03

9

MEMORANDUM

To: Howard P. Willens, Esq.
From: Howard N. Mantel
Subject: Review of Briefing Paper #4: Judicial Branch (Draft August 20, 1976)
Date: August 30, 1976

I had asked Kenneth Kemper, Esq. and Judge Arthur Goldberg to review the paper.* Their comments are incorporated in this memorandum. I have requested copies of the legislation and governor's message dealing with the current proposals for court reorganization in New York State. This was the subject of a special session of the legislature several weeks ago; and involves, inter alia, new methods for selection of judges (e.g., the judges of the Court of Appeals no longer will be elected if a constitutional amendment comes into being).

Page 2b, second paragraph, sentence 1.

I would recast the sentence to stress co-equal branches. In any event I would do away with the word "reasonably" on the grounds that "reasonably independent" is like being "slightly pregnant." I would also suggest omitting the third sentence.

Page 3, para. 3, sentence 2.

At the risk of intruding editing-type comments, the sentence bothers me. The sensitivity that is referred to actually might lessen accountability if accountability includes also the concept of objectivity.

---

* Mr. Kemper is an attorney who has worked extensively on local government legal issues in New York State. He has been working with me currently on the Charter revision and Administrative Code matters for New York City. Judge Goldberg is a retired judge of the New York City Criminal Court and had been involved extensively in the major court reorganization in New York State of about a decade ago.

I would think in the second full paragraph the term "objectivity" should be incorporated. Again, going slightly backward: in the second paragraph (p. 3) what do you mean by tailoring the judiciary to the "real needs" of the Northern Marianas?*

Page 4, para. 1.

You might want to recast this paragraph somewhat. While flexibility to changing conditions is an inescapable argument for delegating wide latitude to the legislature, more rather than less detail in the Constitution may be necessary to avoid politicizing the judicial branch. I don't think that point comes through as clearly as it might, although it is clearly implied by the second sentence.

Pp. 4-5 c, Applicable Provisions of the Covenent.

Do the references to "local" courts encompass any courts of the Northern Mariana Islands or are they to particularized municipal-level courts? That is, am I correct in assuming (as I think I am) that by local courts and their jurisdiction you are referring to any part of the judiciary other than the federal court system? Put another way, should you indicate early on a distinction between what might be termed commonwealth courts and purely local ones?

---

* I don't know if you want to incorporate anything from the Federalist papers, but here's a line that might be useful: "This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government and serious oppressions of the minor part in the community." The Federalist, no. 78, Hamilton.

Page 7, top para., 4th full sentence; also 3rd para., 3rd full sentence.

When you refer to the determination of appellate jurisdiction of the federal courts, I gather the reference is to jurisdiction over matters that originated in local courts, not in federal district court. Bankruptcy, for example, would originate in the federal district court and I assume the normal appellate mechanisms of the federal system would arise within the Ninth Judicial Circuit.

Pp. 4-8.

To the outside reader it may be very useful to have a little more factual information about the present court system, the number of members of the bar in the Northern Marianas, the size of caseload before the court and the types of issues that tend to come up, etc. This is probably well known to the delegates, assuming there are lawyers among them, but some input of this nature would help guide the reader in the sense of practical issues on court structure and court administration.

Page 9 d. 1. First paragraph, last sentence.

You may also want to add, at the end of the sentence: "; and the administrative mechanisms for the court system."

Page 10, para. 1, fn. 3.

Is it understood that all of the costs of federal district courts would be paid for from the federal treasury? Is there any opportunity for cost-sharing in order to overcome the congressional reluctance? Finally, what is the precedent in the American Virgin Islands, American Samoa, etc.?

Page 10, paragraph 2

In the event that Congress appropriated funds for the operation of the federal court but later withdrew the appropriation or reduced it to a point where it could not handle all the cases under its jurisdiction, wouldn't it be necessary to have some type of standby authorization for substitute local courts? In other words the Constitution at a minimum might want to enable the Legislature to create a local court system in the event that the federal court system does not function.

Page 11, 2. "Phase-in"

As part of the phase-in, is there opportunity for a judge first to sit as a member of the federal court and later to assume concurrent and finally totally separate jurisdiction in a local court?

Page 12, 3, paragraph 1

Here and in some of the earlier materials there seems to be a very strong "push" towards flexibility in the constitutional provisions. I did not get that impression in reading other briefing papers, although the issue of division between constitutional and legislative provisions is raised. Query?

