

Constitutional Difficulties of Utah's Executive Branch and the Need for Reform

By John J. Flynn*

I. INTRODUCTION

Utah's constitution of 1896 has been aptly described as a "horse and buggy" constitution. Like most of her sister states, Utah adopted a constitution designed to accommodate a society accustomed to the nineteenth century pace of a horse and buggy at the very time that the industrial revolution was laying the foundation for a vastly different type of society.¹

The horse and buggy description of Utah's constitution is more than justified when one studies the process of drafting and adopting the article on the executive branch. The constitutional convention appointed a fifteen member committee to make the initial draft of an executive article.² Few of the great issues of governmental theory and the executive branch of government were debated when the committee's draft was considered by the full convention. No one questioned the wisdom of creating six elective offices in the executive branch.³ There was no debate on the question of succession in case of the death or disability of the governor;⁴ nor was debate held upon the scope of the governor's, or any of the other elective executive officers' duties and powers.⁵ There was no debate on the purposes and powers of the boards and commissions created by the constitution⁶ with the exception of the Board of Pardons.⁷ And, one is struck by the absence of debate upon the governor's appointive power or the constitutional creation of a Board of Examiners. Little debate was held on the governor's veto power,⁸ qualifica-

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¹ See generally GRAVES, *AMERICAN STATE GOVERNMENT* 64-68 (4th ed. 1953).

² 1 *PROCEEDINGS OF THE UTAH CONSTITUTIONAL CONVENTION 1895*, at 66 (1898) [hereinafter cited as *CONVENTION PROCEEDINGS*].

³ *UTAH CONST.* art. VII, § 1 (governor, secretary of state, attorney general, state auditor, state treasurer, and superintendent of public instruction). The office of superintendent of public instruction was made appointive by an amendment to article VII, § 1, adopted in 1950. The office remained a constitutional office, however, under article VII, § 19. See *State Bd. of Educ. v. Commission of Fin.*, 122 Utah 164, 247 P.2d 435 (1952).

⁴ *UTAH CONST.* art. VII, § 11, establishes a line of succession. There was some debate about the creation of an office of lieutenant governor, 1 *CONVENTION PROCEEDINGS* 653, but the proposal was rejected, *id.* at 656, on the grounds that a lieutenant governor would have little to do and that compensating an elective officer for doing nothing would be a waste of tax revenue.

⁵ There was some debate on the scope of the attorney general's duties during the debate on the proper salary for that office. The convention seemed to believe there would be little labor required of the attorney general; the prestige of the office would bring sufficient extra compensation by enhancing the reputation of the practitioner elected, and \$1500 per annum was sufficient compensation for giving advice to state officers from time to time. 2 *id.* at 1027.

⁶ *E.g.*, *UTAH CONST.* art. VII, § 13 (State Prison Commissioners and Board of Examiners); *id.* § 14 (Insane Asylum Commissioners); *id.* § 15 (Reform School Commissioners).

⁷ *Id.* § 12; see 1 *CONVENTION PROCEEDINGS* 667; 2 *id.* at 1006.

⁸ *UTAH CONST.* art. VII, § 8; 2 *CONVENTION PROCEEDINGS* 1161-62.

tions for election to offices in the executive branch⁹ and the governor's power to call special sessions of the legislature.¹⁰ Considerable time, however, was spent debating the salaries for elected officers of the executive branch originally set by article VII, section 20.¹¹ The controversy did not center upon the question of whether salaries should be set by the constitution, but assumed the affirmative of that question. The delegates devoted their efforts to debating the amount of compensation each elective officer should receive. The consensus of the convention on salaries, and perhaps a significant indication of the convention's philosophy of the function of state government, was voiced by Delegate Varian when he observed: "when the State government goes into operation . . . fully one-half the time of . . . State officers will be unemployed."¹² The delegate from San Juan County compared the state auditor's function and therefore the auditor's compensation, to that of a "good overseer or foreman of our cattle companies" and favored a proposal to set the auditor's pay at about the same level as that of a foreman in a San Juan County cattle company.¹³

The proceedings of the constitutional convention do not evidence serious thought by the delegates of the purpose, function and structure of an executive branch of state government. Although there is no record of the deliberations of the convention's committee on the executive branch which might indicate the source of the committee's draft, the executive article as finally adopted followed the broad outlines of Utah's pre-statehood constitutions of 1872, 1882, and 1888. Similarities between the final draft of Utah's executive article and the executive articles of the Nevada¹⁴ and Washington¹⁵ constitutions seem to indicate that special reliance was placed on those constitutions by the drafting committee.

The executive article called for the election of six officers: governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction.¹⁶ By a 1950 amendment, the office of superintendent of public instruction was made an appointive rather than an elective office, even though the office retained the status of a constitutional office under article VII, section 19, and article X, section 8.¹⁷ Age,

⁹ 1 *id.* at 656-65.

¹⁰ UTAH CONST. art. VII, § 6; 1 CONVENTION PROCEEDINGS 663.

¹¹ Article VII, § 20, was amended in 1946 to give the legislature power to set executive branch salaries for elective officials. Article VI, § 9, still freezes legislator pay into the constitution. A constitutional amendment proposed by the Legislative Study Commission and passed by the Second Special Session of the Thirty-sixth Legislature would amend article VI, § 9, to increase legislator pay and give the legislature power to set legislator pay by law. The amendment will be voted on in November of 1966. See S.J. Res. 4, Utah Laws 2d Spec. Sess. 1966, ch. 15, at 25.

¹² 2 CONVENTION PROCEEDINGS 1016.

¹³ *Id.* at 1023.

¹⁴ NEV. CONST. art. V.

¹⁵ WASH. CONST. art. III.

¹⁶ UTAH CONST. art. VII, § 1. The Washington constitution provides for an additional officer, the lieutenant governor. WASH. CONST. art. III, § 1. But identity of language seems to indicate that article VII, § 1, of the Utah constitution was copied from the Washington constitution.

¹⁷ State Bd. of Educ. v. Commission of Fin., 122 Utah 164, 247 P.2d 435 (1952).

residence and dual office holding qualifications are constitutionally prescribed for all elective executive officers¹⁸ and the attorney general is required to have been admitted to practice before the supreme court of the state and to be in good standing "at the bar at the time of his election."¹⁹ The state auditor and treasurer are "ineligible to election as their own successors."²⁰

The office of governor has several constitutional powers and duties conferred upon it. Article VII, section 5, which has never been interpreted by the courts but has been "defined" by the legislature,²¹ vests power in the governor to: (1) see that the laws are faithfully executed; (2) transact all executive business with the officers of the government; (3) require information in writing from the officers of the executive department and officers and managers of state institutions; and (4) appoint a committee to investigate and report to him upon the condition of any executive office or state institution when the legislature is not in session. Other sections of the constitution make the governor commander-in-chief of the state military forces;²² vest the governor with the sole power of calling a special session of the legislature and defining its agenda;²³ grant the governor a limited power of appointment²⁴ and a general veto power over every "bill" passed by the legislature, with an item veto on bills containing "several items of appropriations of money."²⁵

The duties of the other elective officers of the executive branch are less well defined by the constitution.²⁶ It seems clear, however, that the creation of independently elected officers of the executive branch was intended to confer some exclusive prerogatives and functions upon those offices. The constitutional standard for determining those functions, however, is excessively vague. For example, the attorney general's constitutional function is

¹⁸ UTAH CONST. art. VII, § 3.

¹⁹ *Ibid.*

²⁰ *Ibid.* A proposed constitutional amendment to be voted on in November of 1966 would permit the auditor and treasurer to succeed themselves once. S.J. Res. 14, Utah Laws 1965, at 675. Aside from the question of whether the auditor and treasurer should be elective offices in the first place, the proposed amendment seems to be a timid step with little merit. The auditor and treasurer can still engage in the game of trading offices as they have done since 1936. The amendment only means they must change offices every eight years instead of every four years. Since 1936, five treasurers have been elected auditors at the end of their terms and three auditors have been elected treasurers at the end of their terms. The auditor has often been auditing the books he kept as treasurer. If these offices are to be elective, professional qualifications to run for the office should be required rather than limitations upon the number of times a candidate can run for the same office. See THIRTY-SIXTH LEGISLATURE, REPORT OF THE COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT 254 (1966) [hereinafter cited as LITTLE HOOVER COMM'N REPORT].

