

April 13, 1972

Hon. Leo Graybill, Jr.
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Dear Leo:

Thank you for your letter of April 11 concerning the constitutional matters. I appreciate your taking the time to express your views. I will try to reciprocate by stating my position concerning the proposed new Montana constitution and the pending litigation.

With respect to George Harper, I cannot help but feel that it is difficult for him to be objective and impartial as a member of "the committee of 19" and at the same time solicit so energetically the support of all Montana clergymen for the new constitutional draft in its entirety. I think that is true of any other individual who serves on "the committee of 19". Perhaps this indicates my persuasion that no member of the constitutional convention can impartially and objectively approach the matter of "educating" the voters so that they can vote intelligently by being informed on the matters to be submitted at the election June 6. Right or wrong, this is my stand.

With respect to participation in the Mahoney litigation as a friend of the court I want you to know that my interest is purely and simply as a citizen of Montana and one who has been born, reared and educated in this state and who has resided here continuously except a period of military service. It may very well be that individuals or organizations which are clients of mine might disagree heartily with my views on the constitution, existing or proposed, or my participation in the litigation. Nevertheless, these views and actions are my own. As you may have observed, my principal contention in the Mahoney case is that if the constitutional convention is not adjourned there cannot be an election on June 6. If this involves "the committee of 19" it is coincidental to the principal and basic questions as to the continuing authority and existence of the constitutional convention.

Having had some real interest in the present Montana constitution as a lawyer and sometime compiler and annotater of Montana codes

as well as an interested citizen, I have for many years had some intimate knowledge of that document. I subscribed for and received the proceedings of the recent convention. I do have many objections to the new draft as compared to the present constitution and I will relate a few of my principal objections. This is not intended to be an exhaustive statement. It will perhaps show that in some respects, at least, my thoughts are different from yours and different from a majority of the members of the recent convention. In general, I do not agree that the proposed draft has advantages over the existing constitution. Some of the things I will state are obviously relatively insignificant and could be called "nit-picking." Other objections are serious and fundamental as far as I am concerned.

I do not like the preamble of the proposed constitution. I believe that if God was "Almighty" when the preamble to the 1889 constitution was written, he is "Almighty" now and the deletion of that adjective minimizes the deity. I think that Article I thereof is inaccurate as well as incomplete. It is with no lack of consideration for our Indian brethern that I state that there are many more significant items in Ordinance No. 1 of the present constitution than the portion relating to Indians, such as the adoption of the United States Constitution by the fifth paragraph and the provisions relating to religious toleration and free public schools included in the first and fourth paragraphs of said Ordinance No. 1. I also think Article I of the present constitution defining the boundaries of Montana can well be retained even though stated in the Organic Act which created the Territory of Montana in 1864.

With reference to Article II (Declaration of Rights) of the new draft, I do not like the last phrase "as may be provided by law," of Section 8 which I think limits and makes meaningless the proclaimed right of participation. The exception in Section 9 negates the right to know and, with the exception included, Section 9 is worse than nothing. I dislike the portion of Section 16 of that new article that relates to Workmen's Compensation Laws. I think Section 18 of that same article subjecting the state to lawsuits will cause more problems than advantages. A state tort claims act or similar legislation would be much better. With respect to Section 19 of the said Article II, I cannot see the purpose of omitting the "unless" phrase with respect to habeas corpus that is in our present constitutional provision Section 21 of Article III and in Section 9 of Article I of the U. S. Constitution second sentence. The change in Section 26 with respect to unanimous verdict in non-felony criminal cases does not appeal to me in contrast to the present Article III, Section 23 which permits two-thirds of a jury to render a verdict in such cases. I believe that Section 35 is entirely unnecessary which declares special consideration

for servicemen, servicewomen and veterans and I consider it a gratuitous pandering to these worthy people.

With respect to Section 2 of Article IV (Suffrage and Elections) of the new draft I observe that much has been said in the news about the 18 year old right to vote. This Montana provision is not significant in view of the fact that the 26th Amendment to the federal constitution provides that as to citizens 18 years of age or older their right to vote "shall not be denied or abridged by the United States or by any state on account of age." This amendment to the federal constitution is now effective and it was approved by the 1971 legislative assembly of the State of Montana (see page 1811 of the 1971 Session Laws). Moreover, in that connection Section 4 of Article IV of the new draft would seem to indicate that young people are eligible for any public office but an exception in the proposed constitution (Article VI, Section 3) makes it clear that to hold state executive office an elector must be 25 years of age or older and Section 4 of Article IV also specifically provides that "the legislature may provide additional qualifications" which seems to neutralize the whole effect of the section. I conclude the young people actually have been given nothing by the new draft, publicity to the contrary notwithstanding.

