

Art. IV, § 16

Houses"; or more briefly, "necessary" here means necessary if an "order, resolution, or vote" is to have the force of law. Such resolutions have come to be termed "joint resolutions" and stand on a level with "bills," which if "enacted" become statutes. But "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the President, nor resolutions passed by the Houses concurrently with a view to expressing an opinion or to devising a common program of action, or to directing the expenditure of money appropriated to the use of the two Houses.

... Also, it was settled as early as 1789 that resolutions of Congress proposing amendments to the Constitution need not be submitted to the President, the Bill of Rights having been referred to the States without being laid before President Washington for his approval—a procedure which the Court ratified in due course [citing *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798)]. (Library of Congress Congressional Research Service, *The Constitution of the United States of America—Analysis and Interpretation*, rev. ed. (Washington, D.C.: Government Printing Office, 1973), pp. 127-28 (footnotes omitted).)

As in the case of the federal constitution, the power to veto resolutions was necessary to ensure effectiveness of the veto under the Constitution of the Republic and under the prior state constitutions. Otherwise, laws enacted by resolution rather than bill might have escaped executive scrutiny. Since its adoption, the present constitution has prohibited the enactment of laws by resolution (see the *Annotation* of Art. III, Sec. 30), and the probable original reason for Section 15 no longer exists. As is the case in the federal constitution, about one-half of the states with a similar provision have no constitutional requirement that laws be enacted only by bill. It is probable that the lack of coordination between the 1875 Convention's Committees on the Legislative Department and the Executive Department (and the failure to include the veto in the legislative article, where it belongs, and thus under the jurisdiction of the Committee on the Legislative Department) let Section 15 slip through unnoticed.

The congressional experience suggests that Section 15 was too broadly worded even when it was necessary under the prior constitutions, and there is no justification under the present constitution for its retention. If not eliminated, it should be narrowed to preclude gubernatorial involvement in legislative operations as well as to remove the burden on the governor of having to consider every resolution memorializing or congratulating a citizen or otherwise expressing legislative opinion.

Sec. 16. LIEUTENANT GOVERNOR. There shall also be a Lieutenant Governor, who shall be chosen at every election for Governor by the same electors, in the same manner, continue in office for the same time, and possess the same qualifications. The electors shall distinguish for whom they vote as Governor and for whom as Lieutenant Governor. The Lieutenant Governor, shall by virtue of his office, be President of the Senate, and shall have, when in Committee of the Whole, a right to debate and vote on all questions; and when the Senate is equally divided to give the casting vote. In case of the death, resignation, removal from office, inability or refusal of the Governor to serve, or of his impeachment or absence from the State, the Lieutenant Governor shall exercise the powers and authority appertaining to the office of Governor until another be chosen at the periodical election, and be duly qualified; or until the Governor impeached, absent or disabled, shall be acquitted, return, or his disability be removed.

History

This section originated in the 1845 Constitution and has appeared virtually unchanged in every subsequent constitution. During the 1875 Convention there

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were a few attempts to abolish the office, but both were rejected without extensive debate. (*Debates*, pp. 96, 152.)

Explanation

Section 1 of this article establishes the office of lieutenant governor as an executive officer of the state, but this section reveals that his principal duties are legislative. The lieutenant governor exercises executive duties only when acting as governor. (The succession provisions of this section are discussed more fully in the annotation of Sec. 17.) Because the lieutenant governor is the principal successor to the office of governor his qualifications, selection, and term are the same as the governor's.

The legislative duties imposed by this section are not inherently significant except when there is a tie vote. The Vice-President of the United States and lieutenant governors in most states have similar constitutional duties, but in most cases the role of presiding officer is formal and offers no opportunity to influence legislation. In Texas, the senate's rules have given the lieutenant governor, as presiding officer, significant power over its organization and operation. By statute the lieutenant governor serves on and appoints senate members to several legislative service agencies, including the Legislative Budget Board and the Texas Legislative Council, and another section of the constitution (Art. III, Sec. 28) makes him a member of the Legislative Redistricting Board.

Comparative Analysis

In 38 states the lieutenant governor is a constitutional officer, and in almost all of those states he presides over the senate. In Nebraska he presides over that state's unicameral legislature. In Massachusetts he is a member of the governor's council, which includes eight other members elected by districts to advise the governor, and presides over it in the governor's absence. In Hawaii he performs only the duties prescribed by law, and statutes have given him the duties normally imposed on a secretary of state. In Tennessee the title of lieutenant governor has been given by statute to the speaker of the senate, a constitutional officer who succeeds to the governorship. Several states in recent years have withdrawn the lieutenant governor's legislative duties, permitting the senate to elect its presiding officer from its membership, and have given him only those duties delegated by the governor or prescribed by law.

Recently, several states have also adopted a team system, similar to that for electing the U.S. president and vice-president, for election of governor and lieutenant governor. In at least 11 states, voters cast one vote for a governor-lieutenant governor team (secretary of state in Alaska), so that succession will be in the same party. Before 1960, only New York required the team system.

No state permits the lieutenant governor, as presiding officer, to vote except when a tie occurs, and most permit him to break a tie. In only six or so states does the lieutenant governor retain the right to vote and debate in committee of the whole senate.

Under the *Model State Constitution* there is no lieutenant governor. The governor is the only constitutional executive officer and the legislature elects its presiding officers. (For a discussion of the other states' succession provisions, see the *Comparative Analysis* of Sec. 17.)

All of the recently revised state constitutions have sought new ways to handle the elected lieutenant governor. The office exists primarily to have an official elected statewide on hand to succeed to the governorship, and a few states,

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adopting the approach of the *Model State Constitution*, have abolished the office and require a special election to fill a vacancy in the governor's office if a substantial portion of the term remains. Several of the newest constitutions (Michigan, Illinois, and Montana) have, instead, omitted the traditional legislative duties of the office and have given him the duties delegated by the governor. (Montana's and Michigan's constitutions, however, state that the governor may not delegate constitutional powers and duties.) Those states also require a joint election—one vote for a governor-lieutenant governor team—which, considering the nature of the lieutenant governor's duties, seems appropriate. Alaska abolished the office and provided that the secretary of state be elected on a joint ballot to succeed to the governorship if necessary. Hawaii reached the same result by giving the lieutenant governor, by statute, the duties normally given a secretary of state.

Author's Comment

As the attempts to abolish the office of lieutenant governor during the 1875 Convention indicate, debate over the need for an elected lieutenant governor is not a recent phenomenon. Unlike Texas, where the office exercises potent legislative powers by virtue of the senate's rules, most states have found little for the occupant to do, even though he is expected to have the stature necessary to become governor. Of course, the Texas practice is only informal and continues only at the sufferance of the senate, which controls its own rules. (See Art. III, Sec. 11.) If the senate ever revolts, Texas may find itself with an idle lieutenant governor.