²¹ UTAH CODE ANN. § 67-1-1 to -1-9 (Repl. vol. 1961). The statute defining the governor's power has never been interpreted by the courts either.

²² UTAH CONST. art. VII, § 4.

²³ *Id.* § 6.

²⁴ *Id.* §§ 9, 10.

²⁵ *Id.* § 8.

²⁶ Secretary of State: *Id.* § 16. See also UTAH CODE ANN. §§ 67-2-1 to -2-11 (Repl. vol. 1961), as amended, UTAH CODE ANN. § 67-2-5 (Supp. 1965). Auditor: UTAH CONST. art. VII, § 17. See also UTAH CODE ANN. § 67-3-1 (Repl. vol. 1961). Treasurer: UTAH CONST. art. VII, § 17. Attorney General: *Id.* art. VII, § 18. See also UTAH CODE ANN. § 67-5-1 (Repl. vol. 1961).

defined as being "the legal advisor of the State Officers. . . ." Aside from the difficulty caused by creating a constitutionally required attorney-client relationship, even where the client and attorney are of different political suasion, the constitutional definition is vague. What is meant by "legal advisor"? Who or what are "Officers"? Who or what are "State Officers"?²⁷

The constitution also creates several boards and commissions within the executive branch and places various combinations of the governor and other elective executive branch officers on the boards and commissions.²⁸ With the exception of the "Board of Examiners,"²⁹ all of these constitutionally created commissions and boards may be made nonconstitutional bodies by legislative act, since the convention modified each section creating them by the language, "until otherwise provided by law."³⁰ The legislature has "otherwise provided by law" and, with the exception of the board of examiners, the constitutionally required membership of elective executive branch officers on several boards and commissions is no longer required.³¹ In effect, sections 12 to 15, with the exception of the board of examiners provision in section 13 of article VII, have been removed from the constitution by legislation.

While a superficial examination of the executive article and statutes passed pursuant to it seems to indicate that the drafters of Utah's constitution created a strong chief executive, executive power has been undermined by several factors. Earmarking of tax revenue has made several executive agencies immune from the powerful weapon of budgetary control.³² Constitutional restrictions upon debt limits and tax resources severely limit

²⁷ Some of these questions may be answered by a suit filed by the Attorney General testing the constitutionality of legislation creating the office of Legal Advisor to the Legislature. S.B. 4, Utah Laws 2d Spec. Sess. 1966, ch. 7, at 11. The Attorney General claims the legislation violates the constitutional prerogatives of the office of Attorney General as legal advisor to "State Officers." UTAH CONST. art. VII, § 18. The suit is pending.

²⁸ *Id.* § 12 (Board of Pardons); *id.* § 13 (Board of Examiners); *ibid.* (State Prison Commission); *id.* § 14 (Insane Asylum Commission); *id.* § 15 (Reform School Commission).

²⁹ In *Bateman v. Board of Examiners*, 7 Utah 2d 221, 322 P.2d 381 (1958), the Utah Supreme Court refused to read into the second sentence of article VII, § 13, the "until otherwise provided by law" provision of the first sentence. Consequently the state prison commission, created in the first sentence of article VII, § 13, may be changed by legislative act, while the board of examiners, created by the second sentence of article VII, § 13, may not be changed by legislative act.

³⁰ What little debate was held upon inserting the words "until otherwise provided by law," seems to imply that the convention intended all of the constitutionally created boards and commissions created by article VII, §§ 12-15, to be subject to legislative act. See 2 CONVENTION PROCEEDINGS 1152-53.

³¹ See UTAH CODE ANN. § 64-6-2 (Repl. vol. 1961) (Reform School Commission's duties assigned to State Department of Public Welfare); UTAH CODE ANN. §§ 64-7-1, -2 (Repl. vol. 1961) (insane asylum duties assigned to State Department of Public Welfare); UTAH CODE ANN. § 64-9-2 (Supp. 1965) (State Prison Commission's duties assigned to Board of Correction); UTAH CODE ANN. § 77-62-2 (1953) (Board of Pardons).

³² UTAH CONST. art. XIII, § 3 (income taxes and taxes on intangible property earmarked for support of the public school system); *id.* § 7 (limits source of state funds to support public schools to a maximum of 75% derived from property taxes); *id.* § 13 (license tax, registration fees, driver education tax, other charges related to the operation of motor vehicles on public highways and the proceeds of excise taxes on motor fuels earmarked for highway purposes).

necessary flexibility in a governor's fiscal program.³³ And, a host of other latent and unnecessary constitutional restrictions lie in wait to trap the state's chief executive in the fulfillment of the governmental responsibilities expected to be performed by a state governor in the twentieth century.

Perhaps the most fundamental barriers to the effective exercise of gubernatorial responsibility in Utah, warranting deeper analysis, are: The elective status of numerous executive branch officials; the board of examiners; and the proliferation of boards and commissions to the point of destroying intelligent comprehension of their status and functions and rendering intelligent control and management of executive branch agencies impossible. It is the purpose of this article to examine these difficulties in light of article VII of the Utah constitution, the executive article.

II. ELECTIVE EXECUTIVE BRANCH OFFICIALS

The Utah Constitution of 1896, like so many other state constitutions of the late nineteenth century, carried the principal of "checks and balances" to a logical extreme. The constitutional convention not only established rigid external checks and balances,³⁴ but extended the theory to include numerous *internal* checks and balances. Executive power was fragmented over several elective officials and the legislature was empowered to confer further powers and duties upon these officials by law. The legislature has exercised that power liberally. For example, the constitutionally independent attorney general is, or recently has been, a member of eight boards and commissions,³⁵ is counsel for or represents some twelve state boards, agencies, or commissions,³⁶ represents the state and its agencies in actions brought by or against the state,³⁷ and has general supervisory powers over district or county attorneys.³⁸ Politically independent executive offices fragment gubernatorial control, render fulfillment of gubernatorial responsibility subject to the control of other elective officers, and make fair and intelligent citizen assessment

³³ See generally *id.* arts. XIII, XIV.

³⁴ *Id.* art. V.

³⁵ Board of Examiners, UTAH CONST. art. VII, § 13; Board of Canvassers, UTAH CODE ANN. § 20-8-10 (1953); Traffic and Safety Co-ordinating Committee, UTAH CODE ANN. § 41-14-2 (Repl. vol. 1960); State Council of Defense, UTAH CODE ANN. § 63-5-2 (Repl. vol. 1961); State Records Committee, UTAH CODE ANN. § 63-27-9 (Repl. vol. 1961); School Employee's Retirement Board, Utah Laws 1st Spec. Sess. 1953, ch. 20, § 4; Bureau of Criminal Identification and Investigation, Utah Laws 1st Spec. Sess. 1941, ch. 8, § 1 at 16; Board of the School for the Deaf, Utah Laws 1911, ch. 98, §1, at 138.

³⁶ Trade Commission, UTAH CODE ANN. § 13-2-17 (Repl. vol. 1962); Health Department, UTAH CODE ANN. § 26-15-80 (Supp. 1965); State Road Commission, UTAH CODE ANN. § 27-12-13 (Supp. 1965); Insurance Commissioner, UTAH CODE ANN. § 31-28-18 (Repl. vol. 1966); Industrial Commission, UTAH CODE ANN. § 35-1-101 (Repl. vol. 1966); State Insurance Fund, UTAH CODE ANN. § 35-3-20 (Repl. vol. 1966); Oil and Gas Conservation Commission, UTAH CODE ANN. § 40-6-3 (Repl. vol. 1960); Auto Dealer's Administrator and Advisory Board, UTAH CODE ANN. § 41-3-11 (Repl. vol. 1960); Public Utility Commission, UTAH CODE ANN. § 54-7-21 (Repl. vol. 1963); State Building Board, UTAH CODE ANN. § 63-10-8 (Repl. vol. 1961); State Engineer, UTAH CODE ANN. § 73-2-13 (Repl. vol. 1961); State Water and Power Board, UTAH CODE ANN. § 73-10-11 (Repl. vol. 1961).

³⁷ UTAH CODE ANN. § 67-5-1 (Repl. vol. 1961); UTAH CODE ANN. § 78-11-9 (1953).