Page 12. 3, paragraph 2, sentence 1

Again, to repeat a point made earlier, it would be helpful to have a basic fact or two on the number of local lawyers. In the second sentence and later in the second full paragraph on page 13, the third sentence, an issue not directly broached is implied: the requirements for membership in the local bar. It is the active bar which is the breeding ground in most instances for the bench and it may be appropriate to deal with admission to the bar at least briefly in this document. Query on

whether there are any constitutional issues on this subject?

Page 13, paragraph 2

If the issue of sensitivity of outside judges to local customs and traditions is likely to prove a major problem area, then some combination of two or three-member courts may be desirable, including the feasibility of non-lawyer members. This might be both feasible and practicable for lesser civil and criminal courts or terms of courts, and there is precedent for non-lawyers serving on lower courts (e.g., justices of the peace).

Page 14, paragraph 1

In the first sentence you might modify "removal" to read "removal or retirement." The New York Constitution (Article VI, Section 22) provides that any judge, "...may be removed for cause or retirement for mental or physical disability preventing the proper performance of his judicial duties..." I gather the addition of the term "or retirement" was an effort to provide a courteous method of seeking the involuntary departure of a judge who in the opinion of his peers no longer could sit because of physical or mental disability, but lacks the capacity or willingness to retire voluntarily. In the second sentence a better word than "intransigent" might be found. In the third sentence perhaps you ought to introduce the notion of strict standards governing removal or retirement rather than the "too easy" language. In addition to standards, of course, are procedures with appropriate safeguards against arbitrary actions to remove or retire a sitting judge.

Page 16, top sentence

As noted above the concept of a stand-by local court system might be introduced, which court system becomes active at any point that the federal district court no longer functions in a manner adequate to the type or quantum of cases arising in the Northern Marianas.

Page 16, 1, paragraph 1, sentence 2

Does the language "will presumably fund" imply that the Congress might impose a cost-sharing requirement?

Page 16, 1, paragraph 2, sentence 2

That would not be the case in the District of Columbia where all the courts are federal in one sense, although purely local courts (those dealing with domestic relations and the like) are to be distinguished from the federal district court for the District of Columbia. Is the third sentence contradictory of itself? If there is a shortage of trained lawyers, would not that also be true of the federal court? I assume that you are referring to trained lawyers who can sit as judges, but the problem of the courts also will go to the issue of the number of practicing attorneys and this would be true whether you are dealing with a local court system or a federal court system or both.

Page 17, paragraph 1, sentence 2

The feasibility of combining a local person, not necessarily an attorney, and a practicing attorney, possibly not a resident or citizen of the Northern Marianas, might provide the combination of technical expertise and awareness of local socio-cultural factors.

Page 18, top line, fn.

The footnote is somewhat obtuse. The assumption is that the local trial court so bungled the case that it had to be retried not just by another judge of the same court but by a more sophisticated court. Is this correct? Additionally, there is the question of the role of the local appellate court which would appear to be handling under this arrangement both trial and appellate matters.

Page 18, paragraph 2, last sentence

This begs the question, posed earlier, of some type of unified system encompassing both the federal district court and the local courts. While it may not be possible to have in effect a single court system, from a functioning point of view this may be what you are aiming toward.

Page 19, 3, paragraph 1, sentence 1

The reference to "few trained lawyers" has now been made 3 or 4 times, again without any definition of what is meant, etc., the point having been made previously; at this point it is not worth repeating unless one wants to elaborate in terms of the actual number and the ratio of lawyers to population, and other details. Indeed, the entire paragraph seems repetitive. In the first sentence, the reference to "a local judicial system" would become more meaningful if at least the broad outlines of precisely what is contemplated were spelled out. Are not we speaking of a local judicial system that is (a) a unified system and (b) consists at the most of something equivalent to a magistrate's court or a justice of the peace court on each of the three

populated islands, plus a court of general jurisdiction sitting in Saipan with perhaps 2 or 3 judges; and an appellate court that would hear appeals from all of the above. In all, it sounds as though there might be something like 6 judges, unless I am totally underestimating what is involved and the case load. The point, however, is to suggest the order of magnitude for the benefit of the delegates to the Constitutional Convention.

