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## Energy in the Executive

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## ARTICLES

### ENERGY IN THE EXECUTIVE

by Richard B. Roeder\*

"Energy in the executive is a leading character in the definition of good government." Alexander Hamilton, *Federalist* #70

In November, 1970, Montana's electorate approved a referendum requiring the legislature to reorganize the state's administrative agencies into no more than twenty departments. The 1971 Legislative Assembly passed the necessary legislation, and reorganization is now being implemented. Since this involves reform of the executive branch only so far as statutory changes can alter it, Montana's constitutional convention will have the opportunity to examine the issue further and perhaps carry forward the task of reorganization when it meets early in 1972.

The executive provisions of Montana's 1889 constitution present to today's observer what appears to be an inherent contradiction. Article VII, section 5 invests the "supreme executive power of the state" in the office of governor. But other executive articles are a direct denial of this proposition because they provide for a fragmented, plural executive. The constitution creates or recognizes seventeen executive state agencies. In addition to the Governor and Lieutenant Governor there are five elected officials: Attorney General, Secretary of State, Superintendent of Public Instruction, Auditor, and Treasurer. The constitution establishes the office of State Examiner and a Department of Agriculture and a Department of Labor and Industry. It also sets up seven Boards and Commissions. Five of these are *ex officio* in make-up. Of the other two, the State Board of Education is comprised of the Governor, Superintendent of Public Instruction, Attorney General and eight members appointed by the Governor, while the three members of the State Board of Equalization are appointed by the Governor for overlapping six-year terms.

The 1889 convention adopted most of these executive provisions largely from the abortive constitution of 1884. This is one reason why consideration of the executive article elicited comparatively little debate in the 1889 convention. Another is the fact that delegates largely agreed, indeed took for granted, what constituted a proper executive branch of government. Most of the discussion of the report of the Committee on Executive Departments centered around the salaries of executive officers. When Timothy E. Collins of Cascade County tried to reduce the Governor's salary as proposed by the Committee on the grounds that the Governor would have little to do, he was defeated; but no one gainsaid him when he referred to the office as an "ornament" and a "sinecure." In fact several other delegates described the office in similar terms without contradiction by fellow delegates. Those who

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opposed Collins were not seeking to raise the salary, as one delegate put it, to a "princely" or "unrepublican" level; but they did want to avoid a situation where only wealthy men could afford to hold the office. And while those who opposed Collins might agree that the Governor would have little to do, they also thought he would incur considerable expense in entertaining legislators and prominent out-of-state visitors.

Quite clearly the delegates regarded the Governor's office as largely ceremonial, and they expected that executive matters would be handled in routine fashion by the boards and commissions established by the constitution. That the members of the convention could not entertain the idea of strengthening the Governor's powers is indicated by the discussion of a report of the Judiciary Committee dealing with pardons. The Committee's report calls for the creation of a Board of Pardons, composed of the Secretary of State, Auditor, and Attorney General, but before the report was adopted B. Platt Carpenter of Lewis and Clark County tried to amend the report by deleting the Board of Pardons and placing the power solely in the Governor's hands. William W. Dixon of Silver Bow replied that a "large majority" of the Judiciary Committee favored a Board of Pardons. Carpenter was the only delegate who spoke on behalf of his motion, and he was defeated. Very likely William A. Clark, president of the Convention, reflected the attitude of most delegates when he remarked that the "domain of the one-man power and principle is rapidly narrowing down as the civilization of the century advances." He said that the idea of vesting the power exclusively with the Governor "would strike us all with amazement." And he added, "I do not believe in putting so important a matter in the hands of one man."<sup>1</sup> Thus the delegates thought in terms of a divided executive power. Given the age and the history of the office of governor up to that time it would have been surprising if they had thought otherwise.