Sec. 17. DEATH, RESIGNATION, REFUSAL TO SERVE, REMOVAL, INABILITY TO SERVE, IMPEACHMENT OR ABSENCE; COMPENSATION. If during the vacancy in the office of Governor, the Lieutenant Governor should die, resign, refuse to serve, or be removed from office, or be unable to serve; or if he shall be impeached or absent from the State, the President of the Senate, for the time being, shall in like manner, administer the Government until he shall be superseded by a Governor or Lieutenant Governor. The Lieutenant Governor shall, while he acts as President of the Senate, receive for his services the same compensation and mileage which shall be allowed to the members of the Senate, and no more; and during the time he administers the Government, as Governor, he shall receive in like manner the same compensation which the Governor would have received had he been employed in the duties of his office, and no more. The President, for the time being, of the Senate, shall, during the time he administers the Government, receive in like manner the same compensation, which the Governor would have received had he been employed in the duties of his office.

History

Only one significant change has been made in this section since 1845. Prior to the 1876 Constitution the predecessors of this section provided for the senate to elect a president only when the lieutenant governor was acting as governor or otherwise was unable to preside over the senate. Another section directed the senate to choose a president when it organized. (See the *History* of Art. III, Sec. 9.) Apparently that president was not the one who stood in line to succeed to the governorship. Prior constitutions also contained a provision requiring the secretary of state to convene a special session of the senate to choose a president if the lieutenant governor, while acting as governor during a recess of the legislature, died, resigned, or was absent from the state. Section 17, as submitted by the 1875 Convention's Committee on the Executive Department, contained similar provisions. The convention, during floor debate, deleted election of a president of the

senate for the sole purpose of succession and the requirement for the secretary of state to convene a special session of the senate. Thus, the president *pro tempore* of the senate, elected under Section 9 of Article III, became the second officer in the line of succession. (*Journal*, pp. 232-33, 293.)

Under the first three state constitutions the lieutenant governor, while acting in a legislative capacity, received the same compensation as the speaker of the house. The 1869 Constitution gave him "twice the *per diem* or pay of a Senator." The 1875 delegates apparently did not debate the reduction to the same compensation as senators and the addition of mileage made by the present section.

Explanation

Succession. This section and the preceding section provide for the line of succession to the governorship, and their application is reasonably clear. Under Section 16 the lieutenant governor acts as governor under certain circumstances, and when he does, the president *pro tempore* of the senate exercises the duties of the lieutenant governor's office under Article III, Section 9. Then, if something happens to the lieutenant governor while acting as governor, this section moves the president *pro tempore* into the governor's office. It also provides that an officer that acts as governor receives the equivalent of the governor's salary.

There are a few problems posed by Sections 16 and 17, however. First, there is an ambiguity under Section 16 concerning the tenure of the lieutenant governor in the governor's office. This ambiguity was created by the 1972 amendment that made the governor's term four years (Sec. 4). If the lieutenant governor succeeds to the governorship during the first two years of a four-year term, serving until a governor is chosen "at the periodical election" might require election of a new governor to fill two years of the unexpired term. This problem did not exist when terms were two years; expiration of the governor's term and the next general election always coincided. (The four-year term amendment created the same ambiguity in Section 3a of this article, which provides for succession if a governor-elect does not take office.) In analogous situations, Section 12 of this article clearly requires an election at the next general election to fill the unexpired term when the governor makes an appointment to fill a vacancy in an elective office. This section was written when terms were two years, however, and it is unlikely that anyone intended to limit the tenure of a successor when four-year terms were adopted. Moreover, less reason exists in the case of succession by the lieutenant governor than in the case of appointed successors governed by Section 12 to have an election to fill an unexpired term. The lieutenant governor is elected by the same electorate as the person he is to succeed, and his only executive function is to succeed to the governorship. The ambiguity is less pronounced in Section 17. The tenure of a president *pro tempore* of the senate succeeding to the governorship—"until he is superseded by a Governor or a Lieutenant Governor"—would permit service either for the unexpired term or until the next general election. Whether a successor should be elected at a midterm general election clearly is subject to statutory resolution if the president *pro tempore* succeeds to the governorship, but as yet no statute exists.

Another problem relates to the qualifications of a president *pro tempore* for the office of governor. A senator may be as young as 26 (Art. III, Sec. 6), while a governor may be no younger than 30 (Art. IV, Sec. 4), and a 26-year-old senator may be elected president *pro tempore* of the senate (Art. III, Sec. 9). Section 18 of this article makes successors subject to the "restrictions and inhibitions imposed in this Constitution on the Governor." But Section 3a does likewise in limiting statutory succession schemes, and in that section qualifications are mentioned in

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the same context, suggesting that "restrictions and inhibitions" do not include qualifications. Thus Sections 4 and 18 may not limit this section, and a president *pro tempore* of the senate who is younger than 30 might succeed to the governorship.

In practice, the first sentence of this section has been ignored. It requires a "vacancy" in the office of governor, which normally means death, resignation, or removal and not disability or absence, before the president *pro tempore* of the senate may act as governor. He frequently does so, however, when both the governor and lieutenant governor are outside the state (see C. McClesky, *The Government and Politics of Texas*, 5th ed. (Boston: Little, Brown, 1975), p. 147), and apparently no one has contested the validity of gubernatorial acts performed by a president *pro tempore* in those circumstances.

Compensation. Although it results in awkward organization, this section also fixes the lieutenant governor's compensation. He is paid a legislator's salary, which is fixed in Article III, Section 24, at \$7,200 annually plus a \$30 daily allowance during legislative sessions. (The mileage authorized by this section referred to the allowance for travel to and from the capital for each session, which Article III, Section 24, provided prior to a 1975 amendment. Since that amendment, travel expenses are no longer covered in the constitution, and a statute authorizes a more generous allowance. See Tex. Rev. Civ. Stat. Ann. art. 5429f.) The salaries of all other constitutional executive officers are fixed by statute (see Secs. 5, 21, 22, and 23), and for the fiscal year that began September 1, 1975 the lowest paid of those, the secretary of state, received an annual salary of \$38,100. (See Tex. Laws 1975, ch. 743, art. III, at 2670.) An amendment that would have deleted the provisions of this section on the lieutenant governor's legislative salary and fixed his salary in a new section in the legislative article at \$22,500 annually was defeated in November 1972. The strange wording about compensation of the lieutenant governor and the president of the senate while acting as governor probably is intended to prevent them from receiving both a governor's and a legislator's compensation.

Comparative Analysis

Succession. In the 38 states that have a constitutional lieutenant governor, he is, of course, the person who is first in line to succeed to the office of governor. Among the remaining states, seven make the president of the senate first to succeed, four make the secretary of state first, and one permits the legislature to elect a successor (but if the legislature is in recess, the president of the senate succeeds until the legislature convenes and makes a choice).

There are a great many variations in the order of succession. One-half of the states with a lieutenant governor make the president of the senate the second in the line of succession, seven designate the secretary of state, three the speaker of the lower house, one the attorney general, and eight permit subsequent succession to be determined by law. The speaker of the lower house is second in line in the states that make the president of the senate first in line to succeed. Approximately one-half the states designate the third official to succeed to the governorship (usually the speaker of the lower house in states in which the lieutenant governor and the president of the senate are the first two), and about ten even specify subsequent successors. Two states provide for legislative election of a successor after the first two. A few of the states that enumerate several elected officials in the line of succession provide that they are ineligible if they were not elected to the office.

