

1984 Utah AG LEXIS 69  
No. 82-115  
February 23, 1984  
OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF UTAH

**Request By:**

Honorable Scott M. Matheson  
Governor, State of Utah  
State Capitol  
Salt Lake City, UT 84114  
BUILDING

**Opinion**

**Opinion by:** H. WRIGHT VOLKER, Counsel to the Attorney General

This is in response to your inquiry concerning the legality of actions of state officers who have not taken the oath of office referred to in Article IV § 10 of the Utah Constitution.

The issue surfaced during recent litigation involving the takeover of Murray First Thrift and Loan Corporation by the State Commissioner of Financial Institutions. It was argued that the Commissioner's takeover was invalid because she had failed, albeit inadvertently, to timely take the oath of office after her appointment to that state position. The lawsuit has now been resolved by agreement of the parties. Therefore, many of your questions regarding that particular case no longer need be addressed. However, issues which you raised which have general application to officers of state government remain. Those issues are as follows:

1. What is the meaning of "officer" as used in the oath of office provision of Utah's Constitution (Article IV, § 10)? In other words, are *all* elected and appointed "officers" of the state and its political subdivisions legally required to take an oath of office? If not, identify which state personnel, by office title, must take an oath of office.
2. What is the legal effect of actions taken by "officers" who are legally required to take an oath, but who inadvertently failed to do so due to oversight or misunderstanding rather than a conscious desire not to take their oaths? In other words, are their actions legally valid on the theory they acted as "de facto" officers, or are their actions void on the theory their offices were legally vacant during the period in which they acted without having taken an oath? Also, do the consequences of not taking a required oath vary significantly from office to office?
3. In instances where a compliance bond is statutorily required to hold a particular office, does the filing of that bond satisfy any oath requirement where both address the same subject of the officer's compliance with the law and the faithful discharge of the duties of the office.
4. Is an officer who inadvertently fails to take a required oath of office subject to criminal liability for "unofficial misconduct" and U.C.A. § 76-8-203 (1953), as amended?

**ANALYSIS**

*I. Officers required to take the constitutional oath of office*

Article IV, § 10 of the Utah Constitution requires that all elective and appointive officers take and subscribe to an oath of office:

All officers made elective or appointive by the Constitution or by the laws made in pursuance thereof,

before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support, obey and defend the Constitution of the United States and the Constitution of this State, and that I will discharge the duties of my office with fidelity.

This provision does not define the word "officers," nor am I aware of any Utah statute or other constitutional provision that defines the word for the purpose of taking the oath of office. The wording of the provision itself is indeed broad since it applies to *all* officers made elective or appointive by the Constitution or laws made in pursuance thereof. Broad application may further be implied from §§ 52-1-2 to 52-1-61 which enumerate the places where the oaths of office of state, county, precinct, district, city, town, and school district officers shall be filed. The taking of the constitutional oath of office is not limited to state officers, but is of general applicability. See *State v. Mathews*, 375 P.2d 392 (Utah 1962) (constitutional oath applied to a deputy county recorder).

In your opinion request, you indicated that dicta in the recent case of *Hansen v. Utah State Retirement Board*, 652 P.2d 1332 (Utah 1982), may provide some assistance in defining "officers" as used in Article IV, Section 10 of the Utah Constitution. That dicta stated that the term "state officers" has different meanings depending on the section of the Constitution in which it is contained. Unfortunately, the *Hansen* case sheds no light on the definition of "officer" as it is used in Article IV, Section 10. The question in the case was whether the term "state officer" in Article VII, Section 16 of the Utah Constitution, which provides that "[t]he Attorney General shall be the legal advisor of the State officers, encompassed all State employees. The court held that it did not since the office of Attorney General is an executive department office under Article III, Section 1, of the Utah Constitution and the framers of the Constitution intended to confer constitutional power on the Attorney General only with respect to executive department officers. In so holding, the court said: "The term 'state officers' is used in a variety of contexts [in the Constitution], each for a different purpose and each requiring a construction in accord with that purpose." As previously stated, no definition of the word "officers" in the constitutional oath provision exists.