This suspicion of executive power was deeply ingrained in the minds of the delegates. In fact its roots go back to the Revolutionary period of our history. In the thirteen years of debate that preceded independence, the conflict between Great Britain and the colonies was manifested, in part, in clashes between governors, who represented royal or proprietary authority, and the colonial assemblies which contemporaries regarded as the bastions of liberty and the voice of popular power. As constitutions were adopted to set up state governments to replace the old royal or proprietary governments, it is not surprising that the constitutions reflected this clash between legislative and executive power by their including institutional arrangements designed to limit the executive in favor of power in the legislative branch. Con-

<sup>1</sup>HAMILTON, FROM WILDERNESS TO STATEHOOD, A HISTORY OF MONTANA 1805-1900, 546 (1957); *Proceedings and Debates of the Constitutional Convention Held in the City of Helena, July 4th, 1889, August 17th, 1889*, at 427, 430, 442, 443, 447 (1921).

sequently, the governors of most of the states had less power than royal and proprietary governors had had. In Pennsylvania, for example, the Constitution of 1776 replaced the governor with a plural executive, while in other states the governor's power was limited by election by the legislature (popular election was employed only in New York) and by depriving him of the veto power, surrounding him with an advisory council chosen by the legislature, restricting his power of appointment, and by limiting the length of his term of office and depriving him of eligibility for re-election. As set up in the early state constitutions, the office of governor was largely honorific and ceremonial. The point is illustrated by the story of a delegate to the North Carolina constitutional convention who in response to a query about how much power the governor would have was supposed to have replied, "Just enough to sign the receipt for his salary."<sup>2</sup>

In the first three decades of the nineteenth century the constitutions of new states and revisions of old constitutions altered the position of the governorship somewhat. Constitutional changes provided for popular election, restored the veto power, and relaxed prohibitions against re-election. Though these changes gained the governor a greater independence of the legislative branch, they did not raise the office to one of great power because they were more than counterbalanced by a growing reliance on the long ballot. During the Age of Jackson popular opinion regarded election of a long list of executive officials as the answer to the spoils system and as a way of making government responsive to the wishes of the people. The effect of the long ballot was to diffuse the governor's power. However, by mid-century it appeared that the long ballot had not completely curbed the power of political bosses. Consequently, constitution makers also relied on the idea of "taking administration out of politics" by setting up numerous independent boards and commissions. This attempt to insulate policy from politics further diminished the governorship by distributing executive power among independent agencies and other elective officials. These notions of what the executive should be were the ones in vogue when Montana achieved statehood and they account for the morphology of Montana's executive branch of government.

Administration by boards and commissions may have sufficed at a time when the functions of state government were simple and relatively inexpensive, when it was possible for the Board of Examiners to gather around a table and personally examine claims against the state. But

<sup>2</sup>LIPSON, *THE AMERICAN GOVERNOR FROM FIGUREHEAD TO LEADER*, 14 (1939). Additional information on the historical background of the office of governor and on changing ideas of public administration can be gleaned from Kallenbach, *THE AMERICAN CHIEF EXECUTIVE: THE PRESIDENCY AND THE GOVERNORSHIP* (1966); RICHARDS, *THE TRADITIONS OF GOVERNMENT IN THE STATES, THE FORTY-EIGHT STATES: THEIR TASKS AS POLICY MAKERS AND ADMINISTRATORS*, 40-64; KAUFMAN, *Emerging Conflicts in the Doctrines of Public Administration*, *AMERICAN POLITICAL SCIENCE REVIEW*, (Dec. 1956).

state government was not destined to remain so simple. In the 1890's and the first decades of the twentieth century the public began to make increasing demands on government, and programs expanded rapidly in number and size. In meeting this situation legislatures had the option of putting new programs clearly under the governor's authority or creating new agencies virtually independent of the governor. In most instances they chose the latter.

