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Calvin L. Rampton, Governor of the State of Utah, and The State Of Utah v. Haven J. Barlow, President of the Senate of the State of Utah and Lorin N. Pace, Speaker of the House Of Representatives of the State of Utah, Et Al.: Brief of Plaintiffs and Appellants

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IN THE SUPREME COURT OF THE STATE OF UTAH

CALVIN L. RAMPTON, Governor
of the State of Utah, and
the STATE OF UTAH,
Plaintiffs and Appellants,

v.

HAVEN J. BARLOW, President of
the Senate of the State of
Utah and LORIN N. PACE, Speaker
of the House of Representatives
of the State of Utah, et al.,
Defendants and Respondents.

Case
No.
11725

BRIEF OF PLAINTIFFS AND APPELLANTS

An Appeal from the Judgment of the District
Court of Salt Lake County, State of Utah
Honorable Merrill C. Faux, Judge

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Clk. Supreme Court

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11725

BRIEF OF PLAINTIFFS AND APPELLANTS

NATURE OF CASE

This is an action brought by the State of Utah and its Governor for a declaratory judgment that Section 5(1) of Senate Bill 10 (Chapter 138, Laws of Utah, 1969), passed by the 38th Legislature of the

State of Utah, is unconstitutional and invalid insofar as it purports to confer upon the President of the Senate and the Speaker of the House of Representatives power to appoint members to the State Board of Higher Education.

DISPOSITION IN LOWER COURT

The District Court, after hearing argument and considering memoranda submitted by the parties, filed its memorandum decision and entered a judgment declaring that said Section 5(1) of Senate Bill 10 is constitutional and valid in all respects, and denied all relief sought by plaintiffs.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the judgment and remand to the District Court with directions to enter a judgment declaring Section 5(1), Senate Bill 10, unconstitutional and invalid insofar as it purports to confer upon the President of the Senate and the Speaker of the House of Representatives power to appoint members to the State Board of Higher Education and granting appropriate relief to plaintiffs.

STATEMENT OF FACTS

The 38th Legislature of the State of Utah enacted Senate Bill 10, portions of which became effective

on May 13, 1969, with the remaining provisions becoming effective on July 1, 1969. The bill provides for a State Board of Higher Education to control, manage and supervise all public institutions of higher education in the State of Utah. Prior to enactment of Senate Bill 10, the various colleges and universities throughout the State were governed by boards of regents or trustees whose members—other than those serving ex officio—were appointed by the Governor with the consent of the Senate. Statutes providing for the creation and functions of such boards of regents or trustees were repealed by the bill.

Section 5(1) of the bill provides:

“The state board of higher education shall consist of fifteen resident citizens of the state, nine of whom shall be appointed by the governor with consent of the senate. Three members of the board shall be appointed by the president of the senate and three members by the speaker of the house of representatives in the manner provided herein. Not more than eight members shall, at any time, be from one political party. In making appointments to the board, persons shall be selected from the state at large with due consideration for geographical representation.”

After plaintiffs filed their complaint in the District Court, and before the matter could be set for

hearing on plaintiffs' application for a preliminary injunction, the effective date arrived for that portion of the bill providing for appointments to the board. Immediately thereafter, defendants, Barlow and Pace, made appointments to the board. Subsequently, plaintiffs moved for leave to amend their complaint to add as defendants the six members designated by the defendants. The motion was granted and the added defendants appeared in the action, asserting the right to serve as members of the board.

ARGUMENT

POINT I

SECTION 5(1) OF SENATE BILL 10 PASSED BY THE 38TH LEGISLATURE OF THE STATE OF UTAH WHICH VESTS POWER OF APPOINTMENT TO THE STATE BOARD OF HIGHER EDUCATION IN MEMBERS OF THE LEGISLATURE VIOLATES ARTICLE VII, SECTION 10, CONSTITUTION OF UTAH, WHICH RESERVES SUCH POWER OF APPOINTMENT TO THE GOVERNOR OF THE STATE AND IS UNCONSTITUTIONAL AND INVALID.

The power of the governor of the State of Utah to appoint state officers is found in Article VII, Section 10, Constitution of Utah, which provides:

The governor shall nominate, and by and with the consent of the Senate, appoint all state and district officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for * * *

The principal point of contention between plaintiffs and defendants, in connection with the above provision is over the meaning of the words "whose appointment * * * is not otherwise provided for * * *". Did the framers of the constitution intend, as defendants claim, that the legislature could provide for appointment of state officers by itself, its members or others whenever it by law created a new office or whenever the constitution is silent as to the matter of appointment? Or, was it their intention to provide, as plaintiffs contend, that the appointive power is vested in the governor, as chief executive officer of the state, except where the constitution provides for a different method of appointment?

Much has already been said in this action about whether the words "provided for" constitute a prepositional phrase, and if so, whether the phrase relates to the noun "constitution" or to "by law"; whether or not the last clause is a dependent adjective clause; or whether or not the framers of the constitution were familiar with the importance of

the word "herein." Plaintiffs suggest that such analyses, while interesting and provocative, are of little help in solving the issue at hand. Certainly members of the constitutional convention were familiar with the word "herein" and used it elsewhere in the constitution. Obviously, the meaning of Section 10 would be much clearer had they used it following the words "except as otherwise provided," but it is not clear and the lower court so found by saying "I am not prepared to say that Article VII Section 10 of the Utah Constitution is plain, direct and unambiguous."

Defendants have stated, had the framers intended the construction urged by plaintiffs they would simply have stated "except as otherwise provided *herein*." But it is more plausible to argue that had they intended to give the legislature the authority to provide for any or all future appointments, they would have said "except as may be otherwise provided by law" or "except as shall otherwise be provided." Instead, the present verb "is" was used. It would seem then that they were referring to the present, that is the time when the constitution was being drafted and consequently felt no need to add the word "herein."