³⁸ UTAH CODE ANN. § 67-5-1 (Repl. vol. 1961).

of executive branch responsibility impossible.³⁹ It is therefore not unusual that most modern state constitutions,⁴⁰ the Model State Constitution,⁴¹ and state executive reorganization studies⁴² eliminate or suggest elimination of numerous elective officials.

However, as the following table illustrates, most state executive branches suffer under a similar constitutional handicap of the "long ballot" and a divided executive branch.

TABLE 1
METHOD OF SELECTING MAJOR STATE OFFICIALS⁴³

	<i>Governor</i>	<i>Lt. Governor</i>	<i>Sec. of State</i>	<i>Atty. Gen.</i>	<i>Treasurer</i>	<i>Auditor</i>	<i>Subt. of Public Instruct.</i>
Alabama	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Alaska	C. E.	None	C. E.	G. B.	—	L. A.	G. B.
Arizona	C. E.	None	C. E.	C. E.	C. E.	C. E.	C. E.
Arkansas	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
California	C. E.	C. E.	C. E.	C. E.	C. E.	—	C. E.
Colorado	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
Connecticut	C. E.	C. E.	C. E.	C. E.	C. E.	S. L.	D. B.
Delaware	C. E.	C. E.	G. S.	C. E.	C. E.	C. E.	D. B.
Florida	C. E.	None	C. E.	C. E.	C. E.	G. S.	C. E.
Georgia	C. E.	C. E.	C. E.	C. E.	C. E.	S. L.	C. E.

³⁹ See generally GRAVES, *op. cit. supra* note 1, at 317-61; LAMBERT, "THE EXECUTIVE ARTICLE" IN STATE CONSTITUTIONAL REVISION 194 (Graves ed. 1960); RICH, STATE CONSTITUTIONS: THE GOVERNOR 13-14 (1960).

⁴⁰ See, e.g., ALASKA CONST. art. III (governor and secretary of state elective); HAWAII CONST. art. IV (governor and lieutenant governor elective). The Michigan Constitution of 1964 provides for four elective executive branch officers: the governor, lieutenant governor, secretary of state, and attorney general. Division of executive power is mitigated, to some degree, by the requirement that candidates for the offices of governor and lieutenant governor run, and be elected, as a ticket. MICH. CONST. art. V, § 21.

⁴¹ NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 9-12 (only the governor is popularly elected).

⁴² See, e.g., HEADY, STATE CONSTITUTIONS: THE STRUCTURE OF ADMINISTRATION 9-12 (1961); LITTLE HOOVER COMM'N REPORT 253-56. For a detailed study of the long ballot see CHILDS, CIVIC VICTORIES 3-79 (1952).

⁴³ Key: C.E., Constitutional Office, popularly elected;
C.L., Constitutional Office, elected by the legislature;
D.B., Appointed by Departmental Board;
G., Appointed by the Governor;
G.B., Governor appoints, approval by both houses;
G.C., Governor appoints, approval by Council;
G.S., Governor appoints, Senate confirms;
L., Legislature appoints;
L.A., Legislative Auditor;
S.C., Appointed by judges of Supreme Court;
S.E., Statutory office, popularly elected;
S.L., Statutory office, elected by legislature;
—, No information available;
+, Function belongs to another administrative official.

Source: Prepared from information found in COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, 1966-1967, at 138 (1966).

TABLE 1 continued
METHOD OF SELECTING MAJOR STATE OFFICIALS

	<i>Governor</i>	<i>Lt. Governor</i>	<i>Sec. of State</i>	<i>Atty. Gen.</i>	<i>Treas- urer</i>	<i>Auditor</i>	<i>Supt. of Public Instruct.</i>
Hawaii	C. E.	C. E.	None	G. S.	—	C. L.	D. B.
Idaho	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Illinois	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Indiana	C. E.	C. E.	C. E.	S. E.	C. E.	C. E.	C. E.
Iowa	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	G. S.
Kansas	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	—
Kentucky	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Louisiana	C. E.	C. E.	C. E.	C. E.	C. E.	S. L.	C. E.
Maine	C. E.	C. E.	C. L.	C. L.	C. L.	S. L.	D. B.
Maryland	C. E.	C. E.	G. S.	C. E.	L.	G.	D. B.
Massachusetts	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
Michigan	C. E.	C. E.	C. E.	C. E.	G. S.	L. A.	D. B.
Minnesota	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
Mississippi	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Missouri	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
Montana	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Nebraska	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
Nevada	C. E.	C. E.	C. E.	C. E.	C. E.	L. A.	D. B.
New Hampshire	C. E.	None	C. L.	G. C.	C. L.	None	D. B.
New Jersey	C. E.	None	G. S.	G. S.	G. S.	C. L.	G. S.
New Mexico	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
New York	C. E.	C. E.	G. S.	C. E.	—	+	S. L.
North Carolina	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
North Dakota	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Ohio	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.
Oklahoma	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Oregon	C. E.	None	C. E.	S. E.	C. E.	—	C. E.
Pennsylvania	C. E.	C. E.	G. S.	G. S.	C. E.	C. E.	G. S.
Rhode Island	C. E.	C. E.	C. E.	C. E.	C. E.	+	D. B.
South Carolina	C. E.	C. E.	C. E.	C. E.	C. E.	D. B.	C. E.
South Dakota	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
Tennessee	C. E.	C. L.	C. L.	S. C.	C. L.	None	G.
Texas	C. E.	C. E.	G. S.	C. E.	C. E.	L.	D. B.
Utah	C. E.	None	C. E.	C. E.	C. E.	C. E.	D. B.
Vermont	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	G. S.
Virginia	C. E.	C. E.	G. B.	C. E.	G. B.	C. L.	G. B.
Washington	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.	C. E.
West Virginia	C. E.	None	C. E.	C. E.	C. E.	C. E.	D. B.
Wisconsin	C. E.	C. E.	C. E.	C. E.	C. E.	G. S.	C. E.
Wyoming	C. E.	None	C. E.	G. S.	C. E.	C. E.	C. E.

The office of secretary of state is a constitutional office in 42 states and in 39 states the occupant of the office is popularly elected.⁴⁴ As the table indicates, similar practices exist with regard to the offices of attorney general, auditor, treasurer, and superintendent of public instruction. The long ballot causing voter confusion and inattention, destruction of executive power by creating several independently elected or appointed executive officers, and the proliferation of state bureaucracy caused by legislation assigning different responsibilities to independent executive officers are common problems to almost all of our states. As will be illustrated later, Utah has not escaped the governmental vices caused by numerous constitutionally elective offices. A primary concern of any constitutional convention in Utah will be the elimination of the elective offices of secretary of state, attorney general, state treasurer, and state auditor and the establishment of the elective office of lieutenant or assistant governor to provide for an orderly line of succession in case of the death or disability of the governor.⁴⁵

III. THE BOARD OF EXAMINERS

While efficient and responsible executive power in Utah is fractionalized by the independent election of several constitutionally created executive offices, gubernatorial power is pulverized by the board of examiners. The board is a constitutional body created by article VII, section 13, of the Utah constitution:

They [governor, secretary of state, and attorney general] shall, also constitute a Board of Examiners, with power to examine all claims against the State except salaries or compensation of officers fixed by law, and perform such other duties as may be prescribed by law; and no claim against the State, except for salaries and compensation of officers fixed by law, shall be passed upon by the Legislature without having been considered and acted upon by the said Board of Examiners.

Although the constitutional provision creating the board of examiners seems designed for the purpose of creating an administrative body to resolve tort claims against the sovereign⁴⁶ or as a body designed to perform perfunctory post-auditing tasks, the Utah Board of Examiners has grown into a governmental troika completely dominating the executive branch.⁴⁷

⁴⁴ In Maine, New Hampshire, and Tennessee, the legislature elects the secretary of state.

⁴⁵ Article VII, § 11, of the Utah constitution establishes a line of succession upon the death, impeachment, removal, disability, resignation, or absence of the governor. The order of succession is secretary of state and president *pro tempore* of the senate. There are several difficulties with article VII, § 11. It provides no means for determining disability; it seems to establish an exclusive line of succession; and no provision is made for succession in case the governor-elect is incapacitated prior to inauguration. The Model State Constitution seems to cover most of these contingencies. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 5.08 (6th ed. 1963).

⁴⁶ Note, 68 HARV. L. REV. 506, 507 (1955).

