Memo 6
12 August 1976

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To: Howard Willens
From: Jake Wheeler

Subj: Briefing Paper on Bill of Rights

This may be the most difficult paper to prepare. Certainly this draft refledts the problems inherent in trying to deal with a complex set of issues within the confines of a smadl number of pages. Having to deal with too much, one can only present too little. The paper suffers from the level of generalization forced upon it. I have considerable sympathy for the author who has clearly done his homework. I doubt that anyone can produce a truly happy product--given the form and strcture of this approach--in less than, say, three times this length.

The paper tries to deal with the many specifics of a bill of rights and because of this breadth of attention it can provide little depth on anything. So the author is forced too often to summarize the issues in terms of the "opponents believe" and "supporters believe," suggesting both that there is a dichotomy and that the positions of the two sides are the central issues. In a similar vein the "alternatives" sections are actually not always useful since they generally fall back on rather simple kinds of advice, often repetitive. (A number of them simply point out that the delegates may duplicate or codify).

There is need here--as in the other papers--for some frame of reference--or, in the interest of objectivity, some alternative frames of reference. In the absence of this there is the implicit encouragement for the delegates to use the cafeteria approach, going down the line picking and choosing without much regard for the meal they are putting together. The author clearly recognizes this in the first full paragraph on page 9, but his paragraph merely notes the problem and he does not follow this up with any kind of menu. (I apologize for extending this bad analogy!) My recommendation is that he take that paragraph, expand it into a thoughtful essay of a page or two, and shove it into the introduction. Then he can test the rest of the materials against it.

Comment on the introduction: Even if the practical effect of a state or commonwealth bill of rights is limited by the encompassing impact of the Federal, greater emphasis than is given seems called for. The opening is much too matter-of-fact for me and in reality does not add very much to the reader's understanding. I would suggest consideration of:

1) developing some kind of a frame(s) of reference for dealing with the whole question. (See comment above).
2) emphasizing the importance of civil liberties in the American tradition
   a/ notion of "limited government" in Declaration of Independence, a fine sop to the Bicentennial
   b/ the liberties referred to in the original Consti-

c/ Covenant requirement of a Bill of Rights exemplifies American commitment to idea. (It also should be clearly and early stated that while a Bill is required the Covenant says nothing of importance about its contents).

3) introducing the constitutional/legislative question early,
   a/ some civil liberties fundamental and long lasting, others more temporal--examples
   b/ much protection for individual in legislation, "liberties" do not necessarily have to be in the Constitution to be effective
   c/ legislative branch should be made aware of its responsibility for preserving and expanding rights through its "powers" in this area. (Legislature has been principally responsible for development of what is usually called the "civil right"

Also as introduction or as part of a "frame of reference" one cannot fully escape the question of why a commonwealth bill of rights anyway. The author certainly recognizes this and within the limits of space allowed him presents that issue. I would elaborate it some. And here I do duplicate some of the things already written:

1) The Federal statement is a minimum one. While this statement may meet the needs and expectations of state or commonwealth populations today, that may not always be the case. After all the U.S. Supreme Court only discoverd civil liberties about a half-century ago and its record of support has been a bit spotty. The court since 1940 has been fairly activist in this area but viewed from the vantage point of constitutional history the record is not wholly reassurring. Indeed the present court appears to backing off a bit from some of the stronger positions taken by its predecessor. I am not defending either position but merely pointing out that the "Feds" can change their minds. The Commonwealth constitution should protect what the people of the Marianas consider fundamental.
2) Despite the vast growth in the responsibilities of the Federal government in the past forty years, the states (and commonwealth) still deliver the bulk of domestic government to the people, including those functions generalizaed under "police powers." The possibilities for infringement of individual rights are vast. Local folks should provide for their own protection and not have to depend upon external institutions and external legal systems.
3) The notion of personal liberty permeates a constitutional system--or should. The constitutional document is not only a statement of legally enforceable rules and regulations but is a symbol of unity and a reflection of values. Even if restricted to legally enforceable rules, these can be written in a fashion to enhance the document as symbol. I guess I simply cannot visualize a constitution without a statement of rights. The bill of rights more than any other section of the constitution is modern in its 18th

century language. This adds, I believe, to its readibility and credibility. (The King James has always seemed more convincing than the Revised Standard!)

On organization: is the present approach necessarily the best one to use? I do not know; I am simply raising the question. It does seem to raise the question of the wheat and the chaff to have freedom of speech, etc., followed by the "right" to bear arms. Another approach---

Most necessary constitutional civil liberties may be subsumed under one of the two headings:

1) freedom of expression
2) due process of law

This accords, of course, with the textbook distinction between "substantive" and "procedural" rights. Certainly everything that might conceivably receive widespread support as "fundamental" could be put in one category or another. Some might want to add "equal protection"--as I suspect I would--but that too may be dealt with under due process, as the author points out, it is in some states. However, the use of "equal protection" as a support for the development of certain legislatively defined civil rights justifies its separate treatment.

