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August 25, 1976

Deanne C. Siemer, Esq.
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Washington, D.C. 20006

Dear Ms. Siemer:

Enclosed are notes on briefing paper no. 2, The Executive Branch of Government. They may be a bit discursive: I wanted to get them out today and decided to resist the temptation to read over and edit.

For your possible interest and information, I enclose a summary of official activity between 1943 and 1975 on state constitutional revision, prepared by the National Municipal League.

More to follow . . .

Sincerely,

Howard N. Mantel
Director
Government Programs

Enclosures (3)

2) Education - [illegible]
3) Eligibility to Vote - [illegible]
4) Local [illegible] - Tues
5) Judiciary - Thurs.
6) Taxation - Thurs.

6509

MEMORANDUM

To: Howard Willens, Esquire
From: Howard N. Mantel
Subject: Review of Briefing Paper #2: The Executive Branch of Government (Draft August 9, 1976)
Date: August 25, 1976

These comments will be by page and section.

Page 1, I, Introduction, paragraph 1, sentence 3

You might add another sentence or part of a third sentence to the effect that the executive branch delivers and provides the bulk of public services.

Page 4, paragraph 1

Would any of the provisions of the US Constitution under the 14th Amendment be applicable?

Pages 7-8, b, paragraph 2, sentence 2

Perhaps you ought to put the caution in that the notion of an "absolute veto power" would be quite unusual under the basic constitutional system in the states. In addition, although the point is made later, the veto power could be a veto of a bill or an item veto of part of a bill or an appropriation. In the next sentence an extreme would be that the governor would appoint most of the civil servants. And I think you would want to add that under this arrangement the governor could reorganize executive departments at will within the stated number of executive departments authorized by the legislature. Again, in the preceding sentence, your reference to "long-term" might be modified to read "long term of office or no limit on the number of terms of office." Finally, in that paragraph you might illustrate strong versus weak governor systems by reference to the budgetary authority of the governor. And then add this as a parenthetical statement (still part of the same paragraph),"One could argue that

theoretically power within the executive branch can be diffused without weakening the relative strength of the executive branch vis-a-vis the legislative branch, but in most instances, once power is taken from the governor and spread among other executive offices or agencies, this tends to give greater control to the legislature.

Page 9, paragraph 1, last sentence

Multiple elected agency heads also have the consequence of reducing the power of the governor by limiting his number of top appointments.

Page 10, top line

After "governor," you might add "and within a flexible system of executive branch reorganization;" query: should you add a comment about gubernatorial emergency powers? Your reference to "powers with respect to the budget," might be broadened to include "and budget administration." It has become apparent that a key weapon of a strong executive is his ability to transfer funds either within an agency or between agencies without further legislative intervention--or after a budget is adopted.

Two other points might be noted here although they could come up later on: (1) the question of delegation of legislative authority in the form of greater regulatory authority of the governor or administrative offices; and (2) the potential use of a type of manager or chief administrative officer system.*

*If this were a county charter, major attention would focus on the feasibility and desirability of either a county manager or chief administrative officer (A.O.) form of government. There is an extensive literature on the subject of city and county managers and CAO arrangements. While that is not, strictly speaking, part of the American experience at the state level, given the population of the Marianas, one wonders whether some aspect of a non-elected administrative officer ought to be considered.

Page 11, IV.A, paragraph 1

Two points might be noted but probably are not worth including: (1) most language on executive authority tends to act as a limitation on that authority other than these very broad grants of executive authority in the governor (is there any need, by the way, for a statement where the residual power of the Marianas Government lies?); and (2) language that purports to describe in detail the responsibilities of the governor usually, whether intended or not, will act to constrain him even though popular jargon is employed.

Page 12, 1., paragraph 1

I assume that in the paper on legislative process that you will treat the issue of introduction of bills by the governor or executive branch. It might be logical to begin the subject of the governor's role in the legislative process with policy recommendations to the legislature and preparation of bills, but I assume your early consideration of the veto power is because of its fundamental check on legislative power.

