

# A Failed Relationship: Micronesia and the United States of America

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## I. INTRODUCTION

The United States of America must heal the wounds of injustice it has inflicted upon Micronesia and its people! The United States made promises to the people of Micronesia, and nearly a century later, those promises still remain empty today. Although the United States has attempted to right its wrongs towards Micronesia by attempting to fulfill existing duties pursuant to the Trust Territory of the Pacific Islands and the Compact of Free Association (COFA),<sup>1</sup> it has not done enough. The United

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<sup>1</sup> Compact of Free Association, U.S.-Micronesia & Marshall Islands, 48 U.S.C. § 1901 (1986) [hereinafter Micronesia Compact]; Compact of Free Association, U.S.-Palau,

States has failed to promote Micronesian self-sufficiency and independence – restricting the establishment of an independent self-governing island nation.<sup>2</sup> I have had my share of first-hand experience of the Micronesian island life, its people, economy, infrastructure, and health facilities.

It was the summer of 2013 when I traveled with my mother to her homeland of Chuuk, Micronesia. Homelands are significant in the Micronesian culture. The people live off of the land and ocean. Moreover, status in the community is determined by how much land a family owns. This was my first-time visiting Chuuk, Micronesia since my only previous visit at five-years-old. Of course, I do not remember much about Chuuk after that first visit. However, in 2013, I noticed a lot of things about Micronesia; the economy, infrastructure, and health facilities. I would describe Chuuk as impoverished, underdeveloped, and lacking basic amenities. It was clear that Chuuk was still in need of assistance from the United States to become an independent, self-sufficient, and self-governing island nation.<sup>3</sup>

As soon as we landed at the airport, my uncle was waiting to take us in his car to our village. It is a big deal to own a vehicle in Chuuk. As we drove to our village Unupuker, which is situated on the main island, I was shocked by how bad the roads were. It was like an off-road trail. The road was not paved, and the potholes and ditches were huge. When we got to our village, we did not have any running, public source of tap water. The boys of the village had to go further inland to connect a plastic pipe to a spring. It was from this plastic pipe where we received water to drink, to shower with, and to use for the toilet. And when nightfall crept upon us, the area suddenly became dark. Only certain houses in our area had electricity. For the rest of the outer islands, there was hardly any source of electricity, besides the use of a gas-powered generator and solar panels for the few families who are privileged enough to afford them.

I traveled with my uncle to the Chuuk State Hospital since he was really ill. There is only one hospital in Chuuk, which is situated on the main island, Weno. Those who do not live on the main island must travel by boat from the outer islands to the main island to access the hospital and health care. There are many instances where my relatives who reside on the outer islands do not survive their illnesses and emergency situations due to slow or lack of boat transportation to the hospital. I was surprised when we entered the hospital and saw what my auntie and cousins brought. If you get admitted to the hospital, you must bring your own pillow, bed sheet, and

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48 U.S.C. § 1931 (1986) [hereinafter Palau Compact].

<sup>2</sup> See generally Patsy T. Mink, *Micronesia: Our Bungled Trust*, 6 TEX. INT'L L.F. 181, 187 (1971) (describing how the experiences highlighted by Congresswoman Mink shed light on the evident failure of economic growth and development in Micronesia, which similarly captures my own experience in Micronesia).

<sup>3</sup> See *id.*

blanket for your family member patient. The medical services are so bad that it seemed as if my uncle spent his time in the hospital to rest on a bed and take pills. The medical technology was limited in quantity and appeared to be outdated compared to the medical technology in Hawai‘i.

From my own experiences and observations, life in Chuuk is very hard. My uncle, as well as many others who are privileged enough to have a job, get paid a little over one dollar an hour. Even with the low wages, the prices of goods are similar to the prices in Hawai‘i. In Chuuk, for example, a can of spam sells for almost three dollars and a fifty-pound bag of rice sells for at least sixteen to eighteen dollars. Many members of my family begged us to bring them along with us back to Hawai‘i.

Overall, I was privileged to receive first-hand experience of the Micronesian people, economy, infrastructure, and health facilities. My experience left me with the impression that because the United States government allows Micronesians to travel to the United States to receive economic and health benefits, it has disregarded these issues back home and brushed them off to the side. My summer of 2013 experiences in Chuuk, Micronesia portrays the many reasons why many Micronesians migrate to Hawai‘i, Guam, or the continental United States. The economy, health facilities, education, and infrastructure in Chuuk are impoverished and underdeveloped. These are the effects of the United States’ failure to promote Micronesian self-sufficiency and independence – restricting the establishment of a self-governing island nation.

This comment critiques the relationship between the United States of America and Micronesia (the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau) and offers a framework for reparatory justice. The issues highlighted in this comment are issues of social justice and reparative justice. A special relationship exists between the United States and Micronesia under COFA.<sup>4</sup> Generally, pursuant to COFA, Micronesians are eligible for economic assistance, travel to the United States, and other benefits in exchange for the United States military use and permitting certain United States operating rights in Micronesia.<sup>5</sup>

As discussed later in detail in this comment, the United States has and continues to fail to fulfill its Trust and COFA duties and obligations towards Micronesia. This creates health care, economic, and education complications for the Micronesian people.<sup>6</sup> As a result, many of the

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<sup>4</sup> See *Amici Curiae Brief of the Japanese Am. Citizens League-Honolulu Chapter, The Nat’l Ass’n for the Advancement of Colored People-Honolulu Branch and Kokua Kalihi Valley Comprehensive Fam. Serv. in support of Plaintiffs-Appellees* at 3-4, *Korab v. Fink*, 797 F.3d 572 (9th Cir. 2014) (No. 11-15132) [hereinafter *Korab Brief*].

<sup>5</sup> See P.L. 99-239 §§ 141 (a); 311 (a), (b); see also *Korab Brief*, *supra* note 4, at 16.

<sup>6</sup> See *Mink*, *supra* note 2, at 184.

Micronesian people have emigrated to the United States to receive, among other things, needed medical care.<sup>7</sup> Micronesians, both in Micronesia and those who can migrate to the United States, are still suffering from harms of social injustice. The individuals who are able to move to Hawai‘i, Guam, or the continental United States, are still faced with challenges as they are often discriminated against and excluded because of a narrow reading of the law. Due to the United States’ failures under the Trusteeship and COFA, I argue that Micronesians have not healed from the social injustices with which they are faced.<sup>8</sup> Recent exclusion and discrimination against COFA migrants highlight that they should be provided a clearer and recognized legal status. Providing COFA migrants an unambiguous legal status, which entails new clearer and recognized language under the law, would be significant in providing social healing for Micronesians, and ultimately justice and self-sufficiency.

## II. THE RELATIONSHIP BETWEEN MICRONESIA AND THE UNITED STATES

### A. *Trust Territory of the Pacific Islands*

Micronesia is a geographic region composed of thousands of tiny islands and atolls in the Western Pacific Ocean. This geographic region consists of island nations including Marshall Islands, Nauru, Palau, Kiribati, and the Federated States of Micronesia. However, the COFA only covers the Federated States of Micronesia (Chuuk, Yap, Kosrae, Pohnpei), the Republic of Palau, and the Republic of Marshall Islands.