A review of the general legal definitions of "officer" is somewhat helpful in determining which government officials should take a constitutional oath of office. There are numerous cases from other jurisdictions defining or determining what is an "office" or who is an "officer," but there is very little Utah law on the subject. Two Utah Cases will be discussed later on. In Volume 29A, *Words and Phrases*, there are seventy-six pages listing cases under the word "officer," and annotations on the distinction between an "office" and "employment" are found in 140 ALR 1076, 93 ALR 333, and 53 ALR 595. There is a detailed discussion on the subject in 63 Am.Jur.2d, Public Officers and Employees. A review of these sources indicates that it is well-nigh impossible to frame a definition of "officer" that could be more or less automatically applied to each appointive position in the State government to determine whether the occupant of the position is an "officer" or an "employee." The dilemma is illustrated by the following excerpts from 63 Am.Jur.2d, Public Officers and Employees:

#### § 1. Generally.

There are numerous and varied definitions of the terms "office," "officers," "public office," and "public officer," as used in statutes and constitutions. They are terms of vague and variant import, the meaning of which necessarily varies with the connection in which they are used, and, to determine it correctly in a particular instance, regard must be had to the intention of the statute and the specific matter in reference to which the terms are used. It is easier to conceive the general requirements of public office as hereinafter set forth and the things necessary to constitute one a public officer than to express them in terms that would be entirely faultless.

The term "officer" is one inseparably connected with an office, and so it may be said that one who holds a "public office," as that term is hereinafter defined, is a public officer, and that where there is no office, there can be no public officer. A public officer is such as officer as is required by law to be

elected or appointed, who has a designation or title given him by law, and who exercises functions concerning the public, assigned to him by law. The duties of such officer do not arise out of contract or depend for their duration or extent upon the terms of a contract.

#### § 6. Oath or bond.

Although public officers are generally required to take an oath of office and to furnish a bond, these are mere incidents of office, and official character is not necessarily negated by the fact that no oath or bond is necessary. On the other hand, the fact that a person in the public service takes an oath does not necessarily make him an officer, particularly were the oath which he takes is not the one prescribed by law for public officers. However, in determining whether a particular function pertains to a public office, the courts sometimes take into consideration the presence or absence of a bond or an oath. Although neither requirement is an absolute criterion to distinguish an office, it may be considered with others in determining the character of the position in question.

#### § 11. Distinction between office and employment.

Public office, as hereinbefore defined and characterized, is in a sense an employment, and is very often referred to as such. But there is a distinction between a public office and a public employment, which is not always clearly marked by judicial expression and is frequently shadowy and difficult to trace. The distinction, however, is one which in many instances becomes important and which the courts are called upon to observe. Although every public office may be an employment, every public employment is not an office . . . .

When a question arises whether a particular position in the public service is an office or an employment merely, recourse must be had to the distinguishing criteria or elements of public office. These have been set forth and explained in previous sections and need only be summarized here. Briefly stated, a position is a public office when it is created by law, with duties cast on the incumbent which involve some portion of the sovereign power and in the performance of which the public is concerned, and which also are continuing in their nature and not occasional or intermittent; a public employment, on the other hand, is a position in the public service which lacks sufficient of the foregoing elements or characteristics to make it an office. However, even where the appointment is in the nature of an employment, the appointee may be a public officer if the necessary elements of an office are present.

Some offices are merely clerical or ministerial, but they are useful in enforcing the powers conferred on other officers or tribunals, and they are usually designated as offices by the law, and have features of tenure and duration and of duties prescribed by law which differentiate an office from a mere employment.

Various criteria have been used by the courts in determining what constitutes an office but the courts do not always use the same criteria. However, a statement of the elements of an office that is frequently cited was given by the Supreme Court of Montana in *Barney v. Hawkins*, 257 P. 411 (Mont. 1927), as follows:

\* \* \* we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional . . . .

The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.

Not all courts citing this statement have held that each of the elements must be present to constitute an office, but it appears from the cases that the essential elements are that an office must be created by the constitution or by the legislature or through authority conferred by the legislature and that it must have delegated to it a portion of the sovereign power.