------- paragraph 2

The absolute veto: are you correct in referring to the power of the governor "to prohibit the Legislature from passing an act or bill?" I thought the veto power refers to bills that the legislature has passed. It may be a semantic point. Are there any instances in the United States of an absolute veto power (other than pocket veto situations when the legislature has adjourned)?

Page 13, The Conditional Veto

You might add that informally the governor may indicate that he will veto a bill if passed in unacceptable form, giving the legislature the opportunity to modify prior to its submission of a bill to him.

The partial (or item) veto: you might add that some jurisdictions permit reducing an item in an appropriation bill rather than an item veto.

Page 14, (a), sentence 3

I would recast this sentence somewhat, perhaps along these lines: "Certain bills have such an adverse impact on the governor's policies, or would have such major fiscal implications, or would otherwise, in the governor's opinion, be inimical to good government, that he should be able to either invalidate the action completely..." I think the reference to "in deference to his electoral mandate" is only a partial rationale for the veto power. Quite often the veto is used for very minor or special legislation or even private bills which hardly involve the governor's mandate or gubernatorial policy.

--- sentences 4 and 5

It might be useful to observe that in fact the non-veto situation exists in only one state which clings to the weak governor tradition. Lockard observed,"Sweeping generalizations about the major importance of the veto in establishing á governor's power frequently fail to take account of North Carolina where there is no veto. The Governor of North Carolina is not evidently much less effective in his legislative leadership than other governors. Indeed, his effectiveness apparently surpasses that of some governors who do not have a strong veto. This, of course, does not show that the veto is of no consequence; rather it suggests that it is--like all other resources--not an absolute."*

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* Dwane Lockard, The Politics of State and Local Government, 2nd Edition (1969), p. 365.

Page 14, (b)

You might add at the end of the sentence "and if so, what type of legislative override."

Page 15, paragraph 1

You might recast the first paragraph starting off with the third sentence. While it might increase certainty, it may not increase efficiency since that is a value judgment that implies cost-effectiveness. And I would raise some question about the wording of the first sentence since the legislature itself has a veto power in the form of its capacity to refuse to pass legislation that the governor needs in order to carry out his program.

Page 16, (i)

Should you add here that the governor usually must act within a stated time period with a reference to the discussion below (p. 20).

Page 17, top paragraph

One alternative is to allow a pocket veto but require the governor to state his reasons for doing so. In New York a practice not mandated by the Constitution is for the Governor to issue a statement on all bills acted upon by him including those vetoed by him during the 30-day post-adjournment period. By the way, you might note somewhere that there is precedent, as in the case of New York, for a shorter time period when the legislature is in session, 10 days for example, and a longer period for the Governor to consider the mass of legislation enacted during the closing days, say 30 days.

Page 17, footnote ****

You might explain the statement to the effect that governors can informally inform legislative leaders that if a bill is passed in a certain form, he is likely to veto it, which allows them some opportunity to modify a bill before it is presented to him.

Page 19, paragraph 1, sentence 1

You might say "Most state constitutions, but not the Federal Constitution..."

Page 20, (d), paragraph 2, sentence 1

You might add that the longer time period also facilitates compromise with the legislature on a revised bill that the governor would agree to sign.

Page 21, sentence 1 (line 4)

After "for bills given to the governor" I would add "at or." Again, I raise the question whether the constitution might mandate that the governor state his reasons in writing for any bill which he does not sign, as well as bills which he vetos.

Page 21, paragraph 1, sentence 2

You might add that the 10-day bill-signing period applies under the United States Constitution also.

