

13-149

October 4, 1976

FORMAL OPINION # 8

To: The Governor
Lieutenant Governor

From: Attorney General

Subject: Powers of the Lieutenant Governor as given by the
Legislature in P.L. 13-149.

QUESTION

Both the Governor and the Lieutenant Governor have requested that this Office give an Opinion on the subject of the validity of those parts of Public Law 13-149 which give specific powers to the Lieutenant Governor which had formerly been exercised by the Governor, or at his direction. Specifically, you have asked whether Sections 5601 and 5602 of the Government Code are in conflict with the Organic Act of Guam.

LAW INVOLVED

In addition to the Organic Act of Guam, the pertinent sections of law are Sections 5601 and 5602 of the Government Code as created by P.L. 13-149, (U.S.) Public Law 93-288, and OMB Circular A-95. Section 6 of the Organic Act states, in part:

"There is hereby created the office of Lieutenant Governor of Guam. The Lieutenant Governor shall have such executive powers and perform such duties as may be assigned to him by the Governor or prescribed by this Act or under the laws of Guam."

"The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam. He may grant pardons, . . . He shall appoint, and may remove, all officers and employees of the executive branch of the government of Guam, except as otherwise provided in this or any other Act of Congress, or under the laws of Guam, and shall commission all officers that he may be authorized to appoint. . . .

. . . He shall have the power to issue executive orders and regulations not in conflict with any applicable law. He may recommend bills to the Legislature and give expression of his views on any matter before that body."

Section 5601 of the Government Code states:

"The Office of the Lieutenant Governor shall have program responsibilities

M.L. 10-4-76

Including but not limited to the following:

- (a) Shall be designated as the clearinghouse for all federal aid programs for Guam. As such the Lieutenant Governor shall be the liaison between the Executive Branch of the government of Guam and the Federal Regional Council and Federal Agencies. All federal program commitments, state plans and applications must have the initial review of the Bureau of Budget and Management Research and approval by the Lieutenant Governor prior to their submission to the Governor for final action.
- (b) Shall be responsible for the administration of the Guam Federal Funds Liaison Office as provided under Chapter 1, Title LXV of the Government Code (See P.L. 13-107).
- (c) Shall be designated the clearinghouse for all programs or projects directly or indirectly related to the Territory's recovery, reconstruction, and general public services rehabilitation resulting from the ravages of typhoons, tropical storms, earthquakes, tidal waves and territorial disasters as they may occur. All projects related to Section 5601(c) must have the initial review of the Bureau of Planning and Budget and Management Research and approval of the Lieutenant Governor prior to their submission to the Governor for final action.

"Section 5602. Policy Review Committee. There is hereby created within the Executive Branch of the Government a Policy Review Committee which shall be composed of the Lieutenant Governor, the Attorney General, the Budget Director, the Director of Administration, and the Director of Bureau of Planning. The Lieutenant Governor shall be the chairman of the Policy Review Committee. The (PRC) shall serve as the coordinating body for all policy and program development and formulation, including legislative matters emanating from or coming to the Governor's office. It shall develop, review and recommend programs and policies to the Governor including those requiring legislation. The Committee shall review all bills introduced by the Legislature and make its recommendations to the Governor on those measures that passed the Legislature. The Committee shall also review and coordinate with appropriate departments actions called for in resolutions adopted by the Legislature. The Committee shall review and coordinate with the Bureau of Budget and Management Research the budget preparations prior to submission to the Governor for approval and action."

The Federal Regulations governing the FDAA,, Section 2205.2(1), (m) and (t), define the Governor, his personal representative and the State Coordinating Officer as, respectively, the chief executive officer of any 'state' (Guam), and persons appointed by the Governor. P.L. 93-288 additional Section 301, directs that requests for disaster assistance be made by the Governor. Section 303(c) directs the President to request that "the Governor" designate a State Coordinating Officer.

OMB Circular A-95 states that the clearinghouse shall be appointed by the Governor, or by state law.

CONCLUSION

Because the Governor, personally, as an incident of his office, has been mandated certain powers by the Organic Act which are distinct from the general functioning of the executive branch, certain of the powers delegated to the Lieutenant Governor and to the Policy Review Committee by P.L. 13-149 are, in the opinion of this Office, void as infringing upon the powers of the Governor, as an officer. Other powers provided for in the same act are not an infringement upon the specific powers of the Governor and, therefore, are properly given to the PRC or to the Lieutenant Governor, either as directly provided in this Act or as properly limited in this opinion.