In 1947, the Micronesian islands became the “Trust Territory of the Pacific Islands,” under the newly formed United Nations International Trusteeship System established to help former colonies move towards independence.<sup>9</sup> The United States was designated as the administering authority of the trust territory.<sup>10</sup> The Trustee Agreement for the Former Japanese Mandated Islands was adopted in 1947 and aimed to promote the political, economic, social and educational “advancement of the inhabitants,” their “self-sufficiency” and “health,” and their “development . . . toward self-government or independence.”<sup>11</sup>

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<sup>7</sup> See Korab Brief, *supra* note 4, at 4; see also Chad Blair, *No Aloha for Micronesians in Hawaii*, Civil Beat (June 10, 2011), <https://www.civilbeat.org/2011/06/no-aloha-for-micronesians-in-hawaii/>.

<sup>8</sup> See Blair, *supra* note 7. (Micronesians have not healed from the social injustices with which they are faced. Currently, Micronesians in Hawaii are still facing discrimination and injustices in the form of healthcare.)

<sup>9</sup> See Korab Brief, *supra* note 4, at 11.

<sup>10</sup> Trusteeship Agreement for the Former Japanese Mandated Islands, art. 2, July 18, 1947, 61 Stat. 3301 [hereinafter Trusteeship Agreement].

<sup>11</sup> See *id.* at art. 6 (1)-(4).

Although the stated goals of the United States were to help Micronesia move towards self-governance and independence, the United States, in turn, benefitted by receiving powerful rights over the Micronesian islands. This power was integral to United States' military presence in the Pacific and also became a disincentive to facilitate such independence.<sup>12</sup> The Trust stated that the United States:

[S]hall have full power of administration, legislation, and jurisdiction over the territory subject to the provisions of this agreement, and may apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.<sup>13</sup>

The United States virtually retained *unlimited* power in Micronesia. Such unlimited power included military control:

In discharging its obligations . . . the Administrating Authority [United States] shall ensure that the Trust Territory shall play its part, in accordance with the Charter of the United Nations, in the maintenance of international peace and security. To this end, the Administrating Authority shall be entitled: 1) to establish naval, military, and air bases and to erect fortifications in the Trust Territory; 2) to station and employ armed forces in the territory; and 3) to make use of volunteer forces, facilities and assistance from the trust territory.<sup>14</sup>

The provisions in Article 5 of the agreement provides the United States authority to maintain military forces in the Trust Territory.<sup>15</sup> Pursuant to this provision, the United States was able to pursue its military interests.

With the United States having unlimited authority over the Micronesian islands, the American military presence and control expanded throughout Micronesia.<sup>16</sup> During the years following the establishment of the Trusteeship, the Micronesian region witnessed significant United States military expansion – including the devastating nuclear bomb testing on the

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<sup>12</sup> See Trusteeship Agreement, *supra* note 10, at art. 3, 5. See generally Mink, *supra* note 2, at 187.

<sup>13</sup> See Trusteeship Agreement, *supra* note 10, at art. 3

<sup>14</sup> See *id.* at art. 5(1)-(3).

<sup>15</sup> See *id.* at art. 5(1)-(3).

<sup>16</sup> See HOLLY M. BARKER, BRAVO FOR THE MARSHALLESE: REGAINING CONTROL IN A POST-NUCLEAR, POST-COLONIAL WORLD 19 (2004).

Marshall Islands that lasted twelve years.<sup>17</sup> With the Marshall Islands, being isolated, lightly populated, and already under military control, the United States' military leaders rendered it an ideal place for the Navy to conduct tests without much international scrutiny.<sup>18</sup>

Aside from the power granted to the United States government, the agreement outlined the United States' duties and responsibilities towards Micronesia and its people. Article 6 of the agreement declared that the United States must:

[P]romote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; protect the inhabitants against the loss of their lands and resources; and improve the means of transportation and communication[.]<sup>19</sup>

Under the clear language of the Trust, the United States government was charged with the duties of promoting Micronesian independence and improving and protecting the Micronesian homeland and resources.<sup>20</sup>

#### B. *Compact of Free Association*

By the mid-1980s, the Federated States of Micronesia (FSM), Republic of Marshall Islands (RMI), and the Republic of Palau entered into COFA with the United States.<sup>21</sup> The goals of COFA are to: “(1) secure self-government for each country; (2) assure certain national security rights of the FSM, the RMI, and the United States; and (3) assist the FSM and the RMI in their efforts to advance economic self-sufficiency.”<sup>22</sup>

The goals of COFA virtually mirrored those goals expressed in the Trust agreement between the United States and Micronesia. COFA terminated the United States' trusteeship over the former Trust Territory of the Pacific Islands.<sup>23</sup> However, the resolution established the FSM and the RMI as independent nations and established a special relationship between the United States and these nations.<sup>24</sup> Citizens of these independent nations

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<sup>17</sup> *See id.* at 20.

<sup>18</sup> *See id.* at 19.

<sup>19</sup> Trusteeship Agreement, *supra* note 10, at art. 6(2).

<sup>20</sup> *See id.* at art. 6.

<sup>21</sup> Micronesia Compact, 48 U.S.C. § 1901; Palau Compact, 48 U.S.C. § 1931.

<sup>22</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO/T\_NSIAD/RCED-00-227, U.S. FUNDS TO TWO MICRONESIAN NATIONS HAD LITTLE IMPACT ON ECON. DEV. & ACCOUNTABILITY OVER FUNDS WAS LIMITED 3 (2000).

<sup>23</sup> *See* Korab Brief, *supra* note 4, at 16.

<sup>24</sup> *See* U.S. CITIZENSHIP AND IMMIG. SERV., STATUS OF CITIZENS OF THE FREELY ASSOC. STATES OF THE FEDERATED STATES OF THE MICRONESIA AND THE REPUBLIC OF THE

are recognized as COFA citizens. Such COFA citizens are not citizens or nationals of the United States.<sup>25</sup> They are not ordinary immigrants at all. Rather, COFA citizens are afforded a special relationship with the United States in which they are granted the rights to live, study, and work in the United States for an unlimited length of stay.<sup>26</sup>

Further, the United States pledged compensation for the damages it has caused on the Micronesian islands. The United States:

[A]ccept[ed] the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for the loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands.<sup>27</sup>

Beyond monetary compensation, the United States also agreed to provide “special medical care and logistical support.”<sup>28</sup>

### III. UNITED STATES FAILURE TO FULFILL ITS LEGAL DUTIES

#### A. *Historical Failures*

The United States has failed to fulfill its trustee duties to COFA migrants and citizens.<sup>29</sup> The Marshall Islands were a part of the United Nations Trust Territory administered by the United States, which, as sole trustee, had a duty to “protect the inhabitants against the loss of their land and resources.”<sup>30</sup> Rather than protecting the Marshallese inhabitants against

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MARSHALL ISLANDS (2015) [hereinafter USCIS FACTSHEET] (explaining the historical relationship between the U.S. and COFA migrants. COFA migrants are granted unlimited length of stay in the U.S. for work, health, and education in exchange for U.S. military operating rights in the COFA nations); *see also* S. Con. Res. 148 S.D. 1, 29th Leg., Reg. Sess. (Haw. 2018).

<sup>25</sup> *See* Korab Brief, *supra* note 4, at 7.

<sup>26</sup> USCIS FACTSHEET, *supra* note 24; *see also* S. Con. Res. 148 S.D. 1, 29th Leg., Reg. Sess. (Haw. 2018).

<sup>27</sup> Joint Resolution to Approve the “Compact of Free Association,” and for Other Purposes, Pub. L. No. 99-239, §177(a), 99 Stat. 1770 (1985).

<sup>28</sup> 48 U.S.C. § 1903(h)(1).