This construction is supported by the fact that the framers of the constitution, in those instances in

which they intended to confer upon the legislature the power to supersede provisions in the original constitution, expressly made such provisions subject to subsequent prescription, provision, or fixing “by law.” For example, Article VII, Section 20, provides:

“The Governor, Secretary of State, Auditor, Treasurer, Attorney-General, Superintendent of Public Instruction, and such other State and district officers as may be provided for *by law*, shall receive for their services monthly a compensation as fixed *by law*.
 * * * * *
 * * * * *

(emphasis added).

Additional examples of the framers’ adherence to the words “by law” when referring to future action by the legislature are cited in Appendix A below.

In fact, even Article VII, Section 10, itself demonstrates that the framers distinguished references to future action by using the words “by law.” The last sentence provides:

“* * * * * If the office of secretary of state, state auditor, state treasurer, attorney general or superintendent of public instruction be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and appointee shall hold his office

until his successor shall be elected and qualified, as may be *by law* provided.” (emphasis added).

Inasmuch as Article VII, Section 10, avoids using language such as “except as otherwise provided by law,” or “as may otherwise be prescribed by the legislature,” or “as may be fixed by law” (or fails to use the future verb “shall”) it seems evident that the language “whose appointment * * * is not otherwise provided for,” was intended to mean “not otherwise provided for in the constitution.” Words used in a constitution must be presumed to have been carefully chosen so that each word will have a meaning or to have been measured in such a way as to convey certain and definite meaning with as little as possible left to implication. *Behnke v. New Jersey Highway Authority*, 13 N.J. 14, 97 A.2d 647 (1953). *Chadwick v. City of Crawfordsville*, 216 Ind. 399, 24 N.E.2d 937 (1940). Further, each provision should be construed so as to harmonize with all others with a view towards giving effect to each and every provision insofar as it can be consistent with construction of the instrument as a whole, 16 C.J.S. *Constitutional Law* §23 at 93 (1956).

Under the construction argued for by defendants the legislature could just as logically take the position that it could otherwise provide for the appointment

of officers whose offices are established by the constitution as well as those which may be created by law.

That the term "by law" refers to future action of the legislature was established in *State ex rel. Shields v. Barker*, 50 Utah 189, 167 P. 262 (1917), which said:

"What is meant by the expression 'as may be established by law' in the constitutional provision we have quoted? To our minds the expression admits of but one meaning, and that is, if, in the judgment of the Legislature, it becomes necessary to establish courts in addition to those enumerated in the constitutional provision, then the Legislature may, by law duly passed, create such other courts inferior to the Supreme Court as in the judgment of that body may be necessary. To be 'established by law' means just what it says, namely, by a law duly passed by the law making power of this state. * * *"

Plaintiffs' suggested construction is reasonable, inasmuch as the constitution does "otherwise provide for" the appointment or election of some state and district officers. For example, Article VI, Section 12, permits each house of the legislature to choose its own officers and employees; Article VI, Section 13, permits the legislature to fill vacancies in either house "in such manner as may be provided by law." Article VII, Section 1, provides for election of the executive officers of the state; Article VII, Section 11,

provides for an election to fill a vacancy in the office of governor; Article VIII, Section 3, provides for the selection of judges; Article VIII, Section 8, impliedly provides for the election of justices of the peace; Article VIII, Section 10, provides for election of county attorneys and appointment of attorneys pro tempore; Article VIII, Section 14, provides for appointment of clerks and reporters; Article IX, Sections 1-4, provides for election of congressional representatives.

The extent of the governor's powers to appoint state and district officers, under Article VII, Section 10, is one that does not appear to have been decided by this court. Such decision was not made in *State ex rel. Hammond v. Maxfield*, 103 Utah 1, 132 P.2d 660 (1942), so heavily relied upon by defendants in the lower court.

In that case the 1941 legislature had created a new body known as the Engineering Commission and amended an earlier statute relating to the State Road Commission, thereby providing for the termination of tenure in office of the members of the State Road Commission. The act provided that members of the Engineering Commission would serve as members of the State Road Commission. The previously appointed members of the State Road Commission

brought a quo warranto action against persons appointed to the Engineering Commission to determine their right to hold office as members, ex officio, of the State Road Commission. The court held that the power of the legislature to terminate the incumbency of persons appointed to a state office for a fixed term depended upon the purpose for which termination was effective. Inasmuch as the legislature could create an office it could abolish it but, it said, this must be a genuine abolition and not something done under pretense. If it abolished an office and put another in its place, with substantially the same duties, it would be a device to unseat the incumbent and beyond the power of the legislature. The court stated (and this is the language relied upon by defendants):

“The courts are confronted with the principle that the power to create an office being in the legislature, ordinarily the power to abolish it must also reside there. At one and the same time the courts are confronted with another principle that the power to fill an office, at least if not otherwise provided for in the act creating the office, is executive and under a constitutional provision such as Art. VII, Sec. 10, of our Constitution, absent at least any contrary expression of the legislature, such power lies with the governor. This being the case the legislature has no power summarily to remove the incumbent.”

The language generally recognizes that the power of appointment is an executive one belonging to the governor. The statement "at least if not otherwise provided for in the act creating the office" is not even dicta. It was not necessary to the decision of the case, and merely shows that the court was not considering the question involved in the present case but was leaving it undecided. This is evident by use of the words "at least" twice in the same sentence. A detailed analysis of the case actually shows that it supports the position of the plaintiffs rather than the defendants. Additionally, the court pointed out the necessity of maintaining the separation of powers doctrine under the Utah Constitution, and said:

"On no other basis can the various concepts of legislative power under constitutional provisions such as ours be reconciled or fitted together with the power given the executive."

The only other cases which appear to touch on the question are *McCornick v. Pratt*, 8 Utah 294, 30 P. 1091 (1892), *Duncan v. McAlister*, 1 Utah 81 (1873) and *People ex rel. Dickson v. Clayton*, 4 Utah 421, 11 P. 206 (1886). The *McCornick* case involved a construction of the Organic Act of the Utah Territory which provided:

"* * * The Governor shall nominate, and, by and with the advice and consent of the Legis-

lative Council, appoint all officers not herein otherwise provided for; * * *."