⁴⁷ See Note, *The Utah Board of Examiners*, 5 UTAH L. REV. 349 (1956). In recent years the Utah Supreme Court has continued to expand the board's constitutional powers. See *Toronto v. Clyde*, 15 Utah 2d 403, 393 P.2d 795 (1964); *Bateman v. Board of Examiners*, 7 Utah 2d 221, 322 P.2d 381 (1958); *University of Utah v. Board*

The constitutional history of the board of examiner's provision is skimpy at best. The drafters of the constitution apparently attached no significance to the provision, since there was little debate on the subject.⁴⁸ It seems evident that the concept of a board of examiners, found only in the Idaho,⁴⁹ Montana,⁵⁰ Nevada,⁵¹ and Utah constitutions,⁵² was simply copied with little debate from the 1872 version of the Utah constitution drafted during the struggle for statehood.⁵³ The drafters of the 1872 Utah constitution, in turn, copied the board of examiners provision from the Nevada constitution of 1864.⁵⁴ While the Idaho, Montana, and Nevada courts have restricted the power of their boards of examiners, principally by limiting their boards' power to passing upon *unliquidated* claims against the state,⁵⁵ the Utah Supreme Court and the Utah Legislature have vested the Utah board with

of Examiners, 4 Utah 2d 408, 295 P.2d 348 (1956). The only decision adverse to the powers of the board during the past ten years was *Wood v. Budge*, 13 Utah 2d 359, 374 P.2d 516 (1962). The court held that the attorney general was required to pay monies appropriated by the legislature for a tort claimant despite a recommendation by the board of examiners to the legislature that the claim not be paid. The board had "passed upon" the claim and the legislature was not bound by the board's decision.

⁴⁸ See 1 CONVENTION PROCEEDINGS 933; 2 *id.* at 1015, 1016.

⁴⁹ IDAHO CONST. art. IV, § 18.

⁵⁰ MONT. CONST. art. VII, § 20.

⁵¹ NEV. CONST. art. V, § 21.

⁵² Michigan's Constitutions of 1908, article VI, § 20, and 1850, article VIII, § 4, created a board of state auditors with similar powers to those vested in boards of examiners in Idaho, Montana, Nevada, and Utah. The title used by these earlier Michigan constitutions suggests that the power to "examine claims against the State" is broader than the "quasi-judicial" function of resolving tort claims against the sovereign and includes broad audit powers with regard to all state expenditures. The Utah Supreme Court has suggested that the powers of the Utah Board of Examiners go "beyond mere auditing." *Bateman v. Board of Examiners*, 7 Utah 2d 221, 228, 322 P.2d 381, 385 (1958). The constitutional and statutory powers of Utah's board seem to include passing upon tort claims, audit functions, passing on all state expenditures not specifically excepted by article VII, § 13, and inclusive executive power over all executive and administrative phases of state government. See *Toronto v. Clyde*, 15 Utah 2d 403, 393 P.2d 795 (1964); UTAH CODE ANN. § 63-6-1 to -6-28 (Repl. vol. 1961), as amended, UTAH CODE ANN. § 63-6-1 to -6-21 (Supp. 1965).

⁵³ Constitution of the State of Utah, art. V, § 18 (1872). The board of examiners provision was not included in the 1882 or 1887 pre-statehood constitutions of Utah. Since there is no record of the deliberations of the committee charged with drafting the executive article in Utah's Constitutional Convention of 1895, it is impossible to determine whether article VII, § 12, was copied directly from the Nevada constitution or the Utah Constitution of 1872.

⁵⁴ Article V, § 21, of the Nevada constitution provides:

They [governor, secretary of state, and attorney general] shall also constitute a Board of Examiners, with power to examine all claims against the State (except salaries or compensation of Officers fixed by law) and perform such other duties as may be prescribed by law, and no claim against the State (except salaries or compensation of Officers fixed by law) shall be passed upon by the Legislature without having been considered and acted upon by said "Board of Examiners."

The Nevada and Utah provisions are practically identical.

⁵⁵ See *Winters v. Romsey*, 4 Idaho 303, 39 Pac. 193 (1895); *Fitzpatrick v. State Bd. of Examiners*, 105 Mont. 234, 70 P.2d 285 (1937); *State ex rel. Lyon County v. Hallock*, 20 Nev. 326, 22 Pac. 123 (1889). Compare, *State ex rel. Black v. State Bd. of Educ.*, 33 Idaho 415, 196 Pac. 201 (1921), with *University of Utah v. Board of Examiners*, 4 Utah 2d 408, 295 P.2d 348 (1956); and *Jewett v. Williams*, 84 Idaho 93, 369 P.2d 590 (1962), with *Campbell Bldg. Co. v. State Road Comm'n*, 95 Utah 242, 70 P.2d 857 (1937); and *State ex rel. Dildine v. Collins*, 21 Mont. 448, 53 Pac. 1114 (1898), with *University of Utah v. Board of Examiners*, *supra*.

vast executive and limited legislative and judicial functions similar to the powers vested in governors' councils elsewhere.⁶⁶

For example, the legislature has delegated power to the board of examiners to make deficit appropriations when the legislature is out of session upon unanimous approval by the board.⁶⁷ This delegation of legislative power to the board was no doubt necessitated by the fact that the Utah Legislature is out of session approximately ninety per cent of the time every biennium.⁶⁸ The board has broad judicial powers with regard to general claims against the state,⁶⁹ and at one time had sole jurisdiction to review decisions of the state bank commissioner with respect to granting bank or building and loan charters and permitting existing banks to establish branches.⁶⁰ In effect, the legislature has treated the board as an interim legislature and quasi-judicial "super" administrative agency to oversee and manage the entire executive branch of the state government as well as a judicial body to find facts and make rulings of law.⁶¹

The Utah Supreme Court has contributed to the growth of the board's constitutional powers by broadly interpreting the words "claim" and "ex-

⁶⁶ ME. CONST. art. V, pt. 2, § 1; MASS. CONST. ch. II, § III; N.H. CONST. pt. II, art. 60; N.C. CONST. art. III, § 14.

⁶⁷ UTAH CODE ANN. § 63-6-19 (Repl. vol. 1961).

⁶⁸ The legislature is restricted to sixty-day sessions every other year. UTAH CONST. art. VI, §§ 2, 16. Special sessions may only be called by the governor, UTAH CONST. art. VII, § 6, and are limited to thirty days duration. UTAH CONST. art. VI, § 16. The stringent time limitations upon regular legislative sessions when coupled with the increase of state governmental activity have caused increased use of the special session to the point that special sessions have become a biennial or annual event. From 1896 to 1940 only seven special sessions were called: January 1896 (to implement the new constitution and make the transition from territorial to statehood status); June 1909; September 1919; January 1930; January 1933; July 1933; and, August 1936. From 1940 to July of 1966, Utah's governors have called thirteen special sessions or approximately twice as many in half the time: March 1941; May 1941; March 1944; August 1946; March 1948; June 1951; June 1952; December 1953; April 1955; May 1959; May 1963; January 1966; and, May 1966. Since the governor controls the call and agenda of special sessions, *State Tax Comm'n v. Preece*, 1 Utah 2d 337, 266 P.2d 757 (1954); *State v. Scott*, 105 Utah 31, 140 P.2d 929 (1943); and the time limits on regular sessions are so ridiculous, one might question whether Utah has a legislature in the normal sense of the word or only a rubber stamp to approve proposals of the executive branch and private interest groups. The Thirty-sixth Legislature, at its second special session, proposed several constitutional amendments to remedy the situation. See S.J. Res. 1, Utah Laws 2d Spec. Sess. 1966, ch. 16, at 26 (permits functioning of interim legislative committees); S.J. Res. 2, Utah Laws 2d Spec. Sess. 1966, ch. 14, at 24 (provides annual legislative sessions with budget sessions in even numbered years and general sessions in odd numbered years); S.J. Res. 3, Utah Laws 2d Spec. Sess. 1966, ch. 17, at 27 (authorizes legislature, upon petition by two-thirds of the membership, to call itself into special session). The proposed amendments will be voted on by the electorate at the general election in November 1966.

⁶⁹ UTAH CODE ANN. §§ 63-6-10 to -6-17 (Repl. vol. 1961), as amended, UTAH CODE ANN. §§ 63-6-11 to -6-17 (Supp. 1965).