<sup>29</sup> *See* Mink, *supra* note 2, at 184. (U.S. Representative Mink recognized that the U.S. neglected their duties regarding the promotion of economic advancement and self-sufficiency. She recognized at the time that the people were still largely impoverished and lacking in all of the basic amenities.).

<sup>30</sup> *See* Korab Brief, *supra* note 4, at 8; *see also* *Oversight on the Compact of Free Association with the Republic of the Marshall Islands (RMI): Hearing Before the Subcomm. on Asia, the Pacific and the Global Env’t of the H. Comm. On Foreign Affairs*, 111th Cong. \*3 (May 20, 2010) [hereinafter *Hearing On COFA*] (statement of Jonathan M.

the loss of their land and resources as required by COFA, the United States furthered the loss and destruction of the Marshallese land and resources by undertaking various nuclear bomb tests.

The Micronesian people have suffered physical, emotional, and economic harm because of the military activities of the United States government on the Micronesian islands.<sup>31</sup> In the late 1940s and 1950s, the United States, as trustee for the Trust Territory of the Pacific Islands, “pursued its own interest by testing nuclear bombs on select Pacific Islands.”<sup>32</sup> From 1946 to 1958, the United States dropped sixty-seven atomic and hydrogen bombs on Bikini and Enewetak atolls.<sup>33</sup> The United States vaporized nine islands, which were once inhabited and contained rich sources of farming and fishing.<sup>34</sup> Consequently, the Micronesian homelands, as well as the health of the Micronesian people, were ruined as they suffered irreparable harm. Various Marshall atolls were irreparably harmed – thus the people of those specific atolls lost a part of their identity and culture as they were forced to leave their homelands.<sup>35</sup> The Marshall Islands and its people suffered the greatest harm when the United States tested atomic and hydrogen bombs that were dropped on its atolls.<sup>36</sup>

The most powerful test was “Bravo,” a fifteen-megaton device that was equivalent to 1,000 Hiroshima bombs.<sup>37</sup> “Bravo” was detonated in 1954 at the Bikini atoll – throwing radioactive fallout over nearly 50,000 square miles.<sup>38</sup> The devastation of “Bravo” was powerful, yet its rationale for detonation was questionable as it was conducted during a time of peace rather than a time of war.<sup>39</sup> As pointed out by Zohl dé Ishtar’s *A Survivor’s Warning on Nuclear Contamination*:

In 1954, the USA exploded a hydrogen bomb on Bikini. Strangely code-named Bravo, this bomb was 1,000 times stronger than the one that devastated Hiroshima. Pulverized, Bikini’s reef, islands and lagoon were lifted up into the air

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Weisgall, Legal Counsel for the People of Bikini Atoll).

<sup>31</sup> See Korab Brief, *supra* note 4, at 9-10.

<sup>32</sup> See Korab Brief, *supra* note 4, at 3, 7.

<sup>33</sup> See Zohl dé Ishtar, *A survivor’s warning on nuclear contamination*, 13 PAC. ECOLOGIST 50, 51 (2006-07).

<sup>34</sup> See *Hearing On COFA*, *supra* note 30, 3-4.

<sup>35</sup> See HOLLY M. BARKER, BRAVO FOR THE MARSHALLESE: REGAINING CONTROL IN A POST-NUCLEAR, POST-COLONIAL WORLD 19, 75-77 (2004).

<sup>36</sup> See *Hearing On COFA*, *supra* note 30, at 3-4.

<sup>37</sup> Ishtar, *supra* note 33, at 50.

<sup>38</sup> See *Hearing On COFA*, *supra* note 30, at 4.

<sup>39</sup> Ishtar, *supra* note 33, at 50.

and carried as radioactive fallout over Rongelap and other inhabited islands. It was three days before the U.S. Navy evacuated the Rongelap people and took them to nearby Kwajalein atoll where they camped for three years while suffering the early effects of the radiation that had contaminated them. Their symptoms were similar to those experienced by Japanese people in Hiroshima and Nagasaki. We may well wonder . . . how this nuclear experiment could ever have happened to people here on Pacific Islands, not in war-time, but in a time of peace.<sup>40</sup>

The United States, pursuing its own military interests during the era of the nuclear arms race, unjustly used the Marshall Islands as a test site for their own nuclear bombs – claiming it was for the “good of all mankind.”<sup>41</sup> Instead, radioactive fallout adversely and irreparably affected the health of the Marshallese people.<sup>42</sup> These affects are still felt today.

The radioactive ash, which fell on other atolls, entered the Marshallese islanders’ lungs, stuck to the coconut oil on their skin, and was played with and ingested by the Marshallese children.<sup>43</sup> Experiences of the radioactive fallout are highlighted by Darlene Keju-Johnson’s *For the Good of Mankind*:

The people of Rongelap and Utirik, who were most directly affected, were not picked up until three days after the explosion. Some American soldiers came and said, “Get ready. Jump in the ocean and get on the boat because we are leaving. Don’t bring any belongings. Just go in the water.” They didn’t give people a change of clothing; they had to sleep in their contaminated clothing all the way. They were burnt, and they were vomiting. . . Their hair was falling out, fingernails were falling off – but they were never told why.<sup>44</sup>

Health effects, such as thyroid cancer, suffered by the Marshallese islanders, are directly linked to the nuclear testing program.<sup>45</sup> The most

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<sup>40</sup> *Id.*

<sup>41</sup> See Darlene Keju-Johnson, *For the Good of Mankind*, 2 SEATTLE J. SOC. JUST. at 309 (2003).

<sup>42</sup> See Seiji Yamada, M.D., *Cancer, Reproductive Abnormalities, and Diabetes in Micronesia: The Effect of Nuclear Testing*, 11 PAC. HEALTH DIALOG 216, 216-17 (2004).

<sup>43</sup> See BARKER, *supra* note 16, at 21.

<sup>44</sup> Darlene Keju-Johnson, *For the Good of Mankind*, 2 SEATTLE J. SOC. JUST. 310, 310 (2003).

<sup>45</sup> Yamada, *supra* note 42, at 219-20 (discussing how the importation of tobacco, alcohol, and foods of poor nutritional value also contribute to health problems, while noting that there are health implications directly linked to the nuclear testing program).

damaging irreparable health effects were birth defects.<sup>46</sup> These included stillborn pregnancies and babies born with deformed body parts.<sup>47</sup> Such deformities included the babies having no eyes, and no heads.<sup>48</sup> As expressed by Darlene Keju-Johnson, a Marshallese woman:

Now we have this problem, what we call “jellyfish babies.” These babies are born like jellyfish. They have no eyes. They have no heads. They have no arms. They have no legs. They are not shaped like human beings at all.<sup>49</sup>

Such deformities highlight the irreparable harm caused by the United States government in pursuit of its military interests. The deformities and subsequent trauma are something that the United States could never repay, reimburse monetarily, or in any other way.

Besides the horrific damaging health effects, the Marshallese islanders were irreparably harmed by the destruction of their homelands as they were no longer able to return to, connect with, and live off of their lands.<sup>50</sup> As a result of the nuclear bomb testing, the Marshallese islanders were forcibly removed from their homes to barren atolls that could not support them.<sup>51</sup> Resources that are needed for subsistence and survival were depleted.<sup>52</sup> As expressed by Keju-Johnson:

The United States promised the Bikinians that it only wanted their islands for a short time. The chief thought maybe a short time meant next week, or maybe next month. So they moved to Rongerik. The Bikinians had no choice but to leave their islands, and they have never returned. Rongerik is a sandbar island. There are no resources on it. It was too poor to feed the people. We live on our oceans – it’s like our supermarket – and from our land we get breadfruit and other foods. But on Rongerik, there was nothing.<sup>53</sup>

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<sup>46</sup> See BARKER, *supra* note 16, at 21.