After noting that members of the board of trustees of the agricultural college were "officers" within the meaning of the Organic Act, the court held that a statute which designated persons to serve as trustees was invalid, but that the provisions establishing the board to be appointed by the governor and the legislative council were valid. The court also said:

"* * the legislature has authority to create a board of construction for the college, but has no authority to appoint the members of the board, if they are 'officers,' within the meaning of the organic act."

Cases reaching a similar result were *Duncan v. McAlister, supra*, and *People v. Clayton, supra*, both of which recognized the right of the general assembly to create an office but not to fill it. Those cases, with *McCornick v. Pratt, supra*, would appear to be controlling on the issues presented in the instant case except for the fact that the Organic Act then in force did use the word "herein" in describing the appointing powers of the governor.

In their argument before the lower court defendants took differing positions with respect to use of the word "herein" in describing the appointing powers of the governor. They argued on the one hand that

the omission of the word from Article VII. Section 10, must have been intentional and that the legislature, therefore, may provide by law for the appointment of officers. They argued, also, that the provision was probably copied after the constitution of Colorado—or some other state—which seems to be inconsistent with the intentional omission.

Plaintiffs are inclined to agree with defendants' second argument, that the provision was copied after that of a sister state and therefore omission of the word "herein" has no particular significance in interpretation of the section. This finds support in the reports of the proceedings of the Utah Constitutional Convention where there is no suggestion that elimination of the word "herein" was even considered by the body. The absence of argument about or mention of elimination of "herein" would seem to indicate that the framers of the constitution, adopting the wording of similar constitutional provisions in other states, did not believe they were changing established law. This is particularly so in light of the fact that the *Pratt*, *McAlister* and *Clayton* cases were not decided on the basis of the word "herein."

But even if we were to concede that omission of the word "herein" was deliberate, the omission of the word gives scant support to a contention that the

framers of the constitution intended to confer upon the legislature authority to make appointments.

In light of the territorial and constitutional history of Utah, it would be logical to suppose that the convention eliminated the word "herein" because it was aware of provisions in existing territorial statutes and the Enabling Act affecting the election or appointment of the state officers. In Section 19 of the Enabling Act (28 Stat. 107), for instance, the following is found:

"* * * the State government formed in pursuance of said constitution, as provided by the constitutional convention, shall proceed to exercise all of the functions of state officers; and all laws in force made by said Territory at the time of its admission into the union shall be in force in said State, except as modified or changed by this Act or by the constitution of the State; and the laws of the United States shall have the same force and effect within the said State as elsewhere within the United States."

This language strongly suggests that the framers of the constitution understood that there might be in existence extra-constitutional provisions relating to the appointment or election of certain state officers and that a general provision in the constitution would be necessary to achieve continuity and avoid gaps or lapses in the method of appointment and the tenure of officers.

As previously conceded, it is reasonable to suppose that the framers of the constitution knew the meaning of the word "herein." It is also reasonable to suppose that they knew the difference between present and future tenses. If the defendants' construction is correct, there is no reason why the legislature could not also "provide for" its own appointment of all "officers whose offices are established by this constitution."

Plaintiffs' argument about the significance of the omission of "herein" is supported by the territorial *Pratt*, *McAlister*, and *Clayton* cases, which were not decided on the basis of the word "herein."

In *People v. Clayton*, *supra*, for example, the issue was decided in the following language quoting from an earlier Idaho case:

"All the powers intrusted to government in the territories as well as the states are divided into three departments: the executive, the legislative and the judicial. It is wisely provided that the functions appropriate to each of these branches of the government shall be vested in a separate body of public servants, and it is apparent that the perfection of the system requires that the lines which separate and divide these departments shall be clearly defined and closely followed. It is also true, as a general proposition, that the powers confided by the fundamental law to one of these departments cannot be exercised by another.

And where, as in this case, the organic law provides that the governor, by and with the advice and consent of the legislative council shall appoint the territorial officers, we do not think the authority can be delegated to another body, and the governor thus divested of his prerogative. If this can be done and sanctioned in one instance, it may be in others, and by this method, or in the exercise of the two-third legislative rule over the governor's veto, the executive may be deprived of the appointing power which congress has wisely confided to the executive branch of the territorial government."

In view of this strong language, it is difficult to see how the framers, if they wanted to alter executive powers, could safely feel that they were doing so merely by omission of the word "herein."

The fact that the word "herein" is used in Article V, Section 1, is of no significance in arriving at a determination that the word was intentionally omitted from Article VII, Section 10. Without the use of the word such as "herein" or "in this constitution" the last clause in Article V, Section 1, would have no logical meaning.

A number of cases support plaintiff's position. Many of these deal with the problem on the broader basis of the separation of powers doctrine, and will generally be discussed under Point II below. Several

cases have, however, considered the meaning of provisions similar to Utah's Article VII, Section 10. For example, North Carolina's constitution provided:

“The Governor shall nominate, and . . . appoint all officers whose offices are established by this Constitution, or, which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.” N.C. CONST. art. III § 10 (1868), quoted in, *People ex rel. Nichols v. McKee*, 68 N.C. 429, 433 (1873).

In the early North Carolina case of *People ex rel. Nichols v. McKee*, *supra*, the North Carolina court held that the words “whose appointments are not otherwise provided for” should be interpreted to mean appointments not otherwise provided for in the constitution. After the decision in *McKee*, the North Carolina constitution was amended to eliminate the phrases “or which shall be created by law” and “and no such officer shall be appointed or elected by the general assembly.” Subsequent North Carolina cases construed the amendment as having been made for the purpose of permitting the legislature to make some appointments of officers. See for example, *State's Prison v. Day*, 124 N.C. 362, 32 S.E. 748 (1899) and *State ex rel. Ewart v. Jones*, 116 N.C. 570, 21 S.E. 787 (1895). The latter two cases, having been based upon particular legislative history, have

little bearing upon the construction of the Utah constitutional provision, but *People ex rel. Nichols v. McKee, supra*, decided prior to the amendment does have and in that case the court adopted the construction contended for by plaintiffs.

