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Judicial construction of the Montana governorship by the Montana Supreme Court

John A. Layne

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JUDICIAL CONSTRUCTION OF THE MONTANA GOVERNORSHIP
BY THE MONTANA SUPREME COURT

By

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B.S., University of Montana, 1963

Presented in partial fulfillment of the requirements
for the degree of

Master of Arts

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Chairman, Board of Examiners

Dean, Graduate School

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CHAPTER I

INTRODUCTION

This study analyzes what the Montana supreme court has said about the office and powers of the Montana governor. It examines what the judges have said the governor can or cannot do, and seeks to determine whether the court through its decisions has strengthened or weakened the office and powers of the governor. The focus of the study is on the mode of interpretation used by the court to resolve questions concerning the governor's office and powers when it lacks clear and definite constitutional or statutory direction. Since 1920, there has been increasing recognition of the need to have a strong executive in state government. The hypothesis of this study is that the Montana supreme court, when presented with a situation wherein the constitution or statute lacks prima facie clarity concerning the powers of the governor, should exercise a mode of judicial interpretation consistent with strengthening the office and powers of the governor.

The study is justifiable for two reasons. It attempts to prove or disprove the hypothesis. But the more important reason is that in the next decade the fate of the
50 states as elements of the American federal system will depend upon how the 50 governors exercise their official and unofficial powers. We must understand every aspect of the governors' office and powers, including what state supreme courts are deciding with regard to them.

The Office and Powers of the Montana Governor

It is necessary at the outset to discuss two basic questions concerning executive behavior. First, what is the office and what are powers of the Montana governor? Second, what identifies a strong governorship?

The office of governor is the highest elective executive position in Montana state government, with tenure for four years and various executive duties and responsibilities. In Montana, the office of governor exists so that the "supreme executive power of the state" can be vested in one executive officer whose responsibility is to "see that the laws are faithfully executed." Consequently, more executive power rests in the office of governor than in any other executive office.

The powers of the Montana governor are both constitutional and statutory; for the purposes of this study, the constitutional powers are more important. Some of the more

\[\text{Mont. Const., Art. VII, sec. 5.}\]
important powers which this study reviews and considers include: the appointment and removal powers, the approval and veto powers, the pardon power, the militia power, the proclamation power (covering both elections and extraordinary sessions), the right to succession, the power to call in a district judge, the power to approve state contracts and the discretionary extradition power. This study does not undertake a comprehensive examination of all the governor's powers; it is an analysis only of those powers which have occasioned a judicial test before the Montana high court.

The governor's office combined with his powers creates the executive function, about which two schools of thought may be identified: the literalist school, and the stewardship school. The literalist school holds that the executive "can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise"; whereas, the stewardship school holds that the executive could "do anything that the needs of the nation demanded unless such action was forbidden by the constitution or by the laws." Between these two

These two schools of thought are usually discussed with reference to the presidential executive function.

schools of thought, and with reference to their application to the executive function in Montana government, the literalist view is preferred in this study, since it is more consistent with the spirit of the executive article of the Montana constitution. Recognizing that in constitutional theory the national constitution grants presidential authority while a state constitution restricts gubernatorial authority, Koenig's distinction between a literalist and stewardship mode of interpretation is suggestive that something like the literalist or strict mode of interpretation seems consistent with the spirit of the Montana executive article.

The Concept of a Strong Governor

A strong governor is a state chief executive who brings masterful leadership to the exercise of substantial formal powers, responsibilities and organizational devices, such as (1) a single or near single (non-plural) executive, (2) broad appointment and removal powers, (3) four-year tenure with re-election permitted, (4) an executive budget, (5) a veto power, (6) discretionary administrative decision-making power and (7) an emergency or crisis power. These are not the only powers, responsibilities and devices which contribute to a strong governorship; they illustrate the concept of a strong governor as used in this study.
Many other factors may contribute to the final product of a strong governorship, such as self-confidence and effective personality traits. Certain important qualities, powers and devices will not always create and constitute a strong governorship. A good example to illustrate this point is a study which chose four criteria as indices and concluded that Montana had a strong governorship when, in fact, the Montana governorship is far from strong.

Once a strong governorship is created, what are some of the examples of leadership in the execution of the laws and the exercise of its powers? Among other things, the governor will desire and seek a strong legislature and judiciary. He will exercise his policy formation power in the legislature. He will recognize administrative problems, and will be able to marshal the executive branch to meet and resolve them. He will resort to quick but just action in time of emergencies to keep order. He will inspire his fellow citizens to participate in government, and he will be imaginative and alert. Again, these are


^See Coleman B. Ransone, Jr., The Office of Governor in the United States (University, Alabama: University of Alabama Press, 1956), chap. 7.
only a few examples of uses of leadership inherent in a strong governor.

To place this study in historical perspective, it must be noted that the concept of a strong governorship is relatively new, and that the initial conception of the Montana governorship was that of a weak executive. Nationally, the movement for achieving and implementing a strong governorship began around 1920, and was given impetus by the recommendations of the various "little Hoover Commissions." In the beginning of state government, the governor was nothing more than a figurehead. Even Montana's constitutional draftsmen, in 1889, seem to have regarded the governorship as "almost a sinecure" and "more of an ornament than anything else." But much has happened in state government since then to modify earlier attitudes, and state courts, as instruments of state government, cannot have escaped the impact of these developments on their modes of interpretation.

Today the governor is the most powerful member of the executive branch, which is considered an equal to the state legislature or judiciary. For the achievement and


utilization of a strong governorship the Montana supreme court should exercise a mode of interpretation consistent with this concept.
CHAPTER II

JUDICIAL CONTROL OF THE EXECUTIVE
FUNCTION BY MANDAMUS

Introduction

Mandamus may be defined as a command from a court of law directed to some legal entity compelling the performance of a duty required by law. In Montana the office of governor is political and vests discretionary power in the chief executive, and since the office requires the exercise of discretion, the courts have held that mandamus cannot be issued against the governor to compel him to perform the executive function so long as he observes the laws and acts within the limits of his power and authority. However, there is one significant exception to this rule, which provides that the courts do have a judicial supervisory power over the state executive to compel him to perform a purely ministerial act which comprehends a function of simple obedience or service.

A discretionary act is an act which the governor may or may not perform since he has the authority to make choices and decisions regarding the act; a ministerial act is an act which the governor must perform, since by
nature this kind of act neither involves the use of discretion nor the opportunity to make choices. An example of a discretionary act would be the governor's exercise of his authority to determine whether or not to extradite a fugitive from justice; an example of a ministerial act would be the governor's obligation to issue a commission upon the happening of an event. Thus, where the nature of the act to be compelled is discretionary, the courts have no judicial control by mandamus over the governor's performance of the executive function; however, where the nature of the act is ministerial, the courts do have authority to compel the governor to perform the act.¹

Two of the three Montana decisions about the mandamus power have cited a fundamental federal constitutional case--Marbury v. Madison.² Citation of this case by the Montana court raises the question how persuasive a federal decision should be in a state supreme court. A federal decision probably should not be very persuasive on the issue of the use of mandamus to compel gubernatorial performance of an act since the nature and source of presidential power from the federal constitution is fundamentally different

¹For an additional discussion of this point see notes in 33 Am. Dec. 361 (1839) and 31 Am. St. Rep. 294 (1892), plus 34 Am. Jur., Mandamus secs. 134, 135.

²1 Cranch 137 (1803).
from the nature and source of gubernatorial power from the state constitution. The Montana supreme court failed to acknowledge this fundamental difference between the two executive functions as it cited the Marbury case for support of its own decisions.

Montana Decisions

On three different occasions the Montana supreme court has discussed whether the Montana governor in the performance of the executive function can be controlled by the judiciary through the use of the writ of mandamus. In all three cases the issue specifically before the court was whether mandamus could be used to compel the governor to act, and in two of the three cases the Montana court in deciding the issue cited Marbury v. Madison.3

31 Cranch 137 (1803). In this famous decision, Chief Justice Marshall defined the distinction between discretionary and ministerial acts: "It is said that those powers which are entrusted to the executive discretion, are not subject to the control of judicial authority. They are exclusively political. They respect general and not individual rights, and, being entrusted to the executive, his decision is conclusive. The acts of the secretary of state, so far as he is the agent of the executive in the exercise of his discretionary powers, are not examinable by the courts. But, when the legislature proceeds to impose on that officer other duties; when the rights of individuals are dependent on the performance of those acts, he is to that extent the officer of the law, is amenable to the law for his conduct, and can not at his discretion sport away the vested rights of others. It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined."
Cases from the Territorial Period

The Chumasero Case

Chumasero v. Potts\(^4\) held that the governor could be compelled by mandamus to perform a ministerial act—to sit as a member of a canvassing board to canvass the vote of the people when it was his statutory obligation to do so.

Chumasero, an attorney residing in Helena and an elector of the territory, sought a writ of mandamus to issue against Governor Potts and other state officers to compel them to canvass all the votes of the August 1874 election upon the question of removing the seat of the territorial government from Virginia City to Helena. The governor responded (1) that no one had demanded or requested him to conduct the canvass and that there was no default or refusal by him to conduct the canvass; therefore (2) the court had no authority to control the action of the executive by mandamus.

With reference to the governor's first argument, Chief Justice Wade in his majority opinion made a distinction "between duties of a public nature and those of a mere private character," and ruled that in those instances involving a public duty "there is no necessity for a demand and refusal."\(^5\) "Where the duty is required to be performed

\(^4\) 42 Mont. 242 (1875).
\(^5\) 52 Mont. 255.
by the law and is of a public nature, the law is a sufficient demand, and an omission to perform is a refusal." 6

Concerning the governor's second argument, Chief Justice Wade held "that the executive may be compelled to perform an act clearly ministerial in its nature, and neither involves any discretion nor leaves any alternative." 7 Referring to Chief Justice Marshall's opinion in Marbury v. Madison, 8 Chief Justice Wade stated

. . . the propriety of the writ is not to be determined by the fact that it is demanded against the executive, but by the nature of the act required of the executive to perform. And looking into the nature of the act, we say it is purely ministerial, and is absolutely defined by the law, and hence that the action

6 2 Mont. 255. The statute which conferred this duty on the governor was a territorial enactment titled "An Act to change the seat of government of the Territory of Montana" which provided that the canvass of votes on the question of changing the seat of government should be conducted in the same manner as provided for canvassing the votes for the delegate to Congress. The legislation providing for canvassing the congressional delegate's votes was "An Act Relative to Elections," section 29 of the Laws of the Territory of Montana (1864-5), which provided in part: . . . and it shall be the duty of the secretary of the Territory, with the marshall of the Territory or his deputy, in the presence of the governor, to proceed within thirty days after the election . . . to canvass the votes. . . .

7 2 Mont. 256.

8 1 Cranch 137 (1803). At one point in his opinion, Chief Justice Wade made an analogy between the fact of this case and the facts of the Marbury case, and stated that "the acts of the commissioners in canvassing the vote were purely of a ministerial character, like that of adding a column of figures or of the issuing of a commission to an officer duly elected to an office." 2 Mont. 256.
of the executive in this regard may be controlled by mandamus.\textsuperscript{9}

Justice Servis, dissenting, thought that a demand and default were necessary, and argued that before a writ of mandamus could be issued against the governor, there must be a demand by the plaintiff and a default by the governor. He maintained that since neither demand nor default was alleged in the pleadings nor proven, the governor could not be compelled to procure and canvass the abstract of the votes.

The Tanner Case

Territory ex rel. Tanner v. Potts\textsuperscript{10} stated, as dictum, that mandamus was the proper remedy to compel the governor to audit and allow a claim for expenses and for compensation by a person acting as an appointee of the governor.

Tanner had been appointed by Governor Potts as a "messenger" to arrest and return a fugitive from justice. He was not successful in his mission and, three years later, sought by mandamus to compel the governor to honor his claim for expenses incurred while acting as messenger.

Justice Knowles held that Tanner had waited too long before bringing his action in mandamus and, therefore,

\textsuperscript{9} 92 Mont. 256.

\textsuperscript{10} 103 Mont. 364 (1879).
could not compel the governor to audit and allow the claim of expenses. The court, however, stated as dictum that the governor in such a case "acts as an auditing officer and not in an executive capacity" and, therefore, "an application for a writ of mandate to compel him to proceed and audit a claim for such services and determine to his satisfaction how much would be just and reasonable, if made in due time, should be entertained." But the court could not "dictate to the governor what would be a just and reasonable compensation for such services," since "the determination of this rests in his discretion."\(^{11}\)

The State Publishing Company Case

State ex rel. State Publishing Co. v. Smith\(^ {12}\) held that the governor's duty to approve a contract let by the board of examiners, on which he sat ex officio, was not ministerial but involved discretion.

The state board of examiners, composed of the governor and two other elected state executive officers, had awarded a printing contract to the State Publishing Company subject to approval by the governor and the treasurer; however, Governor Smith and the treasurer refused to approve

\(^{11}\) Mont. 369.

\(^{12}\) 23 Mont. 44, 57 P. 449 (1899).
the contract. The State Publishing Company maintained (1) that the governor's refusal to approve the contract was arbitrary and without reason, and (2) that the governor's duty to approve the contract was purely a ministerial act which could be enforced by a writ of mandamus.

Chief Justice Brantly, after reviewing the Chumasero and Tanner cases, held that "the state executive, when acting in a ministerial capacity only, and in matters not involving executive judgment and discretion, may be controlled by this writ." However, he did not believe that approval in this case was a ministerial act; instead, he believed that the governor and the treasurer in the discharge of their duties "must use their judgment and discretion as to all matters into which the board could or should inquire." The court held that the governor's act was more than ministerial, and could not be controlled by mandamus.

13In the court's opinion, Chief Justice Brantly commented on the strange procedure used by state executive officials to approve such contracts: "It may be unfortunate that the governor was made a member of this board whose duty it is to let these contracts. It puts him in a position where he can refuse to approve the action of a majority of the board of which he is a member, and thus put his veto upon proceedings in which he takes part." 23 Mont. 50.

1423 Mont. 50.

1523 Mont. 51.
Summary

The Montana governor, by constitution and statute, is invested with certain important executive functions, and the performance of these functions depends in part on his honesty, judgment and discretion. With reference to those functions which are entirely political in nature or require the exercise of official judgment or discretion, the Montana supreme court has consistently held that these executive functions performed by the governor cannot be controlled by mandamus. However, on the other hand, the Montana court has held that executive functions or actions which are purely ministerial can be controlled by mandamus.

On three early occasions, the territorial or state supreme court was asked to reverse, by mandamus, actions involving the governor's executive discretion: to canvass results of the election to determine the location of the capital; to honor an appointee's claim for compensation; and to award a state contract. In the canvass case, the court found a clear "public duty" imposed on the governor by statute and awarded the writ. In the compensation case, the issue was mooted by a lapse of time, but the court's dictum indicated that mandamus would have issued to compel payment of a valid claim that was timely made. In the state contract case, the court thought that a curious statutory provision providing for gubernatorial review of a
board decision implied that executive discretion existed and denied mandamus.

The territorial court thus established its availability to review essentially executive decisions of the governor and to substitute its own judgment for the governor's as to the difference between "ministerial" and "discretionary" functions. In addition, the early state case, although not awarding mandamus, cited the territorial decisions as relevant and possibly persuasive. It must be recognized that the determination whether an act is ministerial or discretionary is in itself in some measure a political decision. But proper judicial concern for executive authority implies recognition of this fact and would hopefully resolve doubtful instances in favor of executive discretion, rather than to award mandamus.
CHAPTER III

THE POWER TO APPOINT AND REMOVE PUBLIC OFFICERS

This chapter analyzes what the Montana supreme court has said about the governor's exercise of his appointment and removal power in creating a body of officials through whom he can act. What is the scope of the governor's power to appoint to office? What is the scope of the governor's power to remove appointees? To what extent are these powers subject to judicial review?

The Appointment Power

One of the first tasks of the Montana governor after taking the oath of office is to create a body of officials through whom he can act. This partly consists of selecting his personal staff, appointing non-elective department heads, and filling vacancies by appointment in the various boards and commissions.