Page 22, (d), last sentence

Given the likely nature of much of the legislation, I wonder whether a lengthy bill-signing period will interfere with urgent activities of the government. Two questions of a more general nature come to mind. Both may be irrelevant, but let me pose them:

1. Is there any thought that any type of local municipal enactments would be subject to gubernatorial veto?

2. Should any thought be given to a mandated public hearing prior to action on bills by the governor? This is not the practice among the states, but since we are dealing in some respects with a local government situation (in practical reality) more openness and participation might be considered. The Mayor of New York City holds a public hearing prior to his signing or final action on any bill (this may be a requirement of state law although I have not checked; it is not in the Charter, I believe).

Page 24, top paragraph, last item

If the Constitutional Convention should opt for a single, relatively short legislative session, then one might conceivably argue for a mandated post-adjournment session for the consideration of vetos. Again, since we are dealing heavily with a local government situation on which a variety of matters will come up, it is probable that the legislature would have to meet more than on a short-term annual basis, but this is conjecture on my part.

Page 25, (a), first sentence

Are you certain that the one man-one vote rule applies only to the lower house? I thought the only exception under the American Constitution was the United States Senate? I gather on rereading that your reference is to the Northern Mariana Legislature which under Section 203 (c) of the Covenant provides for an upper house similar to the United States Senate. But you might clarify the fact that the Marianas will be having something unique among the states.

Page 28, paragraph 1

As you know, there is a whole new world of programme planning

and budgeting techniques. While the Constitution as a generic document should not contain a great deal of technical budget and planning procedures, which could become outmoded over time, some thought might be given to either requiring or not prohibiting longer term financial forecasting and planning. One could contemplate a procedure similar to the Federal Government in which all programs bear an authorization for appropriations but the actual appropriation is done separately. A second alternative would be to mandate the submission of an annual budget which would then get converted into an annual appropriation, but to require five-year projections. Questions of earmarking of funds and related matters, I assume, are dealt with in the separate briefing paper on taxation and finance. Finally, one of the hybrids that could be used is to appropriate money but to permit expenditures beyond the ensuing fiscal year. Again the question of overburdening the Constitution should be borne in mind.

Finally, one might note that budgeting no longer is a one-shot proposition but is an ongoing activity in which budget preparation, appropriation, allocation, and accounting and auditing are all part of an around-the-year process. I do not know how this can be reflected fully in a constitution, but I note it.

Page 29, paragraph 1, last sentence

The counter-argument to the foreclosure point is that the legislature can be endowed with specific authority to gain whatever information it wants on budget requests, including the right to secure testimony from department heads.

Page 29, paragraph 2, last sentence

I think the sentence is somewhat naive. A budget is the principal

political activity of any government and it is hard to believe that any type of change from a vesting of budget preparation in the governor eliminates "political factors" in the budget.

Page 30, last paragraph

Is it clear to the reader that the retention of budget preparation responsibility in the governor does not foreclose in any way the development of sophisticated budget offices? While it is true that the scale of operations for the Commonwealth will involve relatively few persons (compared, say, to one of the more populous states), the governor himself is not writing the budget, but the budget officer is working under his direct control.

Page 34, paragraph 1

Should you distinguish between the formal authority of a legislature to reconvene under its own authority and the practice of recesses for varying periods so that the legislature is formally still in session even though it is not meeting for a length of time?

Page 35, paragraph 1

This sort of begs the question of who determines the length of a regular legislative session to begin with. Query?

------- (d), paragraph 2

One might consider too the feasibility of different methods of filling legislative vacancies for the two houses.

Page 36, (e)

In addition to the annual address matter, I suppose some thought

can be given to some form of the British parliamentary system in which the governor participates more directly in legislative sessions. While this is not the practice in the United States Congress or the state legislatures, there is some precedent at local government levels. In one sense activities of this kind fly in the face of the separation-of-powers doctrine while in terms of practical reality it might improve executive-legislative relations, although I suspect this can better be accomplished through informal communication methods. In terms of accountability one could argue, again based on the British question hour process, for a type of mandated "Meet the Press" format in which the governor or his principal cabinet officers must appear and respond to questions by members of the legislative bodies.