Montana was no exception to this national trend of expanding government and mushrooming agencies. In 1890 Montana's administrative machinery consisted of twenty offices, commissions, and boards. Each decade witnessed an increase with the most rapid rate of increase occurring in the 1890's and from 1910 to 1920. By 1920 the original twenty offices, commissions, and boards had increased to 104.<sup>3</sup>

This rapid growth did not go unnoticed by people at the time. The response to this bewildering expansion of government was a reorganization movement which, with fluctuating degrees of interest and success, has continued down to the present. The reorganization movement began at the federal level in 1910 when President William Howard Taft appointed a Commission on Economy and Efficiency. The following year Wisconsin set up a similar body and other states soon followed.

Montana followed suit in 1919 when the Legislative Assembly created a State Efficiency and Trade Commission. In its report to Governor S. V. Stewart the Commission made several recommendations for changes, but it observed that constitutional obstacles in the form of boards manned ex officio by elective officers were "insuperable in any attempt to carry out a . . . scheme of reorganization."<sup>4</sup> The Efficiency and Trade Commission report was the first of a series of governmental studies. Partly in response to the expansion of government which resulted from New Deal programs, interest in reorganization revived in the 1940's and fifties.

During its 1941 session the legislature set up a Select Committee on State Governmental Organization. In addition to make specific recommendations which could be carried out largely by executive order, the Select Committee noted that "Constitutional limitations make any immediate complete re-organization impossible."<sup>5</sup> Since the Committee could barely begin to examine the problems of state government organization in the short time available to it, the legislature responded by creating a Governor's Committee on Reorganization and Economy to report to the legislature in 1943. To assist it the Committee hired Griffenhagen & Associates which produced a stack of fifty-nine reports

<sup>3</sup>SMITH, AN OUTLINE OF THE DEVELOPMENT AND GROWTH OF STATE ADMINISTRATION IN MONTANA, 1890-1953, table 1 (1953).

<sup>4</sup>MONTANA STATE EFFICIENCY AND TRADE COMMISSION, Report Rendered on November 1, 1919 to Governor S. V. Stewart, 52 (1919).

<sup>5</sup>HOUSE JOURNAL OF THE TWENTY-SEVENTH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 399 (1941).

of some 1400 pages. Their 967 recommendations ranged from suggestions on office procedure to constitutional amendments.

After World War II many states established "Little Hoover Commissions" to tackle problems of state government. Again Montana was no exception. In 1951 the legislature established the Commission on Reorganization of State Government. Although this group refused to include proposals for constitutional amendments among its recommendations, it was critical of a system which diluted the Governor's authority. "It is an inescapable fact," the Commission reported, "that the people of Montana hold the Governor responsible for state administration." Therefore, the Commission took the position "that authority must be commensurate with responsibility. Responsibility and performance are both weakened when responsibility does not carry with it sufficient power to accomplish the job." In this respect the Commission was particularly critical of the operation of the Board of Examiners. It observed that the Attorney General and the Secretary of State "have little responsibility in the public mind for administration of state affairs, but nonetheless possess the management authority."<sup>6</sup>

These efforts were followed by two organization studies by the Legislative Council. In its 1960 report the Council was critical of Montana's long ballot and of government by boards and commissions. In the ensuing biennium the Council continued its study of the organization of the executive branch. Its 1962 report included specific recommendations on accounting, purchasing, and budgeting as well as a long-range plan for future work on the executive.

While the Legislative Council's efforts resulted in the adoption of some important specific changes, it has been only in more recent years that a more or less complete reorganization was cast. In 1969 the legislature set up a nine member Commission on Reorganization of the Executive Branch of State Government. In its extraordinary session the legislature also submitted a constitutional amendment to the voters which proposed that all executive functions be allocated within not more than twenty departments by July 1, 1973. The electorate adopted the amendment, and the Commission included in its report a thorough plan of reorganization. The 1971 legislature passed the necessary legislation, and the reorganization contemplated by the constitutional amendment and proposed by the Commission is being implemented. Impressive as these achievements have been, they are less than complete because they do not cover the constitutional problems studies have been calling attention to since 1919.