The Montana governor's appointment power is founded on Article VII, section 7, of the state constitution:

The governor shall nominate, and by and with the consent of the senate, appoint all officers whose offices are established by this constitution, or which may be created by law, and whose
Within this general constitutional grant of authority, statutes and judicial decisions further define and limit the exercise of this appointment power.

The Power to Fill Vacancies

What Constitutes a Vacancy?

The Neill Case.--The Montana supreme court has twice discussed the governor's appointment power to fill vacancies, and both times the crucial question was whether a vacancy existed. An early case, State ex rel. Neill v. Page, held that a voluntary resignation before the end of an appointee's term created a vacancy so that the governor could make an appointment to fill the vacancy.

On July 31, 1895, the governor appointed Page to be state land agent, and on the same day Page was confirmed by the state board of land examiners in accordance with a statute. Two years later, in 1897, the governor requested Page's resignation which he tendered and the governor accepted to take effect on August 7, 1897. On August 9, 1897, the governor, claiming that there was vacancy,

220 Mont. 238, 50 P. 719 (1897).
appointed Neill but the secretary of state refused to countersign Neill's commission since he believed that Neill's appointment had to be approved by the state board of land examiners.

The court recognized two issues in the case: first, whether there was a vacancy created by the governor's acceptance of Page's resignation, and second, if so, who had the power to fill the vacancy. With reference to the first issue, the court noted a general statutory provision that resignation would vacate an office, and ruled that a vacancy was created by Page's voluntary resignation and the governor's acceptance of it. The court held that a resignation before the expiration of a term meant "a resignation before the end of a fixed time, or before the expiration of the time during which an official has the right to serve."

A vacancy existing, the governor could appoint to fill it under authority of a statute which provided that:

When any office becomes vacant, and no mode is provided by law for filling such vacancy, the

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4Mont. Codes Ann., sec. 1101 (Booth 1895). An office becomes vacant on the happening of either of the following events before the expiration of the term: 1. The death of the incumbent, 2. His insanity, . . . 3. His resignation. . . .

520 Mont. 246.
Governor must fill such vacancy by granting a commission to expire at the end of the next Legislative Assembly or at the next election by the people.  

The Jardine Case.—State ex rel. Jardine v. Ford, held that a voluntary retirement had the same effect as a resignation, and thereby created a vacancy to be filled by the governor.

On December 31, 1947, Judge Ewing, who had been elected to a four-year term as district judge, notified the governor that he was retiring at midnight that night. In contemplation of the judge's retirement, the governor requested an advisory opinion from the attorney general whether there would be a vacancy in the office of district judge upon Judge Ewing's retirement. The attorney general advised the governor that either of two statutory provisions might govern the situation: one concerning "resignation," and the other concerning the judge's "ceasing to discharge the duty of his office." The attorney general

6 Mont. Codes Ann., sec. 1104 (Booth 1895). This statute remains in effect as Mont. Rev. Codes, sec. 59-605 (1947).

7 120 Mont. 507, 188 P.2d 422 (1948).

8 Mont. Rev. Codes, sec. 511 (1935). This statute provided that "An office becomes vacant on the happening of either of the following events before the expiration of the term:" death, insanity, "3. His resignation," removal, non-residency, absence from the state, "7. His ceasing to discharge the duty of his office for the period of three consecutive months, except when prevented by sickness, or
concluded that unless Judge Ewing gave the governor "his resignation . . . the office will not be vacant until three consecutive months have elapsed in which he has refrained from discharging the duty of his office, unless prevented from discharging his duty by sickness."\(^9\)

The supreme court did not accept the attorney general's strict interpretation of the statutory provision. Instead, the court reasoned that: (1) since the judge had properly notified the governor of his retirement, (2) since he was entitled to receive a retirement allowance under the retirement system, and (3) since he would not be paid for any further services rendered to the state after his retirement, the judge had voluntarily exercised his right to retire which thereby created a vacancy. In other words, the court chose not to distinguish between "resignation" and "retirement" and ruled that the statutory provision--section 511--was not exclusive so that events other than those enumerated in the section could also create a vacancy. The court maintained that a vacancy arises whenever an office is unoccupied by an incumbent who has a legal right when absent from the state by permission of the legislative assembly," conviction of a felony, refusal or neglect to file his oath or bond, or a void election.

\(^9\)20 Mont. 510. The decision specifically states that the quoted passage was part of the attorney general's opinion; however, the opinion does not appear in 22 Op. Atty. Gen. (1947-48).
Having established that there was a vacancy created by the judge's retirement, the court held that the governor had constitutional authority to fill the vacancy; it cited Article VIII, section 34, of the Montana constitution: "Vacancies in the office of . . . judge of the district court . . . shall be filled by appointment, by the governor of the state. . . ."

Length of the Appointee's Term

General.—The general rule in state government where an individual has been appointed to a newly created elective office is that the appointee's term lasts only until the next general election. This rule became established in Montana when the Montana supreme court decided in State ex rel. Patterson v. Lentz that a district judge appointed to a newly created judgeship could serve only until the next general biennial election, and not until the next quadrennial election at which the district judges generally were to be elected. The case involved an apparent conflict between the clearly stated intent of a statute, and a constitutional provision of general import. The court gave a literal construction to the constitutional provision

11 50 Mont. 322, 146 P. 932 (1915).
to terminate the duration of the gubernatorial appointment before the time specified by the legislature.

The Patterson Case.—In 1913, the legislature created an additional judgeship in the fourth judicial district and authorized the governor to appoint a judge who would serve until after the second subsequent general biennial election in November 1916. In accordance with this legislation the governor appointed Patterson to this judgeship and gave him a commission stating that he was to hold the judgeship until the first Monday in January 1917. The legislature's intent appears to have been to have the term of the new judgeship coincide with the quadrennial term of other district judges elected in presidential election years.

This legislative intent appeared to conflict with Article VIII, section 34, of the Montana constitution, which provided that vacancies in district judgeships would be filled by appointment "until the next general election and until his successor is elected and qualified."

12 1913 Laws, c. 14, p. 14. Section 2 of the act provided: "The governor shall appoint some fit and qualified person as additional judge of the said fourth judicial district to hold his office until the first Monday of January, 1917, or until his successor is duly elected and qualified."

13 Mont. Const., Art. VIII, sec. 34. Vacancies in the office of . . . judge of the district court . . . shall be filled by appointment, by the governor of the state. . . . A person appointed to fill any such vacancy shall hold
Patterson argued that this constitutional provision should be construed to read "until the next general (judicial) election"; that is, that such elections were quadrennial. Thus Patterson claimed that his appointment was valid until a successor was elected in the November 1916 election.

The court chose the view that "next general election" meant the next biennial election to be held in November 1914. The court's ruling placed heavy emphasis on the last two sentences of Article VIII, section 34, and concluded that Patterson's appointment was valid only until the next general election and, therefore, the governor in his commission to Patterson could not extend the appointee's term beyond the next general biennial election.

**Summary**

The Montana supreme court in both the Neill and Jardine cases has ruled that a vacancy exists in an office whenever the office is empty and without an incumbent who has a right to the office. In addition in both cases, the court held that the vacancy in question should be filled by the governor.

In the Neill decision, the court with statutory office until the next general election and until his successor is elected and qualified. A person elected to fill a vacancy shall hold office until the expiration of the term for which the person he succeeds was elected.
direction held that an appointee's voluntary resignation and its acceptance by the governor created a vacancy within the office. Section 1101 presented the court with clear authority to hold that the acceptance of the resignation by the governor left the office empty and without an incumbent and thereby created a vacancy.

The Neill decision affirms the statutory appointment power vested in the governor, and to the extent that it has affirmed this statutory power, the decision has strengthened the appointment power of the governor.

Since the statute presented clear direction for the court to render this decision, the court was unable to exercise a mode of interpretation in the absence of a prima facie constitutional or statutory clarity.

In the Jardine decision, the court was given slight assistance by section 511 which enumerated ten contingencies that would cause a vacancy. Consequently, since the court lacked any clear constitutional or statutory direction regarding the issue of vacancy, it exercised a mode of interpretation when it held that section 511 was not exclusive, and thereby provided that other contingencies such as retirement could cause a vacancy. The court's exercise of this mode of interpretation has strengthened the governor's appointment power and, consequently, becomes a case in point to prove the hypothesis of this study. In choosing
not to distinguish between "resignation" and "retirement," the court exercised a mode of interpretation creating a vacancy, and thereby providing the governor with an opportunity to exercise his appointment power.

The Patterson decision was also rendered with little clear statutory or constitutional direction. The legislation on the one hand said the length of the appointee's term would last until January 1917, whereas the constitution provided that the term should last only until the next general election. Consequently, the court looked to past decisions for the policy that appointments to fill vacancies in elective offices were to remain in effect only until the people could act through an election.

This decision does not focus on the governor's appointment power per se; instead, it focuses on the term of the gubernatorial appointee who is appointed to an elective office. The decision held that the length of a gubernatorial appointee's term to an elective office is only until the next biennial election.

Although the court did rely on precedent and did partially exercise a mode of judicial interpretation in reaching its decision, this is not a proper case to prove or disprove the study's hypothesis since the vacancy to be filled was an elective office and not an appointive office. With reference to elective offices, it seems proper that
any appointment should only last until the people, at the earliest opportunity, can fill the vacancy by election in accordance with the constitution, irrespective of what specific legislation may provide.

The Power to Make Interim Appointments

General

The focus of this study now shifts to those instances where the governor has the power to make an appointment after the confirming body has adjourned. These appointments are often called "recess" appointments, even in the Montana constitution. Nonetheless, a more accurate description would be "interim" appointments. The source of this power for the Montana governor is Article VII, section 7, of the Montana constitution which provides:

The governor shall nominate, and by and with the consent of the senate, appoint all 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. If during the recess of the senate a vacancy occur in any such office, the governor shall appoint some fit person to discharge the duties thereof until the next meeting of the senate, when he shall nominate some person to fill such office.

Generally, the appointing power may, after adjournment by the confirming body, fill a vacancy which has occurred since the adjournment. However, the vacancy must occur after the adjournment; a governor may not, after
adjournment by the senate or confirming body, fill a vacancy that existed while that body was in session.\(^{14}\)

The three previous cases in this chapter were cases where the governor has the power to appoint without the need of a confirming body. Two cases present issues concerning the governor's power to make appointments requiring confirmation during the time the confirming body is not in session. The issue of what constitutes a vacancy becomes even more important since the governor cannot make an interim appointment unless a vacancy exists.

The Nagle Case.--In State ex rel. Nagle v. Stafford,\(^{15}\) the Montana supreme court held that no vacancy existed in an office when a holdover appointee could still perform the duties of the office.

On April 5, 1919, the governor appointed Stafford to be commissioner of agriculture for a term ending April 1, 1933. In 1931, the senate confirmed the appointment in accordance with Article XVIII, section 1, of the Montana constitution,\(^{16}\) and statutory section

\(^{14}\) 38 Am. Jur. 2d 937, Governor sec. 7 (1968).

\(^{15}\) 97 Mont. 275, 34 P.2d 372 (1934).

\(^{16}\) Mont. Const., Art. XVIII, sec. 1. The legislative assembly may provide for a bureau of agriculture, labor and industry, to be located at the capital and be under the control of a commissioner appointed by the governor subject to the confirmation of the senate. The commissioner shall hold his office for four years, and until his successor is appointed and qualified; his compensation shall be as provided by law.
On March 13, 1933, the governor reappointed Stafford to the office for another four-year term. On the same day, the governor resigned. Later, on November 27, 1933, the acting governor called a special session of the legislature; during that special session, Stafford's appointment was presented to the senate which failed to confirm it. After the special session was over, the acting governor attempted, on February 1, 1934, to appoint Bruce to be commissioner of agriculture. Thus the facts created this issue: whether a vacancy existed in the office of commissioner of agriculture so that the acting governor could appoint Bruce to fill the vacancy until the legislature was back in session.

By taking into consideration the special provision of the constitution—Article XVIII, section 1—the supreme court held that Stafford had the right to serve, as a holdover appointee, under his original confirmed appointment until his successor was appointed, confirmed and qualified. In other words, the court ruled that there was no vacancy in the office since there was still someone in the office.

Mont. Rev. Codes, sec. 3556 (1921). The chief executive officer of the department of agriculture, labor, and industry, hereinafter referred to as the commissioner of agriculture, shall be a commissioner of agriculture, to be appointed by the governor, by and with the consent of the senate, and such commissioner shall hold office for a term of four years or until his successor is appointed and qualified.
who could discharge the duties of the office. Thus the acting governor could not exercise his interim appointment power.

The Olsen Case.--State ex rel. Olsen v. Swanberg again held that no vacancy existed in an appointive office because the confirmed holdover appointee had better title to the office then the non-confirmed replacement appointee.

On December 29, 1952, Swanberg was appointed by the governor and later confirmed to be chairman of the industrial accident board to fill a term expiring on May 1, 1955. On April 29, 1955, the governor appointed McChesney to replace Swanberg as chairman for a four-year term expiring May 1, 1959. At the time of McChesney's appointment, the legislature was not in session, hence McChesney's appointment had not been referred to the senate for confirmation.

The governor's power to make the appointment was derived from section 92-104. This section clearly stated that the governor's appointments to the board must be confirmed "by and with the consent of the senate." The issue


19 Mont. Rev. Codes, sec. 92-104 (1947), as amended by 1953 Laws, c. 161, pp. 213-314. There is hereby created a board to consist of three (3) members... and one member shall be appointed by the governor, by and with the consent of the senate... The term of office of the appointed member of the board shall be four (4) years and until his successor shall have been appointed and confirmed.
thus became whether the clear constitutional and statutory
directive for filling the office with a confirmed appointee
should prevail over the statement providing for a four-
year term.

McChesney argued that a vacancy existed in the
office upon the expiration of Swanberg's term, and that
this vacancy occurred during a senate adjournment thereby
authorizing a gubernatorial appointment in accordance with
Article VII, section 7, of the Montana constitution. How­
ever, Justice Forrest Anderson speaking for the court ruled
that this provision in the constitution "has reference only
to such vacancies which leave the office without anyone to
discharge the duties and does not apply to a case where the
incumbent holds until his successor is elected or appointed
and qualified and is discharging the duties of his office." Justice Anderson's opinion distinguished between a non­
confirmed successor and a previously confirmed appointee and
held that until successors are confirmed by the senate, a
previously confirmed appointee is entitled to hold over in
the office. Justice Anderson concluded therefore that Swan­
berg upon serving his four-year term could continue to hold
the office as a previously confirmed appointee until his
successor had been appointed, qualified and confirmed.

20130 Mont. 205.
Summary

Both the Nagle and Olsen decisions by the Montana supreme court have affected the implementation of the governor's constitutionally defined interim appointment power. The court in these two decisions has exercised a restrictive mode of interpretation concerning the word "vacancy" which, when a previously confirmed appointee remains able to perform his duties, prohibits the governor from making any interim appointments which would require confirmation when the confirming body is not in session. An obvious result of these decisions is that (1) if a newly elected governor fails to make all his appointments requiring confirmation in the first two months of his administration while the confirming body is in session, and (2) if the statute provides for a definite term "and until his successor is appointed and confirmed," the governor will have to wait 22 months before confirmation can be obtained, during which time he must guide his administration with some of the previous governor's appointees. This kind of a result is categorically bad and undesirable.

Every governor should have "his team" during his administration, and state supreme courts through their decisions should attempt to achieve this result when they are not bound by the constitution or statutes to do otherwise. It can be argued that in the Olsen case, the Montana
court was bound by legislation which provided that the confirmed appointee should holdover "until his successor was appointed and confirmed." However, this does not excuse the court from its holding in the Nagle case, since the statute in that case simply required that the appointee be "appointed and qualified." The word "qualified" usually has meant meeting basic bonding requirements, and nothing more. Thus it would appear that in the Nagle case the court could have easily held that once the appointee satisfied the bonding requirements he was qualified to assume the interim appointment.