Page 37, 3(a)

I assume the paper on the judicial branch goes into the question of the appointment of local judges.

Page 41, top paragraph

I notice you use the term "ministerial employees." Would it be feasible to distinguish between persons within the classified civil service, assuming there is one, and other officials.

Page 41, (a), fn. 1

The extent of the power may also depend on the division of governmental responsibility at the state level and any local governments that are authorized. With respect to the last line on page 41, you may be merging two types of appointment lists: (1) the standard civil service "rule of three" under which an appointing offical may choose the persons who were the

top three on a civil service examination; and (2) senior appointments where there has been some merit pre-selection but leaves to the appointing official the option of choosing from those who have qualified. One example, which may be relevant, is the New York City Chief Medical Examiner, "the head of which shall be the Chief Medical Examiner who shall be appointed by the Mayor from the classified civil service and be a doctor of medicine and a skilled pathologist and microscopist."

Page 42, (3)

One possible alternative, although I do not know whether it is in practice at the state level, is to subject senior gubernatorial appointees to review but not approval authority of the legislature. This preserves for the governor the final control over his appointments, but it does open the process up so that if a totally unqualified person is proposed, his disabilities would become known. There is a sixth alternative which is implied by 5: the Constitution, or more likely statute under constitutional authority, could state a professional standard of qualification as in the case of the New York City Charter quoted above.

Page 43, paragraph 1

Your first sentence may be somewhat misleading. There are instances in which the power of appointment is vested in a body other than the governor. I believe that the Regents in New York State are appointed by the legislature rather than the governor. There is also a practice here that certain special commissions established by the legislature will have their membership appointed by different bodies. One example is the State commission to revise the New York City Charter in which the legislation authorized appointments of members by the governor, mayor of the city of New York, legislative leaders,

borough presidents, etc., and I am certain there are instances in which an agency head is authorized to appoint his principal deputies. The last sentence of that paragraph might be reworked because it gives the impression that "independent-minded persons" is undesirable.

Page 44, top paragraph

I have not checked the state constitutions but one possibility is to require a time limit for action by the Senate. One recent example at the municipal level is a new provision of the City Charter which states, "Within 30 days after receipt of a nomination, the Council shall act upon such nomination and in the event it does not act within such period, the nomination shall be deemed to be confirmed."

Page 45, paragraph 1

A fifth alternative would be to have all specified appointments for a period of time but still subject to a removal provision. This really is a variation on one and three. In New York City, to take an example close at home, the general rule is that commissioners are appointed and serve at the pleasure of the Mayor without Council confirmation. In the case of a Police Commissioner, however, he is subject to removal by either the Governor or Mayor "whenever in the judgment of the Mayor or the Governor the public interest shall so require..." Another facet of 3 is the process for removal for cause, such as notice of hearing and the presentation of a statement of charges. Dye notes in his text, Politics in States and Communities (2nd Edition): "When a governor's removal powers are limited 'for cause only,' it is next to impossible to remove a subordinate for policy differences." The New York State Constitution, Article V, Section 4, provides that gubernatorial appointments "may be removed by the Governor, in a manner to be described by law."

Page 48, paragraph 2

If you will excuse a minor editing note, 'principal" should read "principle."

Page 49, paragraph 3

It might be noted that the requirement for "examination or by other evidence of competence" in the model state constitution probably does not mandate written examination. There is a complex evolution of assessment methods that have grown up and written examinations have begun to earn something of a bad name because they tend to contain cultural biases. I suspect one would want to examine very precisely the wording that is used, assuming a civil service clause is written in the constitution, in order to be positioned to evolve sophisticated personnel management systems and get a little bit away from the older notion of entrenched civil service bureaucracies. But this may all be gratuitous at this juncture.

Page 51, 5

The question of emergency powers of the governor might be considered. There is language at either the constitutional or the statutory level involving declarations of emergency or actions that governors could take when a civil defense emergency is proclaimed by the President. See, for example, New York Constitution, Article III, Section 25.