In general, all states provide for succession under much the same circumstances

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as those set forth in Sections 16 and 17. New Hampshire adds that if the governor's absence from the state is for official business he continues to perform his duties. (*Cf.* Art. XVI, Sec. 9, of the Texas Constitution.) Almost all states provide that the successor serves the remainder of the term or, if the governor's absence, disability, etc., is temporary, until the disability or absence terminates. When the succession is permanent, however, a few states with four-year terms provide, if the circumstances are appropriate, for election at the next general election to fill the final two years of the term, and two states require a *special* election under some circumstances to fill the unexpired term. About five states provide a procedure for determining whether the governor is absent or disabled and one authorizes the legislature to do so. One state specifically exempts the president of the senate and the speaker of the lower house from meeting some qualifications for governor when they succeed to the office. About half the states specify that an acting governor receives the governor's salary.

The *Model State Constitution* contains a comprehensive section (Sec. 5.08) on gubernatorial succession. First, it covers the failure of a governor-elect to take office. (See the *Comparative Analysis* of Sec. 3a of this article.) Next it covers temporary situations—impeachment, mental or physical disability, and “continuous absence”—in which case the presiding officer of the legislature (or of the senate in a bicameral legislature) serves as acting governor. If the disability or absence exceeds six months the office becomes vacant. In case of vacancy, the presiding officer succeeds to the office for the remainder of the term unless more than one year remains of the term. In that event he serves as acting governor until a new governor is elected at a special election and assumes office. The legislature is given the duty to prescribe by law for special elections to fill vacancies in the governorship, and the supreme court is given “original, exclusive and final jurisdiction” to settle any questions of absence, disability, existence of a vacancy, and all other matters concerning succession to the office or to its powers and duties.

Compensation. About nine other states that have a constitutional lieutenant governor tie his compensation to that of a legislator, usually the speaker of the lower house. The majority of those states, however, permit a legislator's salary to be fixed by law, and a few specify that the lieutenant governor's salary is double a legislator's. The others, like Texas, fix a legislator's pay at a miniscule amount in the constitution.

Of the remaining states, about three fix the lieutenant governor's salary at a small amount (\$1,000 to \$2,500 a year). The others permit the legislature to fix his salary. The *Model State Constitution* has no such office, but it does permit salaries to be fixed by law.

Author's Comment

As was suggested in the *Author's Comment* on Section 16, there have been several new approaches for ensuring availability of a successor to the governorship who is elected statewide. Of the various approaches, the special election is one that is most certain to ensure indefinite succession and most likely to put an effective person in the office. Another approach is to authorize the legislature to provide by law for succession beyond the first in line to succeed. That, of course, would permit the legislature to provide for special elections. The new Illinois Constitution fixes an order of succession among several offices that are filled by statewide election, disqualifies an incumbent in one of those offices if he was appointed to a vacancy, and authorizes a statute to determine succession after the enumerated officials are exhausted. (Ill. Const. Art. V, Sec. 6.)

Another recent innovation has been the establishment of a formal method for

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determining when the governor is mentally or physically disabled. The Twenty-fifth Amendment to the United States Constitution provides that in the absence of a voluntary declaration of incapacity from the president, the vice-president and a majority of the cabinet decide. If the president disagrees, however, it takes a two-thirds vote by congress, within a specified time, for the vice-president to continue as acting president. The *Model State Constitution* gives the supreme court "original, exclusive and final jurisdiction to determine absence and disability . . . existence of a vacancy . . . and all questions concerning succession." It leaves the procedures to be developed by the court or the legislature. Under the new Montana Constitution the lieutenant governor and the attorney general jointly raise the issue of the governor's ability to continue, and the governor raises the issue of his ability to resume. In either case, the governor continues to perform the duties unless the legislature, convening in special session if necessary, by a two-thirds vote finds him incapacitated. The simplest approach, however, is that adopted in Illinois. The legislature determines by law who may question the governor's capacity and the forum and procedures for settling the issue. The failure of the Texas Constitution to provide a forum and procedures for deciding questions about the governor's capacity to continue and other succession issues has not yet caused a problem and rarely will. If the problem arises only once, however, it could be disastrous. Some constitutional provision should be made, and the Illinois provision is the most flexible.

Less important is the question whether the lieutenant governor should temporarily succeed when the governor is outside the state. Today, a governor can administer the office better from outside the state than he could have from 100 miles outside the capital in 1845. The *Model State Constitution* requires "continuous absence" and provides a procedure for determining when it exists. The new Montana and Illinois Constitutions do not mention absence but permit the governor to notify his successor to act as governor when he wants a vacation from the duties of the office, for example. (The successor is elected on a joint ticket.)

Sections 16 and 17 only hint at a distinction between an acting governor, who exercises the powers and duties of the office temporarily but does not move into the governor's mansion and retains title to his first office, and one who succeeds to the office permanently. For example, the compensation provisions are necessary only for acting governors. A clarification of the distinction would be helpful and appropriate. The *Model State Constitution* expresses the distinction as follows:

When the presiding officer of the legislature succeeds to the office of governor, he shall have the title, powers, duties, and emoluments of that office and, when he serves as acting governor, he shall have the powers and duties thereof and shall receive such compensation as the legislature shall prescribe by law. (Sec. 5.08(c).)

One other advantage of the *Model* over Texas' succession provisions is that it covers succession in one place and not in three sections sprinkled haphazardly around the executive article. Finally, a clarification about whether or not a successor must also be eligible for election to the governorship and, if he must, provision for an alternative when the person in line to succeed is ineligible might forestall confusion in the future.

Sec. 18. RESTRICTIONS AND INHIBITIONS. The Lieutenant Governor or President of the Senate succeeding to the office of Governor, shall, during the entire term to which he may succeed, be under all the restrictions and inhibitions imposed in this Constitution on the Governor.

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History

The 1875 Convention added this section to the present constitution without apparent debate. No similar provision appeared in any of the prior Texas constitutions.

Explanation

The delegates to the Convention of 1875 apparently wanted to be certain that anyone succeeding to the office of governor could not circumvent constitutional restrictions on the occupant of that office. Presumably, the restrictions they had in mind were those on dual officeholding and outside employment (Art. IV, Sec. 6) and residence (Art. IV, Sec. 13). No reported judicial opinion or attorney general's opinion has construed the provision, however.

Comparative Analysis

Neither the *Model State Constitution* nor any other state's constitution contains a provision resembling this one.

Author's Comment

It is inconceivable that anyone could devise a persuasive argument that a successor to the vacant office of governor is not under the same restrictions as a person elected to the office. On the other hand, if this section applies to an acting governor—one who exercises the powers and duties of the office during temporary absence or disability of the governor—it is mostly ignored. It is doubtful that every president *pro tempore* who has signed a proclamation as governor while the governor and lieutenant governor were out of the state has resigned all his directorships in corporations (see Art. IV, Sec. 6), for example. In any event, the most important restriction—against dual officeholding—applies to all officeholders. (See Art. XVI, Sec. 40.)