The effect of these two decisions is to allow a holdover appointee to remain in office beyond his term until the non-confirmed appointee is confirmed, when the spirit of Article VII, section 7, of the Montana constitution seems to provide that the governor can make an interim appointment until the confirming body comes back into session. In other words, the effect of these two decisions has weakened the Montana governor's interim appointment power. In the Nagle case, the inheritor of the primary blame for this weakened power is the court since it placed an improper emphasis and definition on the word "qualified," whereas, in the Olsen case, only the secondary blame falls on the court for the weakened power since legislation existed which had already weakened this appointment power.
For the purposes of this study it can be concluded that in the Nagle case, the court, in the presence of clear constitutional and statutory direction favoring an interim appointment, weakened the governor's power, whereas, in the Olsen case, the court, in the presence of clear statutory direction opposing an interim appointment, also weakened the governor's power.

Abuse of the Appointment Power

The Cutts Case

The Montana supreme court was once presented with the issue of whether the governor possessed the authority to make an appointment to fill a legislative vacancy. State ex rel. Cutts v. Hart\(^\text{21}\) held that the governor did not have the authority to fill by appointment the legislative vacancy created by death of a member of the Montana house of representatives when the constitution expressly contemplated a special election for that purpose. On February 7, 1917, in the midst of the 60-day legislative session, the governor appointed Cutts to fill the unexpired term of the deceased representative.

The court noted that since Article V, section 45, 2156 Mont. 571, 185 P. 769 (1919).
of the Montana constitution provided that the only way in which to fill a vacancy caused by death was for the governor to issue writs of election. The people had "retained in themselves, and in themselves alone, the power to fill vacancies in the legislative bodies." Thus, the court held that the governor's appointment of Cutts was made contrary to the Constitution.

**Summary**

The Cutts decision was based on a clear constitutional provision which directed the governor to issue writs of election—not to make an appointment. The governor abused his constitutional appointment power when he appointed Cutts contrary to Article V, section 45.

Article V, section 45, may have been both impracticable and unrealistic in that it would take too long to implement. If a vacancy occurred while the 60-day legislature was in session, as in the Cutts case, the process of election could occupy most of the session by the time the special election was held. Valuable legislative time would have passed leaving the people in the legislative

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22*Mont. Const., Art. V, sec. 45.* When vacancies occur in either house, the governor or the person exercising the functions of the governor shall issue writs of election to fill the same.

23*56 Mont. 574.*
district without complete representation.

In 1932, Article V, section 45, was amended in an effort to correct this deficiency. Legislative vacancies by death were expressly excepted from this provision for special election and the county commissioners were authorized to appoint to fill legislative vacancies. The entire constitutional provision was repealed in 1966 as an incident of legislative reapportionment, leaving in force an early statute which had echoed the original constitutional provision. Once again the vacancies are to be filled by special election. This repeal failed to resolve the problem which still exists: the valuable loss of legislative time and the lack of representation of electors in the district during the implementation of the special election.

The Cutts case neither proves nor disproves the hypothesis of this study. The categorical constitutional provision left the court no room to exercise an independent mode of interpretation.

The Removal Power

Removal from Office Where Term Is Not Fixed

In State ex rel. Bonner v. District Court, the Montana court held that a gubernatorial appointee, who holds a public office whose term or duration is not fixed by law,

122 Mont. 464, 206 P.2d 166 (1949).
holds the office at the pleasure and will of the governor.

On May 6, 1937, Governor Ayers appointed Craighead to be chairman of the unemployment compensation commission, and for the next 12 years Craighead remained as chairman of the commission. Following the sine die adjournment of the legislature, Governor Bonner on March 28, 1949, informed Craighead that his services would not be needed after March 31, upon which day he appointed Stewart to be chairman. On April 1, Craighead sought an injunction against Stewart and Governor Bonner to restrain them from interfering with his duties as chairman. The sole question before the court was who was entitled to hold and exercise the chairmanship of the commission.

One Montana statute provided that the chairman of the commission was to be paid a full-time salary, without providing for a fixed term of office. In addition, another statute provided that "every office of which the duration is not fixed by law is held at the pleasure of the appointing power."  

Chief Justice Adair, speaking for the majority,

\footnote{1937 Laws, c. 137, sec. 10(a), p. 439. . . . The third member of the commission, who shall be designated as chairman at the time of his appointment, shall be paid a full-time salary in an amount to be fixed by the governor and shall be the executive director. . . .}

\footnote{Mont. Rev. Codes, sec. 422 (1935).}
noted the general rule concerning the holding of a public office whose term is not fixed by law was that in the absence of constitutional restrictions, "the power to appoint an officer carries with it the power to remove at the pleasure of the appointing power, where the appointment is not for a fixed term." After observing that the unemployment compensation law failed to create a fixed term for the chairman, and in view of section 422, the chief justice held that, "As the duration of his office is not fixed by law, Craighead held at the pleasure of that Governor," and therefore could be removed by the governor at his will.

Justice Angstman dissented, arguing that section 10(a) of the law provided for the creation of the commission and that it "shall consist of three members who shall be appointed by the governor on a non-partisan merit basis," and therefore required that under the merit system there could be no removal at the mere will of the appointing power.

The phrase "non-partisan merit basis" has acquired a distinct and well known meaning. Once

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27 See annotation in 119 ALR 1437, as quoted in 122 Mont. 471.
28 122 Mont. 482.
an appointment is made under it, removal can be accomplished only for cause and not upon personal considerations.\textsuperscript{30}

In addition he argued that section 422 could have no application to one appointed under the merit system. Thus he concluded that persons appointed under the merit system could not be discharged except for cause.

As to appointments made by the governor on a merit basis, he can adopt such reasonable method as he sees fit in determining the fitness of applicants. Once he makes an appointment, removal can be accomplished only for cause.\textsuperscript{31}

Removal "for Cause"

The gubernatorial power to appoint to public office carries with it the power to remove, in the absence of constitutional or statutory restraint. In Montana, the courts have held that a constitutional or statutory provision for appointment for a fixed term constitutes such a restraint and, in the absence of any provision for summary removal, one who is appointed for a fixed term can be removed only "for cause." This phrase "for cause" has generally meant removal for reasons which law and sound public policy have recognized as sufficient to justify removal. The Montana supreme court, on three different occasions, has been called upon to decide what constitutes removal "for cause."

\textsuperscript{30}122 Mont. 485, 486.

\textsuperscript{31}122 Mont. 490, 491.
The Sullivan Case

State ex. rel. Nagle v. Sullivan\textsuperscript{32} held that the phrase "for cause" means that the governor must give notice to the appointed officer and provide him with a hearing or opportunity to be heard in his defense.

Governor Erickson appointed Sullivan, Flynn and Steinbrenner to the state fish and game commission for fixed terms, and then himself resigned. A year later, the acting governor revoked their appointments "for the good of the commission," and in their place appointed Baumgartner, Gutensohn and Harper. A statute fixed the term of service on the commission at "four years, unless sooner removed" and further provided that the governor had the power to fill all vacancies and "to remove any member of said commission for cause or for the good of the commission."\textsuperscript{33}

Sullivan claimed that the attempted removal was void on the ground that "the action was taken without notice, hearing

\textsuperscript{32}98 Mont. 425, 40 P.2d 995 (1935).

\textsuperscript{33}Mont. Rev. Codes, sec. 3561 (1921). The members of the commission hereby created shall be appointed by the governor of the state of Montana. . . . Two of said members shall be appointed to serve for one year, one to serve two years, one to serve three years, and one to serve four years, and thereafter to be appointed by the governor at the expiration of their first terms, to serve for four years, unless sooner removed. All vacancies in the commission shall be filled by the governor. The governor is hereby given the power to remove any member of said commission for cause or for the good of the commission. . . .
or opportunity to be heard; while Baumgartner alleged that certain matters existed giving legal cause for removal, and further claimed that requirements of notice and a hearing were not necessary. The sole issue before the court was whether the governor had the authority to remove Sullivan without notice, hearing or opportunity to be heard.

The majority of the court held that:

> When a statute provides for an appointment for a definite term of office, without provision otherwise, or provides for removal "for cause," without qualification, removal may be effected only after notice has been given to the officer of the charges made against him and he has been given an opportunity to be heard in his defense.

Thus, the court ordered that the governor could remove Sullivan only after he had received notice and had been given an opportunity to be heard in his defense. It may be noted that the majority based its decision on the statutory phrase of removal "for cause," while the governor had expressly rested his removal order on the statutory ground that it was "for the good of the commission."

Justice Stewart in a concurring opinion agreed with the majority that any removal "for cause" required notice and a hearing for the appointee. However, he stated that the issues had become

3498 Mont. 436.
3598 Mont. 439.
shifted from the broad ground of "for the good of the commission" to the specific charges of wrongdoing, or malfeasance and misfeasance in office. 36

Justice Stewart argued that had the case proceeded solely upon the general grounds originally stated by the governor without the injection of the specific grounds the governor would have had the authority "to remove a commissioner without notice or hearing when it is done for the good of the commission--for the better administration of the affairs of the department." 37

The dissent by Justice Angstman urged that where "the statute simply states that an officer may be removed 'for cause' without any qualifying words and without specifying what constitutes 'cause,' the removing power has authority to determine what shall constitute cause, as well as to determine whether that cause exists." 38 Justice Angstman argued that the legislative intent should govern whether notice and a hearing were requisite before the governor could remove a commissioner. To determine this intent he reviewed similar legislative enactments of the 1921 Montana legislative assembly. His review illustrated that in "some cases notice and hearing are essential, in

3698 Mont. 446.
3798 Mont. 446.
3898 Mont. 447.
others not; and this is true whether the tenure is for a fixed term or otherwise. 39 From this analysis he argued that "there was no thought on the part of that assembly that an officer could not be removed for cause without first giving notice and holding a hearing, except in those cases where notice and hearing were specifically provided for." 40 The justice concluded that the removal power of the governor was discretionary, and could be exercised without notice or hearing. For additional support he cited an Oklahoma case which held:

An appointee to such a position is selected by the chief executive for the purpose of aiding the executive in carrying out his sense of duties and responsibilities to the public and with the belief that such appointee will work in harmony with and aid the Governor in fulfilling his sense of duty to the public. It is the Governor, the chief executive, who is held responsible to the sovereignty for errors in his executive and administrative policies. The appointee is responsible to the chief executive, and in the absence of express authority, the judiciary has nothing to do with the chief executive's judgment, conscience, sense of duty, or responsibilities. 41

The Holt Case

The second Montana supreme court decision concerning the authority of the governor to remove appointees "for

3998 Mont. 450.
4098 Mont. 450.

cause" was State ex rel. Holt v. District Court\textsuperscript{42} which held that the phrase "for cause" meant not only that the governor must provide notice and a hearing, but also must hear all evidence offered in defense by the appointee relating to his good faith.

Acting Governor Holt, on October 28, 1936, charged that the three members of the state highway commission had illegally drawn state funds and issued a notice to the commissioners to appear before him to show cause, if they had any, why they should not be removed. The commissioners appeared and admitted receipt of the funds, but asserted that they were received legally and that they had acted in good faith. They said that when they were informed that the receipt of the funds was illegal, they refrained from drawing further funds. They also alleged that, by reason of certain political activities, the governor "was biased and prejudiced against them and therefore not a proper person to try them on these accusations."\textsuperscript{43}

The governor showed that the funds received by the commissioners were for per diem and mileage claimed by the commissioners at times when the commission was not in session. When the commissioners admitted to this evidence,

\textsuperscript{42}103 Mont. 438, 63 P.2d 1026 (1936).
\textsuperscript{43}103 Mont. 441.
the governor concluded that there was no necessity to hear further evidence, and issued orders removing the commissioners from the commission.

Montana law created the highway commission and provided that its three members should "be appointed by the governor," to "hold office for the term of four years and until his successor is appointed and qualified."\(^4^4\) Another statute further provided that "the members of the state highway commission shall be appointed by the governor and may be removed by him at any time for cause."\(^4^5\)

The majority opinion referred to the Sullivan case which had held that removal "for cause," without qualification, means that removal "may be effected only after notice has been given to the officer of the charges made against him and he has been given an opportunity to be

\(^4^4\)Mont. Rev. Codes, sec. 1783 (1935). There is hereby created a commission to be known as the state highway commission to consist of three members to be appointed by the governor. . . .

Each commissioner shall hold office for the term of four years and until his successor is appointed and qualified and shall receive as compensation . . . the sum of ten dollars ($10.00) per diem for each day actually engaged in the duties of his office, including his time of travel between his home and his place of employment of such duties, together with his traveling expenses while away from his home in the performance of the duties of his office. . . .

\(^4^5\)Mont. Rev. Codes, sec. 1784 (1935). The members of the state highway commission shall be appointed by the governor and may be removed by him at any time for cause. . . .
heard in his defense. The majority perceived the primary issue to be whether the hearing before the governor was "such a hearing as was contemplated under the rules set forth in the Sullivan case," which had held that removal "for cause" had to be in accordance with the public policy of the state which required notice and a hearing. In accordance with these rules, the majority stated that "it was the duty of the governor to hear the evidence which might be offered in support of the defense of good faith."

With reference to the commissioners' other defense, that of the governor's prejudice, the majority held that there was no provision for the disqualification of the governor and, therefore, in accordance with the law, the governor had the exclusive jurisdiction over the commissioners' removal.

The dissenting opinion, written by Justice Morris, began by stating:

The Governor, as the executive head of the state government, is vested with broad discretionary powers and the majority opinion creates a dangerous precedent by unreasonably restricting such discretionary powers in the removal by the

46State ex rel. Nagle v. Sullivan, 98 Mont. 425, 439, as quoted in 103 Mont. 444.
47103 Mont. 444.
48103 Mont. 446.
executive of members of his official family, his appointees. . . . Upon the governor practically alone rests the responsibility of the credibility of his administration, and to deny him the practical control of his appointees, particularly in the expenditure of public funds, goes a long way towards the destruction of the right to hold the Chief Executive responsible for the efficient administration of a government of which he is the head and which was one of the chief purposes of having a single individual the executive head of the government.49

Justice Morris, in further support of his opinion, then cited a short part of U.S. Supreme Court Chief Justice Taft's majority opinion of the Myers case which broadly defined the president's removal power over inferior executive appointees.

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him. . . . The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.50

Justice Morris argued that the same reasoning applies to the chief executive of a state as to the chief executive of a

49103 Mont. 449, 450.

50Myers v. United States, 47 Sup. Ct. 21, 25, 71 L.Ed. 160, 166 (1926), as quoted in 103 Mont. 450.
nation. In addition, he questioned the purpose of the governor's having to hear the defenses of good faith since the governor, after the defenses, still possessed sole discretionary power to remove the commissioners.

The Matson Case

State ex rel. Matson v. O'Hern held that, once the governor provided the appointees with notice and an opportunity to be heard to present their defense, the governor had the power to remove executive appointees "for cause." This case was a continuation of the Holt case in which the court had held that removal "for cause" meant that the governor must provide notice and a hearing so that the appointee can present his defense. The Matson case went one step further, with the same facts, and held that after the governor had given notice and an opportunity for the appointee to present his defense he had discretionary power to remove the executive appointee.

After the Holt decision, the acting governor did provide the commissioners with notice and an opportunity to present their defenses. Upon completion of this hearing, the governor removed the commissioners in accordance with section 1784.52

52Mont. Rev. Codes, sec. 1784 (1935).
The majority opinion, written by Justice Stewart who had concurred in the Sullivan case, noted that the Montana constitution provides that "all officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law." He noted the statutory provision upon which the governor acted which stated: "The members of the state highway commission shall be appointed by the governor and may be removed by him at any time for cause." In discharging his executive duties, the court maintained that the governor acted not only under the authority of the statute which gave him power to remove the appointees, but also under the state constitution. Viewing the Montana law, the majority concluded that the governor had the power to remove the commissioners, and held that "the powers here reposed in him and exercised by him in this proceeding are of a discretionary character, and that his action could be subject to our review only if it should clearly appear from the record that he acted with no facts to move his discretion." Thus, the court held that the grant of the

54 Mont. Rev. Codes, sec. 1784 (1935).
55 104 Mont. 150.
removal power to the executive to remove "for cause" implies that the executive has the authority to judge what constitutes cause for removal, but qualified this by holding that there must be sufficient facts to move his discretion.