⁶⁰ UTAH CODE ANN. § 7-1-26 (1953). Vesting final review of the commissioner's decisions in the board of examiners raised serious due process questions. See *Walker Bank & Trust Co. v. Taylor*, 15 Utah 2d 234, 390 P.2d 592 (1964). A 1963 amendment to UTAH CODE ANN. § 7-1-26 (1953) removed the board of examiners from the process and substituted judicial review of charter determinations by the commissioner. UTAH CODE ANN. § 7-1-26 (Supp. 1965).

⁶¹ For a summary of the board's powers see Note, *The Utah Board of Examiners*, 5 UTAH L. REV. 349 (1956). The board's key power is its absolute control over fiscal affairs. See *Toronto v. Clyde*, 15 Utah 2d 403, 393 P.2d 795 (1964). See generally SNOW, UTAH BOARD OF EXAMINERS: IT'S ROLE IN FISCAL MANAGEMENT (1962).

amine"⁶² to include all demands upon state funds and plenary power to examine into the advisability and necessity of any expenditure or proposed obligation of the state.⁶³ The court has always presumed in favor of the board's constitutional powers when called upon to resolve internal conflicts between the board and other constitutionally created institutions,⁶⁴ with the possible exception of the state legislature.⁶⁵ Possible reasons for the court's disposition to continually widen the powers of the board, even at the expense of other constitutionally created institutions, is the constitutional weakness of the legislative branch and a consequent fear of unchecked dictatorial power becoming centered in the governor's office.⁶⁶ It seems fair to say, therefore, that the court has utilized the board of examiners provision to create an internal check upon gubernatorial power in light of the relatively weak check on executive branch power offered by a legislature hamstrung by outdated procedural and substantive limitations,⁶⁷ absurd time limitations,⁶⁸ and ridiculous compensation restrictions which cause a high rate of membership turnover.⁶⁹

The judiciary's unarticulated rationale for frustrating centralized executive control by creating an executive troika was verbalized by the legislature when it was asked by the present Governor to propose a constitutional amendment to the voters abolishing the board of examiners. In an unusual display of bipartisan protection of the legislature as an independent branch of government designed to check executive power, the legislature delayed

⁶² *Bateman v. Board of Examiners*, 7 Utah 2d 221, 226, 322 P.2d 381, 384 (1958); see *Uintah State Bank v. Ajax*, 77 Utah 455, 297 Pac. 434 (1931); *State ex rel. Davis v. Edwards*, 33 Utah 243, 93 Pac. 720 (1908).

⁶³ *Bateman v. Board of Examiners*, 7 Utah 2d 221, 322 P.2d 381 (1958).

⁶⁴ See *ibid.* (State Board of Education); *University of Utah v. Board of Examiners*, 4 Utah 2d 408, 295 P.2d 348 (1956) (University of Utah).

⁶⁵ In *Wood v. Budge*, 13 Utah 2d 359, 374 P.2d 516 (1962), the court held that the legislature could pass a private bill for the payment of a tort claimant despite action by the Board denying the claim. In the area of tort claims the board is the legislature's fact finder and the legislature serves as an appellate tribunal for dissatisfied claimants before the board of examiners. UTAH CODE ANN. § 63-6-17 (Repl. vol. 1961). But the legislature is not superior to the board in other areas which have been defined as within the constitutional power of the board. For example, the legislature cannot circumvent the board's constitutional power over state expenditures by vesting budget control in the governor's office. *Toronto v. Clyde*, 15 Utah 2d 403, 405, 393 P.2d 795, 796 (1964). However, the court's opinions have not been noticeably succinct in defining what is meant by the board's "general supervisory power over expenditures by the state government," except to befuddle the issue more by saying it is "more than a mere auditing function." *Id.* at 405, 393 P.2d at 796.

⁶⁶ In *Bateman v. Board of Examiners*, 7 Utah 2d 221, 322 P.2d 381 (1958), the court observed: "Looking at the problems here presented in broad perspective it is important to realize that our legislature has met biennially and in special sessions for many years with both the statutory and decisional law of this state being so understood and applied that in practical operation the Examiners and Finance have exercised general supervisory powers over the fiscal and budgetary affairs of other departments of state government . . ." *Id.* at 234, 322 P.2d at 390. In *Toronto v. Clyde*, 15 Utah 2d 403, 393 P.2d 795 (1964), the court took care to point out the composition of the board and that the board members are independently elected and are, therefore, independently responsible to the voters. *Id.* at 405, 393 P.2d at 796.

⁶⁷ See UTAH CONST. art. VI, §§ 22-31.

⁶⁸ *Id.* §§ 2, 16.

⁶⁹ *Id.* § 9 (\$500 per year, \$5 per day, and mileage).

passage of the board of examiners proposal⁷⁰ until passage of several proposed constitutional amendments strengthening the legislature was accomplished.⁷¹ The legislature also passed several bills to increase its staff strength⁷² and a bill designed to enable the legislature to assume duties of fiscal management heretofore the constitutional function of the board of examiners.⁷³

The proposed constitutional amendment passed by the legislature to eliminate the board of examiners,⁷⁴ does not go beyond simply eliminating the constitutional language creating that body. While some confusion may be caused by eliminating the board without specifying what happens to

⁷⁰ H.J. Res. 1, Utah Laws 2d Spec. Sess. 1966, ch. 18, at 27-28.

⁷¹ S.J. Res. 1, Utah Laws 2d Spec. Sess. 1966, ch. 16, at 26 (proposed constitutional amendment to allow each house of the legislature to appoint interim committees); S.J. Res. 2, Utah Laws 2d Spec. Sess. 1966, ch. 14, at 24-25 (authorize annual sessions, alternating between budget and general sessions, and clarify the word day in article VI, § 16, to mean legislative days rather than calendar days); S.J. Res. 3, Utah Laws 2d Spec. Sess. 1966, ch. 17, at 27 (authorize the legislature to call itself into special session and establish the topics to be considered by a two-thirds vote of the members); S.J. Res. 4, Utah Laws 2d Spec. Sess. 1966, ch. 15, at 25 (increase compensation to \$1000 per year until "otherwise provided by law").

⁷² S. 2, Utah Laws 2d Spec. Sess. 1966, ch. 4, at 5-7 (strengthens legislative council); S. 3, Utah Laws 2d Spec. Sess. 1966, ch. 6, at 10-11 (creates a joint legislative operations committee); S. 4, Utah Laws 2d Spec. Sess. 1966, ch. 7, at 11-12 (creates a joint legal services committee and authorizes the employment of a legal advisor to the legislature). The Attorney General has brought suit to test the constitutionality of S. 4. The Attorney General has taken the position that employment of a legislative legal advisor violates article VII, § 18, of the Utah constitution. Article VII, § 18, defines the constitutional duties of the Attorney General as follows: "The Attorney-General shall be the legal advisor of the State Officers, and shall perform such other duties as may be provided by law." The version of article VII, § 18, printed in volume one of the Utah Code Annotated, page 220, is not correct. The word "officers" is capitalized in the official version of the constitution, whereas the code version does not capitalize the word "officers." The distinction may be crucial in the pending litigation since the words "state officers" in capitalized form lend weight to the argument that the Attorney General's constitutional status of "legal advisor to State Officers" applies only to the constitutionally enumerated officers of the executive branch. This seems to be especially the case in light of the use of the word "officers" elsewhere in article VII and the stringent separation of powers provision found in article V, § 1.

⁷³ S. 1, Utah Laws, 2d Spec. Sess. 1966, ch. 5, at 7-9. The act creates a Joint Budget and Audit Committee and authorizes employment of a legislative analyst and legislative auditor. The committee's functions are defined as follows:

To ascertain facts and make recommendations to the legislature concerning: (a) The management, operation, programs, and fiscal needs of the agencies and institutions of state government; (b) the executive budget and budget requests of each state agency and institution, including proposals for construction of capital improvements; (c) revenue from existing and proposed taxes and other sources; and (d) the State's fund structure, financial condition, fiscal organization, and its budgeting, accounting, reporting, personnel and purchasing procedures. . . ."

S. 1, § 2, Utah Laws 2d Spec. Sess. 1966, ch. 5, § 3(2), at 8. Section 7 of the act defines the duties of the legislative analyst and § 8 defines the duties of the legislative auditor.