Yet I am no purist in this. Some specific issues are of such intrinsic and contemporary importance as to require or justify separate treatment. E.g., searches and seizures, etc. Others for historical reasons, e.g., habeas corpus, bill of attainder, may be justified.

Then others for which support has weakened or for which hostorical justification has largely disappeared, e.g., arms, grand jury, etc., could be relegated to another section so as not to be given the same respectability as the accepted fundamentals. (The paper in its quest for objectivity must not end up by taking sides inadvertently through failing to differentiate in this fashion).

And if I may be permitted to revert to my traditional and pervasive and often repeated criticism of the general approach in these papers--focussing on what state constitutions contain as opposed to dealing with constitutional problems: this approach leads in this paper to spending 1½ pages on the right to bear arms without really confronting the central issue while giving little or no help on the truly important matters--emerging issues-in regard to capital punishment, fair trial/free press, the whole obscenity mess. (Well, perhaps the latter should be exempt from this criticism). What I am saying is that the remaining two issues anyway are emergent problems, clearly, but because not much is actually found in constitutions today, they are rather cavalierly dismissed. Am I being fair?

Finally, I found the footnotes most helpful, particularly in in updating some of my thinking about the research I have been doing over here this past year--until suspended for this project. But some things included seem to me to deserve coverage and even expansion in the main body of the text. Please look at the following:

No. 19. This is a value judgment, of course, but it deserves emphasis in the text. Don't hide it.
50. While I disagree with the learned judges, I do think a brief review of their ideas in the text would be useful.
59. If the text talks about the "balancing" act, then this criticism ought to be there.
86. Self-evident. But needs repeating in the text. But then maybe the NRA is not as powerful out there as in Georgia.
88. Same.
174. I would pick up the Marianas tradition and elaborate in the text.

SOME SPECIFIC COMMENTS

p6 Isn't it straining too much to be objective to say repeatedly that "it can be argued that..." when we know with some certainty a matter is a bad idea?

p8 Paragraph beginning "Before reaching..." This is the first of many uses of the dichotomy in this paper, forced, I think, by limitations of space. However, the dichotomy often is misleading. The choices are not that drastic or clean.

p9 I have already indicated that I would like to see the first paragraph fully developed.

p10 I have already mentioned my concern with this approach which mixes chaff and wheat

p11 "No state money shall be spent on any religion." Have there been any problems resulting from such a statement? For example, does "money" embrace "facility"?

p12 "Bank robbery" is a dramatic but unreal example. Why not the real cases of the snake handlers or one from the Jehovah's Witnesses or compulsory vaccination?

p19-20 Could the matter of wiretapping be taken care of by adding to the statement as follows: "....papers, effects, and communications, against unreasonable searches, seizures, and interceptions however effected, shall not be violated...."

p23 I do not know what it would add to point out that the English do not follow the exclusionary rule. I can provide some judicial rationales if you want them.

p26 First paragraph--here the dichotomy is used to forced delegates into one camp or the other. Is there nothing between?

p30 In regard to the grand jury I would point out that in addition to the Federal court refusing to extend the device to the states that whatever trend is evident is away from the device. (A clumsy sentence but my meaning is clear).

p35 I do not really understand the sentence which begins "While crime is basically crime..." Is the issue really that crime is simpler than contract? Or is it that we still to some extent put crime up to popular vote of the jury? On reading this I wonder if my point is clear--even to me. What I am saying is, since crime is "public" are we not just giving the jury the last word on it?

p37 Paragraph beginning "It is clear that..." As important as due process is can we dispose of the issues this simply? If we can spend 1½ pages on my favorite subject, arms,..... This isn't an argument for codification either.

p40 Will there not also be a problem in the Marianas of giving the Carolinians some kind of special, positive protection? "Protection" may not be the best word. Special status, perhaps. Can this be done under equal protection or can others holler?

p44 I am sure the error in recording the "quartering troops" provision has already been caught.
Substantively, while I think this matter totally obsolete, I would like to be assurred that there is no particulary problem in the Marianas. I imagine that were a problem to emerge the provision would be no protection anyway, e.g., a sudden military buildup by the US.

p54 I have already commented on my views on the capital punishment problem.

Final Comments

Footnote 175. I would never give any encouragement to the inclusion of real dollar figures in a constitution, however minor the issue. If you include something like this, let the legislature set the figure, or set the figure if you have to but allow the legislature to change it.