The district court, in its memorandum decision, invoked the principle that a state constitution is not a grant of power but operates solely as a limitation on the legislature and an act thereof is valid when the constitution contains no prohibition against it. Plaintiffs do not challenge the doctrine but only the lower court's basic premise—that in the present case there is no prohibition against the legislature making executive appointments. As stated by Justice Larson in his dissenting opinion in *State ex rel. Hammond v. Maxfield, supra*:

“* * * So too the constitution is mandatory that the executive department, as depository of the executive power, shall exercise the executive functions of government and perform the duties of carrying into operation and effect all acts passed by the legislature; it shall transact all executive business and see that the laws are faithfully executed. *By this grant of power the constitution prohibits the exercise of these powers by the legislature or the judiciary.* * * *

“* * * It is sometimes loosely said that all power not expressly prohibited is vested in

the legislature. This statement is loose and misleading. The legislative power, the full law making power, except as noted above, is the only power vested in the legislature. While it has an exclusive monopoly in that field, it has no power beyond the limits of constitutional law making. * * *

“But the execution of the laws, carrying them into effect, enforcing and seeing to it that the duties and obligations imposed by law are observed and performed and not legislative functions. They are in nature and by the express terms of the constitution executive functions. * * *”(emphasis added).

The same thought was expressed in *State ex rel. Swoop v. Mechem*, 58 N.M. 1, 265 P.2d 336 (1954), where the court was considering the validity of an appointment of three district judges by reason of a statute to increase the number of judges. Regarding the right of legislative appointment the court quoted 42 *Am. Jur., Public Officers*, §94 at 952 (1942):

“* * * where the Constitution makes the act of appointment an executive one, it cannot be exercised by the legislature, nor can the legislature rob the executive of such power by conferring it on an outside agency of its own choosing.”

The constitutional grant of the appointing power to the governor should be construed as depriving the legislature of that power, particularly with

reference to officers whose duties lie within the executive department rather than the legislative or judicial. Such principle of construction is recognized in 1 *T. Cooley, Constitutional Limitations* 215 (8th ed. 1927):

“* * * such powers as are specially conferred by the constitution upon the governor, or upon any other specified officer, the legislature cannot require or authorize to be performed by any other officer or authority; and from those duties which the constitution requires of him he cannot be excused by law.
* * *”

Defendants, of course, dispute this construction and whether resort be had to rules of grammar, rules of statutory constitutional construction, or to the cases and authorities, countervailing principles come into play. It may well be that Article VII, Section 10, considered in isolation, is unclear as found by the lower court. But, if it is unclear, it cannot be a case “expressly directed or permitted” when construed in conjunction with the distribution of powers doctrine enunciated in Article V, Section 1, of the Constitution of Utah, and it is a cardinal rule of constitutional construction that the instrument must be construed in the light of what was intended by its framers. The meaning intended by the framers must be ascertained from the whole of the instrument and in construing a particular section the court

may refer to any other section or provision to a certain object, purpose or intention. *University of Utah v. Board of Examiners*, 4 Utah 2d 408, 225 P. 2d 348 (1956); *Spence v. Utah State Agricultural College*, 119 Utah 104, 225 P. 2d 18 (1950). As discussed below, the courts from numerous jurisdictions have considered the question on this broader basis and have invalidated similar legislation because of its conflict with the separation of powers doctrine.

Defendants' contention that since the constitution is one of limitation rather than grant, the fact that the legislature is not specifically prohibited from making the appointments means they have authority to do so, is repudiated in *Hansen v. Legal Service Committee of the Utah State Legislature*, 19 Utah 2d 231, 429 P.2d 979 (1967). There is nothing in the constitution which specifically proscribed the legislature from appointing a legal advisor either. This court held such proscription was implied by the provision making the attorney general the legal advisor to the officers of the state.

POINT II

SECTION 5(1) OF SENATE BILL 11
PASSED BY THE 38TH LEGISLATURE OF
THE STATE OF UTAH WHICH VESTS
POWER OF APPOINTMENT TO THE STATE

BOARD OF HIGHER EDUCATION IN MEMBERS OF THE LEGISLATURE VIOLATES ARTICLE V, SECTION 1 OF THE CONSTITUTION OF UTAH WHICH PROVIDES FOR THE SEPARATION OF POWERS OF THE THREE DEPARTMENTS OF GOVERNMENT AND IS CONSEQUENTLY UNCONSTITUTIONAL AND INVALID.

Apart from the question of the express power of appointment conferred upon the governor by the Utah Constitution, there is a fundamental objection to defendants' exercise of the power to appoint members of the board of higher education.

A basic concept underlying the constitutions of the United States and the several states is that the legislative, executive, and judicial departments must remain separate, and that one shall not infringe upon or intrude into the powers or functions of another. In the Utah Constitution this philosophy is expressed forthrightly and mandatorily in Article V, Section 1:

“The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of power properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in cases herein expressly directed or permitted.”

Proper construction of the foregoing requires consideration of Article VII, Section 10, which places the appointing power generally within the executive department, and Article I, Section 26, which makes the provisions of the constitution "mandatory and prohibitory" unless declared by express words to be otherwise.

The United States Constitution does not contain an express provision for the separation of powers, but the fundamental concept has long been recognized. In *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 72 L. Ed. 845, 48 S. Ct. 480 (1928), the court considered the power of the governor of the Philippine Islands to appoint directors of certain governmental corporations. The general provision of the Organic Act relied upon by the governor was

"* * * that the supreme power shall be vested in an executive officer, whose official title shall be 'The Governor General of the Philippine Islands.' "

The Organic Act, however, gave to the legislature the authority to increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit and provided for the appointment and removal of the heads of the executive departments by the Governor

General. In discussing the powers of the legislature on the one hand and the governor on the other, the United States Supreme Court said:

“* * * Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. * * * And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of government mechanism.* * *

“It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial powers; the executive cannot exercise either legislative or judicial power; * * *.