The dissenting opinion was written by Justice Angstman who had also written the dissenting opinion in the Sullivan case. It will be remembered that in the Sullivan dissent Justice Angstman had written that the governor's removal power was discretionary and, therefore, the power of removal could be exercised by the governor without providing notice and a hearing to the appointee. However, in the Matson case, Justice Angstman's dissenting opinion was based on the majority opinion of the Sullivan case, which had held that the governor must provide notice and a hearing where the removal is "for cause," and concluded that in the Matson case there was no evidence to support the order of removal. In other words, Justice Angstman argued that the Sullivan case required a showing of cause before the governor could remove an appointee, and that in this case there was no showing of cause, since there was no showing of bad faith by the appointee. In effect, Justice Angstman accepted the majority opinion in the Sullivan case and then rigidly applied it to dissent in this case maintaining that, since there was no showing
of bad faith so as to constitute cause for removal, the commissioners could not be removed.

Summary

In 1949, in the Craighead case, the Montana supreme court held that a gubernatorial appointee, who holds a public office whose term or duration is not fixed by law, holds the office at the pleasure and will of the governor. This decision is consistent with the study's hypothesis since (1) it was rendered in the absence of clear constitutional or statutory direction and since (2) it strengthens the Montana governorship by allowing the governor to remove such appointees at his will. Unfortunately, the three earlier removal decisions failed to accomplish this desirable result.

The first of the three earlier unfortunate decisions rendered by the Montana supreme court was the 1935 Sullivan decision in which the court exercised a mode of interpretation which held that the governor could not remove executive appointees "for cause" unless and until he had provided the appointee with notice and an opportunity to be heard. This case, a bad precedent, served as a foundation for two more cases which further weakened the removal power of the executive. From the beginning of this

— 56 State ex rel. Bonner v. District Court, 122 Mont. 464 (1949).
series of three unfortunate cases, it appears that the court perceived the executive appointees to have an undefined property right in the appointed office and that the appointee could not be removed until after the governor had acted according to judicial due process. The better mode on interpretation, in the absence of clear constitutional or statutory direction, would have held that an appointee has no right in an appointed executive office, except at the pleasure of the governor.

The Sullivan case held that the governor must give notice and a hearing. From this decision, the court held in the 1936 Holt case that not only must the governor give notice and an opportunity to be heard, but also that he must allow the appointee to present all his evidence proving good faith. Up until the Holt case, the court had weakened the governor's removal power by imposing two procedural requirements: notice and a hearing; in the Holt case the majority went one step further to weaken his powers by imposing an additional procedural and substantive requirement—requiring the governor to hear all evidence offered in defense by the appointee regarding his good faith.

From these two precedents, the majority in the 1937 Matson case held that the governor could in fact remove the executive appointees, if he had adhered to the requirements laid down in the Holt case. The total effect of
these decisions is to prohibit the governor from removing executive appointees until after he has: (1) given notice to the appointee, (2) provided the appointee with an opportunity to be heard, and (3) heard the good faith defenses of the appointee.

Such needless restrictions on the governor's discretionary removal power: (1) limit the removal power of the governor, (2) weaken the executive function of the governor, and (3) increase the difficulty of achieving a responsible and efficient state executive. The best interests of a strong and responsible state executive could have been advanced in Montana had the court followed the dissenting opinion in the Holt case.

It is ironic that the majority opinion in the Matson case stated

\[\ldots\] the members of the judiciary can only be drawn from a class or profession whose duty and pride it is to study and understand governmental principles and their practical application. \ldots \ All of this presupposes more than ordinary understanding of governmental principles.\textsuperscript{57}

The irony lies in the fact that the court's opinion is contrary to one of the fundamental concepts of state government--the concept of a strong executive. The court maintains that it is their duty to understand the principles of government; however, by their decision they turn

\textsuperscript{57}104 Mont. 152.
their backs on one of the most important principles in state government.

For this study's hypothesis, all three of these decisions, through the court's mode of interpretation in the absence of clear constitutional or statutory direction, have weakened the governor's removal power.
CHAPTER IV

THE GOVERNOR AND THE LEGISLATIVE PROCESS

Jacksonian democracy left the American people with an inheritance of little trust in the executive branch and a rising loss of popular confidence in the legislative branch. "In the middle of the nineteenth century a weakened and discredited legislature balanced a weakened executive." Gradually, however, the governor's legislative influence became stronger as confidence in the legislative branch continued to decline.

Today, paradoxically, one of the Montana governor's most important executive powers is legislative. The positive side of this power is the governor's legislation approval power; the negative side is the governor's veto power. The Montana governor has other positive executive powers within the legislative branch, such as the power to call extraordinary sessions of the legislative assembly.

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and the power of policy formation when he appears before the assembly to give his "State of the State" address.\(^5\)

### The Approval Power

**Introduction**

Article VII, section 12, of the Montana constitution carefully defines the role of the governor in the final approval of legislation.\(^6\) There appear to be only two exceptions to this role of gubernatorial participation: first, the actions of a single house are regarded as merely internal to that chamber and do not require the governor's approval, and second, the actions of both houses "relating solely to the transaction of the business of the two houses"\(^7\) also are exempt from the governor's approval.

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\(^6\)Mont. Const., Art. VII, sec. 12. Every bill passed by the legislative assembly shall, before it becomes a law, be presented to the governor. If he approves, he shall sign it, and thereupon it shall become a law. . . . If any bill shall not be returned by the governor within five days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it. . . . No bill shall become a law after final adjournment of the legislative assembly, unless approved by the governor within fifteen days after such adjournment. . . .

\(^7\)Mont. Const., Art. V, sec. 40. This constitutional provision also stipulates that concurrent (joint) resolutions must be signed by the governor, whereas, the federal constitution does not impose such a requirement of participation on the president. The Montana supreme court has also
Governor's Approval of Legislative Enactments

General

Since 1907, the Montana supreme court has had four different occasions to discuss the governor's power to approve legislation. In all four cases, the court did incidentally note that the approval power was a constitutionally created power which gave the governor a fundamental and component role in the legislative process.

The Evers Case

The first Montana supreme court decision to discuss the governor's legislation approval power was Evers v. Hudson, which stated that when the governor fails to return within five days any bill passed by the legislature and presented to him during the session, the bill becomes law as if the governor had signed it.

During the 1907 legislative assembly, a statute was enacted to establish county free high schools. The bill was presented to the governor for his approval, but before sine die adjournment, the governor failed to approve the

held that the governor must approve constitutional amendments, whereas, at the national level, the President does not formally participate in the amendment process. See the Livingstone case in this chapter.

836 Mont. 135, 92 P. 462 (1907).
bill. It was urged that the bill failed to become law because it lacked the governor's approval as required by section 23 of the act which provided that this "Act shall take effect and be in full force from and after its passage and approval by the governor."  

The court ruled that although the act had never been expressly approved by the governor it nevertheless became law in accordance with the Montana constitution which provided that

If any bill shall not be returned by the governor within five days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it. . . .

The court held that the act became law as if it had been signed and approved by the governor, irrespective of what section 23 of the act had provided. However, since the approval issue was not the controlling issue in the case, it must be remembered that the court's statements are only dictum.

The Hay Case

State ex rel. Hay v. Hindson stated that legislative enactments passed on the last day of the session and

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91907 Laws, c. 29, sec. 23.
1140 Mont. 353, 106 P. 362 (1910).
not acted upon by the governor until after adjournment must be signed by the governor before they become operative as law.

The question presented by the case did not focus on the governor's approval power; instead, it focused on possibly contradictory provisions in two different pieces of legislation. The governor's legislation approval power was mentioned in passing since both measures had been passed on the last day of the legislative session and had not been acted upon by the governor until after final adjournment.

The court noted that Article VII, section 12, of the Montana constitution required that the governor must approve legislation which was enacted the last day of the session and not signed by the governor until after the adjournment. In addition, the court noted that both pieces of legislation were signed by the governor after adjournment within the time required so as to make them both operative as law.

The Toomey Case

State ex rel. Toomey v. State Board of Examiners\textsuperscript{12} stated that the time of the governor's approval by signature fixed the time the enactment became law.

\textsuperscript{12}74 Mont. 1, 238 P. 316 (1925).
The main issue focused on the clarity of an appropriation statute which had been signed by the governor four days before another general appropriation bill had been approved.

The court stipulated that "no matter what the order of the passage of these two appropriation bills in the two houses of the legislature, neither had any force or effect until approved by the governor, which act . . . fixed the time when each became a law."\textsuperscript{13}

\textbf{The Vaughn Case}

Vaughn \& Ragsdale Co. v. State Board of Equalization\textsuperscript{14} held that when a bill with a defective enacting clause is signed by the presiding officer of each house and the governor, the bill does not become law because the defective enacting clause is a fatal defect.

The facts were that a piece of legislation had the proper enacting clause incorporated into the bill at the committee stage after the bill had been introduced with a defective enacting clause. With the proper enacting clause, the bill passed in both houses. Somehow the original defective enacting clause was reinstated before it was signed by the governor, so that the governor signed a bill

\textsuperscript{13}74 Mont. 15.

\textsuperscript{14}109 Mont. 52, 96 P.2d 420 (1939).
which was then not the same bill as passed in both houses.

The majority noted that the bill which had passed both houses was not the identical bill which had been signed by the governor, and therefore ruled that the bill was not law since the bill with the proper enacting clause had not passed all the stages of the legislative process.

Summary

None of the four Montana cases noted has had as its principal issue the governor's legislation approval power, but all of them incidentally discussed aspects of this executive power. These cases have recognized that the governor plays a fundamental and component part in the legislative process.

The approval power does provide the governor with an opportunity to play a role in the legislative policy formation process. In state government, and particularly in Montana where the legislature is in session only for two months out of every two years, the governor should have some role in the legislative process since it will be his office and the executive branch which must implement and execute the laws passed by the legislative assembly.

These four cases have little relevance for the study's hypothesis since the first three cases possessed clear constitutional direction for the court in rendering
its decision; thus, the court did not have to exercise any mode of interpretation. In the fourth case, the court did not have clear constitutional or statutory direction in reaching its decision. Thus, it did exercise a mode of interpretation, but the subject was the validity of a defective enacting clause and not the governor’s approval power.

Governor’s Approval of Constitutional Amendments

General

It has been noted that the Montana governor plays a role in the amending process of the state constitution. This role of participation by the state executive in the amending process is unique. At the national level, the president does not formally participate in the amendment process; and in Montana, there is an excellent argument that the Montana governor also should not participate in the amending process. However, the Montana supreme court has chosen to involve the governor.

The Livingstone Case

Remarkably, after seven decades of state legislation, State ex rel. Livingstone v. Murray\(^\text{15}\) held that when the legislature neglects to present a proposed

\(^{15}\text{137 Mont. 557, 354 P.2d 552 (1960).}\)
constitutional amendment to the governor for his approval or rejection, the legislature creates a fatal defect in the amendment process.

In 1959, the legislative assembly passed a proposed amendment to the Montana constitution by the required two-thirds vote in each house. The amendment was not referred to the governor as had been common practice, but was sent directly to Secretary of State Frank Murray for publication. While the legislature was still in session, the attorney general rendered an opinion stating that the approval by the governor was not necessary on proposed constitutional amendments. Before publication of the proposal by the secretary of state, Livingstone sought an injunction to restrain the secretary of state from publishing the proposed amendment.

Justice Bottomly, delivering the opinion of the court, ruled that the proposed constitutional amendment contained a fatal defect when the legislature neglected to present the proposed amendment to the governor for his approval or disapproval. He maintained that Article V, section 40, of the Montana constitution required the governor's approval since it did not exempt proposed amendments from the governor's signature although it had

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listed certain other exemptions.\textsuperscript{17} Justice Bottomly, more centrally to the problem, argued that the amending article, Article XIX, section 9, of the Montana constitution, should not control the legislative article, Article V, section 40. Therefore, "any vote of the Legislature requiring concurrence of both houses must be presented to the governor for his approval or disapproval and unless this step is taken the vote is of no force or effect for any purpose unless the vote is presented to the governor for his approval or disapproval."\textsuperscript{19} In concluding his argument, with reference to the legislative article, he stated:

\textsuperscript{17}Mont. Const., Art. V, sec. 40. Every order, resolution or vote, in which the concurrence of both houses may be necessary, except on the question of adjournment, or relating solely to the transaction of the business of the two houses, shall be presented to the governor, and before it shall take effect be approved by him, or, being disapproved, be repassed by two-thirds of both houses, as prescribed in the case of a bill.

\textsuperscript{18}Mont. Const., Art. XIX, sec. 9. Amendments to this constitution may be proposed in either house of the legislative assembly, and if the same shall be voted for by two-thirds of the members elected to each house, such proposed amendments, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published . . . and . . . submitted to the qualified electors of the state for their approval or rejection and such as are approved by a majority of those voting thereon shall become part of the constitution.

\textsuperscript{19}137 Mont. 567.
It should be remembered that our Montana Constitution is unique among state constitutions. We find no other state constitution which contains the same provisions as ours. For these reasons, the decisions from other jurisdictions construing their state constitutions or the federal constitution have little value or weight here, as they construe constitutional provisions altogether unlike our own. They are not in point here.\textsuperscript{20}

Justice Angstman concurred specially in the result that the injunction should be issued against the secretary of state. However, he did not believe that it was necessary for a proposed constitutional amendment to be submitted to the governor for his approval. His argument was twofold: first, he maintained that the spirit of Article V, section 1, of the Montana constitution eliminated the need for the governor's approval of proposed constitutional amendments since the article states that "the veto power of the governor shall not extend to measures referred to the people by the legislative assembly."\textsuperscript{21} Second, he believed that the amending article, Article XIX, section 9, was a special provision which was not to be "controlled by general provisions in the Constitution and particularly not by section 40 of Article V."\textsuperscript{22} It was Justice Angstman's

\textsuperscript{20}137 Mont. 567.
\textsuperscript{21}137 Mont. 569.
\textsuperscript{22}137 Mont. 569.
belief that a proposed constitutional amendment, after passage in both houses, could go directly to the people for their approval. In other words, he believed the governor was exempt from participating in the amendment process.

Summary

In the Livingstone case, the Montana supreme court held that the governor plays a formal and vital role in the amending process of the Montana constitution. The opinion is strange in that it is unique, both at the state and national level. Although the decision does strengthen the office of the Montana governor in that the executive becomes another check on the legislature when it passes proposed constitutional amendments, nevertheless, it also involves the governor in an area which history and logic dictate should be left to the legislative assembly and the people. In addition, the notion of an executive check on constitutional amendment proposals rests in a misunderstanding of constitutional theory.

First of all, constitutional amendments should not be confused with, and be treated like, ordinary legislation. The authority to propose amendments to the constitution is a separate article of the constitution. Thus, the power to amend is not necessarily a part of the power to legislate. Secondly, there is already one check on the
legislative branch since all proposed amendments must be approved by the people after being passed by the legislative assembly. Thirdly, where does it specifically state in the Montana constitution that the governor is supposed to approve proposed constitutional amendments? Nowhere is it specifically stated that the governor must approve the proposed constitutional amendments before they are submitted to the people for their approval. Rather, the amending article, Article XIX, section 9, impliedly excludes the governor from participating in the amending process.

In addition, it seems strange that the court placed so little emphasis on Article V, section 1, which specifically states that the governor does not possess the approval or veto power over those "measures referred to the people by the legislative assembly."\(^2^3\) Certainly a constitutional amendment comes within the spirit of this section since it is referred to the people by the legislature. Also, why should the court choose section 40, an original provision of the constitution, over section 1, as amended, a later expression of the popular will? The court chose a detailed specification of the legislative process to prevail over the separate and special constitutional provision

regarding the procedure for amendment of the constitution.

With reference to the hypothesis of this study, this case is significant. The court lacked any clear *prima facie* constitutional or statutory direction. The court's mode of interpretation strengthened the governor's approval power, but only by moving into an area—constitutional amendments—previously and generally regarded as outside the governor's range of powers. Thus, for the purpose of this study, it may be concluded that the Livingstone case furnishes an instance in which the Montana supreme court, through its mode of interpretation, has strengthened the governor's approval power; however, in all fairness to the study, it must be noted that the decision strengthens the governor's approval power by going outside the previously defined limits of this power.