Sec. 19. SEAL OF STATE. There shall be a Seal of the State which shall be kept by the Secretary of State, and used by him officially under the direction of the Governor. The Seal of the State shall be a star of five points encircled by olive and live oak branches, and the words "The State of Texas."

History

The Constitution of the Republic required a seal of the Republic, which was to be kept and used officially by the president. The 1845 Constitution continued the provision, substituting the governor for the president and adding the design detail. The provision has been included in every subsequent constitution. When this section was adopted in 1876, the secretary of state was given custody of the seal and directed to use it at the direction of the governor.

Explanation

This section is self-explanatory.

Comparative Analysis

All but 11 states have some constitutional reference to a seal. Over half the states give custody of the seal to the secretary of state and another 12 give custody to the governor. There are other miscellaneous references relating to its use or design. The *Model State Constitution* is silent on the subject.

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Author's Comment

It is traditional for governments to adopt a seal, and someone must have custody of it. Both could be provided by statute, but it must be conceded that this type of inclusion, unlike most unnecessary inclusions, has caused no constitutional mischief.

Sec. 20. COMMISSIONS. All commissions shall be in the name and by the authority of the State of Texas, sealed with the State Seal, signed by the Governor and attested by the Secretary of State.

History

This section originated in the 1845 Constitution. (A similar provision appeared in the Constitution of the Republic.) It has continued unchanged since then.

Explanation

This section provides the means of authenticating the official status of public officials, local and state. (See Election Code art. 8.45.)

Comparative Analysis

Some 34 states have constitutional references to the issuance of commissions to public officials. All but two require that they be issued in the name of the state, sealed with the state seal, and signed or attested by the governor, and only eight do not require a countersignature or attestation by the secretary of state. The mavericks provide only that commissions be issued by the governor (New Jersey) or in the name of the state (West Virginia). The *Model State Constitution* provides that the governor commissions all state officers.

Author's Comment

Obviously it is desirable to provide some method of authenticating the official status of persons who exercise governmental powers. It could be provided by statute, however.

Sec. 21. SECRETARY OF STATE. There shall be a Secretary of State, who shall be appointed by the Governor, by and with the advice and consent of the Senate, and who shall continue in office during the term of service of the Governor. He shall authenticate the publication of the laws, and keep a fair register of all official acts and proceedings of the Governor, and shall, when required, lay the same and all papers, minutes and vouchers relative thereto, before the Legislature, or either House thereof, and shall perform such other duties as may be required of him by law. He shall receive for his services an annual salary in an amount to be fixed by the Legislature.

History

The Constitution of the Republic stated that the president could appoint a secretary of state with the advice and consent of the senate. He served "during the term of service" of the president "unless sooner removed by the President, with the advice and consent of the Senate."

This section first appeared in 1845, although it did not require the secretary of state to authenticate publication of the laws and his compensation was not mentioned. The 1845 Constitution also specified that he served "during the term of service of the Governor elect." The provision continued in that form until the 1876

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Constitution.

At the 1875 Convention the delegates added the duty to authenticate publication of the laws and added a sentence fixing his salary at \$2,000 annually. There was an effort to make the office elective and extensive debate about the amount of his salary but none on the deletion of "elect" following "Governor" in the 1869 phrase. (See *Debates*, pp. 162-63, 166, 256-57.)

In 1936 an amendment increased the salary for the office to \$6,000 annually, and in 1954 an amendment removed the constitutional limitation on salary, but a companion amendment prohibited the legislature from setting the salary at less than \$6,000. (See Art. III, Sec. 61.)

Explanation

With one exception, this section is self-explanatory. The peculiar wording about the tenure of the office suggests that a governor who succeeds to the office when vacant can select his own secretary of state. That construction was more plausible under the earlier constitutions, when the tenure was the "term of service of the Governor elect," but there is no indication that the 1875 delegates intended to make a change, for if they had, it easily could have been clearer.

Comparative Analysis

Most states have a constitutional secretary of state. A majority make it an elective office, and two provide for filling it by a joint vote of the legislature. Almost all states provide that the duties of the office are to be prescribed by law, and a substantial percentage provide some constitutional duties ranging from *ex officio* membership on boards to attending to the governor, council, and legislature. There is no secretary of state provided by the *Model State Constitution*.

Author's Comment

Constitutional debate about the secretary of state usually involves the necessity of making it a constitutional office. The *Author's Comment* on Section 16 points out that two states have made the officer who performs the duties of the secretary of state the successor to the governor. Unless the secretary of state performs this role, however, there seems little justification for maintaining his constitutional status.

Sec. 22. ATTORNEY GENERAL. The Attorney General elected at the general election in 1974, and thereafter, shall hold office for four years and until his successor is duly qualified. He shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, and shall especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law. He shall reside at the seat of government during his continuance in office. He shall receive for his services an annual salary in an amount to be fixed by the Legislature.

History

The 1845 Constitution created the constitutional office of attorney general in the judicial article. He was appointed by the governor, with advice and consent of

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the senate, to a two-year term, and his duties and salary were prescribed by statute. An amendment in 1850 made the office elective, and the 1861 Constitution retained the 1845 language and the 1850 amendment.

In the 1866 Constitution the office remained in the judicial article. He was elected to a four-year term, required to reside in the capital and perform duties fixed by law, and received, in addition to perquisites, an annual salary fixed at \$3,000 that could not be "increased or diminished during his term of office."

The 1869 Constitution moved the office into the executive article and provided that it be filled by appointment of the governor with senate confirmation. Again, the attorney general had to reside in the capital and served for four years. In addition to the duties required by law, he was to "represent the interests of the State in all suits or pleas in the Supreme Court in which the State may be a party; superintend, instruct, and direct the official action of the district attorneys so as to secure all fines and forfeitures, all escheated estates, and all public moneys to be collected by suit; and . . . when necessary, giving legal advice in writing to all officers of the government. . . ." (See Tex. Const. Art. IV, Sec. 23 (1869).) Only the 1869 Constitution imposed qualifications (same as the governor) on the office.

The 1876 Constitution again made the office elective and reduced its term to two years. The attorney general's compensation was an annual salary of \$2,000 "besides such fees as may be prescribed by law; provided, that the fees which he may receive shall not amount to more than two thousand dollars annually." The delegates to the 1875 Convention without much debate added lengthy instructions to the attorney general about corporate charters and illegal corporate actions or charges. (See *Journal*, p. 295; *Debates*, pp. 163-64.)

In 1936 an amendment increased the attorney general's salary to \$10,000 and deleted the fee provisions. In 1954 another amendment adopted the present language on compensation while a companion amendment prohibited the legislature from setting the salary at less than \$10,000. (See Art. III, Sec. 61.) A 1972 amendment increased the term of the office to four years.