In the nation as a whole the 1960's were marked by a growing interest in reform of state governments by constitutional revision. There

<sup>6</sup>THE COMMISSION ON REORGANIZATION OF STATE GOVERNMENT OF THE STATE OF MONTANA, Report to the Thirty-third Legislative Assembly, 2 (Jan. 1953).  
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are varied reasons for this widening interest in constitutional change. In some states the U.S. Supreme Court's decisions on reapportionment provided the impetus. In states with metropolitan centers, the demands of the urbanized and underprivileged have been a factor. Very likely the long-term efforts of such groups as the Advisory Commission on Intergovernmental Relations, the Council of State Governments, National Municipal League, and the Citizens Conference on State Legislatures have begun to elicit some response.<sup>7</sup> Not least important is a growing awareness of the fact that state governments have not been withering away as federal government expands and that effective state governments are essential to the federal system.

It was not too many years ago that it was common to hear comments, made with willing acceptance by some and with reluctant resignation by others, about how state governments were rapidly becoming obsolete appendages in our federal system. While it is true that the federal government was drawn into new areas by the vacuum which resulted from the inability or unwillingness of states to act, the fact of the matter is that, by whatever measure employed, there has been a rapidly growing demand for state and local government services.<sup>8</sup> For example, state and local government expenditures have shown sharp increases since World War II. In 1969 state and local governments spent "almost three times as much as total federal non-defense expenditures." As a percentage of the Gross National Product local and federal government expenditures are revealing. Federal non-defense spending declined from 3.8% of the GNP in 1940 to 2.3% in 1966. During the same period state and local spending rose from 8.0% to 10.3% of the GNP. This rising cost is also reflected in employment figures. Since 1953 "employment in state and local governments has increased at a faster rate than employment in private industry or in the federal government."<sup>9</sup>

There are reasons to believe that this trend of expanding state government will continue in the 1970's. Comments by public figures and discussion in popular periodicals indicate a heightened concern for expanding the role of state government in the federal system. President Johnson used the phrase "creative federalism," and more recently Presi-

<sup>7</sup>THE BOOK OF THE STATES 1968-1969, 3 (1968).

<sup>8</sup>*Modernizing State Government*, STATE GOVERNMENT ADMINISTRATION, II, 6 (August, 1967). V. O. Key, Jr. has commented upon the connection between obsolete state political and constitutional institutions and the growth of federal programs as follows: "Institutional gadgets that wear down, discourage, or defeat local majorities can only drive them to the alternative route to action through federal power . . . When the dominant mood of an era encounters institutional blockages at the state level, the flow of effective political power is apt to result in accretions to federal functions . . . Those persons concerned in good faith about federal centralization might well give their attention to the effectiveness of state political systems as instruments of popular government." V. O. KEY, JR., AMERICAN POLITICS: AN INTRODUCTION, 81 (1956).

<sup>9</sup>PECHMAN, FEDERAL TAX POLICY, 2, 211 (1971); MODERNIZING STATE GOVERNMENT, 13 (1967).

dent Nixon used the expression "New Federalism" to refer to this new reliance on the states. As defined by Daniel P. Moynihan, President Nixon's Councilor on Urban Affairs, the "New Federalism" means assigning "governmental responsibilities to that level of government most suited to carry them out efficiently and effectively." In an address to the 61st Annual Meeting of the National Governors' Conference on September 1, 1969, President Nixon himself explained another aspect of the "New Federalism." In addition to using state governments to assist in administering federal programs, as Moynihan indicated, President Nixon also wants to involve them in setting up programs and determining allocation of society's resources in a partnership of policy making.<sup>10</sup>

Governors themselves foresee a greatly expanded role for the states in the 1970's. Governors polled by the American Society for Public Administration envisaged a vital co-operative federalism in which state governors will be, as one of them put it, "the key linkage between the national government and the states." In the next decade what another observer has called the "leadership potential of the American Governor" may well prove to be an important key to forceful state action.<sup>11</sup> It is essential, therefore, that the office be freed from impediments which will prevent a realization of that potential. Fortunately, the sixty years of reorganization studies have yielded guidelines for evaluating the formal adequacy of the office.