The Veto Power

Introduction

The Montana governor's veto power is lodged in, and defined by, Article VII, sections 12 and 13, of the Montana constitution. This veto power can be qualified or absolute depending on particular circumstances at the time. The governor's veto is qualified when it can be overridden by a two-thirds vote in both houses; it is absolute after the assembly has adjourned since all bills presented to the
governor after adjournment must be signed by him within 15 days. The veto power, be it qualified or absolute, contributes materially to the powers of the Montana governor.

The governor implements his qualified veto by returning a bill unsigned to the house in which the bill originated along with a statement of his objections. The executive's veto prevails and defeats the bill unless the assembly, with a quorum present, overrides the governor's action by a two-thirds vote in each house. The governor implements his absolute veto when he fails to approve a bill within 15 days after adjournment. This method is often called a "pocket veto."

The Item Veto

General

The item veto power of the Montana governor is located in Article VII, section 13, of the Montana constitution, and provides that the governor, unlike the president, can veto items in an appropriations bill and still approve the remainder. Consequently, the governor is never saddled with the burden of having to choose between approving or vetoing an appropriation measure which has a repugnant "rider" attached to it, as the president is often obligated to do. This item veto effectively prevents the legislature from attaching riders to legislation since the
governor, through the use of the item veto, can single out the riders and reject them while approving the remainder of the bill. The item veto has only once been the subject of a Montana supreme court decision.

The Veto Case

The well-known Veto case held that the governor's constitutional item veto power does not include the power to scale items in appropriation measures.

Governor Dixon reduced eight items in an appropriation bill which had provided money for the operation and maintenance of various state boards, commissions and departments. After reducing these items, the governor approved the whole bill since he could not return the bill to the legislature which had adjourned.

Chief Justice Callaway noted that "While the supreme executive power of this state is vested in the governor (Const., Art. VII, sec. 5), he is forbidden to exercise any legislative function except that granted to him expressly by the terms of the Constitution." The court recognized that the constitution expressly granted an item veto power to the governor to disapprove items in appropriation bills.

But Article VII, section 13, of the constitution

2569 Mont. 330
presented a problem for the court because the section used both the words "part" and "item" in a troublesome fashion. Chief Justice Callaway believed the words were to be used interchangeably and were meant to be used as synonyms; any other meaning or interpretation of the words other than as synonyms would violate both the spirit and letter of the constitution.

The court concluded that the governor did not have the power to veto a part of an item in any appropriation bill. It relied heavily on an Illinois case which stated:

The legislative branch of the government is vested with the discretion to determine the amount which should be appropriated for any particular object. The Governor, as the chief executive of the State, is given the right to approve or disapprove of any action of the legislature in making such an appropriation. He may disapprove of it . . . for any other reason satisfactory to him, but he has not the right to disapprove of a certain portion of an item appropriated and approve of the remainder, and thus perform a function which belongs exclusively to the legislative branch,--that of using the discretion necessary to determine the amount which should be appropriated for any particular object.27

26 Mont. Const., Art. VII, sec. 13. The governor shall have power to disapprove of any item or items of any bill making appropriations of money, embracing distinct items, and the part or parts approved shall become a law, and the item or items disapproved shall be void. . . .

**Summary**

The court's decision seems consistent with the functional system of needed checks and balances in state government. Had the court upheld the governor's attempted scaling, it would have allowed the governor to determine the amount to be appropriated in any given bill; it would, in effect, have granted part of the legislation function of appropriating money to the executive.

Concerning this study's hypothesis, the Veto case decision is relevant since the court exercised a mode of interpretation in the absence of any clear constitutional provision or statute. This mode of interpretation brought the court to hold that the governor, as a proper exercise of his item veto power, could not scale specific items in an appropriations bill. This mode of interpretation, to the extent that it affirms the governor's item veto power, strengthens the powers of the governor, while at the same time, it provides that the legislative function must be exercised by the legislature unless a specific grant of the legislative function has been made to one of the other co-equal branches of state government. Thus, for the sake of this study, it can be concluded that the mode of interpretation exercised by the Montana supreme court in the Veto case is consistent with the concept of a strong governor, to the extent that it affirms the governor's item
veto power.

Proclamation Power to Convene Extraordinary Legislative Sessions

Although the Montana constitution makes the exercise of legislative powers independent from the exercise of executive powers, the Montana governor, nevertheless, possesses certain constitutional checks which basically are legislative powers. One of these checks is that the governor may convene extraordinary sessions of the legislative assembly by issuing a proclamation stating the purpose for the session. When such a special session is called, the assembly is limited to legislation only within those subject areas specified by his call; that is, specified by the proclamation or by a subsequent message to the assembly.

The Montana supreme court on five different occasions has considered whether specific legislation was within the governor's call for an extraordinary session. On two occasions the issue focused on whether the legislation passed during the extra session was within the purview of the governor's proclamation; on the three other occasions, the issue focused on whether the legislation was

\[28\text{Mont. Const., Art. IV, sec. 1.}\]

\[29\text{Mont. Const., Art. VII, sec. 11.}\]
within the scope of the governor's subsequent message to the assembly. Actually, there is no apparent difference in Montana whether the governor's request for legislation is placed in the proclamation or in a subsequent message; both are regarded as part of his call.

The Governor's Proclamation

The A. C. M. Company Case

State ex rel. Anaconda Copper Mining Company v. Clancy\(^1\) held that certain legislation regarding the disqualification of district judges was within the call of the governor's proclamation since the legislation achieved "the ends sought to be accomplished in his call."\(^3^1\)

On November 10, 1903, the governor issued a proclamation convening the eighth legislative assembly in extraordinary session. The proclamation stated that the session was convened in part to secure legislation which would provide for the disqualification of district judges once an allegation of bias or prejudice was made.\(^3^2\) Pursuant to this call the legislature enacted two pieces of legislation

\(^{30}\text{30 Mont. 529, 77 P. 312 (1904).}\)

\(^{31}\text{30 Mont. 536.}\)

\(^{32}\text{For an insight into the need for this legisla-
\mathrm{tion, and the impact it had on the socio-economic and political problems within Montana, see C. B. Glasscock, \textit{The War of the Copper Kings} (New York: Blue Ribbon Books Inc., 1965), chap. 20.}\)
one of which was entitled "An Act to Amend Section 180 of the Code of Civil Procedure, relating to the Disqualification of Judges." Section 180 was amended by adding Subsection 4 which provided in part:

When either party makes and files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge. . . . Upon the filing of the affidavit the judge as to whom said disqualification is averred, shall be without authority to act further in the action, motion or proceeding, but the provisions of this section do not apply to . . . the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such action or proceeding. . . .

Soon thereafter in Silver Bow County an affidavit alleging prejudice and bias was filed against District Judge Clancy; however, Clancy refused to step down, and instead, proceeded with the trial. The mining company upon Clancy's refusal to step down from the case brought an action under the statute to prohibit him from continuing on with the case.

In determining whether the legislation was within the purview of the governor's proclamation, Justice Holloway noted that it was fairly easy to determine that the governor's purpose for calling the extra session was to

331903 Laws (E.S.), c. 3, p. 10.

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secure some legislation whereby a district judge could be charged with entertaining a bias or prejudice and could be disqualified. With this purpose apparent, the court held that the legislation was within the purview of the governor's proclamation.

... any enactment which will meet the ends sought to be accomplished in his call must be deemed to be embraced within the limits of the subjects submitted for consideration.34

The Blackford Case

The other Montana supreme court decision determining whether specific legislation was within the purview of the governor's proclamation was Blackford v. Judith Basin County,35 in which the court held that certain legislation granting tax relief was within the call of the governor's proclamation.

The Judith Basin County commissioners acquired a tax deed to land owned by Blackford. Later, he made an offer and demand to purchase the land for a sum which included the amount of taxes due, plus penalties and interest. He claimed this right was provided by Chapter 33 of the 1933-34 Extraordinary Session which granted to former property owners a preferential right to purchase

34 30 Mont. 536.
35 109 Mont. 578, 98 P.2d 872 (1940).
tax-acquired property. The board rejected Blackford's offer and accepted a higher offer, whereupon Blackford brought an action against them.

The case presented many issues, one of which was whether Chapter 33 was within the scope of the governor's proclamation. On this issue, Chief Justice Johnson noted that the proclamation stated that the ninth purpose for convening the legislature was "To amend the law in relation to the time for redeeming real estate from tax liens." Furthermore, he noted that Chapter 33 did not actually extend the time of redemption from tax liens, but under certain conditions did "afford an equivalent relief by enabling the former owner to buy back his property for the amount of taxes, penalties and interest." He held therefore that Chapter 33 was related to, and germane to, the governor's proclamation since it had "a natural connection" with the subject stated in the proclamation. In holding that the legislation was within the purview of the proclamation, the chief justice quoted the A. C. M. Company case decision which held that "any enactment which will meet the ends sought to be accomplished in his call

36 1933-34 Laws (E.S.), p. 3.
37 109 Mont. 588.
38 109 Mont. 588.
must be deemed to be embraced within the limits of the subjects submitted for consideration.\textsuperscript{39} 

The Governor's Message

The Sweeney Case

The first Montana supreme court decision determining whether specific legislation was within the call of the governor's message was Sweeney v. City of Butte,\textsuperscript{40} in which the court held that the legislation concerning the recovery of salaries by policemen was within the scope of the governor's message.

During the summer of 1919, the governor by proclamation called a special session of the legislative assembly, and in his message to the assembly he requested that the law regarding municipal police departments be reviewed. During the session the legislature did enact legislation concerning the recovery of salaries by members of municipal police forces. This legislation provided (1) that actions to recover salaries by members of municipal police departments must be commenced within six months after the cause of action arose, and (2) that no action could be maintained by such members except for services actually rendered or

\textsuperscript{39}\textit{State ex rel. Anaconda Copper Mining Company v. Clancy}, 30 Mont. 536 (1904), as quoted in 109 Mont. 590.

\textsuperscript{40}64 Mont. 230, 208 P. 943 (1922).
for the days when the member would report for duty.\textsuperscript{41}

On May 28, 1920, Sweeney commenced a successful mandamus proceeding to compel the city of Butte to restore him to his former position on the police force, with payment of back salary. Sweeney filed his claim for the back salary, but the city clerk refused to accept and pay it.

One of the issues in the case was whether Chapter 11 enacted at the 1919 special session was within the scope of the governor's message as required by Article VII, section 11, of the Montana constitution. Commissioner Comer, who prepared the opinion for the court, held:

The subject of the message or recommendation of the governor now under consideration is an amendment to the law relating to the "department of police," for the purpose of obviating certain conditions in the future, viz., the payment of salaries where no services are rendered. The provisions of Chapter 11 pertain to this recommendation, but do not go beyond its scope or purview.\textsuperscript{42}

\textbf{The Dishman Case}

The second Montana supreme court decision resolving the issue of whether specific legislation was within the scope of the governor's message was State of Montana v. Dishman,\textsuperscript{43} in which the court held that legislation

\textsuperscript{41}1919 Laws (E.S.), c. 11.
\textsuperscript{42}64 Mont. 239.
\textsuperscript{43}64 Mont. 530, 210 P. 604 (1922).
prohibiting the sale of liquor was within the scope of the governor's message which requested additional legislation for the suppression of the illegal traffic in liquor.

On March 15, 1921, "the governor transmitted to the assembly while in extra session a special message, in which he recommended the enactment of further legislation for the suppression of illegal traffic in intoxicating liquors." The assembly enacted legislation which prohibited the selling of liquor, and later Dishman was convicted under the law. He alleged that this law was invalid because the subject matter was not within the scope of the governor's proclamation.

Justice Holloway agreed that the subject matter of Chapter 9 was not within the scope of the governor's proclamation; however, he stated that a "subject submitted by special message while the assembly is convened in extraordinary session is before the assembly for consideration to the same extent as if specifically mentioned in the proclamation." Thus, the court held that since the governor's message has the same binding effect on legislation as does the proclamation, Chapter 9 was within the

4464 Mont. 532.
451921 Laws (E.S.), c. 9.
4664 Mont. 532.
The Pierson Case

Pierson v. Hendricksen held that legislation providing for the creation of new school districts was within the scope of the governor's message which requested legislation providing for the consolidation of school districts. Pierson, a resident and a taxpayer in a newly created high school district, brought an action to enjoin the issuance and sale of bonds for improvements to the county high school. He claimed that Chapter 47 which provided for the creation of new school districts was not within the purview of the governor's proclamation.

Justice Angstman, for the court, took note that the "general subject of consolidating school districts was submitted by the message of December 7," which he held conferred upon the legislative assembly the authority "to pass legislation effecting consolidation of school districts for all purposes." In addition he stated that such "consolidations would in effect create new districts." In conclusion, the court held that Chapter 47 was within the purview of the governor's proclamation since the

47 98 Mont. 244, 38 P.2d 991 (1934).
48 98 Mont. 250.
49 98 Mont. 250.
governor's message has the same binding authority as does his proclamation.

Summary

The Montana constitution has placed considerable power in the governor by providing that all legislation enacted during an extra session must be within the governor's call—that is, the governor's proclamation convening the special session or one of the governor's subsequent messages to the assembly. This constitutional power possessed by the governor gives him real power to control the direction of the legislation to be enacted by the special session. It would appear to be in the best interest of state government for the state courts to liberally interpret this provision so as to increase both the governor's and the legislative assembly's power by enlarging the general subject areas in which the legislature must act. Thus, it is in the best interest of Montana government for the Montana supreme court to exercise a mode of interpretation, in the absence of clear constitutional or statutory direction, that will also liberally interpret this constitutional provision. On this point it is my belief that the language of the A. C. M. Company decision should continue to be controlling

... any enactment which will meet the ends sought to be accomplished in his call must be
deemed to be embraced within the limits of the subjects submitted for consideration.\textsuperscript{50}

The five cases before the court on this subject of whether certain legislation was within the call of the governor's proclamation have presented relatively easy situations for the court to rule and hold that the legislation in question was within the governor's call. In rendering these decisions, the court has not been restrictive in its exercise of its mode of interpretation, and therefore it is possible to conclude for the purposes of this study that all five cases have assisted in strengthening this power which the governor possesses by constitutional grant.
CHAPTER V

PARDON POWER

Introduction

Article VII, section 9, of the Montana constitution vests the power to pardon in the office of the governor. However, before the governor can exercise this power, the proposed action must be approved by the state board of pardons. In accordance with the constitution, the approval by the board need not be unanimous; a simple majority is sufficient.

The pardon power is the constitutionally defined power vested in the governor which allows the executive to grant pardons, absolute or conditional; commutations of punishment; and reprieves for any offense against the criminal laws of Montana. A pardon is a declaration by the governor which releases the offender from all punishment for the offense and from the disabilities which would occur upon conviction. A commutation of sentence is a substitution of a lesser punishment for a greater punishment. A reprieve postpones for a definite time execution of a sentence. The Montana governor’s pardon power also includes the power to suspend or to remit the collection
of a fine or forfeiture.

Operation and Effect of Pardon

General

A pardon operates directly on both the punishment for the offense and the guilt of the offender. In a full pardon, the punishment and guilt of the offender are completely erased so that the law treats the offender as if he had never committed the offense. In a conditional pardon, the punishment is suspended, although the guilt remains as do all the disabilities inherent in the conviction. A conditional pardon will in effect become a full pardon once the conditions of the pardon have been performed; however, until they are performed, the Montana supreme court has held that a conditional pardon has an effect similar to that of a parole.¹

The Sutton Case

The only Montana supreme court decision to discuss the effect of a conditional pardon was In Re Sutton,² which held that a conditional pardon is similar to a parole, so that one who receives a conditional pardon from the governor is released only from the punishment—not from the judgment of conviction as he would have been had he

¹In Re Sutton, 50 Mont. 88, 145 P. 6 (1914).
²50 Mont. 88.
received a full or absolute pardon.

