

Memo 8
14 August 1976

02
9

From: Jake Wheeler
To: Howard Willens
Subj: Briefing Paper on Executive

This paper is the closest yet to the approach which I think the papers should have to be useful to the delegates who are charged, first, with fashioning a constitutional system, and secondly, describing that system in a document. But even this paper has some distance to go for it does not remain consistent to the plan it seems to suggest at the outset. Excluding the paper on land alienation for the moment because of its peculiar subject matter, let me say that I hope the Solomon model can be polished up and followed.

While he too relies too heavily on counting constitutional provisions, he does include the more relevant materials in emphatic ways; for example:

- 1) he does highlight recent trends and draws examples from recent constitutions, which hopefully may reflect the influence of modern ideas; see p9, paragraph beginning, "Experience in the United...."
- 2) he pays some homage--for the first time in these papers I believe--to the ideas of the people who have labored in these vineyards so long. E.g., p87, "Constitutional experts since the turn..." Also, in various places, "The Model State Constitution...."

(This is not an advocacy of the model as a set of specifics but as a goad to discussion. It is not a blueprint but it can be an aspiration.)

- 3) while I think he too slavishly follows the pattern of quoting proponents and opponents on each possible issue, he does on occasion point to concrete problems which result from one approach or another. E.g, p30, "...This procedure led to public and legislative confusion...."
- 4) And he does not shy wholly away from expressing values and judgments. E.g., p40, "The most important powers that the Constitution can delegate...."

This paper above all strives to develop some kind of frame of reference or theory for developing the more descriptive material which follows. While it needs a good deal of development and elaboration, it is a start. E.g., p7, "The basic political and philosophical issues...." In addition, the paper on a few occasions tries to introduce various sub-topics with a generalized statement on the reason for or meaning of the ~~device~~ device to be dealt with. See, for example, the discussion of the veto power in various places.

There is a pervasive ambivalence in the paper which should be checked out. The introduction contains a view of the concept of separation of powers which one might have found in textbooks before World War II (although some of my colleagues continued to teach from them long after!!). It is the old notion that the

Memo 8
14 August 1976
page 2.

thinks about the government. Yet the paper is much more modern in its assumptions later on. E.g., p15, "An absolute veto power permits the governor to maintain control of his program....." Also, "Executive budget preparation offers the Governor an opportunity to identify systematically state needs....."

Part of this results from two problems inherent in the structure of the paper. First, like the legislative paper it tries to treat one institution of government without dealing with the system of which it is a part. For example, the veto power is dealt with solely in terms of a gubernatorial check on the possible excesses of the legislature; it is not treated as one of those bridges built between the two "separated" branches which encourage and even force cooperation. The veto power, for example, can never have ~~any~~ effectiveness measured by counting up the number of times it is sustained as opposed to overrides. The important ~~check~~ of the device may lie in the requirement that each branch must consider the attitudes of the other in almost anything it does. This same principle could apply to other matters, I believe.

And the second problem may actually be a derivative of the first. The treatment is based upon a separation of powers, a system of conflict and competition. Perhaps a more accurate image may be that of a separation of institutions sharing powers, and these institutions may be in conflict or in cooperation or in a combination of the two with constitutional provisions aiding cooperation or abetting conflict. (See Neustadt, Presidential Power).

But let me repeat that for whatever my appraisal is worth, I believe that this paper begins to approach the style they all should take.