Explanation

The provisions of this section regarding the attorney general's term of office, residence, and compensation are simple and straightforward. If the powers and duties of the office had been left to be prescribed by law, Section 22 would have caused few problems. Since some powers and duties were included, however, the meaning of the section has been a continuous source of litigation and speculation.

One of the first questions to arise involved the relationship between the attorney general and the county and district attorneys. Article V, Section 21, provides that the county and district attorneys "shall represent the State in all cases in the District and inferior courts," and this section requires the attorney general to "represent the State in all suits and pleas in the Supreme Court." Presumably, the draftsmen intended the local state's attorneys to handle trials and the attorney general to handle appellate work. If that was so, Section 22 was incomplete because the constitution directed no one to appear for the state in the court of appeals, which appeared in the 1876 Constitution as it was originally adopted. (The court of criminal appeals and courts of civil appeals replaced the court of appeals in 1891. See the *History of Art. V, Sec. 1.*) Apparently, the Committee on the Executive Department, whose report the convention considered and finally adopted four days before the Committee on the Judicial Department had even reported (*Journal*, pp. 375, 406), anticipated that the judiciary article would provide only one appellate court—a supreme court—as had been the case in all the prior state constitutions. (See the *History of Art. V, Sec. 1.*) In fact, the report of

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the Committee on the Judicial Department provided only for the supreme court. (*Journal*, pp. 406-22.) The convention added the court of appeals during floor debate more than 20 days after final adoption of the executive article (*Journal*, p. 640), and apparently no one remembered to go back and add the court of appeals to this section.

Shortly after adoption of the constitution, Justice Stayton, who had been a delegate to the 1875 Convention, stated for the supreme court that indeed the constitution divided responsibility for representing the state with the attorney general to appear before the supreme court and county and district attorneys to appear in trial courts. (The legislature could determine who would represent the state before the court of appeals.) This constitutional division of authority was mandatory, and a statute could not authorize the attorney general to file suit in behalf of the state without express constitutional authorization. (*State v. Moore*, 57 Tex. 307 (1882).) Such a division of authority proved impracticable, however. As a supreme court opinion in a later case pointed out (see following citation for *Brady v. Brooks*), county and district attorneys are elected locally and they are elected primarily to perform their principal function—prosecution of criminal cases. Their independence of any statewide authority made it impossible to apply a uniform policy in the initiation (or defense) of suits on behalf of the state. Perhaps for those reasons the legislature ignored *Moore* and continued to direct the attorney general to sue on behalf of the state to collect delinquent taxes, recover state lands, etc. Finally, in *Brady v. Brooks* (99 Tex. 366, 89 S.W. 1052 (1905)) the supreme court ruled that the phrase in Section 22 directing the attorney general to “perform such other duties as may be required by law” empowers the legislature “to create causes of action in favor of the state, and to make it the exclusive duty [of the attorney general] to prosecute such suits” in trial as well as appellate courts. Since *Brady* the courts have emphasized repeatedly that the attorney general may be given trial duties when the legislature creates a new or additional cause of action. (See *Smith v. State*, 160 Tex. 256, 328 S.W.2d 294 (1959); *Maud v. Terrell*, 109 Tex. 97, 200 S.W. 375 (1918).)

The *Brady* rule that the attorney general may appear for the state in trial court only to enforce a *new* cause of action in favor of the state has not been explored further. No reported opinion has ruled that a cause of action the attorney general sought to enforce pursuant to a statutory authorization was an old or preexisting one that is to be enforced exclusively by county and district attorneys. One case, however, ruled that the attorney general may not be given *exclusive* authority to prosecute *criminal* offenses, but the court declined to decide whether he may be authorized to prosecute crimes in instances in which local state’s attorneys refuse to prosecute. (See *Shepperd v. Alaniz*, 303 S.W.2d 846 (Tex. Civ. App.—San Antonio 1957, *no writ*.) In practice, the *Moore-Brady* rule that the trial-appellate division of powers in this section and Article V, Section 21, is exclusive has been ignored. The attorney general frequently appears for the state at the trial level, sometimes without statutory authorization, and district and county attorneys usually appear before the supreme court in appeals of cases they handled in trial court.

The attorney general’s constitutional powers respecting private corporations have also required judicial clarification. Soon after adoption of this constitution the supreme court ruled that the attorney general’s supervisory powers over private corporations authorize him to institute and maintain suit to prevent or redress illegal acts by private corporations even in the absence of a statute and that his power to do so is exclusive and may not be exercised by or given by law to the county and district attorneys. (*State v. Paris Ry.*, 55 Tex. 76 (1881); *State v. International & G.N.R. Co.*, 89 Tex. 562, 35 S.W. 1067 (1896). Prior to *Brady*, this

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was the attorney general's only constitutional authority to appear in trial court.) The attorney general may not sue a corporation when only private rights are involved, however; injury to the public generally must have occurred or be imminent. (*State v. Farmers' Loan & Trust Co.*, 81 Tex. 530, 17 S.W. 60 (1891).) Thus if a public utility seeks to charge unreasonably high rates, the attorney general may, at least in the absence of governmental regulation of rates, institute suit to prevent imposition of the unreasonable rates. (*State v. Southwestern Bell Tel. Co.*, 526 S.W.2d 526 (Tex. 1975).)

This section and Article V, Section 22, in defining who may represent the state, are exclusive. The legislature may not authorize a private citizen to maintain suit on behalf of the state (*American Liberty Pipe Line Co. v. Agey*, 167 S.W.2d 580 (Tex. Civ. App.—Austin 1942), *aff'd*, 141 Tex. 379, 172 S.W.2d 972 (1943)). More importantly, the legislature may not authorize another state, county, or district office or agency to employ attorneys to represent its and, hence, the state's interest in court unless the agency's attorney acts as a subordinate to and with approval of the attorney general or a county or district attorney. (*Maud v. Terrell*, 109 Tex. 97, 200 S.W. 375 (1918).) Perhaps because the caseloads in some instances have become too burdensome for the state's attorneys and their staffs, the legislature occasionally authorizes other attorneys to represent the state in court (presumably as a *special* assistant state's attorney), if the attorney general or a local state's attorney approves. (See, e.g., Tex. Rev. Civ. Stat. Ann. art. 7335a.)

The legislature has created an office of state's attorney, appointed by the court of criminal appeals and independent of the constitutional state's attorneys, to represent the state before the court of criminal appeals. (See Tex. Rev. Civ. Stat. Ann. art. 1811.) Presumably, the legislature concluded that it could do so because this section mentions only appearances for the state before the supreme court.