Page 53, (i)

A fourth alternative which is really a variation on 3 would be for the constitution to mandate the legislature by statute to deal with the age question. That is, if the constitution is silent, then it might be argued that it would be unconstitutional for the legislature to impose an age limit, and it is better to avoid such ambiguity.

Page 54, paragraph 1

I have never heard of any instance and it is probably inappropriate, but I raise the question of whether maximum age limits should be imposed?

Page 56, fn. 1

The New York Constitution contains a five-year residency requirement. Article IV, Section 2 (I am only citing from the New York Constitution because I happen to have it at hand).

Page 61

One alternative is to state a maximum number of terms which would be in addition to any unexpired term where the incumbent succeeded during the course of the term of his predecessor. The federal provision on this would be illustrative.

Page 63, (i), paragraph 3, sentence 3

You might add that not every state provides for an initial successor by way of a lieutenant-governor.

Page 64, paragraph 2, line 1

I think you slip in the concept of a joint ballot without explaining it. You might add a line or footnote that one arrangement is for the governor and lieutenant-governor to be elected as totally separate officers and the other is that they are cast on the same ballot as in the case of the President and Vice President.

Page 64, paragraph 3

While it is true (going to page 65) that succession by a legislative leader would involve a person not elected on a statewide basis, in the case of the speaker of the lower house, he at least has been chosen by the collective wisdom of the representatives of the Commonwealth as a whole.

Page 65, paragraph 1

Are there any instances in the American tradition of allowing the governor to choose his own successor? If not, that ought to be stated at the outset.

Page 67, top paragraph

Again, you might want to check about emergency in the event of a major catastrophe as in the hypothetical case of a bomb falling on the state house and all likely successors, including the legislature itself, have disappeared. Some work has been done on this type of thing and I can probably flesh it out for you if warranted.

Page 67, paragraph 1, sentence 1

This is somewhat misleading, no doubt influenced by the events of the past several weeks. What you might do is to separate the sentence into 2 sentences and say "by tradition, at the national political conventions, the Presidential nominee selects his Vice President, which is normally ratified by the convention. This enhances the case for a joint ballot, since the Vice President is in effect the President's man."

Page 68, top paragraph

There are provisions for the lieutenant-governor-elect to take the oath as governor in the event the governor-elect dies prior to inauguration date. I have not checked this but I think I am correct and it might be worth pursuing.

Page 71

It may be worth noting that even where the lieutenant-governor or other designated successor temporarily serves as acting governor, in fact (in most states) the governor's office and his immediate staff con-

tinue to run most affairs and are usually in touch with the governor by telephone. More technical questions arise with respect to bill-signing and appointment power; again, this tends not to be a problem for short absences.

Page 75, (i)

By civil offices do you also include judges? If so, should that be stated separately?

Page 79

You might add some reference back to the removal issue. If by some consideration the constitution was to authorize impeachment for department heads, rather than just (say) for elected officials, then impeachment can be an alternative way of getting rid of an officer and could be viewed as a way of challenging the governor's appointment and removal power, assuming that were the case.

Should there be any discussion of the office of governor, including the right of the governor to appoint his immediate staff and functions that can take place within the executive office. That is one set of issues. In addition, those states that constitutionally set a limit on the number of departments may include (New York as an example) an executive department into which a wide miscellany of agencies and units are included. One issue under the immediate office of the governor is the right of the governor to choose his staff without legislative control, even though there may be an advise and consent requirement for department heads.

Page 82, fn. 1

I do not know if it is worth adding, but there is an interesting statement by Dye (op. cit.), page 186: "Since lieutenant-governors generallly have political ambitions of their own, they seldom make good 'assistant governors' who will submerge their own interest for the success of the governor's administration."