The powers which cannot be delegated by law, but which may be delegated by direction of the Governor so long as he retains ultimate control are:

1. That part of Section 5601(a) which mandates that all federal program commitments, state plans and federal grants be reviewed by Budget and approved by the Lieutenant Governor before being presented to the Governor, unless such review is required or is otherwise a part of the respective federal program.
2. Section 5601(c) to the extent that it removes the Governor's powers to declare an emergency, to request federal aid, and to designate his personal representative and State Coordinating Officer, although nothing herein will preclude the Governor from designating the Lieutenant Governor to any of the above functions, nor will it preclude the Lieutenant Governor from functioning under Sec. 5601(c) at a level below that of the Governor's powers mentioned above. (Of course, only the Governor may declare an emergency.)
3. Those parts of Section 5602 which give to the Policy Review Committee coordination of all policies and programs coming from and going to the Governor; which require review of all bills which have been passed by the Legislature, or which have been introduced by it, This latter power being within the discretion of the executive to do or not do to, just as the Legislature cannot be mandated to hold a public hearing on amendments to a bill before it by the Governor; and to the extent that the Governor's direction as to Resolutions is diminished, the requirement of review and coordination of all Resolutions passed which call for action by the executive.

The remaining powers granted to the Lieutenant Governor or to the PRC by P.L. 13-149 appear to be valid and should be regarded as a proper legislative mandate.

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ANALYSIS

Since Sections 5601 and 5602 delegate to the Lieutenant Governor many separate power and duties, some of which are valid and some of which are not valid acts of the Legislature, an overview of the question is in order before specific powers and duties are analyzed.

All of the powers given to the Lieutenant Governor by this Act were formerly exercised by the Governor personally, or by direction. None are powers which have been taken from other agencies. The question then becomes whether the Legislature may

delegate the powers away from the Governor, or whether the powers so delegated are, by the Organic Act, made personal to the Governor. No cases directly on point have been found. However, two, one from Indiana and one from California, do analyze the question of delegating powers of one agency, and the Governor, to another by the Legislature where the powers granted are granted by the Constitution.

The case of Tucker v. State, 35 N.E.2d 270 (Sup.Ct.Ind., 1941) discusses the power of appointments to state offices by a committee, including the Lt. Governor in one case, instead of by the Governor. Like Guam, the executive power of Indiana is vested in a Governor. Other powers given to the Governor of Guam, such as recommending legislation, execution of laws, pardons (without limitation on Guam), appointments of officers (with limitations on Guam), are likewise given to the Governor of Indiana. However, unlike Guam, Indiana permits only "duties" to be assigned the Lieutenant Governor by law, while Guam permits executive powers as well as duties to be given him by law, the Governor or by the Organic Act.

Nevertheless, the case of Tucker stands for the proposition that there is only one chief executive of the government, and the whole of the executive branch is built around that idea, not a plan of multiple executives. The Organic Act of Guam is so similar to that constitution that a similar, but not identical, result must be reached here.

The Supreme Court of California, more recently, has determined that the Legislature of California cannot require another agency to exercise power specifically given by the Constitution to a different body. In State Board of Education v. Levit, 343 P.2d 8 (Sup.Ct.Calif., 1959), that court states, quoting Cooley, Constitutional Limitations:

"Such powers⁸⁵ are specially conferred by the constitution upon the Governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from these duties which the constitution requires of him he cannot be excused by law." This principle has been applied in this state."

The Supreme Court of Guam, in deciding that the Special Prosecutor was without power to bring indictments since his office was placed within and his appointment was by the Judiciary contrary to the doctrine of separation of powers (despite the fact that appointments of officers shall be made by the Governor "except as otherwise provided in the laws of Guam) the Supreme Court followed the Supreme Court of the United States in Springer v. Govt. of the Philippine Islands (277 U.S. 189, 48 S.Ct. 480). There the Supreme Court of the United States declared that separation of powers governs all organic acts (and constitutions of the U.S., and states) even though all such instruments do not specifically state the matter and forbid activity across that boundary (People v. Namacho, et al., Sup.Ct.Cr.Cases Nos. 36F-47F - 75)

In referring to Section 9(a), as passed in 1950, its legislative history states:

"Section 9. Provision is made for the establishment of a merit system for service in the government of Guam. At the same time, the Governor is left free to appoint, by and with the consent of the Guam Legislature, heads of executive agencies who would be in policy-making positions. Such a provision is clearly necessary in the interest of efficient government." 2 U.S.Cong.Serv. '50, 2445.

Thus we can see that the basic elements of separation of powers and constitutional construction are applicable to Guam and to this question - in that nowhere are two chief executives officers, or government by committee created in any Organic Act of the U.S. What executive powers are to be given to the Lieutenant Governor by law are those which are general in nature and not specifically given to the Governor as an incidence of his office.