“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.”
(emphasis added).

The court noted that the officers in question were charged with the exercise of executive functions and therefore could not be appointed by the legislature,

and that the enumeration of the governor-general's appointive powers was not exclusive inasmuch as all executive functions were vested directly in the governor-general or under his supervision and control.

Myers v. United States, 272 U.S. 52, 71 L. Ed. 160, 47 S. Ct. 21 (1926), which involved the power of the President to remove executive officers who had been appointed by and with the advice and consent of the senate, contains an extensive and informative review of the debates in the constitutional convention relating to the executive power of appointment and removal, and to the separation of powers. In its review of the history of the constitutional convention, the court said (272 U.S. at 116):

“* * * Mr. Madison insisted that article 2 by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that article. He pointed out that one of the chief purposes of the convention was to separate the legislative from the executive functions. He said:

‘If there is a principle in our Constitution, indeed in any free Constitution more sacred than another, it is that which separates the legislative, executive and judicial powers. If there is any point in which the separation of the legislative

and executive powers ought to be maintained with great caution, it is that which relates to officers and offices.' 1 Annals of Congress, 581. . . . As Mr. Madison said in the First Congress:

'The powers relative to offices are partly legislative and partly executive. The legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the legislative power ceases. *They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature.* Although it be qualified in the constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also.' " (emphasis added).

The court took the position that the power to appoint and remove executive subordinates is part of the "executive power," and that such power could not be legislative or judicial power as they are understood.

In *Tucker v. State*, 218 Ind. 614, 35 N.E.2d 270 (1941), the legislature sought to erode the powers of

the governor by placing a number of boards, commissions, and departments under the jurisdiction of the secretary of state, state auditor, state treasurer, and lieutenant governor, and giving separate administrative departments the power to appoint and remove their departmental officers. A separate statute abolished the state board of education and set up a new board, four members of which were to be appointed by the governor, and four by the lieutenant governor.

In a lengthy and well considered opinion the Supreme Court of Indiana held unconstitutional the legislation taking the appointing power from the governor and giving it to other officers. Among other things the court quoted a pertinent Indiana decision:

“* * * A department without the power to select those to whom it must intrust part of its essential duties cannot be independent. If it must accept as ‘ministers and assistants,’ as Lord Bacon calls them, persons selected for them by another department, then, it is dependent on the department which makes the selection. * * *”

This court further pointed out:

“The appellants say that if it had been intended to confer the appointive power upon the Governor, a few appropriate words would have sufficed to do so. But Constitutions are

concisely drawn and superfluity is avoided. It was generally understood that the grant of executive power carried with it, among other things, the general power of appointment,
* * *

The court rejected arguments that a provision that officers whose appointment is not otherwise provided for in the constitution should be chosen in the manner now or thereafter prescribed by law, conferred upon the legislature the power to make appointments. Such construction was seen as creating inconsistencies in the constitution which could not be permitted.

The Supreme Judicial Court of Massachusetts has refused to let the legislature exercise appointing powers which properly belong to the executive department. In *In re Opinion of the Justices*, 303 Mass. 615, 21 N.E.2d 551 (1939), the court held invalid a statutory provision permitting the legislature to participate in the choosing of four commissioners of representative districts. The court said:

“The power (to provide for the naming and settling of all civil officers) which * * * is conferred upon the General Court is very broad * * * but its scope must be determined in the light of other constitutional provisions, including the provisions of art. 30 of the Declaration of Rights that ‘the legislative department shall never exercise the executive * * * powers.’ ”

After quoting from an earlier case that "the power to appoint and the power to remove officers are in their nature executive powers," the court added:

"Without implying that the General Court may not by fixed law confer the power of choosing the members of boards of special commissioners upon the people or upon the General Court acting under its constitutional power to 'name and settle' * * * civil officers. * * *—questions which are not presented by the bill under consideration—it is enough to say that in our opinion the power of appointing members of such boards is so far executive in nature that it cannot be conferred by fixed law upon such purely legislative officers as senators and representatives, acting in any manner other than that prescribed by the Constitution for action by the General Court without violating the provisions of art. 30 of the Declaration of Rights. * * *

In another *In re Opinion of the Justices*, 302 Mass. 605, 19 N.E.2d 807 (1939), the court held that the president of the senate and speaker of the house of representatives did not have power to appoint members of a commission, saying:

"We are of the opinion, however, that the power of appointing such members cannot be conferred by law upon the President of the Senate and the Speaker of the House of Representatives, whether or not such members are required to be chosen from among

the members of the Senate and of the House. 'The power to appoint and the power to remove officers are in their nature executive powers.' (citing cases). The soundness of this general principle is not impaired by the fact that the Constitution explicitly empowers the General Court 'to name and settle annually * * * all civil officers within the said commonwealth,' * * *

"* * * we are of the opinion that to confer upon such purely legislative officers the executive power of appointment of members of the commission or committee provided for by the bill and an amendment thereto, whether or not such members are required to be chosen from among members of the General Court, would be violative of said art. 30 as authorizing the legislative department to exercise executive powers. See *People v. Tromaine*, 252 N.Y. 27, 43-45, 56-60, 168 N.E. 817."

In *State v. State Office Building Commission*, 185 Kan. 563, 345 P.2d 674 (1959), the Supreme Court of Kansas had under consideration legislation which created the state office building commission and required the governor to appoint members of the legislature to serve on the commission. This requirement was held to be invalid because in contravention of the Kansas Constitution, which prohibits any of the three branches of the government from exercising the powers of another branch. The court noted that the legislative power is the authority to make laws

but not to enforce them and that the powers of the commission in this case were executive powers.