The popularly elected state auditor is already charged with the duties of legislative auditor. UTAH CODE ANN. § 67-3-1 (Repl. vol. 1961). It seems, however, that popular election of the state auditor and inclusion of that office in the executive article of the constitution, article VII, § 17, has caused the legislature to consign the state auditor to the executive branch in practice if not by law.

⁷⁴ H.J. Res. 1, Utah Laws 2d Spec. Sess. 1966, ch. 18, at 27-28.

the powers heretofore exercised by the board,⁷⁵ elimination of the board is a primary goal to any effort to rehabilitate the executive article of the Utah constitution.

As presently constituted, the office of governor is subject to the control and judgment of an independently elected secretary of state and attorney general in the management of almost all phases of the executive branch. Budgetary control, the hiring of high level executive branch personnel, the efficient expenditure of appropriated funds, and the important minutiae of effective gubernatorial control of subordinates, such as approval of employee travel vouchers, are all subject to the veto of officers not elected as the chief executive of the state government. Thus, although article VII, section 5, of the Utah constitution vests broad responsibilities upon the office of governor, the board of examiners provision has undermined the governor's power to fulfill those responsibilities. The net effect of charging the governor with great responsibilities while denying a good governor the power to fulfill those responsibilities to the best of his ability is the absence of any rational basis for voters to make an intelligent assessment of a governor's performance, the creation of a vacuum of power in state executive affairs, and the further atrophy of state power in the presence of expanding federal power.

IV. REORGANIZATION OF THE EXECUTIVE BRANCH

The constitutional difficulties of several independently elected executive branch officers and the board of examiners are the root causes of the third major difficulty of Utah's executive branch — bureaucratic proliferation of executive branch agencies and the consequent need for reorganization. To be sure, the problem of executive reorganization to make management and

⁷⁵ Creation of a Utah Legislative Budget and Audit Committee should replace some of the board's fiscal management powers; annual sessions should alleviate the need for an executive agency to have "defeat appropriation" powers; and the passage of the Utah Governmental Immunity Act, waiving sovereign immunity (UTAH CODE ANN. §§ 63-30-1 to -30-34 (Supp. 1965)), should remove the necessity for an administrative tribunal to handle claims against the state. However, there is a serious question as to the constitutionality of the Utah Governmental Immunity Act, since it attempts to circumvent the board of examiners in settling tort claims against the state. The extent of legislative power to waive sovereign immunity in light of the board of examiners' powers has never been clearly settled by the courts. While the Utah Supreme Court has said in dictum: "We have no constitutional provision inhibiting the legislature from waiving immunity from suit," *Campbell Bldg. Co. v. State Road Comm'n*, 95 Utah 242, 251, 70 P.2d 857, 861 (1937), the court has held that the board is a "constitutional tribunal" to adjudicate tort claims against the state, *Wilkinson v. State*, 42 Utah 483, 134 Pac. 626 (1913), and all "claims against state funds" must be "passed upon" by the board, *Uintah State Bank v. Ajax*, 77 Utah 455, 297 Pac. 434 (1931) (liquidated bounty claim against special bounty fund). A deeper issue as to the constitutionality of the Governmental Immunity Act may be raised if the voters approve the constitutional amendment abolishing the board of examiners. The immunity act went into effect July 1, 1966, and the voters will vote on the examiners amendment in November of 1966. Thus, the act may be unconstitutional for five months and its "prior condition of servitude" may have no effect after that date. To avoid the issue as to claims after the next regular session in January of 1967, the legislature should re-enact the immunity act. What solution lies in store for claims arising between July 1, 1966 and the abolition of the board can only be described as a "constitutional juggernaut."

In any event, the Thirty-seventh Session of the Utah Legislature must give long and careful consideration to the disposition of the board of examiners' powers in the event that the voters approve the constitutional amendment abolishing the board.

administration of the executive branch efficient and responsible, while eliminating duplication, waste, and petty "empire building" is not peculiar to Utah's executive branch. It has plagued state and federal governments in the United States for many years.⁷⁶ Proliferation and duplication of executive branch agencies seems to be a vice of government, only to be curbed by periodic reviews with a view toward consolidation and adequate constitutional powers to effectuate consolidation.

Utah has had a checkered history of attempts to effect executive reorganization and curb the tendency to proliferate executive branch agencies. The first attempt to stimulate reorganization came in 1921 at the instance of Governor Maybey.⁷⁷ Legislation was passed creating a Utah Department of Finance and Purchase, which department had control over the financial operations of the state.⁷⁸ Dissatisfaction with the operation of the department brought its demise in 1927. A similar attempt to centralize fiscal administration and to centralize tax collection was made in 1930 when the voters approved a constitutional amendment creating the state tax commission.⁷⁹ The amendment created a four member tax commission appointed by the governor with the consent of the senate to "administer and supervise the tax laws of the State."⁸⁰ Prior to that time, responsibility for the administration of tax laws and the collection of revenue had been widely dispersed among several executive officers.⁸¹ The tax commission remains as a salutary if not overly progressive instance of the executive reorganization effort in Utah.

A broader attempt at executive reorganization was made in 1933 for the limited purpose of attempting to keep the state budget in balance during the Depression.⁸² Some consolidations were effected, but the greatest contribution made by the 1933 effort was the fact that it stimulated interest in the creation of a new study committee in 1935. The 1935 general session of the legislature created a special committee of nine members charged with the broad responsibility of investigating the organization and operation of the state and local governmental units of Utah.⁸³ The so-called "Committee of Nine" recommended a limited degree of centralized control within the existing constitutional framework by suggesting consolidation of major executive branch functions into departments headed by the elected officers of the

⁷⁶ See generally ABERNATHY, *SOME PERSISTING QUESTIONS CONCERNING THE CONSTITUTIONAL STATE EXECUTIVE* (Univ. Kansas Gov't Research Series No. 23 1960); BUCK, *THE REORGANIZATION OF STATE GOVERNMENTS IN THE UNITED STATES* (1938); COUNCIL OF STATE GOVERNMENTS, *REORGANIZING STATE GOVERNMENTS: A POLICY STATEMENT* (1950); HEADY, *STATE CONSTITUTIONS: THE STRUCTURE OF ADMINISTRATION* (1961); WILLBERN, *ADMINISTRATION IN STATE GOVERNMENTS* (1955).

⁷⁷ UTAH FOUNDATION, *ANALYSIS OF THE UTAH LITTLE HOOVER COMMISSION REPORT — PART A 14* (1966) [hereinafter cited as *LITTLE HOOVER REPORT ANALYSIS*].

⁷⁸ Utah Laws 1921, ch. 127, at 354-59.

⁷⁹ UTAH CONST. art. XIII, § 11.

⁸⁰ *Ibid.*

⁸¹ *LITTLE HOOVER REPORT ANALYSIS* 14.

⁸² See generally *REPORT OF THE INVESTIGATING COMMITTEE OF UTAH GOVERNMENTAL UNITS* (1933).

⁸³ Utah Laws 1935, ch. 135, at 420.

executive branch.⁸⁴ But the 1937 and 1939 regular sessions of the Utah Legislature failed to act upon the extensive recommendations of the "Committee of Nine."

In 1941 Governor Maw took up the cause of governmental reorganization, basing his recommendations on the report of the "Committee of Nine." In his message to the Twenty-fourth Legislature, Governor Maw indicated four objectionable features of the then existing structure of state administration:

- (1) It has been the past policy of legislatures to create new departments and commissions and to provide for their organization without making adequate investigation and without having accurate information as to what sort of organization plan will provide the most efficiency;
- (2) Commissions, departments, and institutions have been permitted to grow and expand without appreciable legislative or executive control or guidance;
- (3) They have been financed without adequate legislative or executive investigation of their financial needs;
- (4) They have been permitted to operate as independent units of government without inter-department coordination or proper legislative or executive supervision.⁸⁵

To remedy the situation the Governor recommended the elimination of "scores of boards, commissions, departments, and other official agencies"; classification of the "State's activities into as few units as possible"; and, the creation of "an organization to administer each classification."⁸⁶ But the Governor did not suggest an attack upon the fundamental constitutional impediment to consolidation, reduction of the number of elective executive branch officers and abolition of the board of examiners. Instead, he suggested a grouping of functions into departments under the direction and control of the constitutionally elective officers.⁸⁷ The legislature implemented many of the Governor's recommendations to create eleven operating departments⁸⁸ and a central fiscal control agency, the finance department,⁸⁹ while creating several new agencies.⁹⁰

⁸⁴ For the committee's general report see 4 STATE OF UTAH, PUBLIC DOCUMENTS, 32 (1934-36). See also LITTLE HOOVER REPORT ANALYSIS 15.