Page 19, paragraph 2, sentence 4 (page 20)

The assumption that one needed trained lawyers for the appellate courts but not necessarily for the trial courts could be misconstrued and is misleading: in fact, very local matters, traffic offenses, domestic relations cases, juvenile delinquency issues, minor misdemeanors, are of considerable significance to the population and require expertise both in the law and in social issues and behavior. We all have the tendency to regard our top appellate courts as more important than our lower courts and this simply is not the case. Of course, it is all in the eyes of the beholder.

Page 20, paragraph 1

I suggest that you eliminate this paragraph in its entirety. Its assumptions are questionable and I think it will pose more questions than it deserves. Granted, the paucity of top-flight talent which could fill certain of the judicial positions. If a case for a local court system has been made (and you spend a good part of the first 19 pages making that case at least prima facie), then you tend to whisk the whole argument away here. The second sentence is particularly questionable. The third sentence I think is incorrect. It

equates democracy with popularly elected institutions of short-term duration, but I thought our democratic principles were more pandemic. The following sentence on "judges, unlike governors and legislators..." also could be challenged on its basic assumption. We are not dealing with the US Supreme Court.

Page 20, paragraph 2, last sentence (page 21)

I assume there is no way in which judges appointed to a federal court, assuming for the moment there were no local courts, could be appointed locally under some delegation from the President. Alternatively, in a practical sense, would the judges be appointed on local nomination?

Page 21, paragraph 1

I think the most important objective is for the Constitution to establish a unified local court system. It may wish to specify the types of courts, leaving as you suggest the details on number of judges and physical locations for legislative action. In any event the Constituion should not provide such an elaborate system as to overwhelm the needs of the Northern Mariana Islands. The scale of activity, given the population of the Islands, is considerably less than in most of the jurisdictions whose constitutions are examined in this report.

In addition to mandating in the Constitution a unified court system, the Constitution might well specify that the court will have its own court administration and will prepare a budget and submit it to the Legislature for action on appropriation. These dual specifications would go a considerable way toward insuring the independence of the court system. The term "unified court sytem for the State" is used in the New York State Con-

stitution (Article VI).

Page 22, top paragraph

The last sentence does not preclude cases going to the US Supreme Court from appeal from a decision of the 9th Circuit Court of Appeals, I assume. At least I do not read Covenant Section 403(a) as precluding the ultimate appeal to the US Supreme Court.

Page 22, paragraph 1, sentence 3

Can the term "the convenience of local litigants" be explained? The last sentence of that paragraph seems to contradict earlier sentences on local sensitivity. If you want to make that point, I think it should have been made early on.

Page 23, paragraph 1, last sentence

I assume that de novo review would be subject to a standard and not simply the absolute discretion of the appellate court. That is, there would have to be a finding of gross mishandling of the case in the original trial court.

Page 25, paragraph 2, sentence 3

It is probably correct to divide a jurisdiction during the phase-in period along the lines suggested, but it seems a bit strange to create a local self-government mechanism under the Constitution and then have the constitutional questions involving the Constitution decided by the federal court. At a minimum I would think that a representative of the local court system should sit on such cases.

Page 26, paragraph 1

Is it possible to reverse some aspect of the arrangements that are being imposed along this line: to have a judge of the federal district court sit with a local judge on a complex matter coming before the local court over which it does have jurisdiction? This would be somewhat analogous to the British colonial system in which a judge from the United Kingdom is sent to sit in particularly difficult cases in some British dependency, for example Bermuda. In fact, one could conceive an arrangement in which there is a borrowing, as it were, from the American states and from the federal judiciary to sit with a local judge in a local court. Such arrangements might be critical if there were to be no or very limited federal court jurisdiction and great emphasis on an early development of the local court system.

Page 27, paragraph 1,fn.

I think the second sentence of the footnote should be brought up to the text and elaborated upon, along the lines of comments made supra (q.v.). In the text of the first paragraph I wonder if the third sentence should not be recast to emphasize membership in the bar for stated periods as the basic prerequisite to qualify for a judgeship.

Page 28, paragraph 1

Would not you be better positioned to assert the possibility of courts that are deliberately composed of both members of the bar and lay members? This brings the issue out in the open and allows the delegates to deal forthrightly with it. It also recognizes different specialties among those who are trained as lawyers on matters of adjective and substantive law and those who are expert in juvenile behavior or social conditions.