Sutton, an attorney, was convicted of forgery and sentenced to two years in the state prison. Upon his conviction and in accordance with a statute, Sutton was presented with a show cause order from the Montana supreme court to show cause why he should not be disbarred. Sutton's answer to the court's show cause order was that the governor had issued an executive order pardoning him. The pardon, however, was conditional by its very language.

Sutton argued that

... the effect of the pardon is not only to release him from the punishment inflicted by the judgment of conviction, but that it obliterates, in legal contemplation, the offense itself and restores him to the same standing in the community as if the offense had never been committed.

In other words, he maintained that the judgment of conviction was canceled by his pardon and could not serve as a

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3Mont. Rev. Codes, sec. 6409 (1907). In case of the conviction of an attorney and counselor of a felony or misdemeanor, involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction.

4The conditions of the pardon were that Sutton (1) must make a written report monthly to the secretary of the board of pardons stating his address, nature of work, employer, etc., (2) shall not be guilty of any breach of law, and abstain from the use of intoxicating liquors, (3) must provide for his wife and children, and (4) shall remain in the legal custody of the state board of prison commissioners.

550 Mont. 91, 92.
basis for the disbarment proceeding.

Chief Justice Brantly, speaking for the court, held that the pardon granted to Sutton was conditional, having the same effect as a parole.

The act of the governor . . . though designated by him as a pardon, is closely assimilated to a parole. . . . A parole does not operate to wipe out the judgment of conviction but merely suspends its operation by remitting, for the time being, the confinement and hard labor, until the end of the term, or until an unconditional pardon is granted.6

The court held that the governor's imposition of the conditions in the pardon implied the existence of a judgment which could not be canceled until the conditions in the pardon had been performed. Thus, the judgment of conviction remained and could serve as a basis for the disbarment proceeding.

Summary

In the Sutton case, the governor granted to Sutton a pardon which was conditional by its very nature. The court held as a matter of interpretation that the pardon was, in effect, similar to a parole. The governor could have granted Sutton a full pardon, but instead he granted a pardon with specific conditions attached.

The court's opinion respects the governor's pardon

650 Mont. 94.
power. The court held that when the governor grants a pardon with conditions, the pardon is in effect a parole which suspends the punishment but does not cancel the judgment of conviction. In the Sutton case, the court has exercised a mode of interpretation in the absence of clear constitutional or statutory direction, and has clearly defined the effect of a conditional pardon, while at the same time it has respected the governor's pardon power.

Encroachments upon the Pardon Power

Encroachment by the Judiciary

General

When the constitution vests the pardon power in the governor, as in Montana, the courts have no jurisdiction in criminal cases to exercise this power. The Montana supreme court, on two different occasions, has been presented with questions concerning the judiciary's relationship to, and possible encroachment upon, the governor's pardon power. In both cases the decisions, in part, focused on the district court's implementation of Montana's suspended sentence statute.
The Reid Case

The first of these two cases was State ex rel. Reid v. District Court,⁷ in which the court held that a trial court lacked jurisdiction to modify a judgment after it had been pronounced and after the defendant had started serving the sentence. Such a modification would be an encroachment by the district court upon the executive's constitutional pardon power.

Reid was sentenced to six months in jail and fined $500. He was then committed to the county jail and after he had served eight days of his sentence the district court entered an order reducing the sentence and judgment.

Chief Justice Callaway stated, for the court, that Montana's suspended sentence statute⁸ allowed the court to suspend the execution of a sentence, but ruled that this power must be exercised at the time the sentence was pronounced. The district court, by making the

⁷Mont. Rev. Codes, sec. 12078 (Choate 1921). In all prosecutions for crimes or misdemeanors, except as hereinafter provided, where the defendant has pleaded or been found guilty . . . and it appears that the defendant has never before been imprisoned for crime . . . and where it appears to the satisfaction of the court that the character of the defendant and circumstances of the case are such that he is not likely again to engage in an offensive course of conduct . . . said court may suspend the execution of the sentence and place the defendant on probation. . . .
modification after the defendant began serving his sentence, had "sought to exercise a power which the Constitution reposes in the governor and board of pardons." The court concluded that since the constitution had granted the pardon power to the executive it could not be exercised by the judiciary.

The Sheehan Case

The other Montana supreme court decision discussing the judiciary's encroachment upon the executive's pardon power was Ex Parte Sheehan, in which the court held, on a collateral issue, that when a justice court imposed a condition upon a suspended sentence, such an action constituted an encroachment upon the governor's pardon power.

Sheehan pleaded guilty to a misdemeanor charge and was given a suspended sentence by the justice of the peace in Deer Lodge County, on the condition that Sheehan "leave and remain out of Deer Lodge County."

On the issue raised by Sheehan whether the condition attached to the suspended sentence was an encroachment

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968 Mont. 312.

10 100 Mont. 244, 49 P.2d 438 (1935).

11 100 Mont. 249.
upon the pardon power, Justice Matthews, speaking for the court, held that the condition had no force or effect since it was in the nature of a pardon on condition which could only be exercised by the governor. "... Such remit­tance of judgment after sentence is in the nature of a pardon on condition rather than punishment." Thus, the court held that the justice court had tried to exercise the governor's pardon power when it made the suspended sentence conditional upon the defendant's exile from the county.

Summary

The Montana supreme court's decisions in both the Reid and Sheehan cases have exercised a mode of interpretation in the absence of clear constitutional or statutory direction which has strengthened the governor's pardon power since it has prohibited another branch of government from exercising this power. The court in both cases has illustrated that it commands an understanding of what the pardon power is, and what constitutes an encroachment upon this power.

The court rightly held in the Reid case that, after the defendant actually began serving his sentence, the execution of the sentence could not be interfered with unless by the governor's exercise of his pardon power or by appeal.

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12100 Mont. 255.
And the court correctly held in the Sheehan case that, although the justice court had the authority to suspend the sentence, it did not have the authority to put such a condition on the suspended sentence since the pronouncement of such a condition exceeded its jurisdiction and entered the domain of the governor's pardon power.

Encroachment by the Legislature

General

When the Montana constitution vested the pardon power in the governor, it presumably excluded the legislature from exercising this power. However, the legislature can by statute confer upon a court the power to suspend the execution of a sentence if the discretion of the court does not usurp the governor's pardon power.

The Bottomly Case

The only Montana supreme court decision which has discussed the possibility of the legislature's encroachment of the executive's pardon power appears to have been State ex rel. Bottomly v. District Court, in which the court held that the Montana "suspended sentence" statute does not


15 73 Mont. 541, 237 P. 525 (1925).
impinge upon the governor's pardoning power.

On December 13, 1924, Rasmussen was sentenced to be imprisoned in the county jail for 60 days and fined $200. On the same day he appealed the conviction, and the appeal was dismissed on May 14, 1925. The next day, May 15, the district court suspended the sentence and placed Rasmussen on probation. One of the questions before the court was whether the legislature's enactment of the suspended sentence statute was an encroachment upon the governor's pardon power.

Justice Holloway, speaking for the court, noted that the first legislative assembly had enacted a suspended sentence statute, notwithstanding the constitutional provision establishing the executive's pardon power. He further noted that since then the legislature had on two other occasions enacted legislation providing for the suspension of sentences.

Thus it will be seen that from the organization of Montana as a territory to the present time—a period of sixty-one years—it has been assumed by all departments of our government, and the assumption has been acted upon, that the legislative branch of government had authority to provide for the suspension of the execution of a judgment in a criminal case, and the legislature has assumed to exercise the authority in at least three instances since the Constitution was adopted.16

1673 Mont. 548.
The Montana court argued, in addition, that the terms "pardon," "commutation" and "respite" as found in Article VII, section 9, of the state constitution were not "intended to comprehend the suspension of the execution of a judgment." Justice Holloway noted that the Montana suspended sentence statute did not make the defendant a free man; instead, he was "in effect serving his sentence, though not within the prison walls." Thus, the court concluded that the Montana statute was not an encroachment upon the governor's pardon power and therefore was a valid legislative enactment.

Summary

The decision in the Bottomly case fails clearly to distinguish the difference between the effect of a suspended sentence and the effect of a reprieve which, of course, is within the domain of the governor's pardon power. The purpose to be achieved by the suspended sentence statute is to allow a first offender to be released on probation in those cases where the circumstances dictate that such a release will not endanger the public safety. A suspended sentence in effect postpones the execution of the sentence. But so does a reprieve, so what is the

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1773 Mont. 549.
1873 Mont. 549, 550.
difference? Apparently, the difference is that a reprieve postpones the execution of the sentence for a definite time, whereas a suspended sentence postpones the execution of the sentence for an indefinite time; that is, the time during which the offender obeys the laws and conditions imposed by the court. The court was not at all clear on this point.

However, had the court effectively distinguished between a suspended sentence and a reprieve, legislative enactment of the suspended sentence statute would not appear to be an encroachment upon the executive's pardon power; the legislature should have the power to invest certain discretion in the judiciary so long as this discretion is not an encroachment upon the governor's pardon power. The court should have the discretionary power to suspend the sentence of a first offender where it believes the suspension to be in the best interest of all the parties concerned. However, this power should not be established until it is satisfactorily distinguished from the governor's reprieve power.

Encroachment by the State Board of Pardons

General

When the Montana constitution vested the pardon power in the governor, it required the state board of pardons to act in concert with the governor in exercising this
power. The constitution provides that the governor shall be advised by the board and that the actions of the governor must be approved by the board. However, although the board has the power to advise and approve, this does not invest the board with the power to perform the pardon function per se.

The Herman-Roy Case

The only Montana supreme court decision to discuss the state board of pardon's encroachment on the executive's pardon power was State ex rel. Herman and Roy v. Powell, in which the court held that the state board of pardons could not grant a parole to a subsequent escape sentence and thereby extinguish a former sentence; such a discharge of a former sentence would in effect be an exercise of, and an encroachment upon, the governor's pardon power.

Herman was serving a five-year prison sentence at the time he escaped in July, 1958; Roy was serving a six-year sentence when he escaped in November, 1958. Each convict was captured soon after his escape, pleaded guilty to the escape charge and received a one-year sentence on the escape charge. Later, at different times in 1959, each was paroled subject to serving out his time of the escape sentence. After serving the minimum time, each was paroled

on his escape sentence. In 1960, each violated the conditions of his parole and was returned to the state prison. Herman and Roy each contended that the board's grant of the parole to the escape sentence resulted in a discharge of the original sentence.

The court rejected this argument of the petitioners as to the effect of their paroles on the original sentences. Justice John Harrison, for the court, ruled:

... no Montana statute gives the state board of pardons power to extinguish a former sentence by paroling a man to a subsequent sentence. To sustain such an argument would have the effect of granting to the Board the right to pardon or commute a sentence. This, of course, cannot be done because the exclusive power to pardon and commute a sentence rests in the office of the governor.20

The court noted that a parole releases a convict from confinement before the expiration of his sentence, but that it does not change his status as a prisoner. In other words, the parole does not suspend the prisoner's sentence, it merely substitutes a shorter confinement. In so holding, the court took note of a statute which states in part: "... A parole shall be ordered only for the best interest of society, not as an award of clemency; it shall not be considered a reduction of sentence or pardon. ..."21

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20139 Mont. 586, 587.
Thus, the Montana court held that paroling a man to a subsequent sentence does not extinguish an earlier sentence since such a discharge would be tantamount to granting a pardon which the state board of pardons, without the governor, cannot do.

Summary

The court's mode of interpretation, in the absence of clear constitutional or statutory direction, in the Herman-Roy case has strengthened the governor's pardon power since it has prohibited the board of pardons from exercising this power without the governor's involvement. Again the Montana supreme court has illustrated that it understands what constitutes an encroachment upon this power. Although the state board of pardons has the authority to advise the governor regarding pardons and the responsibility to approve all pardons, it nevertheless does not have the authority to discharge a former sentence by paroling a convict to a subsequent escape sentence since such a discharge would be similar to a pardon or commutation of sentence which would be an exercise of the governor's pardon power.
Summary

On five different occasions the Montana supreme court has rendered decisions concerning the Montana governor's pardon power. In all five of these decisions, the Montana court has exercised a mode of interpretation, in the absence of clear constitutional or statutory direction, which has respected the governor's pardon power. In four out of five of these decisions it has directly strengthened the executive's pardon power, and it could have strengthened the power in the fifth case—the Bottomly case—had it distinguished clearly between a suspended sentence and a reprieve. All in all the court has demonstrated an understanding of the pardon power and, furthermore, has prohibited the judiciary and an executive board from encroaching upon this constitutionally defined power. The court's work could have been complete had it illustrated in the Bottomly case why a suspended sentence statute was different from a reprieve so as to clarify why the statute was not an encroachment on the governor's pardon power.
CHAPTER VI

MILITIA POWER: EXECUTIVE USE OF TROOPS TO SUPPRESS INSURRECTION

Introduction

The militia power of the Montana governor is defined in Article VII, section 6, of the state constitution which provides that the governor shall have the power to call out any part or all of the militia "to aid in the execution of the laws, to suppress insurrection or to repel invasion."\(^1\) The militia power, for the purposes of this study, can best be defined as the executive's "use of troops in aid of civil authorities."\(^2\)

When the governor exercises this militia power to suppress a riot, but does not declare martial law, he acts as a civil officer and directs the military forces in accordance with the law. Under this condition, the military acts as a major police force and could, if need be, arrest and detain rioters until the disturbance is suppressed. However, when the governor declares martial law,

\(^1\)Mont. Const., Art. VII, sec. 6.

"the civil status of the state is suspended and the governor acts in a military capacity as commander in chief of the military forces." It appears that the usual test of determining whether martial law is in existence is whether or not the courts remain open.

The Use of Troops in Aid of Civil Authorities

General

Labor troubles in Butte in 1914 furnished the governor with an occasion to exercise his militia power: to use the militia to aid the local law enforcement authorities in Silver Bow County. During the same year, a challenge of the governor's exercise of this power reached the Montana supreme court in the nationally known case of In Re McDonald, which determined the limits of the militia power.

The McDonald Case

In the McDonald case, the court held that the governor through his constitutional militia power could not


4For a brief discussion of martial law, its definitions, dimensions and effects, see Thurman Arnold, op. cit., pp. 162-166.


549 Mont. 454, 143 P. 947 (1914).
declare martial law and thereby transfer the judicial func-
tion to a military commission. On September 1, 1914, the
governor by proclamation declared that Silver Bow County
was in a state of insurrection and under martial law. On
September 12, McDonald and others filed writs of habeas
corpus alleging that they were being unlawfully detained
by Major Donohue, the commander of the militia which the
governor had ordered in to aid the local authorities in the
suppression of the insurrection. Donohue replied that the
detention was necessary because McDonald and the others were
leaders of the insurrection. On September 24, Gillis filed
his petition for a writ of habeas corpus alleging unlawful
detention by virtue of a commitment issued by a summary
court set up by the military authorities, while all the
district courts were open and actively attending to their
business. The commitment of Gillis was defended as a valid
exercise of authority authorized by the governor's procla-
mation of martial law. The Montana court joined both
actions applying for writs of habeas corpus and heard them
together.

The case raised two issues in an almost classical
fashion and with reference to the detention of McDonald and
the others who petitioned the court on September 12, Jus-
tice Sanner held that McDonald and the others were properly
detained under the authority of the governor's proclamation.
was valid and justifiable under Article VII, section 5, of the Montana constitution, and properly conferred lawful authority on the actions of the militia in arresting and detaining McDonald and the others.

With reference to the second issue—Gillis's trial before a military tribunal, Justice Sanner held that the governor did not have the constitutional authority to establish a form of martial law which would authorize the conviction of a citizen without a trial by jury.

... neither the governor nor the military under him can lawfully punish for insurrection or for other violations of the law. The courts cannot be ousted by the agencies detailed to aid them; nor can their functions be transferred to tribunals unknown to the Constitution.

Thus, the court held that although the governor may impose a certain degree of military rule during an insurrection, he has no authority to proclaim absolute martial law which means the abrogation of all constitutional guaranties, thereby granting jurisdiction to military tribunals to convict civilians without a trial by jury.