With respect to Article V (the Legislature) of the new draft, I have no particular objection to most of what is included in the article but I have serious objection to what is omitted that appears in the present legislative article which is Article V of the present constitution. I cannot see a valid reason for omitting Sections 20, 21 and 22 of the present Article V and I think it is a great mistake to omit sections 25, 27, 28, 29, 31, 32, 34, 36, 37, 38, 39, 41, 42, 43 and 44 of the said Article V of the present constitution, all relating to requirements, limitations and restrictions with reference to the legislative process and legislators. If as a result of this statement and other observations in this letter you ask whether I do not have full trust and confidence in the legislature, the answer is "yes, I do not." My confidence is in the people and the constitution is their document. Also, our state constitution is intended and expected to be a limitation upon the power of the legislature as contrasted to the federal system which involves a grant of legislative power. Having observed legislatures in action over many years I have seen things done by legislatures that the people should forbid the legislature to do. By saying this I mean no reflection on the thousands of fine people who have served well as legislators in the past. I particularly deplore the omission of Section 25 of Article V of our present constitution which requires that in amendatory legislation "so much thereof as is revised, amended or extended shall be re-enacted and published at length." My opinion, again, is that this is one of the most important provisions in our present constitution involving the legislative process. I definitely oppose annual legislative sessions provided in Section 6 of Article V of the new draft. Among my reasons in opposition are the limited

availability of persons to become legislators to serve 60 or more days each year, the excessive cost and the certainty that we will have more laws, more regulation, more government than the people need or want.

With respect to Article VI of the proposed draft I object to the provision in Section 5 relating to officers of the executive branch who "may be a candidate for any public office during his term" only because Section 10 of Article VII (the Judiciary) requires forfeiture of a judicial position if the incumbent files for an elective public office other than a judicial position. Frankly, I do not like the limitation in the judicial article. Many good public officers have come out of judicial positions. My personal belief is that any person should have the right to run for any office without forfeiting an office presently held. Retention of justices of the peace as constitutional officers is also a mistake, in my opinion. I also object to the elimination of the state treasurer and the clerk of the supreme court as constitutional officers.

With respect to Article VIII (Revenue and Finance) of the proposed draft I seriously object to Section 5 which seems clearly to state that "the legislature may exempt from taxation" any property whatsoever while not positively exempting anything at all - even property of the United States or any public property which probably cannot be taxed in any event. The present tax exemption section and Sections 1 and 7 of the present state constitution Article XII have been construed to mean that all property not constitutionally exempt must be taxed. The omission of those sections as well as Section 17 of Article XII of the present constitution seems to me to be a great mistake. I also do not personally approve of the change in the so-called "anti-diversion" amendment in Section 6. By Section 8 a state debt could be created by legislative vote alone if two-thirds of the members approve. It occurs to me that the people must have the right to vote on state indebtedness. In the same article I do not like the lack of restriction with respect to investment of public funds. Specifically, corporate bonds should not be proper investments which I think the language of the proposed section 13 allows and I believe that paragraph (c) of subsection (2) opens up the investment authority as to permanent educational funds to anything provided by the legislature which bears "a fixed rate of interest." Bonds of the defunct corporations of the past and the more modern cases of Penn-Central and Lockheed should make us more cautious with the people's money. Omitted from the Revenue and Finance article is the limitation in Section 9 of Article XII of two mills for state purposes except by a vote of the people. True, we may have to levy more than two mills for state purposes (as we do now for the university system) but my view is to let the people vote! I am not convinced that the elimination of state and county boards of equalization as constitutional boards (Section 15 of present Article XII) is desirable.

I object to the provision in Article XIII, Section 2 of the proposed draft providing for a "consumer counsel" limited to representing consumer interests only "in hearings before the public service commission or other successor agency." The public service commission is not a constitutional body but a statutory one that could be discontinued by legislative action with no "successor agency." A consumer counsel could and should be established by legislative act to represent consumer interests in all respects if needed.