⁸⁵ Governor's Message to the Twenty-fourth Session, SENATE JOURNAL 23, 26 (1941).

⁸⁶ *Id.* at 31.

⁸⁷ *Ibid.*

⁸⁸ The Governor recommended the creation of: Department of Engineering; Department of Public Welfare; Department of Lands and Water; Department of Service and Inspection; Department of Health; Department of Publicity and Industrial Development; and a Department of Higher Education. The Governor recommended realignment of the Tax Commission, Industrial Commission, and Liquor Commission. *Id.* at 32-36.

⁸⁹ *Id.* at 32.

⁹⁰ The regular and first special session of the Twenty-fourth Legislature created: The Department of Health, Utah Laws 1941, ch. 30, at 43-45; Public Welfare Commission, Utah Laws 1941, ch. 66, at 154-56; Department of Publicity and Industrial Development, Utah Laws 1941, ch. 75, at 174-78; Aeronautics Commission, Utah Laws 1941, ch. 2, at 4; State Building Board, Utah Laws 1941, ch. 4, at 7-9; Department of Business Regulation, Utah Laws 1941, ch. 5, at 10-12; Department of Engineering, Utah Laws 1941, ch. 9, at 17-19; Department of Finance, Utah Laws 1941, ch. 10, at 20-26; Department of Fish and Game, Utah Laws 1941, ch. 11, at 27-37; State Road Commission, Utah Laws 1941, ch. 13, at 39-41; Industrial Commission,

The 1941 reorganization achieved little consolidation, even by the creation of the finance commission⁹¹ since the newly created departments were headed by three member commissions, new departments were headed by constitutionally elective, and therefore independent, executive officers and the finance commission never achieved its full potential as regulator of fiscal policy because of the constitutional powers of the board of examiners.⁹²

During the succeeding twenty-five years sporadic attempts were made at reorganization; while at the same time, the legislature created additional boards and commissions at every regular session.⁹³ By 1965 it became apparent that the proliferation and duplication of executive agencies had again reached crisis proportions and had made the executive branch unmanageable. The Thirty-sixth Legislature followed in the footsteps of the Twenty-fourth and created a twelve member "Commission on the Organization of the Executive Branch of the Government," which subsequently became known as the "Little Hoover Commission."⁹⁴ Extensive majority⁹⁵ and minority⁹⁶ reports were issued. While a detailed critique of these reports is not possible here, a general comment is in order.

The Little Hoover Commission found that the executive branch consisted of a total of 156 "separate officials, departments, boards, commissions, councils, and committees."⁹⁷ The commission found the executive branch unmanageable, particularly because of the "overwhelming reliance placed in

Utah Laws 1941, ch. 15, at 43-46; Liquor Control Commission, Utah Laws 1941, ch. 20, at 55-57; Loan Commission, Utah Laws 1941, ch. 21, at 58; Public Service Commission, Utah Laws 1941, ch. 23, at 61-62; Department of Registration, Utah Laws 1941, ch. 28, at 68-69; State Land Board, Utah Laws 1941, ch. 35, at 76-78; and, Securities Commission, Utah Laws 1941, ch. 29, at 70. The Governor called the second Special Session of the Twenty-fourth Utah Legislature to consider budget matters and the need for consolidation of fiscal management. Governor's Message to the Second Special Session of the Twenty-fourth Legislature, Utah Laws 2d Spec. Sess. 1941, at 1-6. Aside from appropriating funds for the agencies, commissions and departments created by the regular session and the first special session, the Second Special Session did nothing to centralize fiscal management. The administrative structure of the executive branch created by the Twenty-fourth Legislature has remained as the basic structure of the executive branch to the present time.

⁹¹ LITTLE HOOVER REPORT ANALYSIS 16.

⁹² In 1963 the legislature abolished the three-man finance commission and attempted to circumvent the board of examiners by substituting a director of finance responsible to the governor. Utah Laws 1963, at 532-42. The Utah Supreme Court struck down this attempt to consolidate and centralize budgetary control in the hands of the governor as a usurpation of the constitutional powers of the board of examiners. *Toronto v. Clyde*, 15 Utah 2d 403, 393 P.2d 795 (1964).

⁹³ LITTLE HOOVER REPORT ANALYSIS 17.

⁹⁴ Utah Laws 1965, ch. 138, at 387-90.

⁹⁵ LITTLE HOOVER COMM'N REPORT.

⁹⁶ A SUPPLEMENTAL REPORT TO THE REPORT OF THE COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT (1966) [hereinafter cited as MINORITY REPORT].

⁹⁷ LITTLE HOOVER COMM'N REPORT 2. The breakdown of the agencies by administrative structure of the agency is as follows: Elected Officials, 5; Elected Boards, 1; Major Commissions, Board and Departments, 49; Ex officio Boards and Commissions, 17; State Institutions, 15; Minor Boards, Commissions, Councils and Agencies, 37; Licensing Boards, Committees, and Councils, 28; and, Interstate Compact Commissions, 4. The breakdown by agency functions is as follows: General Control, 20; Education, 11; Natural Resources, 9; Health, 8; Public Safety, 10; Promotion and Development, 9; Business Regulation and Commerce, 14; Licensing Boards, 27; and, Welfare, 6. *Id.* at 2-3.

the commission or board-form of organization to administer state programs."⁹⁸ The commission suggested that reliance was placed on this form of management out of a fear of dictatorship,⁹⁹ even though its faults are obvious. The multimember board or commission form of administrative management in Utah results in the governor appointing, nominating or approving over five hundred individuals; a lack of administrative expertise among appointees; inefficiency caused by delays inherent in the committee form; the stifling of initiative by staff members due to commission interference in day to day staff operations; partisanship in administration caused by bipartisan appointments to boards and commissions; and, independence from and unresponsiveness to gubernatorial control caused by staggered terms of commission or board members.¹⁰⁰

While many of the fundamental problems with executive branch administration isolated by the Little Hoover Report have a familiar echo in Governor Maw's reorganization message to the Twenty-fourth Legislature, the remedies do not. The Little Hoover Report recommended, *inter alia*, abolition of the board of examiners,¹⁰¹ abolition of the elective offices of secretary of state and establishment of the office of lieutenant governor,¹⁰² changing the status of the office of elective attorney general to that of an appointive attorney general,¹⁰³ changing the elective office of treasurer to an appointive office,¹⁰⁴ and the abolition of the elective office of auditor and the establishment of an office of legislative auditor appointed by the legislature.¹⁰⁵ To offset the loss of a politically independent attorney general's office with an ability to challenge arbitrary or illegal executive branch conduct, the commission recommended the establishment of an "office of information and complaints" to review citizen complaints.¹⁰⁶ While apparently modeled upon the Scandinavian concept of the ombudsman,¹⁰⁷ the commission's concept of the office of information and complaints does not seem to take into account the vital judicial function performed by state attorneys general in issuing opinions interpreting state law for state agencies. Some argument could be made that this facet of the office of attorney general should be kept free of gubernatorial control.¹⁰⁸

⁹⁸ One hundred and twenty-two or 80 per cent of the "organizational units" of the executive branch are headed by multimembered boards, commissions, councils or committees. *Id.* at 5.

⁹⁹ *Ibid.*

¹⁰⁰ *Id.* at 5-6.

¹⁰¹ *Id.* at 22-24.

¹⁰² *Id.* at 12-14.

¹⁰³ *Id.* at 72.

¹⁰⁴ *Id.* at 81.

¹⁰⁵ *Id.* at 253-55.

¹⁰⁶ *Id.* at 14.

¹⁰⁷ See Blix, *A Pattern of Effective Protection: The Ombudsman*, 11 HOW. L.J. 386 (1965); Gellhorn, *Finland's Official Watchmen*, 114 U. PA. L. REV. 327 (1966). Gellhorn, *Swedish Justitieombudsman*, 75 YALE L.J. 1 (1965).