<sup>47</sup> See Darlene Keju-Johnson, *For the Good of Mankind*, 2 SEATTLE J. SOC. JUST. at 311 (2003).

<sup>48</sup> See Keju-Johnson, *supra* note 43, at 311.

<sup>49</sup> See *id.*

<sup>50</sup> See BARKER, *supra* note 16, at 21.

<sup>51</sup> See *id.* at 64.

<sup>52</sup> See Keju-Johnson, *supra* note 44, at 311-12.

<sup>53</sup> *Id.* at 309.

The Islanders had to relocate from their home island that was resource rich – both on the land and reefs – to sand bar atolls that did not have much sources of food.<sup>54</sup>

The Marshallese, like many groups of Pacific Islanders, stress an importance of social, cultural, and spiritual connection to their land.<sup>55</sup> Due to the damages caused by the United States' nuclear bomb testing, the Marshallese islanders were forced to abandon the significant connection to the land that defined their relationships with each other.<sup>56</sup> Thus, the Islanders were harmed both emotionally and psychologically.<sup>57</sup> Not only were the initial victims emotionally and psychologically harmed because of the loss of access to their lands, but also present and future generations are harmed because they too are unable to return to their now uninhabitable ancestral homelands.<sup>58</sup>

Although the Marshall Islands and its people suffered the greatest harm of exposure to nuclear radiation, the damaging health effects are not only limited to the Marshall Islands. Rather, the negative health effects affect the other surrounding Micronesian islands too. Physician Seiji Yamada, who treats and studies the health care challenges of COFA residents in Hawai'i, assessed that:

Given the mega tonnage of nuclear testing that the U.S. conducted in the Pacific, it appears plausible that excess cancer would have occurred in areas of Micronesia other than the Marshall Islands . . . while diabetes is not a radiogenic disease, and other cancers are generally less radiogenic than leukemia or thyroid cancer, the social and cultural effects of nuclear testing specifically, and the strategic uses to which Micronesia has been put generally, have each had a role in the social production of disease . . .<sup>59</sup>

Due in part to these various effects, approximately 18,000 Micronesians migrated to Hawai'i to obtain needed health care, education, and economic stability.<sup>60</sup>

This problem is not new. Indeed, in 1970, United States Representative Patsy T. Mink authored a piece entitled *Micronesia: Our Bungled Trust*, which depicted the United States' failed duties and

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<sup>54</sup> See *id.* at 309.

<sup>55</sup> See Korab Brief, *supra* note 4, at 9.

<sup>56</sup> See *id.* at 9.

<sup>57</sup> See Korab Brief, *supra* note 4, at 9-10; see also Keju-Johnson, *supra* note 44, at 309-10.

<sup>58</sup> See Korab Brief, *supra* note 4, at 10.

<sup>59</sup> Yamada, *supra* note 42, at 219-20.

<sup>60</sup> See S. Con. Res. 148 S.D. 1, 29th Leg., Reg. Sess. (Haw. 2018).

obligations to help Micronesia become independent.<sup>61</sup> Specifically, Mink argued, the United States failed to “promote the economic advancement and self-sufficiency of the inhabitants” and “protect the inhabitants against the loss of their lands and resources.”<sup>62</sup> Mink’s piece critiqued the United States’ colonial presence in Micronesia.<sup>63</sup>

The United States government neglected their trust duties and obligations, thus leaving Micronesia with empty promises. As Mink also expressed, “had the United States acted meaningfully to implement these obligations during the twenty-three years of its control, by now we would expect to see great gains for the people involved.”<sup>64</sup> Instead, in pursuit of its own military interests, the United States instead accelerated the damage and loss of Micronesian land and resources. As Mink pointed out:

After winning the right to control Micronesia, we proceeded to allow the islands to stagnate and decay through indifference and lack of assistance. President Truman turned over the job of administering the islands to the Navy, whose rule, despite a few modest efforts toward reform, can best be described as classic military colonialism. Even today, the people are still largely impoverished and lacking in all of the basic amenities which we consider essential – adequate education, housing, good health standards, modern sanitation facilities.<sup>65</sup>

Again, the notion of military interest was cited as one of the reasons that the United States failed to fulfill its duties under the Trust agreement. As a result, the Micronesian people are harmed as they are left with inadequate basic and essential amenities. My first-hand experiences during my 2013 trip to Chuuk, Micronesia illustrated such lack of basic amenities.

The issues that hampered the goal of self-government, as Mink pointed out, included for example, trade restrictions.<sup>66</sup> As Mink’s piece stated,

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<sup>61</sup> See generally Mink, *supra* note 2, at 184-89.

<sup>62</sup> *Id.* at 183-84.

<sup>63</sup> See Mink, *supra* note 2, at 185-86.

<sup>64</sup> Mink, *supra* note 2, at 184 (explaining the obligations that Congresswoman Mink highlights as the obligations to “promot[e] economic advancement and self-sufficiency of the inhabitants” and to “protect the inhabitants against the loss of their lands and resources.” Further explaining her opinion that if these obligations were undertaken meaningfully, there would have been actual and noticeable improvements by now).

<sup>65</sup> *Id.* at 184.

<sup>66</sup> See *id.* at 191.

[T]he U.S. has at times complicated the Micronesians own efforts to better themselves by the adoption of conflicting policies which impede such efforts. The U.S. tariff barriers against the sale of Trust Territory products in America is a prime example. While claiming to be trying to bolster the Micronesian economy, we impose trade restrictions which hamper this goal.<sup>67</sup>

### B. Modern Failures

Today, the United States continues to fail to fulfill its legal obligations and duties – now arising under COFA. Although there are modern failures for COFA migrants throughout the U.S., this paper focuses on modern problems COFA migrants face in the State of Hawai‘i. For Micronesian COFA migrants who have decided to leave their homelands for Hawai‘i, life is still hard. Micronesians now face new issues like the high cost of living, unemployment, and, most importantly, lack of access to healthcare.<sup>68</sup> The large and growing population of Micronesians has taken a toll on the State’s budget.<sup>69</sup>

In Hawai‘i, Micronesians initially received state-funded Medicaid benefits.<sup>70</sup> They were then moved to a Basic Health Hawai‘i plan that ran from 2009 to 2011.<sup>71</sup> Under Basic Health Hawai‘i, Micronesians were afforded only limited coverage of health care: no more than ten days of medically necessary inpatient hospital care per year, twelve outpatient visits per year, six mental health visits, and a maximum of four medication prescriptions per calendar month.<sup>72</sup> Micronesian COFA migrants were excluded from Medicaid eligibility under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>73</sup> After the courts holdings

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<sup>67</sup> Mink, *supra* note 2, at 182.

<sup>68</sup> See Mileka Lincoln, *State Officials: Majority of Kaka‘ako Homeless are COFA Migrants*, HAW. NEWS NOW (May 12, 2015 10:24 PM), <http://www.hawaiinewsnow.com/story/29049224/state-officials-majority-of-kakaako-homeless-are-cofa-migrants>; (a number of COFA migrants are now homeless as they can't afford the high cost of living in Hawai‘i); *see also* E-mail from Dina Shek, Assoc. Fac. Specialist, William S. Richardson Sch. of L., (Apr. 21, 2018, 03:10 HST) (on file with author).