The following are some of the principles of administrative organization that have emerged: (1) unity of the executive under the governor with the elimination of "most" elective officers, (2) grouping related functions into a few major departments with department heads appointed by the Governor and responsible to him, (3) use of a merit system to protect career employees from political exactions, (4) use of central staff service and controls for such things as purchasing and record keeping, (5) use of the executive budget and legislative post audit, and (6) elimination of boards and commissions for administrative work.<sup>12</sup>

<sup>10</sup>Ways, *Creative Federalism and the Great Society*, FORTUNE, 121-123, 223, 224-226, 228-229, (Jan. 1966); Elazar, *The Resurgence of Federalism*, 43 STATE GOVERNMENT, 166, 173 (Summer 1966); Colman, *Rhetoric or Reality?*, 59 NATIONAL CIVIC REVIEW, 358 (July, 1970); Moynihan, *The Need to Move Programs to Policy in the Federal System*, 43 STATE GOVERNMENT, 226-228 (Autumn, 1970); Nixon, *A New Strategy for the 1970's at Home and Overseas*, 42 STATE GOVERNMENT, 206 (Autumn, 1969).

<sup>11</sup>Ransome, Jr., *A Symposium: The American Governor in the 1970's*, 30 PUBLIC ADMINISTRATION REVIEW, 40 (Jan.-Feb., 1970); Olsen, *The American Governor: Executive Management for System Change*, 44 STATE GOVERNMENT, 26 (Winter, 1971).

<sup>12</sup>These principles are summarized in MONTANA LEGISLATIVE COUNCIL, EXECUTIVE REORGANIZATION: REPORT NUMBER 7, 9 (1962). They are also presented in WILLBERN, ADMINISTRATION IN STATE GOVERNMENTS, THE FORTY-EIGHT STATES: THEIR TASKS AS POLICY MAKERS AND ADMINISTRATORS, 114-115. While these principles are generally considered valid in the sense that their implementation will improve the operations of state government, political scientists recognize a need for empirical data about the operation of administrative organizations. For a discussion of this need, see Simmons, *American State Executive Studies: A Suggested New Departure*, THE WESTERN POLITICAL QUARTERLY, 777-783 (December, 1964).



With the reforms instituted in the last decade or so and with the reorganization program now being implemented, Montana's executive branch embodies most of these principles. In fact, the office of governor in Montana now compares favorably with many other states. Joseph A. Schlesinger has attempted to combine various factors for the purpose of arriving at a general index of the formal powers of governors which is useful for purposes of comparison. Except for his appointive power, where he has a low rank, Montana's governor as revealed by Schlesinger's index ranks among the top thirteen states. Some of the states whose governors have formal powers that exceed the Montana governor are ones which have had recent constitutional revisions or extensive administrative reforms.<sup>13</sup>

A four-year term and the absence of any restrictions on succeeding himself are sources of strength for the governor's office, and most students of state government would regard these as positive aspects of Montana's Constitution. However, there are several aspects of the governor's election that could be improved. One of these is the time of assuming office. The governor now begins his term on the first Monday in January following his election. Permitting the governor to take office a month earlier would shorten the lameduck period of his predecessor and give him a month to begin familiarizing himself with his office before the legislature convenes in January. Another aspect which could bear re-examination is the election calendar. Montana now holds elections at the same time as national elections. Although authorities are not in complete agreement, holding state elections in odd numbered years would enable the electorate to focus on state matters without being distracted by national issues. Still another matter which cries for attention is joint election of the governor and lieutenant governor. As it is now, they can be of different parties. Joint election would prevent this, would facilitate matters when the governor has to be out of state and make for a smoother transition in the event the lieutenant governor had to succeed the governor. Finally, there is a need to clarify the constitution on the problems of incapacity of the governor, vacancy of the office, and orderly succession. Ambiguities about succession and the governor's inability to perform the duties of his office should be removed. Arrangements similar to those in the 25th amendment to the federal Constitution, adopted in 1967, would suffice.