In *State ex rel. Yancey v. Hyde*, 121 Ind. 20, 22 N.E. 644 (1889), the Supreme Court of Indiana struck down legislation giving the legislature power to appoint a director of the department of geology and natural resources created by statute. This was done after the court held Article XV Section 1 of the Indiana Constitution, similar to our Article VII Section 10, does not give the legislature the power to appoint but only to prescribe the manner of appointment. Referring to the constitutional provision for separation of powers, the court recognized that some offices, related to its functions, might be filled by the legislature adding:

“But the appointment to an office like the one involved here, where it is in no manner connected with the discharge of legislative duties, we think involves the exercise of executive functions, and falls within the prohibition * * * of the constitution.”

In *State ex inf. Hadley v. Washburn*, 167 Mo. 680, 67 S.W. 592 (1902), the Supreme Court of Missouri annulled legislation establishing a class of persons from whom the governor was required to make appointments for a particular position, holding that the legislation violated the separation of powers

provision of the state constitution. Referring to a constitutional provision that appointments of officers not otherwise directed were to be made in such manner as might be prescribed by law, the court said:

“* * * That section expressly authorizes the general assembly, acting within its legislative capacity, to pass a law prescribing the manner in which an appointment shall be made, but it does not authorize the general assembly to make the appointment itself, nor to authorize anyone unconnected with the government to do so. To provide by law the manner in which an appointment shall be made is one thing, to make the appointment is another; the one is in its nature the legislative, the other is essentially executive. The constitution authorizes the legislature to do the one but not the other. * * *

“The act of filling a public office by appointment is essentially an administrative or executive act, and, under the constitution, can be exercised only by an officer charged with the duty of executing the laws. There is, however, an exception to this rule which does not conflict with the meaning of article 3. Courts and the general assembly may appoint such officers or agencies, not otherwise appointed by law, as are necessary to the exercise of their functions. * * *”

In *Wittler v. Baumgartner*, 180 Neb. 446, 144 N.W.2d 62 (1966), an act which unduly restricted

the field from which the governor might make appointments of directors of a grid system was held by the Supreme Court of Nebraska to be unconstitutional because in violation of the separation of powers provision of the constitution. Quoting from an earlier case, *State ex rel. Hensley v. Plasters*, 11 Neb. 652, 105 N.W. 1092 (1905), the court said:

“Again there can be no doubt that the Legislature, after it has established an office, or in the act of establishing it, may provide for filling the office either by election by the people or in a proper case by appointment by some designated authority. The Legislature, however, cannot itself fill the office. It cannot elect or appoint the officer (citing cases) and it seems to us to follow that it cannot by direct legislation for that sole purpose cause an office to be held for the term, or any period of the term, by any particular individual * * *”

The court recognized the power of the legislature to prescribe reasonable qualifications for the person to be appointed to an office but held that the legislature could not appoint officers whose offices are created by law, either directly or indirectly.

The extent to which legislative appointments is prohibited by the provisions of Article V, Section 1, and Article VII, Section 10, of the Utah Constitution has never been directly ruled upon by this court.

insofar as we have been able to find. The question of the right to make appointments was touched upon in the case of *Lee v. State*, 13 Utah 2d 15, 367 P.2d 861 (1962), which involved validity of enactment of a constitutional amendment granting temporary emergency powers to the legislature. In discussing the provisions of the amendment the court pointed out that it gave the legislature power to provide temporary succession to the powers and duties of public officers, remarking that it pertained "to the executive department of our state government, its powers, duties, and qualifications of its officers." The court noted that one of the amendments was to "make it possible for the legislature instead of the executive officer to provide for temporary succession for public offices where the incumbents have become unavailable."

The amendments were held unconstitutional and a different amendment was subsequently passed which impliedly recognizes that it is ordinarily the governor's prerogative to make appointments. *See* UTAH CONST. art. VI § 32.

The constitution of Arizona is less restrictive than Utah's and the Supreme Court of Arizona has held that the legislature has quite extensive power with respect to appointments. Yet even this court, and others like it, recognize that there are some limits

upon such legislative power, and that the appointments made by it should somehow be related to the legislative function. In *Dunbar v. Cronin*, 18 Ariz. 583, 164 P. 447 (1917), the court upheld some legislative appointments and reviewed cases from other states. The court said:

“* * * A review of the cases bearing upon the subject would seem to indicate a consensus of opinion where the office is peculiarly identified or associated with the appointing power, as where it has to do with the functions and duties of the appointive power, whether it be judicial, legislative, or executive, the appointment properly belongs to that department.”

The limitations on the part of the legislature to both enact and assist in the execution of laws was recognized by the Supreme Court of South Carolina in *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E.2d 88, 173 A.L.R. 397 (1947), which involved appointments to an auditorium board. The statute provided that two of the members of the board would be the representative and senator from the county in which the district was located. In holding the statute to be unconstitutional the Supreme Court of South Carolina relied upon a constitutional provision essentially the same as Article V, Section 1, of the Utah Constitution. See also *Spartanburg County v. Miller*, 135 S.C. 348, 132 S.E. 673 (1924).

Aside from the question of the power to appoint, a large number of cases have dealt with the general proposition that legislative, executive, and judicial functions must be separate. Among those are *Kimball v. City of Grantsville*, 19 Utah 368, 57 P. 1 (1899); *Stockmen v. Leddy*, 55 Colo. 24, 129 P. 220 (1912), in which an act establishing a legislative investigating committee was held unconstitutional as a "clear and conspicuous instance of an attempt by the general assembly to confer executive power upon a collection of its own members"; *Giss v. Jordan*, 82 Ariz. 152, 309 P.2d 779 (1957), invalidating a law purporting to exempt per diem and mileage for legislators from a provision requiring presentation of claims to the state auditor.