<sup>69</sup> Malia Blom Hill, *U.S. Should Rethink Costly Migrant Aid in the West Pacific*, THE HILL (Apr. 25, 2017, 11:40 AM), <http://thehill.com/blogs/pundits-blog/economy-budget/330276-us-should-rethink-cofa-aid-in-the-west-pacific>.

<sup>70</sup> *See* Korab v. Koller, No. 10-00483 JMS/KSC, 2010 WL 5158883, (D. Haw. Dec. 13, 2010) at 1.

<sup>71</sup> *Id.* at 1-2.

<sup>72</sup> *See* Korab v. Koller, No. 10-00483 JMS/KSC, 2010 WL 5158883, (D. Haw. Dec. 13, 2010) at 2.

<sup>73</sup> E-mail from Dina Shek, *supra* note 68.

in *Korab v. Koller*<sup>74</sup> and *Korab v. McManaman*,<sup>75</sup> Micronesians were left with obtaining health care insurance under the Affordable Care Act exchanges.<sup>76</sup> COFA migrants who are financially eligible for Medicaid, are required to buy insurance on the Affordable Care Act market.<sup>77</sup> Even if Micronesians have healthcare subsidies to help cover the costs of the premiums, they are left with co-pays and prescription costs.<sup>78</sup>

The United States has failed to uphold its duties and obligations towards Micronesia and its people:

Over twenty-five years after the Compacts' initiation, the United States still has failed to discharge its responsibility to the Micronesian people, and the dire situation in the Micronesians' homelands has compelled ever-increasing migration to Guam, the Commonwealth of the Northern Marianas and Hawai'i.<sup>79</sup>

The United States Government Accountability Office (GAO) has acknowledged that the health care in the FSM and RMI are, as mentioned earlier, well underdeveloped and inadequate.<sup>80</sup> As a GAO report highlighted, the health care in the FSM and RMI are “inadequate to meet the needs of the population, providing incentive to travel or move to the United States in order to receive appropriate health care.”<sup>81</sup>

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<sup>74</sup> See generally No. 10-00483 JMS/KSC, 2010 WL 5158883, (D. Haw. Dec. 13, 2010) (Plaintiffs on behalf of similarly situated COFA citizens, filed a class action challenged the State of Hawai'i DHS's implementation of a new health care benefits program, Basic Health Hawai'i ("BHH"), Plaintiffs assert that BHH violates (1) the equal Protection Clause of the Fourteenth Amendment because it provides less health benefits than the State of Hawai'i's Medicaid program offered to citizens and certain qualified aliens, and (2) the Americans with Disabilities Act. The court granted the Plaintiffs motion for preliminary injunction.).

<sup>75</sup> See generally 135 S. Ct. 472 (2014). (COFA residents brought a purported class action against Hawai'i officials, challenging the validity of the implementation of a health care benefits program by the state's Department of Human Services (DHS). Defendants moved for summary judgment as to the claims directed to the new residents, and moved for a preliminary injunction. The court held that strict scrutiny applied to the new residents' Equal Protection challenge, but preliminary injunctive relief was not warranted.).

<sup>76</sup> E-mail from Dina Shek, *supra* note 68.

<sup>77</sup> See *id.*

<sup>78</sup> *Id.*

<sup>79</sup> Susan K. Serrano, *The Human Costs Of "Free Association": Socio-Cultural Narratives and The Legal Battle For Micronesian Health In Hawai'i*, 47 JOHN MARSHALL L. REV. 1378, 1395 (2014).

<sup>80</sup> See U.S. GOV'T ACCOUNTABILITY OFF. GAO-02-40, MIGRATION FROM MICRONESIAN NATIONS HAS HAD SIGNIFICANT IMPACT ON GUAM, HAW., & THE COMMONWEALTH OF THE N. MAR. IS. 18 (2001).

<sup>81</sup> *Id.*

### C. *Proposed Truths for United States Failure*

So what's really going on here? The United States has both the capacity and resources it needs to fulfill its obligations and duties towards Micronesians. However, the United States has not done so, effectively ensuring that Micronesia will continue to depend on the United States. The overarching reason for this is the continued use of the Micronesian region for military purposes.<sup>82</sup>

The Micronesian region continues to be a strategic and important military location that the United States cannot afford to lose – especially now with North Korea, Russia, and China's constant threats.<sup>83</sup> Although the United States may well be able to fulfill its duties and obligations, it chooses not to do so (for stated reasons of military purposes) – finding ways to ensure Micronesian dependency on the United States. As an example, as Congresswoman Mink concluded, the United States claimed to be bolstering the Micronesian economy while imposing stringent trade restrictions contrary to the alleged American goal of Micronesian independence.<sup>84</sup>

It is evident that the United States, in light of strategic military necessities, intentionally promotes Micronesian dependency on the United States rather than promoting Micronesian self-government and independence. As pointed out in a report commissioned by the Kennedy Administration, a strategy was outlined for “furthering American interests in Micronesia, in part by intentionally fostering economic dependence on the United States.”<sup>85</sup> Congresswoman Mink highlighted American military interests in the area as the apparent obstacle to “basic amenities” and ultimately, Micronesian self-determination.<sup>86</sup> Clearly, the United States promotes and fosters dependence on the United States to further its own interests in Micronesia while its people suffer from the United States’ historic and modern-day failures.

## IV. PROPOSED SOLUTION: A SOCIAL HEALING THROUGH JUSTICE FRAMEWORK

As described above, the issues that Micronesians face are issues of social injustices, inequalities, and unfulfilled duties. The Trust Territory of the Pacific Islands and COFA may be viewed as forms of reparative justice

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<sup>82</sup> See Mink, *supra* note 2, at 184.

<sup>83</sup> *Id.* at 182.

<sup>84</sup> See *id.* at 191.

<sup>85</sup> Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 479 (2002) (citing John B. Metelski, *Micronesia and Free Association: Can Federalism Save Them?*, 5 CAL. W. INT’L L.J. 162, 183 (1975)).

<sup>86</sup> See Mink, *supra* note 2, at 181.

and reconciliation efforts between the United States and the Micronesian people. However, is COFA adequate and does it provide an opportunity for genuine social healing for Micronesia and its people?

A. *Earlier Efforts of Reparation: Courts Tort Law Monetary Model*

In the early 2000s, American reparation efforts were focused on the potential application of tort claims to address injustices from slavery.<sup>87</sup> Under Tort law, reparations were equated with, and emphasized as monetary compensation by redress opponents – thus receiving technical legal objections.<sup>88</sup> In *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, Law Professor Eric Yamamoto writes:

The once powerful idea of reparations . . . has been largely eviscerated by redress opponents in the United States. Those opponents have managed to narrowly recast reparations to mean monetary compensation, thus requiring legal proof of an individual perpetrator who caused direct harm to a specific victim, and the filing of legal claims before the expiration of short statutes of limitation.<sup>89</sup>

Consequently, "this framing . . . distorts public understandings of group-based injustice."<sup>90</sup>

The notable failure of reparation lawsuits in the courts were accompanied by the consequence of the "public perception that reparation claims lacked merit."<sup>91</sup> However, Professor Mari Matsuda points out that the "failure of reparations claims in traditional tort law does not mean that the claims lack merit as group-based rights."<sup>92</sup>

The tort law [monetary] model, with its emphasis on direct

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<sup>87</sup> See Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 103-04, 120, 126 (2004); see also Eric K. Yamamoto & Ashley Kai'ao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 28-29 (2009).