189. I am sure the error here has been noted.

*** 28. I confess that I am lifting out of context here to illustrate a point I have made ad nauseam. (Although in context I would wish for a heavier criticism of over specificity). Anyway...feudal tenures. An example of what comes about from dealing with somewhat uncritical what is in constitutions. When Arkansas started to write its constitution for entry into the union in 1836, it looked at what other states had done. And it found in New York's document this feudal tenure bit. Now what was good enough for New York must be good enough for Arkansas. Nobody inquired why New York had the provision or they would have found that

this grew out of peculiar problems resulting from the system the Dutch had brought to the Hudson Valley in 17th century. Arkansas had no such tradition or set of problems. Minnesota in 1858 probably followed Wisconsin's earlier example which was probably based on Arkansas or directly on New York. Anyway New York as far as I know dropped it but the others have it. I know of no particular harm that comes from this, nor am I aware of any particular body of legal thought which has developed from it. But it does illustrate the problem I have emphasized.

(All the above I am recalling from hazy memory; I hope I am not proved wrong on detail, particularly if it leads one to conclude that I am wrong on the principle!)

PS. If I may add at this point a footnote which I intended to put in my first two paragraphs in support of my expression of sympathy for the author.....

If you will look at Dick Howard's two volume Commentaries on the Virginia constitution you will find that almost one-fourth of the 1200 or so pages are devoted to the bill of rights.

Memo 7
12 August 1976

From: Jake Wheeler
To: Howard Willens
Subj: Briefing Paper on Restrictions on Land Alienation

As I suspected, my ability to comment intelligently on this subject is severely limited. However, since that has not deterred me before, I offer a couple of comments which may have some validity.

First, this paper makes a good case for inclusion of a matter which in some jurisdictions might be considered inappropriate. Though I am inclined toward the purist's position in constitutional matters I am not a purist. My position is that those who want to add stuff to a constitution must bear the onus of argument or else accept the label of "clutterer." Here the case is made effectively. If natural resources are so important (read: fundamental) to Alaskans and water to Arizonans and levees to Louisianans to be dealt with in their respective constitutions then land alienation certainly deserves constitutional treatment in the Marianas. How much should be in the Constitution is another matter, one on which I have little to offer. I suspect that it will be hard for the delegates in a short period to hammer into granite a lasting arrangement. I would thus tend to leave as much as possible to the legislature or to provide a way for legislative adjustment later if necessary.

In this vein I might quarrel with the assertion on page 19. I refer to the whole of the first full paragraph beginning "It is difficult..." I would raise a question about every sentence. Suffice it to say that the author's assertion is valid only if he assumes that the Convention in the time available can and will develop a complicated formula that will stand the test of time, not in the sense of survival but also in the sense of justice. Remember if it is put into the constitution it will immediately establish vested interests. These vested interests will be protected by whatever extraordinary majority is required for changing the document. So the delegates had better be right, in the sense of doing really what they intend to do.

Which leads to my second point. There is another way to handle this, between constitutional treatment and leaving it to the legislature. The truly fundamental stuff--"definition of Northern Marianas descent", for example--might be put in the constitution. The more detail aspects might be worked up by the convention but placed in a "schedule" to be attached temporarily to the constitution and voted upon at the same time. If the constitution and schedule are approved, the latter becomes in effect <u>legislation</u>. Then, the legislature is free later to make adjustments in that by normal legislative processes, although it might be possible to place a time limit before the legislature could change something. Granted legislation established in this fashion might carry a greater aura of respectability than ordinary legislation, discouraging casual change, but so much the better. I recommend that this possibility at least be looked into.

This is a very interesting and well-written paper. I find it more satisfying than most of the others I have read. (I have not yet read the executive). Perhaps this is due to my ignorance in this area and my familiarity with the materials of the others and perhaps a distorted sense of proprietorship about the latter. However, I do not really think so. I believe the key is that this paper is the first which really comes to grips with the problems of the Marianans in a very direct way. Of course, I realize that the nature of the issue conditions this somewhat.

Yet I do have the nagging feeling of some implicit difficulty. The approach outlines the options available to the Marianans. Or does it? I do not know. In other words, instead of asking the Marianans what it is exactly they want to achieve and then fashioning the constitutional arrangements to do it, the paper defines the alternatives, or attempts to. Now, the paper may be all-inclusive; it may not be. It may actually condition the choice of the delegates by its treatments of the possibilities. This may be an inescapable condition but it should be kept in mind--as I am sure it is.

Obviously these comments have been hastily drawn after a quick review of the paper. I hope I will not be held too accountable.