An early case stated that the attorney general may act only if he has constitutional or statutory authority to do so. (*Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S.W. 865 (1887) (Stayton, J.). See also *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d 191 (1955); *State ex rel. Downs v. Harney*, 164 S.W.2d 55 (Tex. Civ. App.—San Antonio 1942, *writ ref'd w.o.m.*.) Several attorneys general have contended, however, that the office has inherent, common-law powers (e.g., Shepperd, "Common Law Powers and Duties of the Attorney General," 7 *Baylor L. Rev.* 1 (1955)), and gratuitous statements in a few early decisions support the contention (e.g., *Queen Ins. Co. v. State*, 22 S.W. 1048, 1052 (Tex. Civ. App.), *rev'd on other grounds*, 86 Tex. 250, 24 S.W. 397 (1893)). In fact, the attorney general has been representing the state on the assumption that he has common-law authority to do so in federal habeas corpus proceedings, for example. (See Taylor, "Modernizing the Powers of the Attorney General of Texas," 36 *Texas Bar J.* 51 (1973).) The issue has not yet been decided by the courts. It is not inconceivable that the courts ultimately may decide that the office has implied or common-law powers to represent the state in situations in which the constitution and the statutes are silent. Yet the *Brady* case and the express constitutional requirement that county and district attorneys represent the state in trial courts appear to be insuperable obstacles to any implied power to institute or defend suits in state courts.

The attorney general's constitutional duty to render advisory opinions has caused no problems. Indeed, the constitutional duty has been supplanted by broader statutory responsibilities (Tex. Rev. Civ. Stat. Ann. art. 4399).

Comparative Analysis

The attorney general is a constitutional officer in most states and is elected in about half. In one state he is appointed by the supreme court to an eight-year term.

His term of office is usually the same as the governor's, and his duties are usually prescribed by law, although several states also prescribe some duties in the constitution. Only a few constitutions require the attorney general to be an attorney. The *Model State Constitution* does not mention a chief law officer.

Author's Comment

It is because of the excessive detail about the duties of the attorney general (and of the county and district attorneys) that this section has caused so much litigation. If the 1875 Convention had abandoned the 1869 Constitution's specification of duties and returned to the form of the first three state constitutions, which left *all* the attorney general's duties to be prescribed by law, a century of jurisdictional clashes with local state's attorneys probably would not have occurred.

Moreover, if the 1875 Convention's Committee on the Executive Department had paid closer attention to the effect of the changes it was making it might have foreseen the unworkability of divided authority to represent the state. The 1869 Constitution directed the attorney general to represent the state before the appellate court, but it also gave him supervisory power over local state's attorneys in most civil cases. (See the *History* of this section.) Thus the 1869 division of authority made sense. At least in theory, the cases the attorney general handled on appeal had been tried by his subordinates. The committee probably was displeased with the theoretical subordination of local state's attorneys to the attorney general, but their retention of the 1869 Constitution's division of authority without any central supervision over the local trial attorneys undoubtedly created as many problems as it solved. It may have appeared convenient to delegates who had come long distances to the convention, probably on horseback over poor or nonexistent roads, to let the attorney general stay in the capital and the local state's attorneys stay in their localities, but had the delegates questioned the need for preserving that convenience in the constitution, particularly in light of the change they made in the status of the local state's attorneys, they might have elected to return to the language of earlier constitutions.

Traditionally, the primary state function of county and district attorneys has been the prosecution of criminal cases. The connotations of the label "district attorney" should be sufficient to preserve that function. If the constitution must expressly divide authority to represent the state, however, it should go no further than to specify the local state's attorneys' criminal responsibilities.

Section 22 also illustrates the importance of convention procedures in determining the content of the convention's proposal. The task of drafting a constitution probably cannot be handled successfully without dividing its parts among several committees. Usually there are committees on the executive article, the legislative article, the judiciary, local government, etc. The product of each committee, however, is part of a single document, and all its parts must mesh. Close coordination between committees is imperative, but even this is not enough. It was not the lack of committee coordination that led the 1875 Convention to overlook inclusion of the court of appeals in this section; that court was written into the judicial article during floor debate after the executive article had been finally approved. Final approval of each article should await preliminary approval of all articles, and the convention should prescribe some procedure for detecting the impact of a change made in one article on other articles and for making the necessary modifications prior to final approval.

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Sec. 23. COMPTROLLER OF PUBLIC ACCOUNTS; TREASURER; COMMISSIONER OF GENERAL LAND OFFICE; OTHER STATUTORY STATE OFFICIERS; FEES, COSTS, AND PERQUISITES. The Comptroller of Public Accounts, the Treasurer, the Commissioner of the General Land Office, and any statutory State officer who is elected by the electorate of Texas at large, unless a term of office is otherwise specifically provided in this Constitution, shall each hold office for the term of four years and until his successor is qualified. The four-year term applies to these officers who are elected at the general election in 1974 or thereafter. Each shall receive an annual salary in an amount to be fixed by the Legislature; reside at the Capital of the State during his continuance in office, and perform such duties as are or may be required by law. They and the Secretary of State shall not receive to their own use any fees, costs or perquisites of office. All fees that may be payable by law for any service performed by any officer specified in this section or in his office, shall be paid, when received, into the State Treasury.

History

The treasurer and comptroller first appeared as constitutional officers in the 1845 Constitution. Until an 1850 amendment required public election, both were elected to two-year terms by a joint ballot of the house and senate. The 1850 amendment also required election of the land commissioner, who had been a statutory officer. The 1861 Constitution retained the 1845 provisions and the 1850 amendment. The 1866 Constitution did not mention the land commissioner. It provided for election of the treasurer and comptroller to four-year terms. Although the first three constitutions limited the number of consecutive terms of governors, none did so for other elected executive officers.

The 1869 Constitution included all three officers, but covered each in a separate section. Each was elected to a four-year term, was required to have the same qualifications as the governor, and was entitled to a salary fixed at \$3,000 annually. The duties of the three officers were spelled out in detail.

The 1876 Constitution consolidated these offices into a single section, deleted the detailed lists of duties required by the 1869 Constitution, reduced their salaries to \$2,500 annually, and reduced their terms to two years. It also required residence in the capital and added the last two sentences relating to fees and other perquisites of office.

In 1936 an amendment increased their salaries to \$6,000. In 1954 another amendment removed constitutional limits on their compensation, but a companion amendment prohibited the legislature from setting the salaries at less than \$6,000. (See Art. III, Sec. 61.) An amendment adopted in 1972 increased their terms to four years and added the language applying to statutory officers.

Explanation

The offices of treasurer, comptroller, and land commissioner are created in Section 1 of this article and their election is required by Section 2. This section only fixes their terms of office at four years, requires them to reside in the capital while in office, and prohibits them from receiving fees and other perquisites of office as compensation. Curiously, this section, instead of Section 21, also prohibits the secretary of state's receipt of fees and other perquisites as compensation. The legislature could prescribe duties and fix salaries whether or not this section authorized it.

The 1972 amendment added statutory officers who are elected statewide in order to get around the restrictions on the lengths of terms of office in Article XVI, Section 30, but it also apparently imposed the residence and fee requirements on them. The exception of statutory officers who are elected statewide but whose

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terms of office are prescribed elsewhere in the constitution applies to members of the Railroad Commission. (See Art. XVI, Sec. 30.)