<sup>88</sup> See Yamamoto & Obrey, *supra* note 87, at 29.

<sup>89</sup> See Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 ASIAN-PAC. L. & POL'Y J. 2, 7 (2014).

<sup>90</sup> See *id.* at 7.

<sup>91</sup> See Yamamoto & Obrey, *supra* note 87, at 29.

<sup>92</sup> See Yamamoto & Obrey, *supra* note 87, at 29 (citing to Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. Rev. 323, 374 (1987)).

causation, is designed for situations such as a simple car accident lawsuit between two drivers involving only money damages. It does not account for systemic group-based harms over generations. It also misses the repairing of bodies, minds and spirits of individuals and communities.<sup>93</sup>

Thus, for the reasons mentioned above, the tort law monetary model pursued in courts would not be the appropriate or an adequate model to provide genuine social healing for broad groups of harmed people such as Micronesians.<sup>94</sup> The discrimination, forcible removal of land, and lasting health effects on Micronesian people cannot be repaired through money.

Consequently, a new generation of reparations, while still valuing aspects of the legal process, shifts away from the litigation-compensation model.<sup>95</sup> Efforts now focus on reparative measures to heal the continuing wounds of injustice that broad groups of people, such as Micronesians, still suffer from today.<sup>96</sup>

#### B. *Professor Yamamoto's Social Healing Through Justice Framework*

Professor Eric K. Yamamoto developed an analytical approach – *Social Healing Through Justice* – for “shaping, evaluating, and reconfiguring reconciliation initiatives aimed at engendering healing for those still suffering deep wounds of injustice and for society itself.”<sup>97</sup> Professor Yamamoto’s “praxis approach” to the healing of injustices, suggests a “pragmatic search for healing understandings that resonate both with policymakers and on-the-ground communities.”<sup>98</sup> Mutual commitment is required from all sides, in order to “generate productive relations through acts of justice.”<sup>99</sup>

Professor Yamamoto’s Social Healing Through Justice framework merges theories from “the disciplines of law, theology, social psychology, political theory, human rights, economics, and indigenous healing

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<sup>93</sup> Yamamoto & Obrey, *supra* note 87, at 29 (citing to Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 374 (1987)).

<sup>94</sup> See Yamamoto & Obrey, *supra* note 87, at 30.

<sup>95</sup> See Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. WESTERN L. REV. 1, 56 (2007).

<sup>96</sup> See Yamamoto & Obrey, *supra* note 87, at 30.

<sup>97</sup> See Eric K. Yamamoto, Miyoko Pettit-Toledo, & Sarah Sheffield, *Bridging the Chasm: Reconciliation's Needed Implementation Fourth Step*, 15 SEATTLE J SOC. JUST 109, 113 (2016).

<sup>98</sup> Yamamoto, Pettit & Lee, *supra* note 89, at 7.

<sup>99</sup> Yamamoto & Obrey, *supra* note 87, at 31.

practices.”<sup>100</sup> Professor Yamamoto acknowledges that each of these disciplines’ approach to healing has its own share of benefits and limitations.<sup>101</sup> The discipline of law “speaks of equality and dreams of truly ‘egalitarian’ relations – a law-inspired leveling of social and economic hierarchies. Yet law also acknowledges that claims to reparations . . . have fallen short in the courts.”<sup>102</sup> Moreover, the theology discipline “highlight[s] . . . the reunification of people according to religious tenets of acknowledgement and atonement. Yet religious conflict often seems to spur rather than quell conflict.”<sup>103</sup> Social psychology “works toward transformations in group consciousness and behavior in an effort to address present-day and future generational wounds.<sup>104</sup> Political theory aims to reshape the “polity by breaking old barriers and reincorporating people at the margins.”<sup>105</sup> Individuals advocating under the Human rights discipline “seek to change ‘legal consciousness’ and institutional behavior about what is right and just . . . but human rights norms are largely unenforceable absent collective political will.”<sup>106</sup> Economic theory engages in “‘capacity-building’ for those injured by injustice to remove social structural impediments to societal advancement . . . but economic reparations are ‘sacrificed on the altar of governmental fiscal restraints.’”<sup>107</sup> Indigenous healing practitioners commit to “communally making right, or righteous, the broken relationship.”<sup>108</sup>

Professor Yamamoto identified six common principles among the seven disciplines theories previously discussed:

- (1) mutual engagement by those responsible in some fashion and a convergence of their interests in social healing;
- (2) equality and fair treatment and at least a partial leveling of one group’s power over the other;
- (3) reparative measures addressing both the individual and the communal (or societal);
- (4) economic capacity-building and financial assistance for those harmed in ways that foster autonomy and self-determination;
- (5) a blend of words and actions that encompass acknowledgements of harms and causes,

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<sup>100</sup> Yamamoto, Pettit & Lee, *supra* note 89, at 7-8.

<sup>101</sup> *See id.* at 8.

<sup>102</sup> *Id.* at 8.

<sup>103</sup> *Id.* at 9-10.

<sup>104</sup> *Id.* at 11-12.

<sup>105</sup> *Id.* at 12.

<sup>106</sup> *Id.* at 14-15.

<sup>107</sup> *Id.* at 15-16.

<sup>108</sup> *Id.* at 18.

acceptance of responsibility and reconstruction of relationships in order to fully repair the damage; and (6) anticipation and handling of the risks of backlash and incompleteness.<sup>109</sup>

These principles support the Social Healing Through Justice framework. They shape the “conceptual meaning and practical operation of the framework’s four points of inquiry . . . as they grapple with the kind of justice that foster healing” for both the group of individuals suffering, and for society itself.<sup>110</sup>

Professor Yamamoto’s approach to social healing engages individuals, communities, justice organizations, businesses, and governments in what Professor Yamamoto calls the framework’s four points of inquiries; the “Four R’s” – recognition, responsibility, reconstruction, and reparation. As Professor Yamamoto outlined:

1) *Recognition* addresses the social psychological by examining the historical, cultural, and structural context of past and continuing suffering. By investigating the ways in which individuals suffer “pain, fear, shame and anger” and communities sustain lasting tears in their social fabric, by decoding “cultural stereotypes that seemingly legitimize” injustice and by scrutinizing “the ways that organizational structures” empower and embolden leaders and ordinary people to harm others, participants in the social healing process grapple with acknowledgment of the full range of harms and underlying causes.

2) *Responsibility* includes both “assessment of power over others” and “acceptance of responsibility of repairing the damage . . . imposed on others through power abuses.” All responsible in some fashion for collective injustice . . . need to engage in the interactive enterprise of social healing. By focusing on not only assessing responsibility for “disabling constraints,” but also on accepting responsibility for reparative actions, the mutual engagement of participants maximizes the prospect for enduring social healing.

3) *Reconstruction* is performative. It aims to build new productive relationships. Effectively building the kind of relationships needed for genuine healing and a sense of justice restored might include “apologies and forgiveness,” reframing the “history of interaction” and the “reallocation of political and economic power.” Reallocation of power,

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<sup>109</sup> *Id.* at 18-19.

<sup>110</sup> *Id.* at 20.

through changes in a “state’s social, legal or political institutions and policies” and through empowering those harmed, aims to prevent repetition of the underlying abuses by addressing root causes.