There are also some aspects of the governor's role in the legislative process that might bear study. Montana's governor has a strong veto power. It takes a two-thirds vote in both houses to override a veto, and the governor has the item veto on appropriation bills. He can

<sup>13</sup>Schlesinger, *The Politics of the Executive*, POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS, 220-229 (1965); Ransone, *Scholarly Revolt in Dullsville: New Approaches to the Study of State Government*, PUBLIC ADMINISTRATION REVIEW, 350-352 (December, 1966); Beyle, *The Governor's Formal Powers: A View from the Governor's Chair*, PUBLIC ADMINISTRATION REVIEW, 540-545 (Nov.-Dec., 1968).

also pocket veto bills after the legislature has adjourned. There are those who advocate removing the pocket veto. Also, the governor might be provided with an alternative either to signing a bill or using a veto power which is infrequently overruled. This is the executive amendment or, as it is called in New Jersey, the conditional veto whereby the governor may return a bill with suggested changes.<sup>14</sup> The length of time the governor has to examine bills should be reassessed. He now has five days while the legislature is in session and fifteen days after adjournment. The length of time varies among the states from three to thirty days. The present governor and recent occupants of the office would best be able to advise on this matter.

The administrative power of the governor's office could be strengthened by granting him executive reorganization powers subject to legislative review. Ever since President Herbert Hoover altered the administrative structure of the national government through executive orders there has been interest in extending this power to state governors. Only Alaska has embodied this power in its constitution, but several other states grant the power in statutes similar to the Federal Reorganization Act of 1949. Moreover, some states, such as New Jersey, Hawaii, and Alaska, supplement executive reorganization powers with a constitutional ceiling on the number of executive departments similar to the constitutional amendment Montana's electorate adopted in 1970.

However, the main obstacles to the governor's functioning as the state's chief administrator derive from the solution to the problem of power which was dictated by the historical context of the period in which Montana's Constitution was written. To avoid what William A. Clark called the "one-man power" principle, the framers relied on government by boards and commissions. Every study of Montana's government since the report of the State Efficiency and Trade Commission in 1919 has been critical of this practice. As the Legislative Council pointed out in 1960, boards and commissions may be useful where quasi-judicial or citizen advisory functions are involved; but "where boards have partial or full powers of internal administration inefficiency is sure to result. There are inherent defects in multi-member administrative control which prevent quickness and certainty of action, which spread responsibility which ought to be definite, and which in general hamper administrative effectiveness." Particularly irksome is the use of overlapping terms which exceed the governor's term. As the Commission on Reorganization of State Government observed, this will force "one Governor to live under the shadow of his predecessor and in turn, cast his shadow over his successor."<sup>15</sup>

<sup>14</sup>For a discussion of the veto see Rich, *The Governor as Policy Leader*, SALIENT ISSUES OF CONSTITUTIONAL REVISION, 91-94 (1961).

<sup>15</sup>MONTANA LEGISLATIVE COUNCIL, THE ORGANIZATION AND ADMINISTRATION OF STATE GOVERNMENT: REPORT NUMBER 3, at 11; COMMISSION OF REORGANIZATION OF STATE GOVERNMENT, REPORT TO THE THIRTY-THIRD LEGISLATIVE ASSEMBLY, at 5.