Page 28, 2, paragraph 1

Is not there another alternative, that is, that judges other than (possibly) lay judges must be members of the local bar? Thus, the qualifications for admission to the bar in most instances would deal with overall citizenship and residency requirements.

Page 29, paragraph 2

Given the paucity of attorneys in the Northern Mariana Islands, the thing to do perhaps is to encourage importation of attorneys, some of whom may find their way into judgeships, rather than singling out the judicial function.

Page 30, paragraph 1, fn.

I would assume that if a person is admitted to a bar, whether for the Mariana Islands or any other jurisdiction, the minimum age requirement will have been met. While it is true that there are various provisions in state constitutions and statutes respecting minimum ages for judges, in the situation at hand a person who has been duly admitted to a bar probably has minimum prerequisites, assuming there is opportunity to judge individual qualities of a nominee.

Page 31, top paragraph, last sentence

While it may be difficult to administer, it is feasible in some instances to separate types of private law practice or other employment not incompatible with the duties of a judge. Thus, a judge who deals exclusively with criminal courts might well be able to maintain a civil practice but be barred from handling any criminal matters whatsoever. Instead of prescribing a conflict-of-employment provision in the Constitution,

the Constitution might mandate that this be done by the Legislature or by the judiciary itself.

Page 35, paragraph 1

The issue of pay scale and outside employment are related and might be emphasized here: if it is not feasible to pay judges (assuming they are lawyers and therefore in demand) what they could earn in private practice, then it may be necessary as a practical matter to compromise and allow some outside employment to supplement income. There is another issue which might be noted concerning comity among the branches of government. Presumably this entails some equality of salaries among top elected and appointed officials of all 3 branches: governor, speaker of the lower legislative branch, chief judge, etc.

Page 36, paragraph 2

I would omit the first sentence. With regard to the third and subsequent sentences, may I again suggest that we speak of "removing or retiring" a judge and so soften the language when dealing with disability. Quite often very human problems intervene in which a well-intentioned and basically sound judge is unaware or unwilling to face the reality of some physical or mental debilitating factor. Hence, discipline in the ordinary sense and removal in the sense of removal for cause do not fully apply and the language I quoted from the New York Constitution might well be utilized.

Page 37, paragraph 2

You might add the factor of local sensitivity, a point made earlier in the paper. Because many of the judges will be dealing with very localized situations, as distinguished from major disputes between corporations, familiarity with the local scene and awareness of who the judge is

on the part of the local citizenry tend to favor the popular election of trial judges.

Page 39, b, paragraph 1, sentence 1

Again, the Constitution could distinguish between methods of appointment of trial and appellate judges, assuming this does not complicate what should be a relatively simplified judicial system.

One approach is to have the appointment made by the appointing authority either from nominees offered up by a nominating panel or screened in advance by a panel. The latter has been the practice in recent years in New York City. This mainly refers to nominees for appointment to the Criminal and Family Courts and interim appointments to the civil court, and to the Mayor's Committee on the Judiciary, which screens the nominees prior to final mayoral appointment. In addition, the several bar associations review nominees for the appointed judges. None of this is done in a totally apolitical atmosphere, of course. With respect to the last sentence in the second paragraph, I believe it is a practice in at least some counties of South Carolina for local judges to be selected by the local bar association. This has a certain appeal since that is a selection-by-peers kind of procedure. It has I suspect disadvantages and I am not certain whether this is formally specified either in the South Carolina Constitution or laws. Finally, as I noted earlier, New York in very recent weeks proposed substantial changes in the court system, including a conversion of the Court of Appeals from an elected court to an appointed court.

I have requested copies of the legislation and as soon as I get them I will forward them.

Page 41, paragraph 1

It might be worth noting that judicial selection involves a great key element of our political system, namely, the ability to award a substantial benefit to the party faithful. Duane Lockard observes, "No doubt a major role in 'politicizing' the selection of judges belongs to party politicians who aimed at control over offices and patronage rather than restraint on judicial discretion."* A further comment which may be quoted which Lockard includes quoting Adolph Berle is: "Both the appointive and the elective methods really mean that the judges are chosen by the chieftains of the political parties..."**

Page 43, paragraph 1

One of the more recent reforms in New York history has been to strengthen the leadership of the Chief Judge of the Court of Appeals over the disciplining of members of the court system. While it is difficult to judge objectively how well it has worked, Judge Breitel appears to have gone quite far in efforts to control abuses on the part of judges. Disciplining does not necessarily have to involve formal removal from office but, in effect, various types of "slaps on the wrist."