¹⁰⁸ See generally ABERNATHY, *SOME PERSISTING QUESTIONS CONCERNING THE CONSTITUTIONAL STATE EXECUTIVE* 32-49 (Univ. of Kansas Gov't Research Series No. 23, 1960).

The commission also recommended consolidation of existing executive agencies into eleven "major groups," seven of which would be "line or program groups"¹⁰⁹ and four staff or control groups.¹¹⁰ To prevent future proliferation of agencies or disintegration of the suggested groupings, the commission recommended a constitutional amendment giving the governor reorganization powers subject to legislative veto, a power similar to that possessed by the President in management of the executive branch of the federal government.¹¹¹

While some of the Little Hoover Commission's recommendations seem to be poorly thought out¹¹² and while the Minority Report criticized the methods by which the commission carried out its assignment,¹¹³ plus the absence of alternative recommendations,¹¹⁴ and several of the majority's specific recommendations,¹¹⁵ the commission recognized that constitutional difficulties were the causes of executive proliferation and made generally sound recommendations to effectuate a lasting and meaningful reorganization of the executive branch. Lest the history of Utah's 1941 reorganization attempt repeat itself, however, it seems imperative that three fundamental constitutional changes recommended by the Little Hoover Commission Report be made. (1) Abolish the elective offices of secretary of state, attorney general, auditor, and treasurer and establish the office of lieutenant governor or assistant governor.¹¹⁶ Without this constitutional reform executive power will continue to be fractionalized and the legislative tendency, evidenced by the 1941 reorganization, to create independent agencies to meet specific needs and assign control of the institution created to constitutionally elective officers will repeat itself. (2) Abolish the board of examiners. Without this constitutional reform centralized control of budget and fiscal management will be frustrated. (3) Vest reorganization power subject to legislative veto in the office of governor. Without this reform, proliferation will begin

¹⁰⁹ Public Safety Services; Transportation Services; Health and Welfare Services; Higher Education; Public Education; Natural Resource Services; and, Labor and Commerce Services. LITTLE HOOVER COMM'N REPORT 247-48.

¹¹⁰ Budget and Administrative Services; Revenue Services; Legal Services; and, State Development Services. *Ibid.*

¹¹¹ *Id.* at 16. The Model State Constitution contains this type of reorganization provision. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 5.06 (6th ed. 1963).

¹¹² Particularly the suggestion that a five man court be established to "handle the state's administrative hearing work load." LITTLE HOOVER COMM'N REPORT 257. The suggestion seems to be based on the fear of arbitrary administrative action, rather than a factual demonstration that administrative appeals are burdensome and poorly handled by the regular court system. If there is a need for reform of administrative proceedings, the best reform would be the establishment of a well trained group of hearing examiners.

¹¹³ MINORITY REPORT iii.

¹¹⁴ *Ibid.*

¹¹⁵ In general the minority report took a much less serious view of the present status of the executive branch. For example the minority report was unwilling to condemn the commission form of management and did not subscribe to the view that all executive branch officers should be appointive, with the exception of the governor and a lieutenant governor.

¹¹⁶ It has been suggested that the office of lieutenant governor can be made more meaningful if it is called "Assistant Governor." ABERNATHY, *op. cit. supra* note 108, at 24.

anew and legislative inertia in overhauling existing state agencies will be difficult to overcome.

A fourth vital constitutional reform, worthy of consideration and one not suggested by the Little Hoover Commission, is a constitutional provision limiting the total number of executive departments exclusive of commissions assigned quasi-judicial functions. Utah's 1941 reorganization and perhaps all attempts at a major overhaul of any state's executive branch have faced the difficulties of finding a starting place and the absence of coercion to force the necessary accommodations among existing independent agencies, boards, and commissions. In a very practical, political sense, every agency favors total consolidation of every other state agency but itself and almost all agencies have sufficient pressure group support desiring agency independence to frustrate legislative reorganization. The Model State Constitution offers a well drafted example of such a provision¹¹⁷ and the states of Alaska,¹¹⁸ Hawaii,¹¹⁹ Massachusetts,¹²⁰ Michigan,¹²¹ New Jersey,¹²² and New York¹²³ have had successful experiences with this type of constitutional provision. If such a provision is not adopted in Utah it seems safe to predict that the experience of the 1941 reorganization will repeat itself¹²⁴ and twenty-five years hence Utah's executive branch will again be in a state of chaos, incapable of management.

V. CONCLUSION

The executive article of Utah's constitution creates a feeble institution to carry out the duties of managing the expenditure of over 300 million dollars annually and meet the political, social, and cultural responsibilities demanded of the executive branch of a modern state government. The source of executive branch weakness is a constitutionally imposed disunity through the liberal use of internal checks and balances on gubernatorial power. The drafters of the federal constitution were well aware of the crippling effects constitutional disunity could have upon good government. Hamilton's famous analysis in *The Federalist Papers* of the need for a strong chief executive in the federal government stands today as perhaps the most

¹¹⁷ NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 5.06 (6th ed. 1963). The Model provision suggests twenty as the optimum number of agencies exclusive of quasi-judicial agencies.

¹¹⁸ ALASKA CONST. art. III, § 22.

¹¹⁹ HAWAII CONST. art. IV, § 6.

¹²⁰ MASS. CONST. ch. VI. art. LXVI.

¹²¹ MICH. CONST. art. V, § 2.

¹²² N.J. CONST. art. V, § IV, para. 1.

¹²³ N.Y. CONST. art. V, §§ 1-5.

¹²⁴ The Second Special Session of the Thirty-sixth Legislature passed a joint resolution, H.J. Res. 3, Utah Laws 2d Spec. Sess. 1966, ch. 20, at 29, accepting the report of the Little Hoover Commission, but refused to endorse or condemn the proposals of the commission. The resolution does endorse executive consolidation within the existing framework consistent with the constitution and laws on the books. Unless more affirmative action is taken by the Thirty-seventh Legislature, reorganization will be doomed to political bickering.

succinct criticism of the scheme created by nineteenth century state constitutions to prevent centralized executive control. Hamilton observed:

There is an idea, which is not without its advocates, that a vigorous executive is inconsistent with the genius of republican government. . . . Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws, to the protection of property against those irregular and high handed combinations, which sometimes interrupt the ordinary course of justice, to the security of liberty against the enterprises and assaults of ambition, of faction and of anarchy. . . .

. . . .

A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution: And a government ill executed, whatever it may be in theory, must be in practice a bad government.

. . . .

The ingredients, which constitute energy in the executive, are first unity, secondly duration, thirdly an adequate provision for its support, fourthly competent powers.¹²⁵

The key "ingredients" missing in Utah's executive article are "unity" and "competent powers." The consequences are obvious. Reform of the executive article of Utah's constitution is imperative if the recommendations of the Little Hoover Commission are to have any lasting impact, if Utah's government is to fulfill the demands of her citizens, and if Utah is to play a vital role in the continual evolution of the federal-state partnership.

But it is doubtful whether adequate and intelligent constitutional reform can be carried out by the piecemeal process of constitutional amendments. The longer one studies the Utah constitution the more obvious becomes the need for total constitutional revision by the convention process. The present constitution is so complex and interdependent, that intelligent rewriting of the executive article can only be done in the context of total revision of the entire document. For example, before the legislature was willing to pass the proposed amendment abolishing the board of examiners it passed five amendments strengthening the legislative article to offset increased centralization of executive power. But none of the amendments could be carefully weighed as integral parts of the overall document, with the result that an integrated and balanced document becomes even farther out of reach.¹²⁶

However, efforts to update and strengthen state government, even though short of necessary reforms, deserve support. It is hoped that abolition of the board of examiners is the first short step toward the total revision of Utah's executive branch that must be done in the context of a constitutional convention if a workable and understandable state constitution is to govern Utah in the future.

¹²⁵ THE FEDERALIST No. 70, at 471-72 (Cooke ed. 1961) (Hamilton).

¹²⁶ For example, the constitutional powers of the Utah State Board of Education under article X, § 8, of the Utah constitution may well have to be relitigated since the abolition of the board of examiners renders past opinions interpreting this section of little value. See *Bateman v. Board of Examiners*, 7 Utah 2d 221, 322 P.2d 381 (1958); *State Bd. of Educ. v. Commissioner of Fin.*, 122 Utah 164, 247 P.2d 435 (1952).