I discovered that in the proceedings of the Constitutional Convention in New York in 1967 there was a proposal to eliminate the elected office of lieutenant-governor and authorize the governor to appoint a lieutenant-governor subject to the advise and consent of the Senate. That provision was not included in the proposed Constitution and, as you know, the whole thing went down to defeat.

Page 85, top

This refers to the matter I noted earlier on some counterpart to the county manager or chief administrative officer position. You might note some of the alternatives under those more traditional forms which would include serving at the pleasure of the legislative body, but that would be a radical change from the notion of a popularly elected governor and hence your alternative is probably the only feasible one, unless a set term plus removal for cause was included as a possible option.

Page 87, (ii), fn.

I tend to agree with your implicit relegation of the long ballot-short ballot issue to a footnote, but there are still those around who think that it is the most burning issue! You might simply make the point in the text that one problem of a long list of elected officials is that

this would confuse voters who may also be voting for other public positions.

Page 91,

One could introduce the thought, which certainly is a fact of life, that multiple elected officials allows for ticket-balancing.

Page 92, B, paragraph 1

Shouldn't you add to the second sentence a method of reorganization?

Page 95, (c)

In discussing reorganization plan authority, including legislative veto, you might distinguish in the discusssion between internal reorganizations of the executive office or a particular department or agency and major structural changes as in wholesale shift of functions from one agency to another. Thus, if prior approval to a law is required for the creation of a new agency or for major shifts, then some flexibility should be allowed the governor or department heads in upgrading the internal cohesiveness of a single agency. I would think that you ought to give some direct focus to a plan similar to the federal reorganization plan authority (is that still in effect?) in which the President or the governor proposes reorganization plans which are subject to a legislative veto within a stated time period and then have the force and effect of law. We just adopted a similar provision in New York City under the new Charter.

Let me add a few miscellaneous thoughts that I may or may not have dealt with earlier:

1. Assuming there is a local government structure rather than a unitary system (I assume this is an issue to be addressed separately),

one question with respect to gubernatorial authority is his right to control or influence both the selection and, more importantly, the removal of locally elected or appointed officials, such as a mayor.

2. Is it appropriate to raise in this paper the issue of "sunshine laws?" I just note it but make no further comment.

3. Because it is popular, how about Ombudsman? My own intuitive sense is that this does not belong in a constitution because in effect a strong Ombudsman would be in competition with the attorney-general, the legislature, or even the governor. I gather that Ombudsman arrangements have not received constitutional status, at least according to a 1974 article by Paul Dolan, "Creating State Ombudsmen: A Growing Movement," National Civic Review (1974), pp. 250. There were proposals (not adopted in the draft Constitution) at the 1967 New York Constitutional Convention. For example, one proposition states, "There shall be in every county of the State an office of Ombudsman, who shall investigate and adjust, and if necessary prosecute citizens' complaints against public officials." A second one states, "The Legislature shall create the office of Ombudsman for the purpose of receiving and investigating complaints from any person regarding any administrative act or decision of a State department, agency, board, bureau, or commission. Such office shall be under the jurisdiction of the Legislature and the functions, powers, and duties of such office shall be prescribed by law."

4. Texas proposed a new Constitution which was voted down on November 15, 1975. One proposed change dealt with giving the Governor

The should be removed for use in briefing paper!

greater control over appointments, particularly to multi-membered state agencies. The proposal was designed so that by the third year of his term, the Governor would have a majority of members. Apparently, the propositions also dealt with the removal power, and state budget control. Finally, there is a proposal, which I gather has been suggested elsewhere, limiting the life of a state agency to 10 years with an option to renew for a similar term. Apparently, the idea is that many agencies lose their usefulness but tend to linger on. I think this is "cute" and it makes much more sense to put in either a Hoover Commission type of arrangement or a constitutional reorganization plan authority. But I pass the thought along. You might want to look at the article on the proposed Texas Constitution in the National Civic Review, September, 1975, pp. 404. As I say, the proposed Constitution was defeated.