Therefore, upon examination of each power given to the Lieutenant Governor by the sections referred to in this Opinion, a determination must be made as to whether each power is one which is given to the Governor personally as an attribute of that office or whether the powers given the Lieutenant Governor are such as are general powers within the executive branch which may be assigned to an appropriate officer of that branch by the Legislature (and reassigned by the Governor pursuant to his powers of reorganization - not necessarily applicable to the case of the Lt. Governor).

First, is Section 5601(a). That subsection gives the clearinghouse (OMB Circular A-95) responsibilities to the Lieutenant Governor, and makes him the Federal Liaison of the government of Guam, and requires that all state plans, federal commitments and applications be reviewed by Budget and the Lt. Governor before being given to the Governor for his "approval and final action". There are three separate functions here

I see no Organic Act limitation in designative the Lt. Governor as the federal clearinghouse (with Budget) since this position is actually one created by a Federal Regulation which has the effect of Federal Law. Since the Regulation permits state law to designate this clearinghouse, then the question is one outside of the Organic Act and its powers and limitations. If anything, such a clearinghouse (and federal liaison) are must such lesser duties as may be assigned to the Lieutenant Governor through Section 6 of the Organic Act cited on page 1 of this Opinion.

However, such is not the case with the third power granted here, that of previewing all federal commitments, state plans and applications. First, this may conflict with powers or requirements stated in any given federal program. I do not know the requirements for all programs affecting Guam, so cannot comment other than generally. This must be answered as to each program as the question arises. Certainly, however, this broad power does conflict with Section 29(b) of the Organic Act as here the Governor is given the power to "establish, maintain and operate" the public education system of Guam. To dilute this power, with regard to federal grants which form an integral part of the operation and maintenance of the schools, is to delegate a power which is given specifically to the Governor, and which cannot be taken away by the Legislature. Just as this cannot be done in California, it cannot be done on Guam. Further, this delegation takes away a very basic power of the Governor to direct those whom he appoints to make policy for him. If the Lieutenant Governor, or any Budget Bureau, can review all federal grants, applications and state plans, even those which need not go through a clearinghouse (whose duties, as well as existence, are prescribed in federal regulations), then the Governor could (I do not here intimate would by the incumbents in the affected offices - we are dealing with powers in this Opinion, not in the way they are exercised) be prevented from presenting an application, federal commitment or state plan which he approves and which is disapproved of by the Lieutenant Governor. Of course, had the law limited the powers of the Lt. Governor to those of procedural review, then there would be no objection.

Section 5601(b) makes the Lt. Governor responsible for the Federal Liaison Office in San Francisco. I see no Organic Act defect in this as the nature of his duties are not such as to be exercising a power given specifically to the Governor, or a power of appointment which cannot be placed elsewhere in the executive branch.

Section 5601(c) presents a different question. Since Federal Law specifically state that the Governor is the one to initiate a request for federal disaster aid after a disaster, is specifically the head of Civil Defense programs by local law (which has not been repealed) and is the one whom the President requests to appoint a State Coordinating Officer, these powers would appear to rest with the Governor. The letter from the FDAA appears to miss the point in its reference to Pennsylvania. While there is no objection to the Governor designating the Lt. Governor as his personal representative, State Coordinating Officer, or both, still it is the Governor who makes this decision. The question remains, however, whether the Legislature may mandate the Governor's choice in this area. I think not. If it is mandated by the Legislature, then it is not the Governor's selection. This is recognized in OMB Circular A-95, where it states that either the Governor designates the Clearinghouse or it is designated by state law. But this is not the end of the matter, as there is much more to be done than merely designating the federal liaisons. While the Governor retains overall control of disaster programs, as provided in the Federal Laws controlling the matter, and in the specific grant of power to the Governor with respect to certain federal requests and powers during a disaster both in the Organic Act and in the government Code, Section 5601(c) may require that the Lt. Governor act as the coordinator for all disaster related activity below that of general direction and policy and the liaison appointments. Therefore, there is a role for the Lt. Governor here, but it must be always subordinate to the overall direction of the Governor. How this is to be worked out is beyond the scope of a legal opinion, and must be made on practical level between the Governor, Lt. Governor and those involved.

Section 5602 creates a "Policy Review Committee" having the following powers:

1. Coordination of all policies and programs coming from or going to the Governor, including all legislative matters.
2. Develop, recommend and review programs and policies to the Governor, including those requiring legislation.
3. Review all bills introduced and make recommendations to the Governor on the passel, presumably as to approval or veto.
4. Review and coordinate on all Resolutions which call for action by the Legislature.
5. Review and coordinate with the Bureau of the Budget the annual budget preparations before submission to the Governor.