Plaintiffs do not contend that the foregoing decisions are necessarily based on constitutional provisions identical to either Article V, Section 1, or Article VII, Section 10, of the Utah Constitution. Nor do they contend that the cases standing alone are dispositive of the issues presented in the present case. The decisions do, however, under factual situations involving similar attempts to infringe upon the executive power of appointment, (1) illustrate the context in which Article VII, Section 10 must be considered, and (2) establish that the consensus of opinion in the United States is toward proscribing

executive appointment by persons other than the department entrusted with executive function. Moreover, they portray the nature of the difficulty that could transpire if excursions into the executive realm by the legislature are not prevented, and they show that there are two distinct provisions of the Utah Constitution which preclude defendants, Ballou and Pace, as members of the legislature, from making executive appointments.

The district court, in its memorandum decision, found that plaintiffs had not pointed to any clear-cut section of the constitution which prohibits the legislature from doing the acts of which plaintiffs complained. Plaintiffs submit that Article VII, Section 10, is such a provision; standing alone, the section may not seem absolute, but when read in conjunction with Article V, Section 1, there can be no doubt. One says the executive (the governor) shall make appointments to state office. The other says that neither of the other departments shall exercise any powers properly belonging to the executive, except where *expressly* directed or permitted. There is nothing in the constitution expressly authorizing the legislature to make such appointments, thus it is prohibited from doing so, and as observed previously, the lower court did not interpret the Article VII language to be express. The only provision which

authorizes the legislature to appoint officers is Article VI, Section 12, which provides: "Each house shall determine the rules of its proceeding and choose its own officers and employees." Moreover, the prohibition need not be clear-cut or express. It may be implied. *University of Utah v. Board of Examiners, supra*, and *Kimball v. City of Grantsville, supra*.

The district judge apparently felt that what the legislature had done here was not too bad since it appointed only six of the fifteen members, and the governor was permitted to appoint the other nine. He did not feel that it constituted an "alarming incursion" of the legislative department into the powers of the executive (although he was not so certain about inroads recently made into the judicial department). But the question cannot be resolved on the basis that the legislature has made only a little encroachment. If the court tells the legislature that it is all right for them to appoint six out of fifteen members, what is to prevent them from appointing nine and the governor six, or to prevent them from appointing all of the members and the governor none? If they can appoint six, nine, or fifteen members to the State Board of Higher Education, by the same reasoning they can appoint all state officers. In that case, of course, Article VII, Section 10, would be completely emasculated.

If the defendants' construction of that provision is sanctioned, the legislature could "otherwise provide for" appointments to all state and district offices by persons other than the governor. If such a precedent were established what would prevent a hostile legislature from doing exactly what the Indiana legislature did in *Tucker v. State, supra*? The district judge's impression of that case, that the legislature sought to *abolish* the powers of the governor, is entirely correct. Should this court adopt the construction contended for by defendants, how could it distinguish from a situation where the legislature abolished all appointments of the governor if it should try to do so in the future? Plaintiffs submit that it could not logically do so. But if it should not, Article V, Section 1 would be down the drain along with Article VII, Section 10.

A recognition of this fact was made in *Hansen v. Legal Services Committee of the Utah State Legislature, supra*. This court, in halting a legislative excursion into the area of legal services stated:

"Always there are they who want to change our government for one reason or another. If the legislature, by fiat, could create its own legal advisor, then logic would say it could create 50 or more others for itself, each of which, of course, would have to have secretaries and other personnel. * * * We believe

the framers of the constitution had no such intention in mind under our tri-partite system of government."

Even if it should be conceded that the legislature has some leeway in providing for the filling of inferior administrative or executive offices by some means other than the gubernatorial appointment, appointment may not be made by the legislature itself. To permit the legislature to appoint or designate certain of its members to appoint executive officers in their uncontrolled discretion, is a patent threat to representative government. To whom can the people look for recourse in the event of poorly advised appointment? The people as a whole do not elect the president of the senate or speaker of the house. This cannot be a government wherein "all political power is inherent in the people."

The defendants' citation in the lower court of numerous acts wherein the legislature ostensibly authorized appointment of state officers by persons other than the governor is without legal significance. For one thing, many of these acts provided for only nominations or recommendations to the governor and the governor made the final appointment. In other cases, appointment of an ex officio type are made and generally the acts involved only councils or boards with advisory authority only. In any event,

even if the legislature did encroach upon executive powers in the past it is not entitled to do so now. This was in fact recognized by the district court in its memorandum decision.

“It is contended that the fact that similar statutes have been enacted and become operative indicates a practical construction of the constitution which affords sanction for this legislation * * * The rule of practical construction is of no value when it is plain that the practice has been in open violation of the instrument which the court is called upon to construe.’ ”

POINT III

SECTION 5(1) OF SENATE BILL 10 PASSED BY THE 38TH LEGISLATURE OF THE STATE OF UTAH IN REQUIRING SENATE APPROVAL OF THE GOVERNOR'S APPOINTEES, BUT NOT THOSE OF THE PRESIDENT OF THE SENATE AND SPEAKER OF THE HOUSE IS DISCRIMINATORY AND VIOLATES ARTICLE I, SECTION 23, OF THE UTAH CONSTITUTION, AND THE “EQUAL PROTECTION” CLAUSE OF AMENDMENT XIV, OF THE CONSTITUTION OF THE UNITED STATES.

Not content with usurping executive functions the legislature, in drafting Section 5(1) of the Bill, went even further. It provided that the nine appointments to be made by the governor would be with

the consent of the senate, but required no consent by anyone as to the appointments to be made by the president of the senate and the speaker of the house. No complaint can be made concerning the requirement for senatorial consent to the governor's appointments, since such consent is required in the constitution for executive appointments generally. However, to allow the "legislative" appointments to be made by two individuals who are not answerable to the senate, or indeed to anyone else, is discriminatory and violates Article 1, Section 24, Utah Constitution, which provides that "All laws of a general nature shall have uniform operation."

Coupled with the requirements of selection with regard to geography, political affiliation, and senate consent, the legislative power of appointment could well deprive the governor of effective use of the power to appoint "his" nine members of the board. It could result in partisanship, favoritism, and political cronyism of the worst sort—some of the things the writers of the constitution sought to eliminate by providing for senatorial confirmation of executive appointments. This alone should result in the court striking from the act provisions allowing appointment of members of the board by the president of the senate and speaker of the house.