4) *Reparation*, which may include restitution, [monetary payments], compensation, and “medical, legal, or educational and financial support for individuals and communities in need,” entail more than money. Reparation may also encompass rehabilitation, “restoration of property, rebuilding of culture, economic development” (including individual capacity-building and community development) and public education. In particular, public education serves to “commemorate, impart lessons learned, and . . . generate a new justice narrative about a democracy’s commitment to civil and human rights.”<sup>111</sup>

For the purposes of the issues presented in this comment, the author employs Professor Yamamoto’s Social Healing Through Justice Framework, with a deeper emphasis on the “Reparation” prong. Specifically, the author emphasizes that the appropriate reparations must include affording Micronesians a clearer and recognized legal status.

### C. *Application: Social Healing Through Justice Framework*

The Compact of Free Association may be perceived as a form of reparative justice and reconciliation efforts on the part of the United States. By entering into COFA with Micronesia to provide economic assistance, the United States, in theory, recognized the historical, cultural, and structural context of past and continuing suffering of the Micronesian people – caused in part by the United States’ nuclear testing program.<sup>112</sup>

Again, the “three principle U.S. goals” of COFA were to “(1) secure self-government for each country; (2) assure certain national security rights of the FSM, the RMI, and the United States; and (3) assist the FSM and the RMI in their efforts to advance economic self-sufficiency.”<sup>113</sup> Pursuant to COFA, COFA citizens are afforded a special relationship with the United States in which they are granted the rights to live, study and work in the United States for an unlimited length of stay.<sup>114</sup> Further, the United States

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<sup>111</sup> Yamamoto, Pettit & Lee, *supra* note 89, at 20-21.

<sup>112</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, T-NSIAD/RCED—00-227, U.S. FUNDS TO TWO MICRONESIAN NATIONS HAD LITTLE IMPACT ON ECON. DEV. & ACCOUNTABILITY OVER FUNDS WAS LIMITED 3 (2000).

<sup>113</sup> *Id.* at 6.

<sup>114</sup> See U.S. CITIZENSHIP AND IMMIGR. SERV., STATUS OF CITIZENS OF THE FREELY ASSOC. STATES OF THE FEDERATED STATES OF MICRONESIA AND THE REPUBLIC OF THE MARSH. IS. (2015).

pledged monetary compensation for the damages it caused on the Micronesian islands and the nuclear testing program conducted on the Northern Marshall Islands in particular.<sup>115</sup>

The United States, by entering into COFA with Micronesia, implicitly accepted the responsibility of repairing the damage of social harms that Micronesians are faced with. However, written promises on pieces of paper do not mean anything if they are practically restricted or limited.

The reparative and reconciliation efforts of the United States through COFA, although a significant step in healing the injustices it inflicted on Micronesians and their homelands, is not adequate to provide genuine social healing for Micronesians. Although COFA opened the floodgates for open travel to Hawai'i, Guam, and the continental United States, it still falls short of genuine social healing as it is accompanied with downfalls and limitations. For example, while pledging under section 177 of COFA to provide monetary damages to the Marshallese Islanders for their sufferings caused by the nuclear bomb testing on their islands, the Marshallese officials have alleged that the funding is inadequate.<sup>116</sup> Section 177 of COFA recognized the United States' responsibility "[T]o address past, present and future consequences of the nuclear testing program."<sup>117</sup> However, less than four million dollars have been awarded out of a two billion judgment rendered by a Nuclear Claims Tribunal created under COFA.<sup>118</sup> As long as monetary damages continue to be limited and restricted, the United States promises of monetary damages to the Micronesian people will be rendered useless and meaningless.

Moreover, for example, while pledging in COFA to allow unrestricted travel to the United States for purposes not limited to medical treatment, state laws and policies have effectively limited this benefit.<sup>119</sup> COFA promised access to medical treatment for Micronesians but what is actually available is inadequate. As mentioned earlier, Micronesian COFA migrants in Hawai'i were excluded from Medicaid eligibility under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>120</sup> Consequently, Micronesians were left with obtaining health care insurance under the Affordable Care Act exchanges.<sup>121</sup> Even if

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<sup>115</sup> Micronesia Compact, 48 U.S.C. § 1901.

<sup>116</sup> John C. Babione, *Mission Accomplished? Fifty-Four Years of Suffering for the People of the Marshall Islands and the Latest Round of Endless Reconciliation*, 11 *IND. INT'L & COMP. L. REV.* 115, 130 (2000).

<sup>117</sup> See Korab Brief, *supra* note 4, at 17.

<sup>118</sup> See *id.* at 18.

<sup>119</sup> E-mail from Dina Shek, *supra* note 68.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

Micronesians who are already struggling financially have healthcare subsidies to help cover the costs of the premiums, they are still left with co-pays and prescription costs.<sup>122</sup>

For reasons mentioned above, COFA between the United States and Micronesia alone is inadequate to provide genuine social healing for Micronesians. Although a significant step towards social healing, reparation measures other than the Compacts – “medical, legal, or educational and financial support” – is needed.<sup>123</sup> Here, this article proposes that providing COFA migrants with a clearer and recognized legal status would be significant in providing social healing for Micronesians.

#### D. Clarifying COFA Legal Status

COFA migrants who move to Hawai‘i, Guam, or the continental United States to seek medical care or a new life, are still faced with new challenges. While seeking the benefits promised under COFA, such migrants are often discriminated against and excluded due to a narrow reading of the law.<sup>124</sup> In addition to COFA, new clearer and recognized language of legal status would be significant in providing social healing for Micronesians.

Here, this comment proposes that COFA migrants should be afforded a legal status similar to that of lawful permanent residents. A lawful permanent resident “is a non-citizen who has been granted authorization to live and work in the United States based on a permanent basis. As proof of that status, a person is granted a permanent resident card, commonly called a green card.”<sup>125</sup> Like lawful permanent residents, COFA migrants are lawfully present in the United States to work, attend school, raise families, create business, serve in the military, pay taxes, and make other significant contributions.<sup>126</sup> Moreover, like lawful permanent residents, COFA migrants are deportable for committing deportable crimes under United States law.<sup>127</sup> However, the notable difference is that the legal status of lawful permanent residents is explicitly carved out and recognized under the law and administrative systems, while COFA status is not.<sup>128</sup>

Currently, Micronesian migrants from the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau

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<sup>122</sup> *See id.*

<sup>123</sup> Yamamoto, Pettit & Lee, *supra* note 89, at 20-21 (2014).

<sup>124</sup> E-mail from Dina Shek, *supra* note 68.

<sup>125</sup> DEP’T OF HOMELAND SECURITY, GET A GREEN CARD, <https://www.dhs.gov/how-do-i/get-green-card> (Apr. 18, 2019).

<sup>126</sup> *See* S. Con. Res., 148 S.D. 1, 29th Leg., Reg. Sess. (Haw. 2018).

<sup>127</sup> USCIS, *Lawful Permanent Resident* (2016), <https://www.uscis.gov/policymanual/Updates/20160727-EffectiveLPRDate.pdf>.