Liability for Oppressive or Destructive Acts

General

The existence and implementation of the governor's militia power neither authorizes military license, nor

649 Mont. 477 (1914).
places the lives or property of citizens under the absolute control of the military. When the militia power is used to oppress citizens or to destroy property, the party responsible for such action will be held accountable. Thus, a reckless or destructive act ordered or executed by the commander will establish his liability for the damages; however, if an order to a subordinate to commit a destructive act was lawful or reasonable on its face, the subordinate who carries out the order will not be held liable.⁷

The Herlihy Case

The other Montana decision involving the governor's militia power was Herlihy v. Donohue,⁸ which illustrated the proposition that officers may be held responsible for damages resulting from arbitrary orders calling for the destruction of private property, but that subordinate officers could not refuse to carry out orders which were valid on their face, and therefore their actions in obedience were justifiable and released them from liability.

The fact situation in the Herlihy case was born out of the same labor dispute in Butte in 1914 which caused the governor, on September 1, to declare that Silver Bow County was in a state of insurrection. During the military

⁸52 Mont. 601, 161 P. 164 (1916).
occupation, on September 19, Major Donohue ordered his subordinate officers and a few enlisted men to destroy the stock of liquor in Herlihy's saloon because Herlihy had violated Donohue's orders by opening his saloon and selling some liquor during the curfew.

Justice Holloway held that the military's destruction of Herlihy's property was not justifiable as a valid use of the militia power since there was no proof that the destruction of private property was imminently and overwhelmingly necessary. In so holding he stated that the militia during the insurrection performed the function of a strong arm of the governor by aiding in executing the law and in suppressing the insurrection, and therefore the militia was bound by the same authority which binds the governor.

Independently of the executive, the militia had no power or authority, except possibly with reference to its own internal affairs. It acted as an executive agency, subject to the orders of the governor and bound by the authority which he might lawfully exercise. The governor is at all times amenable to the Constitution and laws of the state. They are the charters of his powers and in them he must find the authority for his official acts.9

Thus the court held that since the militia was bound to the same authority which binds the governor, the militia was bound by the constitution and state laws and therefore the

952 Mont. 609.
officers of the militia— but not the subordinates— would be held liable for any damages to private property which could not be justified under state law. With reference to the subordinate officers, the court held that since Donohue's order was valid and reasonable of its face, the subordinates who acted in obedience to the order were released from liability since their actions in obedience were required.

**Summary**

The Montana supreme court has twice exercised a mode of interpretation, in the absence of clear constitutional or statutory direction, which has strengthened the Montana governor's militia power to the extent that the court has recognized that the constitution vests emergency powers in the governor. The McDonald decision affirmed the existence and use of the militia, while it defined the limits of this power and held that the governor could not declare martial law per se. This decision illustrates among other things that the Montana constitution does not provide that the governor may declare martial law and thereby supplant the authority of the civil courts. Nowhere does the constitution use the words "martial law." This decision can also be viewed as a contest between the executive and judicial branches of
state government with the outcome being that the judiciary prevailed over the executive. The Herlihy decision again affirmed the existence and use of the militia power, while it held that an excessive use of this power—the unwarranted destruction of private property—would cause the officer giving the order for the destruction to be liable for any resulting damages. Thus the court has been pragmatic in affirming the existence and proper use of this power, while it has been wise to hold that the exercise of this power must fall within the constitutionally defined limits of the executive's powers.
CHAPTER VII

SUCCESSION

Introduction

The constitution of 1889 evidently sought to anticipate all contingencies which might arise in succession to the governorship. Article VII, section 14, of the Montana constitution appeared to grant the right of gubernatorial succession to the lieutenant-governor. The section appeared to provide for a successor in almost any contingency so that the administration of the executive department would not be placed in jeopardy. Yet the first occasion for succession to the balance of a gubernatorial term vacated by resignation precipitated litigation and required the supreme court to rule whether the provisions were in fact clear and comprehensive.

The Lamey Case

On March 13, 1933, after serving as governor for only a couple of months, Governor Erickson resigned,

1Mont. Const., Art. VII, sec. 14. In case of the failure to qualify, the impeachment or conviction of felony or infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office, for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant-governor.
whereupon Lieutenant-Governor Cooney assumed the office and powers of the governor. State ex rel. Lamey v. Mitchell\(^2\) soon held that upon a governor's resignation, his powers and duties were immediately transferred to the lieutenant-governor. The question before the court was whether there was a vacancy in the office of governor to be filled by a special election. Lamey and others argued that there was a vacancy and that the secretary of state should be compelled to put their names on the ballot.

The opinion of the court, written by district judge McKinnon sitting in place of Justice Angstman, noted the constitutional provision that if the governor should resign, "the powers, duties and emoluments of the office, for the residue of the term . . . shall devolve upon the lieutenant-governor."\(^3\) From this constitutional provision, the court held:

\[\ldots\text{when the Governor resigns or is permanently removed from office, there is no vacancy in the office of Governor in the sense that there is no one left with power to discharge the duties imposed upon the Governor. . . . The framers of the Constitution never intended that there should be any interim in which the affairs of the state should not be executed, for they said in explicit language that on the happening of any of the contingencies mentioned in section 14, supra, the powers, duties and emoluments of the office were to be immediately transferred to the Lieutenant-Governor, who is then}\]

\(^2\)97 Mont. 252, 34 P.2d 369 (1934).
\(^3\)97 Mont. 256.
given a mandate to discharge the duties of the office for the residue of the term for which the Governor was elected. He, as Lieutenant-Governor, acts as Governor and is empowered to perform the duties of that office.4

Summary

The Lamey case said, in effect, that the very existence of the lieutenant-governorship was intended to prevent a situation in which there would be no one left to discharge the duties imposed upon the governor. To argue, as Lamey had, that a vacancy occurred upon the resignation of the governor, seemed to disregard the prima facie intent of the constitutional draftsmen.5 In sustaining the argument that a vacancy existed upon the governor's resignation, the court would have placed the administration of the executive branch in jeopardy. Obviously, that was not the intention of the draftsmen. Instead, the intention would appear to provide for an efficient right of succession upon any of the mentioned acts in section 14.

The court's decision strengthened the office and

497 Mont. 256, 257.

5But in a few states, the lieutenant-governor does not succeed to full office and powers of the governorship upon the death of the elected governor. In these few states, a special election is called to elect a new governor.
powers of the governor since it has held that upon certain
defined contingencies the gubernatorial office and powers
will be executed by the lieutenant-governor. Had the
court held that a vacancy existed in the office of the
governor, this decision would have weakened the office
since it would possibly have jeopardized the administra-
tion of the executive branch and the execution of the laws
during the time the vacancy remained in effect.
CHAPTER VIII

MISCELLANEOUS POWERS

This chapter reviews four additional powers of the governor which the Montana supreme court has had to consider. The powers are: (1) to call in a district judge, (2) to approve state contracts, (3) discretionary extradition power, and (4) to proclaim elections.

The Power to Call in a District Judge

The Smith Case

The Montana supreme court has decided two cases, both fairly recent, which considered whether the governor, upon the application of any interested person, properly exercised his statutory power to call a district judge into a neighboring judicial district. State ex rel. Smith v. District Court\(^1\) held that the governor exceeded his statutory authority to call in a district judge from a neighboring judicial district when under a statute the disqualified resident judges still had the primary authority and responsibility to call in a judge from a neighboring district.

\(^1\)116 Mont. 251, 151 P.2d 500 (1944).
On December 13, 1943, Judge Horsky of department no. 1 of the first judicial district ordered a temporary injunction to be issued in an abatement case. The next day, an affidavit of disqualification was filed against him so he transferred the case to Judge Padbury of department no. 2 where the injunction was dissolved. Judge Padbury then planned to be absent from the state for about a month, whereupon the county attorney on December 18 disqualified him. On the same day the acting governor, in the absence of the governor, called in Judge Lynch from another district in accordance with section 8823\(^2\) to preside in the case. On December 28, Judge Lynch appeared but declined to assume jurisdiction of the case on the ground that under section 8868\(^3\) Judge Horsky, and not the governor, had the authority to call in another judge.

In delivering the opinion of the court, Justice Morris

\(^2\)If for any cause a district court is not or cannot be held in any county by the judge or judges thereof, or by a district judge requested by such judge or judges to hold such court, or if the business of the court in any county is not or cannot be dispatched with reasonable promptness, the governor may, upon application of any interested person, by an order in writing, require some district judge to hold court in said county for such time as may be specified in the order. Mont. Rev. Codes, sec. 8823 (1935).

\(^3\)Mont. Rev. Codes, sec. 8868 (1935). This is a very lengthy statute providing for the disqualification of a district judge and for the calling in of another judge if no judge or judges in the district remains able to perform the judicial duties.
stated that he believed it was improper for the governor to call in Judge Lynch, in accordance with section 8823, "while the power granted by section 8868 has not been exhausted." Consequently, the court held that the governor should not have called Judge Lynch because: (1) while Judge Padbury was in the district, he had the primary responsibility to call in another judge, and (2) while Judge Padbury was absent from the state, the authority and responsibility to call in another judge was vested in Judge Horsky who had remained at all times within the district. Thus, the court held that the governor should not have called in Judge Lynch under section 8823, since the powers under section 8868 to call in a neighboring judge had not been exhausted by the judges within the judicial district.

The Bennett Case

State ex rel. Bennett v. Bonner held that the statute which authorizes the governor to require some district judge to hold court in another district does not empower the governor to divest the duly elected and qualified district judge of his authority and jurisdiction.

The governor had issued executive orders directing two district judges from other judicial districts to come

4116 Mont. 258.
into the fifth judicial district to "hold court" in the counties comprising the fifth judicial district "until the business of the court therein has been dispatched." Bennett, the judge of the fifth judicial district, commenced an original proceeding and sought a writ of prohibition to restrain the two visiting district judges from proceeding under the governor's executive orders. In bringing this action, Bennett asserted among other things that (1) the executive orders disregarded Article IV, section 1, of the Montana constitution which defines the separation of powers within Montana government, and (2) there was no statutory authority empowering the governor to make the orders.

Chief Justice Adair at the beginning of the majority opinion noted that the governor's "general authority is narrowly limited by the Constitution." After he reviewed all the constitutional provisions, he held that there was "no provision of the constitution empowering the governor to make the executive orders in questions." In addition, he held that there were no statutory enactments which would authorize the making of the executive orders which would

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6 As quoted in 123 Mont. 417.
7 123 Mont. 423.
8 123 Mont. 428.
authorize the governor to "require some district judge to hold court" in another county under certain conditions. However he stated that this statute neither authorized the governor to exclude or remove from office the duly elected, qualified and acting judge of the district, nor to fix the terms of court. To hold otherwise, he said, "would place the business of the courts at the mercy of the chief executive."  

While present in his district and qualified and capable, he may not be divested of his authority and jurisdiction by an executive order of the governor and be forced to abdicate and stand aside while others take over his office and perform the duties imposed upon him by the constitution and necessarily attendant upon the office of district judge of the fifth judicial district. Under our constitution it is from the supreme court of this state rather than from the supreme executive power of the state that relief is to be had where a district court or a district judge is in error or in need of superintending guidance or correction.  

In holding that the governor was acting without authority to issue the executive orders, the chief justice concluded:

The inappropriateness of having an executive department administer the business affairs of

9Mont. Rev. Codes, sec. 93-312 (1947). This is the same statute that was cited in the Smith case as Mont. Rev. Codes, sec. 8823 (1935).

10123 Mont. 429.

11123 Mont. 431.

12123 Mont. 434.
the court is manifest. The constitution clothes
the governor with no judicial power nor does it
authorize him either to transact or to direct the
transaction of such judicial business.13

Justice Freebourn, in a separate opinion, stated
that he believed section 93-312 was unconstitutional but,
since the court in the Smith case had held the section to
be constitutional and operative, he believed the executive
orders of the governor were "justified and proper."14

Justice Angstman, in another separate dissenting
opinion, disagreed with the majority because he believed
they had misapplied the facts to the law. He argued that
the governor's orders did neither "divest Judge Bennett of
authority or jurisdiction over cases in which he had not
been disqualified" nor did it force Judge Bennett to stand
aside "while others take over his office."15 Justice
Angstman concluded his dissent by arguing that since the
executive orders did not divest Judge Bennett of his
authority to hear and decide those cases in which he had
not been disqualified, and since it did not force him to
stand aside in his own court, the governor's executive
orders were within the scope of section 93-312.

13123 Mont. 436.
14123 Mont. 440.
15123 Mont. 440.
Summary

Both the Smith and Bennett decisions have ruled that the governor exceeded his statutory authority when he called in a district judge. In the Smith case, the court held that one of the disqualified resident judges should have called in another judge, instead of the governor. In the Bennett case, the court seems to have said (1) that recourse should first be had to the supervisory power of the state supreme court, and (2) that if the problem still persists after recourse has been had to the state supreme court, then the governor can issue executive orders calling in another judge, but the orders should be limited so as not to divest the existing district judge of his authority or jurisdiction in those cases which he still has the authority and jurisdiction to hear.

For the purposes of this study, both the Smith and Bennett decisions have, in the absence of clear constitutional or statutory direction, sustained the governor's power to call in a district judge under certain circumstances. Both decisions have upheld the constitutionality of the statute giving this authority to the governor, although in both cases, the court has held that the governor's exercise of this authority was improper under the facts and circumstances of the cases. In both cases, the Montana supreme court has held that the governor's attempted
exercise of this statutory authority was excessive and transgressed into the performance of the judicial function which is the domain of the state judiciary. The court in both decisions has attempted to adhere to the doctrine of separation of powers by holding that the judicial function should be performed by the judiciary, unless there is a specific grant of judicial power to another branch of government by the constitution or statute.

This whole problem of the governor calling in a district judge might be resolved and the administration of justice advanced if the power was placed in the hands of the state supreme court and taken completely out of the governor's scope of responsibility. No valid reason is apparent why this judicial function should be vested in the governor, when it appears that the Montana supreme court might perform this function equally well without raising questions of separation of powers. Modern notions of judicial administration would strengthen the responsibility of the highest court for the general administration of the state judicial system.\textsuperscript{16}

The Power to Approve State Contracts

The Hogan Case

The only Montana supreme court decision to consider the governor's power to approve contracts was State ex rel. State Publishing Company v. Hogan, in which the court held that contracts for state printing are invalid unless signed by the governor when the state constitution and statutes require such written approval by the governor.

The constitutional provision involved in the case read in part:

... and the printing, and binding and distribution of the laws, journals, and department reports and other printing and binding ... shall be performed under contract, to be given to the lowest responsible bidder. ... No member ... of the government shall be in any way interested in any such contract; and all such contracts shall be subject to the approval of the governor and state treasurer.

The statutory provision required that "all contracts made by the board must be approved by the governor and the state treasurer." On December 20, 1898, the state board of examiners awarded a printing contract to the State Publishing Company which had submitted the lowest and best bid for certain printing. However, Secretary of State Hogan refused to deliver the papers to be printed on the grounds

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1722 Mont. 384, 56 P. 818 (1899).
19Mont. Codes Ann., sec. 710 (Booth 1895).

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that the Montana constitution and statutes required that all contracts entered into by the state board of examiners for such printing and binding were subject to the approval of the governor and state treasurer.

The three-man court, in a *Per Curiam* opinion, held that the governor's approval was an indispensible element of the contract and that there could be no valid and enforceable contract between the parties until the governor had approved the contract. The court perceived this contract approval power to be similar to the governor's veto power and concluded that this approval power exists as "a check upon possible extravagances of the Board of Examiners."\(^{20}\)

**Summary**

The establishment of this contract approval power in the governor, both by the constitution and by statute, has added to the powers of the state chief executive. The Montana supreme court through the Hogan decision has sustained this grant since the court held that the governor's approval is an indispensible element to such a contract. The decision placed the responsibility for reviewing and approving such state contracts squarely on the shoulders of the chief executive.

\(^{20}\) 22 Mont. 390.
For the purposes of this study, the Hogan decision has no special interest since the court rendered the decision on the basis of clear constitutional and statutory direction which required no interpretative function.

The Discretionary Extradition Power

The Booth Case

The only Montana supreme court decision concerning the governor's discretionary extradition power was State v. Booth, in which the court held in part that the motives which induce a governor to act on a requisition for a warrant for extradition are not reviewable in a habeas corpus proceeding.