Comparative Analysis

In the states that give constitutional status to executive officers in addition to the governor, lieutenant governor, secretary of state, and attorney general, treasurers and either auditors or comptrollers are the most frequently provided. Less frequent are superintendents of public instruction, agriculture commissioners, and insurance commissioners. Land commissioners are relatively rare. (For a comparison of numbers of constitutional offices, see the *Comparative Analysis* of Sec. 1 of this article.) The *Model State Constitution* provides no constitutional executive officers other than the governor.

Only a small number of states appear to have specific prohibitions against fees and other emoluments. The *Model State Constitution* has no provision on compensation.

Author's Comment

The term limitation that necessitated inclusion of statutory offices in this section is discussed in the annotation to Article XVI, Section 30. Some of the issues involved in giving the officers in this section constitutional status are discussed in the annotations of Sections 1 and 2 of this article.

Presumably, the fee prohibitions in this section may be eliminated. The legislature is unlikely to authorize fees as compensation since the need to circumvent constitutional limitations on compensation no longer exists.

Sec. 24. ACCOUNTS AND REPORTS; INFORMATION TO, AND INSPECTION BY, GOVERNOR; PERJURY. An account shall be kept by the officers of the Executive Department, and by all officers and managers of State institutions, of all moneys and choses in action received and disbursed or otherwise disposed of by them, severally, from all sources, and for every service performed; and a semi-annual report thereof shall be made to the Governor under oath. The Governor may, at any time, require information in writing from any and all of said officers or managers, upon any subject relating to the duties, condition, management and expenses of their respective offices and institutions, which information shall be required by the Governor under oath, and the Governor may also inspect their books, accounts, vouchers and public funds; and any officer or manager who, at any time, shall willfully make a false report or give false information, shall be guilty of perjury, and so adjudged, and punished accordingly, and removed from office.

History

The 1845 Constitution and each of its successors contained the customary statement that the governor "may require information in writing from the officers of the Executive Department, on any subject relating to the duties of their respective offices." No previous Texas constitution contained any of the additional details now included in Section 24. The report of the Committee on the Executive Department to the 1875 Convention proposed to add to the traditional information-to-the-governor provision the sentence requiring accounts and periodic, sworn reports on them; the clause authorizing gubernatorial auditing; and the perjury language. The committee also proposed to permit the governor to require the traditional reports to be under oath. The convention added the removal statement and altered the committee's version to require that the traditional reports be under oath. (See *Journal*, pp. 234, 298, 304.)

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Explanation

Apparently only one question has arisen under Section 24. That involved the extent of its application to statutory executive agencies. The attorney general concluded that the state "institutions" mentioned include all state boards, commissions, departments, authorities, and agencies. (Tex. Att'y Gen. Op. No. O-4904 (1942).)

The absence of reported disputes about the section, however, cannot be attributed to the clarity of draftsmanship. For example, it literally requires the governor to file a sworn accounting report with himself. Also, a literal reading of the perjury language could define as perjury *any* false statement by an executive officer, whether or not it is made under oath. Presumably, however, the draftsmen intended the perjury language to apply only to false statements in the reports required to be sworn by this section or, perhaps, by the second sentence of the section.

The lack of any controversy probably results because the innovations the 1875 Convention included in the section have been ignored. State agencies and offices keep accounts and make periodic reports on them to the governor and the Legislative Budget Board. They do so pursuant to statutory requirements, however, and the reports are made only annually or biennially and are not under oath. (See, *e.g.*, Tex. Rev. Civ. Stat. Ann. arts. 688, 5429c; Tex. Laws 1975, ch. 743, art. V, secs. 51 and 52, at 2866-67.) The legislature has established an auditing process, but the auditor is appointed by and responsible to a legislative committee. (See Tex. Rev. Civ. Stat. Ann. arts. 4413a-7a — 4413a-24.) In 1929 the legislature created an auditor under the governor, giving the governor some assistance in performing his constitutional auditing powers. (Tex. Laws 1929, 1st Called Sess., ch. 91.) Within 15 years, however, the legislature repealed the authorization of a governor's auditor and established the current legislative auditor. (See Tex. Laws 1943, ch. 293, sec. 1.) Finally, the statutes always have defined perjury to apply to *all* false statements under oath, including those by state officers. (See, *e.g.*, Penal Code secs. 37.02-37.07.)

Comparative Analysis

Only some ten state constitutions have a provision requiring state officers to keep accounts and make a periodic report on them to the governor. In five states the reports are semiannual; in the others, they are annual or when required by the governor or both. Seven require the accounting to be under oath, but only one other state constitution includes the perjury language.

Approximately three-fourths of the states, however, have a requirement that executive officers report to the governor at his request on subjects relating to the duties of their offices. Again, only a few require them to be under oath and even fewer include the perjury language. A few states require regular reports, but in each the report is for transmittal to the legislature at the beginning of its regular session.

Two or three states require reports to the governor at his request only for his use in preparing the state's budget, and one state has a separate, additional reporting requirement covering information needed for budget preparation. In that state (California) the governor-elect also may demand information to assist him in preparing a budget.

One or two states also provide in the constitution that executive officers report to the legislature when either house requires it.

Approximately 20 state constitutions expressly mention audits of executive agencies or direct an official or agency to perform postaudit functions. Five of

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those provide only for an audit of the state's treasurer (plus the comptroller in one case and the auditor in another). More than half of the constitutions that mention an audit impose the duty on a comptroller, auditor, examiner, or other similarly styled official, and another five simply direct the legislature to provide by law for auditing of state agency accounts. Only three other state constitutions grant the governor auditing powers, although a few other constitutions make the auditing official a gubernatorial appointee. Most of the recently adopted constitutions—*e.g.*, Alaska, Hawaii, Illinois, Montana, New Jersey—make the auditor a legislative appointee.

Some five state constitutions empower the governor to investigate or appoint a committee to investigate *all* state agency operations, which of course includes finances. Most of those, however, expressly lodge audit powers elsewhere.

The *Model State Constitution* specifies that the governor "may, at any time, require information, in writing or otherwise," from executive officers. This, of course, could include financial reporting. It does not mention accounts or accounting reports, but it mandates an auditing process under an auditor who is a legislative appointee.

Author's Comment

As the *Comparative Analysis* indicates, the requirement that executive officers give information in writing to the governor on his request is customary in state constitutions. In an executive branch such as in Texas, where officials are removable only for cause and only after a trial-type hearing (see Art. XV), the requirement is mainly decorative. It may indicate that the governor is boss, but it confers little legal authority on him.

The requirements that state officials keep accounts and file periodic reports on these accounts and the granting of auditing powers to the governor apparently represent an attempt by the delegates to the 1875 Convention to ensure honesty in reaction to abuses by the Reconstruction government. The 1875 Convention's final product required two separate kinds of sworn accounting reports, however. Subsection (a) of Section 6, Article XVI, also requires a sworn report of "the receipts and expenditures of all public money." It is to be published annually in the manner prescribed by law. If a required accounting made under oath will aid in securing honesty in the handling of public funds, the annual one required in Article XVI should be enough. The legislature, however, undoubtedly would require accounts and accounting reports by law without constitutional mention of them.