The first power of "coordination" is nothing less than an attempt to take over a basic power of the Governor. As chief executive officer of the Government, policies emanate from him, as do the directions on the implementation of those policies. Likewise, programs developed by the Governor are programs of an individual, not of an office. If the power of "coordination" were granted over certain programs that were set up by law, or imposed by law, then, possibly, there could be no objections since the law which established them could also direct the officers within the executive to carry them out. However, here we are talking about initiatives of the Governor,

personally, not legally mandated, or "ministerial" actions. Again, as to policies or programs coming from the outside to the Governor, this power of "coordination" is one of "filtering" information from the Governor. Obviously, we are not mentioning here disaster programs, as power over that coordination is placed elsewhere in the Bill, and to the extent therein limited, is a proper power for this Office of Lieutenant Governor. To say that "all policies and programs" coming to the Governor, regardless of their source, or regardless of the person or office from whom such originally came is to say that the Governor may receive only that information that has been coordinated by another. Even as a policy matter, this can cause problems if a chief executive becomes isolated from the workings of government. Under this Organic Act the Legislature may not mandate this isolation, or at least potential isolation. Likewise, this power of "coordination" takes from the Governor much of his ability to have "general supervision and control of all the departments, bureaus, agencies and other instrumentalities of the Government of Guam." Much of this supervision and control is coordinated away by this legislation, or easily could be by a Lieutenant Governor so inclined. Thus, the broad power to coordinate all policies and programs coming to and going from the Governor cannot stand.

The second power, not being exclusive, to develop, recommend and review policies and programs for the Governor, is a legitimate function in that the Governor is stripped of no power here, nor is he deprived of any direct access to his department heads, as his own initiatives are not stopped or filtered through mandatory "coordination". There should be no forced duplication of effort, but rather a close working with the Governor and the PRC in regards to this function. While this is an "executive power" it is not exclusive to the Governor, and therefore, may be assigned to the Lt. Governor in the same manner that much of the governmental planning function has been delegated to the Bureau of Planning.

The third power, which is a statutory delineation of a power formerly possessed by this Committee as it was created and delegated by the Governor, does interfere with the powers specifically given to the Governor as an individual. The Organic Act specifically requires that a bill, to become law, must have the action (or specific inaction) of the Governor, not the action or inaction of the executive branch. Likewise, if a bill is not to become law because of a veto, this power is exercised by the Governor alone, not by any or all of the executive branch. If the Governor desires to have the advice of others, both in and out of the executive branch, that is his prerogative. However, it is equally his prerogative to approve or veto a bill upon his own initiative without the advice of others. Previously, Governor Bordallo has taken both routes, neither of which is being criticized here. To create a body which must review passed bills before the Governor's action thereon actually will deprive the Governor of the full ten days given to him by the Organic Act to review measures before action, either veto or approval, is taken by him. Thus, this power is one which the Legislature cannot take from the Governor by law.

The fourth power to review and coordinate all Resolutions is questionable. Resolutions do not have the force of law, and this piece of Legislation cannot give them that force, since the requisites of the Organic Act have not been followed in order for them to become law. Thus, to try and require some positive action on Resolutions which request executive action must fail, as the basic Resolution cannot require action if the Executive determines that none is necessary. However, it is well to keep track of resolutions, and to disseminate them to the affected agencies for their information and action, since it is obvious that many Resolutions do authorize action such as acceptance of new federal grants, or do authorize other executive action.

This review and coordination is not, however, an individual power of the Governor, though his overall powers of supervision and control would leave ultimate decisions in this area to him. Not being an individual power, it may be delegated to a committee or to the Lieutenant Governor through both Section 6 and Section 9(b) of the Organic Act.

The final power of review and coordination of the Budget is another general executive power which is neither personal to the Governor at the level referred to here, nor is it exclusive - limiting the power of the Governor over this Legislation. In fact, it could be viewed as an amendment, again by implication (the usual, and difficult legislative method on Guam), of the Executive Budget Act. Just as the Bureau of the Budget & Management Research has certain powers over the Budget, so does this Committee. Considering everything, I believe that this power is essential for the smooth working of the budgetary process, so that Departments other than the Bureau of Budget & Management Research can review the document before the Governor finalizes it. If this power were not in law, it certainly should be delegated by the Governor. Nevertheless, this committee may not limit any changes the Governor may request in the budget, as it is the Governor, alone, who has the specific power to recommend measures to the Legislature for their introduction and passage.

As a final analysis, it should be noted that ^{all} ~~some~~ of the powers herein discussed, which are in excess of the Legislature to give, may be assigned to the Lieutenant Governor or to the PRC by the Governor under the Organic Act if the Governor believes that such assignment, subject to his own control, will aid him in his functions. The essence of the difference is that by assignment of the Governor, he retains the control necessary to enable him to carry out the duties mandated to him by the Organic Act. As certain of the duties are mandated by law and made exclusive to the Lieutenant Governor or the PRC and made all-inclusive, the Governor loses the control mandated to him by the Organic Act, and so those sections are void.

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