<sup>128</sup> *See* S. Con. Res., 148 S.D. 1, 29th Leg., Reg. Sess. (Haw. 2018).

are admitted to the United States as nonimmigrants under COFA's terms.<sup>129</sup> Micronesian migrants are not citizens or nationals of the United States; rather they have a special relationship with the United States as COFA migrants.<sup>130</sup> The COFA migrants may:

[E]stablish residence as a nonimmigrant in the United States and according to the United States Citizenship and Immigration Services (USCIS), they are granted an unlimited length of stay for which they have no end of stay date listed in the legal documents that establish their legal residency; and . . . [are] authorized to remain in the U.S. as long as they maintain a valid status.<sup>131</sup>

Micronesians, on paper, have the best legal status. But that is not the reality for COFA migrants. The law tends to be read narrowly, often overlooking COFA migrants, thus Micronesian COFA migrants get excluded and face real life implications.<sup>132</sup> There are about "18,000 [COFA] migrants" that "live in Hawai'i, where they make other significant contributions; however, they face social and institutional discrimination and are regularly ignored in federal law which exacerbates their systemic exclusion from fair and equal treatment."<sup>133</sup>

For example, COFA migrants are systemically excluded when they encounter issues completing the USCIS I-9 forms. According to USCIS, "Form I-9, Employment Eligibility Verification, is the core of E-Verify . . . [which] is an internet-based system that compares information from Form I-9 to government records that confirm that an employee is authorized to work in the U.S."<sup>134</sup> Without the I-9 form, COFA migrants cannot work.

In 2013, employers were unable to complete the I-9 forms for their COFA migrant employees due to their unclear status under the law. Specifically, there was no clear way to indicate "COFA" status on the I-9 forms.<sup>135</sup> This issue occurred during a transition period where employers had to use an online (E-Verify) form that utilized drop-down box forms,

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<sup>129</sup> U.S. Citizenship & Immigr. Serv., *Federated States of Micronesia, Republic of the Marsh. Is, and Palau* (Oct. 30, 2018), available at <https://www.uscis.gov/i-9-central/complete-correct-form-i-9/complete-section-1-employee-information-and-attestation/federated-states-micronesia-republic-marshall-islands-and-palau>.

<sup>130</sup> See Korab Brief, *supra* note 4, at 3; see also U.S. Citizenship & Immigr. Serv., *supra* note 129.

<sup>131</sup> S. Con. Res. 148 S.D. 1, 29th Leg., Reg. Sess. (Haw. 2018).

<sup>132</sup> See *id.* at ¶ 9.

<sup>133</sup> *Id.* at ¶ 9.

<sup>134</sup> U.S. Citizenship & Immigr. Serv., *E-Verify and Form I-9*, (Nov. 14, 2016), available at <https://www.uscis.gov/i-9-central/about-form-i-9/e-verify-and-form-i-9>.

<sup>135</sup> E-mail from Dina Shek, *supra* note 68.

which did not include a COFA status option.<sup>136</sup> In this instance, COFA migrants were systemically excluded and could not verify that they were authorized to work in the United States. Consequently, COFA communities met with USCIS and urged them to clarify and include the COFA status in the system.<sup>137</sup> Two years ago, in 2016, USCIS updated the I-9 system to include the COFA status.<sup>138</sup> Here, in this issue, the United States Citizenship and Immigration Services had the authority to clarify and include the COFA status in the I-9 system.

Further, COFA migrants are systemically excluded from medical access. As mentioned earlier, in Hawai‘i, COFA migrants previously received state funded Medicaid benefits.<sup>139</sup> They were then moved to a Basic Health Hawai‘i plan where they were afforded only limited coverage of health care: ten hospital days, twelve outpatient visits per year, and four outpatient medications per month.<sup>140</sup> Micronesian COFA migrants were excluded from Medicaid eligibility under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.<sup>141</sup> Micronesians are now left with health care insurance under the Affordable Care Act where they are left with co-pays and prescription costs.<sup>142</sup>

Administrative clarification for COFA migrants - similar to lawful permanent residents - would allow access to Medicaid after a five-year wait period.<sup>143</sup> Qualified non-citizens must wait five-years after receiving qualified immigration status before they can get Medicaid coverage.”<sup>144</sup> As Professor Dina Shek determined, “most COFA migrant folks [she] knows would be fine with a five-year wait period for Medicaid, rather than being permanently barred from access to state funded Medicaid simply because they were left out of the legal language of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.”<sup>145</sup> This restricted medical access clearly undercuts COFA’s benefits of travelling to the United States for medical treatment.<sup>146</sup>

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<sup>136</sup> *See id.*

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See id.*

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

<sup>144</sup> USCIS, *Lawful Permanent Resident* (2016), available at <https://www.uscis.gov/policymanual/Updates/20160727-EffectiveLPRDate.pdf>.

<sup>145</sup> *See* E-mail from Dina Shek, *supra* note 68.

<sup>146</sup> *See id.*

COFA migrants should be afforded a clearer and recognized legal status similar to that of lawful permanent residents under the law in order to provide genuine social healing for Micronesians. USCIS has the authority and capability to clarify COFA migrant's status, like the case of the I-9 forms.<sup>147</sup> As previously discussed, since the late 1940s the United States has failed to promote Micronesian self-sufficiency, thus Micronesia lacks essential basic amenities – adequate education, housing, good health standards, and modern sanitation facilities.<sup>148</sup> In order to foster genuine social healing, the United States must remove systematic and legal barriers to COFA migrants' access to the basic amenities that originally induced them to migrate to the United States.<sup>149</sup> For COFA status to not be excluded, it should be made clearer and recognized systematically and under the law.<sup>150</sup>

By having a clearer and recognized legal status, COFA migrants would at the very least, be afforded better access to basic amenities and promises that they were promised pursuant to COFA. For example, in regards to medical access, providing COFA migrants with a clearer and recognized legal status under the law would provide them with genuine social healing as the basic amenities and services they were promised would be less restricted, thus COFA migrants would be included.

#### V. CONCLUSION

The United States, through military practices, caused irreparable harm upon the Micronesian islands and its people. The United States has failed and continues to fail to foster economic sufficiency for Micronesia – thus creating healthcare, economic, and education complications for the Micronesian people.<sup>151</sup> Generally, pursuant to the Compact of Free Association between the United States and Micronesia, COFA migrants are eligible for economic assistance, travel to the United States, and other benefits in exchange for United States defense and certain United States operating rights in Micronesia.<sup>152</sup>

Although the United States has undertaken some measures through the terms of COFA to try to right its wrongs against Micronesia, it is not enough to foster genuine social healing for Micronesians. Pursuant to COFA, COFA migrants are promised open travel to the United States to

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<sup>147</sup> See S. Con. Res. 148 S.D. 1, 29th Leg., Reg. Sess. (Haw. 2018) (urging the U.S. Congress to pass legislation to clarify the status of migrants under the COFA to promote fairness and equality under the law).

<sup>148</sup> See Mink, *supra* note 2, at 184.

<sup>149</sup> See E-mail from Dina Shek, *supra* note 68.

<sup>150</sup> See *id.*

<sup>151</sup> See Korab Brief, *supra* note 4, at 3, 14-15.

<sup>152</sup> See *id.* at 16.

access education, economic, and medical benefits.<sup>153</sup> However, access to such benefits is restricted due to a narrow reading of the COFA status. The Compact of Free Association and the United States' efforts under it is not adequate for genuine social healing, as it does not address the systemic exclusion of COFA migrants under the law.

In order to foster genuine social healing for Micronesians, they must be afforded a legal status similar to that of lawful permanent residents. Providing COFA migrants with a clearer and recognized legal status under the law would provide them with genuine social healing as the basic amenities and services they were promised would be less restricted, and they would be included in the American society.

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<sup>153</sup> See USCIS FACTSHEET, *supra* note 24 (explaining the historical relationship between the U.S. and COFA migrants. COFA migrants are granted unlimited length of stay in the U.S. for work, health, and education in exchange for U.S. military operating rights in the COFA nations).