Article I, Section 24, has frequently been considered by this court and it has always held that discriminatory and arbitrary classifications cannot stand. There can be classification, and there can be differentiation, but there must be a reasonable basis for distinction. See e.g., *Roe v. Salt Lake City*, 20 Utah 2d 266, 437 P. 2d 195 (1968); *Justice v. Standard Gilsonite Company*, 12 Utah 2d 357, 366 P. 2d 974 (1961); *Gronlund v. Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948).

What reasonable basis can there be for exempting the president's and speaker's appointments from the requirement of senate consent. It couldn't be that they are more "representative of the people" than the governor. As pointed out above, the governor represents the people of the entire state, but a member of the senate or house does not. Neither is answerable to the people as a whole.

No reasonable distinction can be based upon the fact that the president of the senate and the speaker of the house are themselves members of the legislature. The speaker, of course, has nothing to do with the senate, and the president is just one member of that body. It cannot be presumed that their appointments would be more acceptable per se to the senate as a whole than would be the appointments

of the governor. Can a reasonable basis for the distinction be found in the fact that the speaker and the president are from the opposite political party than that of the governor? It is suggested that this question answers itself; besides, it may not always be so. There is no reasonable basis for the exemption, the act is discriminatory and arbitrary and this court should not allow it to stand.

A feature of the act making the exemption from senatorial confirmation more intolerable is that providing that no more than eight members shall at any one time be from one political party. Such a provision would not ordinarily be objectionable but inasmuch as the legislative appointments need no confirmation and the governor's do, there is nothing to prevent the president and the speaker from appointing "acceptable" members of the opposite party thus forcing the governor to make practically all his appointments from his opposite party or at least from one party. Since his appointments must, under the act, be made with the consent of the senate, the president and the speaker could effectively control the state board of higher education.

Apart from "uniform operation," it is impossible to read the provisions of Section 5(1), Senate Bill 10, without getting an uneasy feeling that fundamental principle has been ignored.

This feeling arises largely from recognition that the president of the senate and speaker of the house are not "state officers" in the accepted sense; that the constitution refers to "presiding officers" of the legislative branches; and that the "presiding officers" are not chosen by the legislative representatives of the people as a whole but by those identified with that political party with a majority of senators or representatives.

Voters at large are not being represented equally. The legislation in question (and other legislation like it, presently in vogue in the state) favors the views of one group of voters over another, and gives one political party an unequal voice in determining the composition and character of an important public board. Although the problem is somewhat different from that of determining the composition of the legislature itself, Senate Bill 10 does deny "equal protection" to all the voters of the state, and should be held unconstitutional on that ground.

In *Baker v. Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962), the Supreme Court of the United States said:

"* * * A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution * * *"

CONCLUSION

The provision of Section 5(1), Senate Bill 10, conferring upon the senate president and house speaker the power to appoint members of the state board of higher education, contravenes the state and federal constitutions and portends continuing excursions by the legislature into the executive and judicial domains.

In the first place, the legislation infringes upon powers expressly conferred upon the governor by Article VII, Section 10, Utah Constitution, to appoint those state and district officers (particularly those in the executive branch of the government) whose election or appointment is not otherwise provided for in the constitution.

In addition, the legislation violates a fundamental principle of constitutional government, announced in Article V, Section 1, of the Utah Constitution which provides that the legislative, executive, and judicial branches of the government shall forever remain separate and distinct, and that no one of them shall perform the functions of the other. It violates Article I, Section 23, Utah Constitution, in that it is discriminatory and makes distinctions without any reasonable basis. It is contrary to the "equal protection" clause of Amendment XIV, United States

Constitution, in that it grants to members of a single political party an arbitrarily determined great voice in the government of our institutions of higher learning. And, as suggested by the decision of the Massachusetts Supreme Judicial Court in the *Opinion of the Justices*, cited *supra*, even if the appointing power may constitutionally be exercised by the legislature it must be done by legislative action rather than by uncontrolled delegation to two of its members.

If the legislature is permitted to arrogate to itself the power to appoint members of the board of higher education, there is no reason to suppose it will not, in the future, extend its power into all branches and levels of the government, and make appointments of law clerks, court clerks, reporters, deputy state officers, and administrative assistants to the governor. By exercise of its appointing power it will be able to do away with the classical separation of powers and participate fully in all aspects of state government.

In *Hansen v. Legal Services Committee of the Utah State Legislature*, *supra*, this court halted a legislative sally into the area of legal services. The extent of litigation in this general area illustrates how true are the words of this court, "Always there

are they * * *” The framers too could foresee “they” and by Article I, Section 27, intuitively provided:

“Frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.”

Section 5(1) of Senate Bill 10 must be declared unconstitutional and invalid.

Respectfully submitted,

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Attorney for Plaintiffs

APPENDIX A

Article VI, Section 21, relating to removal of officers; Article VII, Section 1, relating to duties of officers; Article VII, Sections 13, 14, and 15, relating to the composition of the board of examiners, board of insane asylum commissioners, and board of reform school commissioners; Article VII, Sections 16, 17, 18, and 19, relating to the duties of the secretary of state, auditor and treasurer, attorney general and superintendent of public instruction; Article VIII, Section 1, relating to establishment of inferior courts; Article VIII, Section 9, relating to appeals from decisions of justices courts; Article VIII, Section 10, relating to duties of county attorneys and other attorneys provided by the legislature; Article VIII, Section 14, relating to duties of the supreme court clerk and county clerks; Article VIII, Section 20, relating to salaries of judges; Article IX, Section 2, relating to ratios for legislative apportionment; Article XI, Section 1, relating to subdivisions of the state; Article XVI, Section 2, providing for establishment, prescription of duties, and compensation of the board of labor, conciliation and arbitration; Article XIX, Section 2, relating to reformatory and penal institutions and those for the benefit of the insane, blind, deaf and dumb; and Article XXIV, Section 8, relating to seals of courts.