Closely related to the reliance on boards and commissions is the election of independent executive officers. Section 82-1301 Revised Codes of Montana requires the Governor, among other things, "to supervise the official conduct of all executive and ministerial officers." Where the officers are elected it is doubtful that the governor can satisfactorily carry out this command. In so far as these officers perform only ministerial duties a plural executive does not greatly weaken the governor's position; but when they participate in policy formulation or perform functions crucial to the governor's program their presence can be disruptive, especially if there are party differences or personality clashes.<sup>16</sup>

The fragmented, plural executive diffuses power but not responsibility. The testimony is almost universal that the people hold the governor responsible for the course of action. This is only natural since among elected officials he has the greatest degree of visibility. But holding him responsible while other elected officials, over whom the governor exercises little or no control, exercise power in a political penumbra which shades them from public view is hardly fair to the man occupying the governor's office.

Clearly the trend in recent years has been away from the plural executive, and some states have taken steps to shorten the ballot. In New Jersey the governor is the only popularly elected member of the executive branch. In Hawaii the governor and lieutenant governor are elected, while in Alaska the governor and secretary of state are on the ballot. Organizations such as the Council of State Governments and the National Municipal League have given the idea of a unified executive their endorsement. The latter organization in the most recent version of its *Model State Constitution* has an executive article which provides for the election of only the governor and gives him the power to appoint and remove the heads of all administrative departments. In 1967 the Committee for Economic Development, whose membership is drawn from some of the nation's most prominent business leaders, published a report which called for the election of the governor and lieutenant governor. A year later, relying heavily on the recently adopted constitutions of Alaska, Hawaii, Michigan, and New Jersey the Study Committee on Constitutional Revision and General Government Organization reported to the National Governors' Conference a model state executive article which limited election to the governor and lieutenant governor.<sup>17</sup>

While such groups have been trying to give the idea of a unified executive a wider currency, there is surely nothing new in it. It is,

<sup>16</sup>RANSOME, *THE OFFICE OF GOVERNOR IN THE UNITED STATES*, 223-224 (1956).

<sup>17</sup>MODEL STATE CONSTITUTION, 9 (1968); MODERNIZING STATE GOVERNMENT, 20-21 (1967); REPORT TO NATIONAL GOVERNOR'S CONFERENCE BY THE STUDY COMMITTEE ON CONSTITUTIONAL REVISION AND GENERAL GOVERNMENT REORGANIZATION, 6 (1968).

of course, reflected in the national Constitution. Our first effort at constitution making for the nation, the Articles of Confederation, did not provide for a separate executive. During the 1787 convention, however, the delegates early decided not only on a separate branch but also on a single officer. While a few of the delegates "stood agast" at the presidential office that emerged, most of them favored an independent and powerful office.<sup>18</sup>

Although not as sharply criticized as such things as the powers of Congress, the presidential office was called into question during the ratification struggle which followed the work of the Philadelphia convention. It was to the situation in New York, where ratification appeared hopeless, that James Madison, Alexander Hamilton, and John Jay addressed their *Federalist Papers*. In *Federalist* numbers 70 through 77 Hamilton defended the design of the president's office with observations which sound strikingly modern. Unity, he wrote, "is conducive to energy" while a plural executive would "conceal faults, and destroy responsibility." To Hamilton energy was the essential essence of the executive: "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."<sup>19</sup>

Despite the antiquity of the idea of a unified executive and its wide endorsement today, any attempt to introduce energy into Montana's executive is certain to be greeted with strong resistance. Where it has been tried the opposition was led by elected officials, professional administrators, and some legislators. The arguments against a unified executive are now pretty much standardized: (1) it is essential that other executive officers be elected in order to check the governor and to keep the executive branch "close to the people;" (2) use of independent commissions and their employing professionally trained administrators are essential for keeping departments "out of politics" and providing continuity of policy; and (3) the governor will become too powerful for the legislature to control.