Page 45, paragraph 1

One could introduce the subject of training for judicial service, which is not the practice in the United States but on which there is some precedent abroad.

---

* The Politics of State and Local Government, 2nd Edition, 1969, p.433.

* Ibid., pp. 452-453.

Page 45, 2(a) Life Term or Tenure

You should I would think start off by repeating what the Federal Constitution provides in this regard, since that is the preeminent example of life appointments for "good behavior."

Page 47, paragraph 1

Is not there a further modified approach: optional retirement at a stated age? This is the practice of the US Supreme Court I believe.

Page 50, 3. Compensation

It occurs to me that given the relatively few judges who would comprise the local judicial system of the Northern Mariana Islands, interchange among the courts and the judges themselves may be critical. Thus if there is a single judge acting in the appellate term and he is ill, it may be necessary to assign one of the sitting judges to appellate duty. In addition, something of a reverse order might be true. This suggests a single compensation or pay scale arrangement for the judges. I think it is important not to overcomplicate, again principally because of the scale with which we are dealing.

Page 55, paragraph 1

One might introduce the concept of "reprimand" or something that is a little less condemning than "censure."

Page 55, paragraphs 2 and 3

I indicated earlier the suggested use of the term "retirement" when the subject "removal" was introduced. You deal with it here, but as I indicated earlier the concept of involuntary retirement should be suggested at the outset.

Page 56, top paragraph

The ways of the legislature can be subtle! One method of removal that can circumvent the requirement that the state constitution specify the sole means for judicial removal is through the power of the purse or even the elimination of certain courts. This becomes particularly important in the Northern Marianas since we are dealing with very small numbers of judges. Hence, to take a single example, suppose that there were a trial court for minor criminal offenses and smaller civil matters on the island of Rota. If the Legislature decided to "remove" the sitting judge there, they could do so by eliminating that court.

Page 56, f. Miscellaneous

You slide over a terribly important point, and that has to do with court administration. In the past two decades, the whole concept of unified and sophisticated court administration has grown substantially. California was one of the leaders and New York has now moved more strongly than ever to a unified court administration system. Again, in terms of scale, there will have to be some kind of non-judicial officers of the court, including administrative personnel; and the scale with which we are dealing strongly suggests a single unified court administration system, even if there is a divided series of local courts. While administrativeness and court unification are not synonymous, there has been a tendency to move in that direction. The Book of the States (1976-77) notes: "The primary purpose for the unification of courts is to enable the state judiciary to have a more consistent structure throughout the state system and to provide for administrative direction by the

state's highest court within that system. There are different patterns of unification, including the consolidation of all trial courts, adoption of tier systems, and combinations of these and other methods." In addition, it is noted that comprehensive budget systems have been adopted for entire state court systems, Kentucky being the latest state to join in a total state judicial expenditure system. The use of formal systems of judicial administration (getting away from the notion of a single clerk of the court) has grown rapidly. The Book of the States (page 89) notes that as recently as 1965, only about 25 states had operating offices of Court Administrator. This now has increased to 48 states plus the District of Columbia and Puerto Rico. It may be important to emphasize, although this is probably not a constitutional matter, systematic judicial planning, court record and information systems. In any event I would not agree with the last sentence on page 56 and suggest that some consideration of a unified court administration system be included in any constitutional article on the judiciary.

There is another matter which ought to be highlighted, although I am not certain how much food for constitutional stuff is involved. It has to do with in-service training of judges and those who deal with the courts. Particularly since we are dealing with the new and the novel, and the potential use of laymen as lawyers and judges imported from other jurisdictions, a well-organized system of in-service training for judges should not be overlooked. This is a matter which will have to be emphasized in the actual implementation of the judicial system, but I only wanted to note it here.*

* In the Appendix (page xvi) you note that there are no formal training programs for Marianan judges. The use of correspondence courses, I suspect,

One final note. The data on caseloads appearing on the last page of the Appendix is somewhat revealing. Perhaps a few data items could be included early on in the discussion.

---

is not terribly fruitful. There are, however, conferences for judges which have become rather well-organized and it may be useful to consider ways of supporting such participation by judges of the Northern Mariana Islands to exploit these training opportunities.