proposal on permanent denial. (U)

1. Ambassador Rosenblatt's recommendation relating to the undertaking of the Micronesian entities with respect to denial (proposed § 411 of the Compact) is as follows:

Recommendation. The denial provision is unlikely to contribute very much of real value to the security of the U.S. since the prospects for actual introduction of foreign military forces into Micronesia will, in the final analysis, depend far more upon the general state of U.S.Micronesian relations and upon U.S. determination to forcefully assert its presence in the area than upon a Micronesian undertaking of this nature. However, given the crucial emphasis placed upon the provision by a number of Senators without whose support the Compact has no chance of success in Congress, the Administration has no practical alternative to acceptance of the denial provision. The Micronesian commitment might be tightened somewhat by a change in the provision's language to "shall not permit." (C)

Classified by Derivative: State Department Memorandum dated July 25, 1980.
Reason: Foreign relations and activities of the United States.
Date of Review for Declassification: July 25, 1986.

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Comments of the Department of Justice:

We agree with Ambassador Rosenblatt that the Administration has no choice but to go ahead with the denial proposal. In so doing, we believe all concerned should be aware of the possibility that future governments of the Micronesian entities may seek to repudiate the denial undertaking, and that the latter may cause problems in the United Nations in connection with the termination of the Trusteeship Agreement. (C)

2. Ambassador Rosenblatt's recommendation relating to the U.S. guaranty of territorial integrity is as follows:

Recommendation. While the provision should be amended to define the territorial limitations of the U.S. guarantee, the language otherwise affords the U.S. considerable flexibility in responding to internal strife within the Micronesian states and should be accepted by the Administration. The U.S. negotiators should, however, insure that the Micronesian government clearly understand the U.S. interpretation of the extent of its commitment in the event of civil conflict. (C)

Comments of the Department of Justice:

We agree generally with Ambassador Rosenblatt's recommendation. We believe that a convenient method to define the territorial limitation of the U.S. undertaking generally would be to replace the words "territories, territorial waters or airspace[s]" in §§ 411, 412, and 413 by "Palau, the Marshall Islands, and the Federated States of Micronesia." Those terms are defined in § 461(c) of the Compact as the areas recognized by the United States. (C)

3. Ambassador Rosenblatt's recommendation on the question of court access is as follows:

Recommendation. The provision should be amended to make the U.S. undertakings of economic assistance to the Micronesian states enforceable in the Court of Claims as well as in U.S. district courts. (C)

Comments of the Department of Justice:

We have no basic objection to the grant of court access to the Micronesian entities with respect to grant assistance under §§ 211(a), 213, and 217 of the Compact. It is, however, our view that these monetary claims should be enforceable only in the Court of Claims and not in the district courts. As a fall-back, we might concede district court jurisdiction for the unlikely situations in which the Court of Claims has no jurisdiction, i.e., where injunctive or mandatory relief is required. (C)

If we grant court access, the first part of the first sentence of § 218, relating to full faith and credit becomes meaningless because all general and judicially enforceable obligations of the United States have equal standing. Similarly, the provision for authorization of appropriations is unnecessary, since approval of the Compact will constitute an authorization for the appropriation of the grant assistance. The first sentence of proposed § 218 thus is surplusage. We believe, however, that it is harmless and have no objection to it, since the Micronesian entities apparently want those clauses as a matter of pride because they are part of in § 702 of the Covenant with the Northern Mariana Islands, 48 U.S.C. § 1681, note. (C)

4. Ambassador Rosenblatt's recommendation is the amendment of 453(c) of the Compact, the 100% clause, is as follows:

Recommendation. The proposal that the U.S. continue levels of economic assistance specified in the Compact in the event a Micronesian government unilaterally terminates free association should be accepted. (C)

Comments of the Department of Justice:

In our view, the United States should seek to retain § 453(c) in its present form in order to give the United States negotiating leverage should unilateral termination occur, and that the United States should back from this position only if it becomes manifest that negotiations will collapse absent this concession. (C)

In this connection, it should be kept in mind that one or more of the Micronesian entities could possibly terminate the Compact shortly after it goes into effect, collect the full grant assistance during the remainder of the fifteen year period provided for in the Compact, and then,

having reaped the advantage of this agreement, repudiate the denial obligation on the ground that it constituted an unequal treaty or was the result of duress; it appears that the Senate Energy Committee confronted counsel for the Marshall Islands with a choice between permanent denial and permanent trusteeship. (C)

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