The first of these contentions is based on the assumption that "good" elected officials will check the actions of a "bad" governor. But this proposition works both ways. As Coleman B. Ransone, Jr. has written, "A careful selection of examples can be used to show that there have been occasions on which it appears that a bad governor was checked by good elected officials, or, on the other hand, where a bad

<sup>18</sup>FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES*, 77, 79, 161 (1913); ROSSITER, *1787 THE GRAND CONVENTION*, 222 (1966); BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787* (1966).

<sup>19</sup>COOKE, *THE FEDERALIST*, 471, 472 (1961).

official successfully opposed a good governor and destroyed the effectiveness of a part of his program."<sup>20</sup> As for keeping the executive close to the people, Terry Sanford, former governor of North Carolina, argues that "in practice it simply is not so; the people barely know the offices exist, and cannot possibly keep up with their activities and performances." Sanford clinches his opposition to a fragmented executive with a simple analogy: "Imagine the bewilderment if the President's cabinet were elected by the people."<sup>21</sup>

That the use of boards and commissions removes any area of state government from politics is a myth. Whether recognized or not, all agencies pursue some form of policy, and policy decisions are political. As Ransome has aptly put it, "It is not a question of policy or no policy but a question of whose policy."<sup>22</sup> Any danger of a revival of the spoils system can be averted by a merit system to protect public employees below the rank of department heads, and it will be up to the legislature to scrutinize the system it sets up in order to avoid the inertia which naturally accompanies tenured bureaucracies.

Finally, rather than weakening legislative power, a strengthened executive can make legislative oversight more effective. The fear that an increase in executive power will diminish legislative power is based on the assumption that power is finite, and that when more is added to one branch it must be taken from the other. But this is not the case. As the Legislative Council noted, adding power to one can actually increase the effectiveness of the other, and Sanford similarly observed that the "unhampered governor, far from restraining the legislatures, will open to them new channels of legislative strength and effectiveness."<sup>23</sup>

Control over the governor must come from without not from within the executive branch. The primary source of control is popular election. The effectiveness of this, in turn, will be enhanced if a strong party system functions to criticize and to offer alternatives. The other source of control must be a strengthened legislature. In fact, reform of the executive cannot be undertaken apart from reforms which will make the legislature more effective.

The nineteenth century solution to the ever-present problem of power was to fragment it so completely as effectively to deny the governor power. This solution threw out the baby with the bath water. What prevents the governor from doing great wrong must also limit his power to do great good. If the "New Federalism" is going to work, we need state governments that can act effectively. But we must remember that constitutional changes are not panaceas. They can help

<sup>20</sup>Ransome, *supra* note 16 at 372.

<sup>21</sup>SANFORD, *STORM OVER THE STATES*, 29 (1967).

<sup>22</sup>Ransome, *supra* note 16 at 381.

<sup>23</sup>Sanford, *supra* note 21 at 184.

us wrestle with future problems by removing impediments to action, but they cannot be a substitute for leadership. As Leslie Lipson has written,

Reform of the executive article cannot assure that the governor will exercise creative leadership, but it will free him to be the leader he can be.

The ultimate solution lies beyond the scope of mere institutional reform. Provisions of law can ordain hierarchies and confer authority. But true leadership, which inspires the willing confidence of men, cannot be crystallized into constitutional grants of power. Each governor must win it anew.<sup>4</sup>

Finally, a simpler executive article can be part of making the constitution what it ought to be, namely fundamental law and not a code. The distinction was put very ably by Justice Benjamin N. Cardozo:

Statutes are designed to meet the fugitive exigencies of the hour. Amendment is easy as the exigencies change. . . . A constitution states . . . not rules for the passing hour, but principles for an expanding future. In so far as it deviates from that standard, and descends into details and particulars, it loses its flexibility, the scope of interpretation contracts, the meaning hardens. While it is true to its function, it maintains its power of adaptation, its suppleness, its play.<sup>5</sup>

<sup>4</sup>Lipson, *The American Governor*, *supra* note 2 at 268.

<sup>5</sup>CORDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 83-84 (1921).  
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