From Article XI of the proposed draft (Local Government) there has been eliminated the provision in the present Section 4 of Article XVI providing for commissioner districts of counties which districts are required to be "as compact and equal in population and area as possible." I see no good reason for eliminating this desirable provision from the state constitution.

With respect to Article XIV (Constitutional Revision) it is my personal feeling and belief that a constitutional convention, periodic submission of the constitution and easy amendment by initiative or otherwise is not desirable. I feel that any constitution, state or federal, should have some degree of stability and permanency. The present limitation of three amendments being submitted at one election would be entirely eliminated as I read Section 8 of the proposed Article XIV. In 1968 the people voted down a proposal that would have allowed six proposed constitutional amendments to be submitted at the same election. This indicates to me that as recently as 1968 the attitude of the people was that we should make change slowly in the state constitution.

It cannot be fairly said that these objections should have been made known by me or others to the convention. I tried that in a limited way. Probably stupidly I did not know that a completely new document was contemplated. I found out early that with few gratifying exceptions I did not know what the convention was doing or intending to do until it was done and on the floor of the convention. To try to contact delegates at that stage of the game I found to be fruitless, ineffective and possibly understandably resented by delegates. I did not persist in face of the obstacles. In some instances I did not know what was done until the final draft was received by me on the day the convention adjourned sine die. Moreover, to contact you or "the committee of 19" would have been difficult if not impossible for there was no publicity that I saw concerning time or place of any meeting. There were no facts relating to the litigation that I could learn from you so it would have been useless to take up your time or otherwise impose on you in this regard.

As originally stated, this is not intended to be an exhaustive dissertation with respect to the new constitutional draft nor with respect to the convention's emissions from the present constitution. The paper entitled "Highlights of Proposed Constitution" prepared

by the convention and distributed after the convention to the newspapers and to those who subscribed to the constitutional convention proceedings makes no mention at all of omitted sections. As pointed out, some of the sections proposed to be omitted are sections that I do not think should be omitted. Similarly, with respect to the limitations of public indebtedness specified in Section 5 and Section 6 of Article XIII of the present constitution, I think those constitutional limitations should be retained. I object to three boards of education (Article X, Section 9 of the new draft) instead of one.

At the present time most of the ordinary voters of Montana do not even know of the existence of many of the matters that I recite as being objectionable to me. As stated, some of these matters I did not know about until after the convention and it is certain I got no direct information concerning omissions from publicity or other sources originating from the convention. Notwithstanding the rush to adjourn that was obvious in the closing days of the convention, I am very surprised and quite disappointed that the delegates, and especially the lawyers among them, allowed the deficiencies I relate here to be in the final draft, whether resulting from omissions or inclusion. Resolution No. 15 of the convention submitted by delegate Torrey B. Johnson to recess for five months to consider in its entirety the proposed constitution made sense to me but it was defeated March 17, 1972 by a vote of 67 to 26 as you know. I cannot understand the hurry in finalizing an instrument as important as a proposed complete replacement of an existing state constitution, the details of which the people should have an opportunity to know and consider before any final draft. In my opinion, careful and protracted examination of the completed document should have caused some second thoughts on the part of the delegates.

Again I ask you to bear in mind that what is stated herein is not intended to be exhaustive but is illustrative of my feeling with respect to the proposed state constitution which is the product of the recent constitutional convention. You asked what my objections are and I have related what appears here. You may not like what is said or agree at all but here it is. I want you to understand clearly that what is stated herein are my ideas alone and are not affected by any relationships, professional or otherwise, that I have.

Finally, I must say that I am very doubtful that some Denver based representative of Common Cause who apparently "endorses" the "new constitution" (Great Falls Tribune, April 11, 1972 and Helena Independent Record of April 12) knows the contents of the present

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state constitution, or of the proposed constitution or the needs of Montana. It is no transient or easy undertaking to become acquainted with these things. Accordingly I will appraise critically those who endorse the proposed Montana constitution in toto and I will look for some valid reasons to revise, alter, amend or replace the present Montana constitution as proposed.

With kind personal regards, I am

Sincerely yours,

WESLEY W. WERTZ

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