The governor of Oregon requested the governor of Montana to issue a warrant for the extradition of Booth. Thereafter, Booth was detained by virtue of the Montana governor's warrant whereupon, on August 13, 1957, he petitioned a district court for a writ of habeas corpus alleging, among other things, that the application for his extradition had not been made in good faith by the state of Oregon.

Chief Justice Harrison noted that "where a warrant of extradition is sought for some ulterior purpose ... it is within the discretionary power of the governor of the

state to refuse to issue it." But the chief justice held

... the motives which induced a governor to grant, honor or refuse a requisition will not be inquired into on habeas corpus, since such inquiry would be opposed to principles of public policy and to the freedom of action by the executive within its constitutional authority. 23

Summary

In the Booth decision, the Montana supreme court exercised a mode of interpretation, in the absence of clear constitutional or statutory direction, which strengthened the powers of the Montana governor since it has noted that the governor has the right and responsibility to exercise his discretion in extradition matters. But even more important, it strengthened the powers of the governor since it has held that the courts will not look into the motives of the executive when he exercises his discretion in granting or denying a requisition for extradition.

22134 Mont. 247. For a discussion of the duty of the governor of the asylum state to determine whether a crime has been charged, see 40 ALR 2d 1155, sec. 3.

23134 Mont. 247. For an additional discussion of this subject, see 94 ALR 1493.
The Power to Proclaim Elections

Introduction

A Montana statute provides that the governor must give notice by proclamation to the electorate of certain impending elections. With reference to this power the Montana supreme court has held that insufficiency of notice by the governor to the electorate in a general election will not affect the validity of the election. In addition, the court has held that insufficiency of notice in a special election to fill a vacancy will not affect the election's validity. Thus, for both general and special elections the court has held that insufficiency of notice will not affect the election's validity. This issue of the governor's election proclamation power has been before the Montana supreme court on three different occasions: twice directly, and once quite indirectly.

The Breen Case

The subject of the governor's election proclamation power first arose indirectly in State ex rel. Breen v. Toole. Since the case was a mandamus action to compel the


26 32 Mont. 4, 79 P. 403 (1905).
governor to issue a certificate of election to Breen, the court decided the case on the merits of the question whether the writ of mandamus should be issued and did not resolve the proclamation issue: the effect of the governor's proclamation which had called for an election of two judges from the second judicial district instead of three.

On May 4, 1901, the governor appointed McClernan to fill the vacancy in one of the judgeships of the second judicial district. At the next election in November, 1901, McClernan was elected to fill the remaining term of the judgeship. Later in November, 1904, there were six candidates for the three judgeships; Breen polled the third highest number of votes, and thereafter demanded that the governor issue him a commission as judge.

Breen argued that all the terms for district judge were uniform, and thus all three judgeships were up for election in 1904; therefore, as a consequence, since he received the third highest number of votes, he was entitled to a commission for the third judgeship. The state, however, argued that Breen had not alleged and proven that there was a candidate for the third judgeship--McClernan's judgeship--and therefore the governor could not be compelled to issue a certificate of election for the third judgeship since Breen had not proven that he had a clear and legal right to it.
The court conceded two points with reference to Breen's argument: first, there was a strong constitutional basis for the argument that the terms of the three judgeships were uniform; and second, that the formalities of notice are not binding in a general election. Thus, the court admitted that the proclamation was not binding on the election since it was a general election. However, at this point, the court dropped the proclamation issue since it was not controlling for the central issue of granting the writ of mandamus. The court held that the writ of mandamus should not be issued against the governor since Breen had failed to show that he had a clear legal right in the commission in order to justify the issuance of the writ against the governor. In other words, the court held that Breen had failed to show that he was a candidate for the third judgeship, and therefore he had not shown that he had a legal right in the commission.

The Patterson Case

The second Montana supreme court decision to discuss the governor's election proclamation power was State ex rel. Patterson v. Lentz, in which the court held that insufficiency of notice in the governor's proclamation of

2750 Mont. 322, 146 P. 932 (1915).
a vacancy in the office of district judge would not invalidate the special election to fill the judgeship when the electorate had actual notice of the vacancy by means of the candidates' campaigns.

The facts were that in the governor's proclamation calling for a general election there was no reference to the vacancy in one of the district judgeships to be filled by special election, but the proclamation did state that, among other officers, there was to be elected "a district judge in any judicial district where a vacancy may exist."\(^{28}\)

The court stated that the election to fill the judgeship was a special election, and therefore it was "incumbent upon the governor to include in his proclamation specific mention of the fact that in a particular district" an election was to be held.\(^{29}\) In addition, it went on to state that the governor's proclamation gave insufficient notice to the people of the special election because it "left the people in any district to ascertain for themselves whether the emergency existed requiring them to elect a judge, instead of informing them definitely that such an emergency existed and that they should proceed with the

\(^{28}\)As quoted in 50 Mont. 333.

\(^{29}\)50 Mont. 343.
However, even in view of this fact that the governor's proclamation was insufficient notice to the people, the court held that after an election the rule requiring official notice by publication is not as binding as before the election. After an election, the court held that the validity of the special election depends upon "whether the electors generally had notice and generally indicated their choice of candidates."\textsuperscript{31}

\ldots inasmuch as the people have the right to choose officers to serve them no informality in the election will suffice to defeat their will, as expressed by their votes, if in fact it appears that they had actual notice and did indicate their choice.\textsuperscript{32}

The court held, as a consequence, that the insufficiency of notice in the governor's proclamation was not sufficient to invalidate the special election since the electors had actual notice through the candidates' campaigns that a judgeship was vacant and up for election.

The Nordquist Case

The third Montana supreme court decision discussing the governor's election proclamation power was Nordquist v.

\textsuperscript{30}50 Mont. 345.

\textsuperscript{31}50 Mont. 345.

\textsuperscript{32}50 Mont. 345.
Ford,\textsuperscript{33} in which the court held that the governor's proclamation did not have to make reference to a referendum: a measure referred by the legislature to the people.

Nordquist sought to enjoin the governor from issuing and selling bonds for the construction and repairs at the state hospital. Sale and issuance of bonds for this purpose had been authorized by Chapter 168 of the Laws of 1939, "which was an Act passed by the legislature and by it referred to the people at the general election in 1940."\textsuperscript{34}

Nordquist claimed that the failure to publish the governor's proclamation with mention of Chapter 168 invalidated the law, and therefore the governor should be enjoined from the issuance and sale of the bonds under the law. Justice Angstman held:

\ldots under the law there is no requirement that the Governor's proclamation make any reference to a measure referred by the legislature to the people. Obviously if the proclamation need make no reference to such referendum measures, then failure to publish the proclamation becomes immaterial so far as this point is concerned.\textsuperscript{35}

The court thus held that referendums need not be incorporated into the governor's proclamation, and therefore need

\textsuperscript{33}112 Mont. 278, 114 P.2d 1071 (1941).
\textsuperscript{34}112 Mont. 280.
\textsuperscript{35}112 Mont. 283.

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Summary

The Montana supreme court on three separate occasions has discussed the Montana governor's election proclamation power. The first discussion was in the Breen case in which the court implied, as dictum, that when the time and place of an election are fixed by statute, as they are in a general election, the existence of the statute is notice to all the electors of the election, and therefore the failure of the governor to give complete notice by proclamation as required by law does not invalidate the election. This dictum seems to weaken the election proclamation power of the governor since the court defines the nature of this power as directory and ministerial, and not mandatory and discretionary. However, this power should only be directory and ministerial. This is not a major power of the governor. Neither should the statute impose a mandatory obligation on the governor, nor should the governor be able to defeat a general election if the power is improperly exercised.

The Patterson case held that insufficiency of notice in the governor's proclamation was not sufficient to invalidate a special election to fill a vacancy when the electors had actual notice of the election by means of the
candidates' campaigns. Again it could be argued that this holding weakens the governor's election proclamation power since it fails to impose a mandatory obligation on the governor to perform his duty of giving proper notice. However, this power should not be binding on the governor. Even in a special election, it should not be binding if the electors had actual notice. The Patterson decision gives the better rule since it holds that the lack of statutory notice by proclamation to fill a vacancy in a special election does not invalidate that election if the electors had actual notice of the election.

The third discussion was in the Nordquist case which held that the governor's proclamation did not have to make reference to any referendum. This case also affects the governor's power, but not in the same manner as the first two cases. They weakened the governor's power by holding that his statutory obligation to provide notice was not mandatory; whereas the Nordquist case weakens the governor's power by holding that all things to be voted on in an election need not be stated in the proclamation.

Although it can be argued that these decisions weaken the governor's election proclamation power, this study agrees with the court that the duty and responsibility of the governor to provide election notice should
only be directory, not mandatory. This formalistic power should neither impose a mandatory obligation of the governor nor be essential to the conduct of a valid election. To impose a meticulous observance of detail as to all elements in elections on the governor would not really strengthen the governorship. In addition, to invalidate an election for a minor formal failure of such detail would diminish popular control without any sensible increase of gubernatorial authority. In conclusion, this study recommends that this power and responsibility should be taken out of the governor's office and placed in the secretary of state's office since he is the major election officer in Montana.
CHAPTER IX

CONCLUSION

The hypothesis of this study has been that the Montana supreme court, when presented with a case or controversy concerning the Montana governorship, in the absence of clear constitutional or statutory direction should exercise a mode of interpretation which will strengthen the office and powers of the Montana governor since it is now desirable to have strong executives in state government. Thus, this study is an analysis of the Montana governorship as seen through the eyes of the Montana supreme court, tested against the assumed desirability of a particular mode of judicial interpretation.

A few of these decisions have dealt with important powers of the governor and have raised significant issues; others have dealt with relatively unimportant or minor powers and have involved little interpretive function. This might be expected since lawyers often must raise minor issues to get their client's interest before the court. This study has witnessed examples of this; notably most of the cases raising the issue of the governor's power to proclaim a special session. In these cases the issue was
whether the legislation was within the call of the governor's proclamation or message. In all but one of the cases, the legislation was clearly within the boundaries of the governor's call, and the court accordingly sustained the governor's authority to issue the call and to limit or extend the boundaries of the subject matter of that call. Nevertheless, the issue was raised by counsel as he argued his client's interest before the court.

Another example would be the cases raising the issue of the governor's power to proclaim elections. There counsel was reaching for an issue by raising the question of whether the election had been mentioned in the election proclamation.

This study has examined 38 cases and 26 proved to be relevant for the hypothesis. A few were important and have been recognized nationally, and therefore deserve special attention. These cases are: the Chumasero case (mandamus), the Veto case (veto power), and the McDonald case (militia power).

Still others were important within the state since they have been concerned with major powers of the governor and have been relevant for the study's hypothesis (see Table 1). These cases include: the Jardine case, which recognized a vacancy that could be filled by gubernatorial appointment; the Craighead case, which provided
that the governor could remove an appointee at will; the Sullivan, Holt and Matson cases, which restricted the governor's removal power; the Livingstone case, which applied the governor's approval power to constitutional amendments; the pardon power cases, which respected the governor's pardon power; the Herlihy case, which affirmed the governor's militia power while it defined limits of liability; and the Lamey case, which established the right of succession.

A student of state government would naturally assume that state supreme courts would be more persuaded and influenced by the concept of a strong governor as it became more established and popularly believed by the citizenry and public officials. This would mean that as the concept grew, so would the persuasive effect grow on state supreme courts which would render decisions manifesting this concept. The three most recent cases in this study do indicate this trend: the Booth case (extradition discretion), the Livingstone case (approval power), and the Herman-Roy case (pardon power). However, all three of the Montana court's more noted decisions which strengthened the Montana governorship were rendered relatively early in the court's history: the Chumasero case (1875), the McDonald case (1914), and the Veto case (1923). This fact might be cited to support the notion that the
court was as much concerned with a strong governor in the early days of statehood as it is now—80 years later—in the era of "creative federalism."¹

The court, obviously, is not primarily responsible for the fact that Montana has a weak governorship. The primary source of weakeners are the constitution, the legislative assembly and practice of past governors; however, this does not exempt the court from any fault. The court can be faulted in one area especially, the removal power—one of the governor's really major and important powers. The court has weakened the governor's removal power by not allowing the governor the right to remove appointees at will.

Thus, in conclusion, it has been demonstrated that the court, both early in the state's history and more significantly in recent years, has exercised a mode of interpretation, in the absence of clear constitutional or statutory direction, to strengthen the Montana governorship. However, it also has been proven that with reference to the removal power three of the four decisions have weakened the Montana governorship.

ⁱA popular term used during the early years of Lyndon B. Johnson's presidency to symbolize the "new" federal-state relationship.
TABLE 1
BOX SCORE ANALYSIS OF THE 38 MONTANA SUPREME COURT DECISIONS

<table>
<thead>
<tr>
<th>Clear Statutory Direction</th>
<th>Clear Constitutional Direction</th>
<th>Exercised a Mode of Interpretation</th>
<th>Strengthened or Weakened</th>
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II. MANDAMUS

The Chumasero case
X -1

The Tanner case
X -1

The State Pub. Co. case
X -1

III. APPOINTMENT POWER

The Neill case
X

The Jardine case
X S

1These three mandamus decisions strengthen the governorship to the extent that they recognize executive discretion and will not control this discretion by mandamus; however, they weaken the governorship to the extent that they recognize that some executive actions are ministerial.
TABLE 1 (Cont'd.)

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<thead>
<tr>
<th>Clear Statutory Direction</th>
<th>Clear Constitutional Direction</th>
<th>Exercised a Mode of Interpretation</th>
<th>Strengthened or Weakened</th>
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</table>

### III. APPOINTMENT POWER (Cont'd.)

The Patterson case

The Nagle case

The Olsen case

The Cutts case

REMOVAL POWER

The Craighead case

The Sullivan case

The Holt case

The Matson case

2 This decision neither strengthens or weakens the governorship since its primary focus was on the length of the appointee's term.
TABLE 1 (Cont'd.)

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<tr>
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<th>Clear Statutory Direction</th>
<th>Clear Constitutional Direction</th>
<th>Exercised a Mode of Interpretation</th>
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<td>IV. APPROVAL POWER</td>
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<tr>
<td>The Evers case</td>
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<td>The Hay case</td>
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<td>The Toomey case</td>
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<td>The Vaughn case</td>
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<td>The Livingstone case</td>
<td>X</td>
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<td>VETO POWER</td>
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<td>The Veto case</td>
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<tr>
<td>SPECIAL SESSION POWER</td>
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<tr>
<td>The A.C.M. Co. case</td>
<td>X</td>
<td>X</td>
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3 This decision neither strengthens nor weakens the governorship since its primary focus was on the validity of the defective enacting clause.
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<tr>
<th>Clear Statutory Direction</th>
<th>Clear Constitutional Direction</th>
<th>Exercised a Mode of Interpretation</th>
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<td>The Blackford case</td>
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<td>The Sweeney case</td>
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<td>The Pierson case</td>
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<td>V. PARDON POWER</td>
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<td>The Sutton case</td>
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<td>The Reid case</td>
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<td>The Sheehan case</td>
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<td>The Bottomly case</td>
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<td>The Herman-Roy case</td>
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4 This decision neither strengthens nor weakens the governorship since it failed to clearly distinguish between a suspended sentence and a reprieve.
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<th>Clear Statutory Direction</th>
<th>Clear Constitutional Direction</th>
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<td>VI. MILITIA POWER</td>
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<td>The McDonald case</td>
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<td>VII. SUCCESSION</td>
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<td>The Lamey case</td>
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<td>VIII. MISCELLANEOUS POWERS</td>
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<td>The Smith case</td>
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<td>The Booth case</td>
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<td>The Patterson case</td>
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<td>The Nordquist case</td>
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VIII. MISCELLANEOUS POWERS (Cont'd.)

This decision with reference to the governor's proclamation power neither strengthens nor weakens the power; however, with reference to the use of mandamus to control executive action, this decision strengthens the office of the governor.
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"Constitutionality of statute conferring on court power to suspend sentence," 26 ALR 399 (1923).

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APPENDIX

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