A comprehensive auditing process is a more effective method of controlling the receipt and expenditure of public money. Most contemporary authorities consider auditing to be a legislative function, however. For example, the comment on the *Model State Constitution's* audit provision states:

In view of the tremendous growth of state expenditures over the past half-century, the post-audit function has become a necessity. The post-audit function is crucial not only to insure honesty among administrative officials but also to insure that officials of the executive branch have made their expenditures in line with policies established by the legislature.

The auditor should, of course, be directly responsible to the legislature and be chosen by that body. Yet today in only fifteen states is the official exercising the post-audit function legislatively appointed; eighteen are elected and (indefensibly) nine are appointed by the executive. In the remaining states the appointment is exercised in a variety of ways. This function is of such importance as to justify constitutional prescription for appointment. (Sec. 4.17, Comment.)

Of course, a constitution is not an appropriate document for treating auditing or

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any other subject comprehensively. Accordingly, the *Model* and most recently adopted state constitutions designate constitutional responsibility for conducting audits but leave the details to be specified by law. The new Illinois Constitution, for example, requires the legislature to provide by law for “the audit of the obligation, receipt and use of public funds” and requires the legislature to appoint an auditor general to conduct the audits. (Ill. Const. Art. VIII, Secs. 3 and 4.)

The perjury language in Section 24 is superfluous. It is inconceivable that the legislature would ever except public officials from application of the perjury laws or remove criminal sanctions for false statements under oath. If it did so, however, the prospect of a criminal prosecution under this constitutional provision seems even more remote.

Sec. 25. CUSTODIANS OF PUBLIC FUNDS; BREACHES OF TRUST AND DUTY. The Legislature shall pass efficient laws facilitating the investigation of breaches of trust and duty by all custodians of public funds and providing for their suspension from office on reasonable cause shown, and for the appointment of temporary incumbents of their offices during such suspension.

History

This section first appeared in the 1876 Constitution. The Committee on the Executive Department proposed the section in its report, and the convention adopted it without reported debate. (*Journal*, p. 234.)

Explanation

This section appears to be nothing more than an exhortation to the legislature to take affirmative action to ensure honesty in government. It may be that the draftsmen feared that, without express constitutional authorization, the legislature might not be able to provide for suspension of an officer pending his removal under Article XV and statutes enacted under it. The legislature has provided for suspension pending removal and for appointment of a temporary replacement in the case of removal proceedings against several kinds of public officers, including some who are not “custodians of public Funds.” (Tex. Rev. Civ. Stat. Ann. art 5982.) Long ago a county judge who was suspended under the statute argued that the legislature may not provide for suspension. The supreme court rejected the contention without mentioning this section, upholding the plenary power of the legislature to act in the absence of an express constitutional prohibition of its action. (See *Griner v. Thomas*, 101 Tex. 36, 104 S.W. 1058 (1907).) Thus, Section 25 clearly is unnecessary and adds nothing.

Comparative Analysis

A few states mention suspension of officers in the sections providing for removal, but it is usually to restrict the legislature’s power to provide for suspension. For example, two states provide that the legislature can provide suspension only during the pendency of an appeal from a removal suit. Apparently no other state has a provision similar to this one, and the *Model State Constitution* certainly has nothing like it.

Author’s Comment

Unnecessary and superfluous provisions like Section 25 cannot be dismissed as harmless in a constitution. The state constitution is a limiting instrument and the

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legislature has all legislative power not expressly prohibited by the constitution. (See the *Explanation* of Art. III, Sec. 1.) There being no prohibition against statutes providing for investigations or for suspension of officeholders and appointment of temporary replacements, the direction and authorization for the legislature to do so adds nothing to the constitution. Because the provision is included, however, a court might well be persuaded that it must have been necessary and that the legislature lacks the power in situations not covered by Section 25. For example, in the *Griner* case discussed in the *Explanation* the supreme court might have been compelled to hold Section 25 to be superfluous in order to uphold the suspension if a crafty lawyer had argued forcefully that the section, if necessary, implies a lack of legislative power to provide for suspension of officers who are not "custodians of public funds."

On the other hand, Section 25 illustrates the futility of constitutional directions to the legislature to do something. The only general statutory removal procedure for state officers provides for removal by impeachment and no statute mentions suspension from office. (See Tex. Rev. Civ. Stat. Ann. arts. 5961-5963.) Obviously, the drafters of the statutes assumed that the constitutional provision on suspension pending trial of impeachment charges (Art. XV, Sec. 5) also applies to statutory impeachments. That assumption is questionable, however, as is the statutory provision for removal by the impeachment process of officers not mentioned in Section 2 of Article XV, but neither assumption has been tested.

Sec. 26. NOTARIES PUBLIC. (a) The Secretary of State shall appoint a convenient number of Notaries Public for each county who shall perform such duties as now are or may be prescribed by law. The qualifications of Notaries Public shall be prescribed by law.

(b) Nothing herein shall affect the terms of office of Notaries Public who have qualified for the present term prior to the taking effect of this amendment.

(c) Should the Legislature enact an enabling law hereto in anticipation of the adoption of this amendment, such law shall not be invalid by reason of its anticipatory character.

History

Constitutional status for notaries public dates from the Constitution of 1845. (Under the Republic they were provided for by statute.) Section 19 of Article V of that constitution provided for appointment by the governor with the advice and consent of the senate of not more than six notaries for each county. The section remained unchanged in the Constitutions of 1861 and 1866.

The Reconstruction Constitution of 1869 dropped the provision but provided that justices of the peace "shall also be commissioned to act as notaries public." (Art. V, Sec. 20.) The Reconstruction Constitution also had a dual-officeholding provision that excepted from the prohibition both notaries public and justices of the peace. (Art. III, Sec. 30.) Assuming that the left and right hands of the Reconstruction constitutional convention knew what each other was doing, notaries public were to continue on a statutory basis.

Whatever the 1869 Constitutions meant concerning notaries public, it appears that some delegates to the 1875 Convention assumed that they were living under a constitution that allowed only justices of the peace to be notaries. During that convention it was proposed to strike Section 26 on the grounds that justices of the peace acting as notaries would be sufficient. The proposal lost. (See *Debates*, pp. 166-67.)

The original Section 26 was the first sentence of the current Subsection (a) with the words "The Governor, by and with the advice and consent of two-thirds of the

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Senate,” instead of “The Secretary of State.” The current version was adopted in 1940. The reason for the amendment is obvious; what is not obvious is why someone did not simply propose to repeal Section 26 and handle the whole business by statute.

Explanation

This section is self-explanatory. The only significant constitutional question to arise under the section concerned the secretary of state’s power to remove a notary public. The attorney general ruled against the power of removal (Tex. Att’y Gen. Op. No. O-4940 (1942)).

Comparative Analysis

Only five states besides Texas give the office of notary public constitutional status. A great many states refer to a notary public in some context of qualification for public office. (Consider Sec. 40 of Art. XVI, for example.) Neither the United States Constitution nor the *Model State Constitution* mentions notaries public.

Author’s Comment

It seems obvious from the foregoing that there is no need to make notaries public constitutional officers.