With respect to Utah case law, an early case, *McCormick v. Thatcher*, 8 Utah 294 (1892), involved a situation wherein the Legislature created a Board of Construction to construct buildings for the Agricultural College at Logan, Utah, and appropriated \$ 65,000 for that purpose. One of the issues was whether the members of the Board of Construction were officers of the State who should have been appointed by the Governor with the consent of the Legislative Council and who could spend the funds appropriated, or whether the funds should be expended under the supervision of the Board of Trustees of the College. In reviewing various definitions of "office," the court said: "one who holds an office is an officer, and it becomes necessary to consider what is, properly considered, an 'office.' The definitions of the term 'office' as given by the writers and courts, are not in entire harmony . . .". The court concluded that the members of the Board of Construction were officers, using the following criteria:

The members of the board of construction are charged by the statute with an important public trust, affecting the people of the whole Territory, and with their compensation fixed by the statute. Their duties are of a continuing nature. and are prescribed by law, and not by contract, and could not be completed in less than one year, as the money can only be drawn in quarter-yearly installments. The duration of their terms of service may be much more than one year by reason of litigation, such as this case, or by the necessary time to complete the contemplated buildings, or from other causes. They are each required to give bond in the sum of \$ 25,000, and to take the official oath; and *hence we think they are officers*, and must be appointed by the governor and legislative council . . . .

The issue in *Romney v. Barlow*, 469 P.2d 497 (Utah 1970) was whether the Legislative Council was a civil office of profit so as to preclude members of the Legislature from serving on it because of the provisions of Article VI, Section 7, of the Utah Constitution, which provides:

No member of the Legislature, during the term for which he was elected, shall be appointed or elected to any civil office of profit under this State, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected.

The court concluded that it was a civil office and that it was an office of profit since by statute its members were to receive a per diem of \$ 25.00, plus expenses. In determining that the Council was a civil office, the court stated:

Black's Law Dictionary defines "civil office" as follows:

An office, not merely military in its nature, that pertains to the exercise of the powers or authority of civil government. Requisites are continuity, creation and definition of powers and duties by Constitution or Legislature, or their authority, possession of governmental power, and independence unless controlled by superior officers.

[1] The office of a member of the Legislative Council fits squarely into the requirements as set out in Black's Law Dictionary above:

1. The Council was created by the Legislature.

2. It has a definite tenure, to wit, until the convening of the next regular session of the Legislature following their appointment.
3. The duties of the Council are set forth by the Legislature.
4. It is given power to administer oaths, issue subpoenas, compel attendance of witnesses, etc., and to take testimony.
5. It performs its work according to its own rules and regulations independent of any supervision.
6. The Council possesses governmental powers as set out in Sec. 2 of Chapter 67, Laws of Utah 1947, which in substance are as follows:
  - a. It assists the legislative arm of government by collecting information concerning the government and general welfare of the state.
  - b. It examines the effects of previously enacted statutes and recommends amendments thereto.
  - c. It prepares a legislative program.
  - d. It studies and investigates revenues and expenditures of the state.
  - e. It cooperates with the legislative and judicial departments of state government in devising means of enforcing the law.
  - f. It takes over the duties of the Inter-State Cooperation Committee.
  - g. It performs duties as reference attorney to both houses of the Legislature.
  - h. It enjoys every additional power and performs every labor or function assigned to it by joint resolution of the Legislature.

The criteria used by the Montana Supreme Court in the *Hawkins* case, *supra*, and the Utah Supreme Court in *Barlow* are essentially the same, except that in *Hawkins* the court said the position must possess "a portion of the sovereign power of government," and in *Barlow*, the court said it must possess "governmental power." These criteria are clear enough but their application to many positions in Utah State government are extremely difficult because the terms "sovereign power" and "governmental power" are not precisely defined.

Black's Law Dictionary, Fifth Edition, defines the terms as follows:

*Government powers:* The totality of power which reposes in a government enabling it to carry out its proper functions as a sovereign. General powers of federal government are enumerated in the U.S. Constitution; powers of state government in-state constitutions; municipal governments in charters.

*Sovereign powers or sovereign prerogatives:* That power in a state to which none other is superior or equal, and which includes all the specific powers necessary to accomplish the legitimate ends and purposes of government. *Aetna Casualty and Surety Co. v. Bramwell*, D.C. Ar. 12 F.2d 307,309.

My research has not disclosed a precise definition of "governmental power," but it appears that in the context in which it was used by the Utah Supreme Court in *Barlow*, *supra*, it would be synonymous with "sovereign power." With respect to "sovereign power," some courts have said that sovereign power is manifested in but three ways, i.e., by the power of taxation, by the power of eminent domain, and by way of the police power of the government. *United States v. Douglas William Sartouis Co.*, 22 P. 92 (Wyo. 1889). Other courts have used broader definitions. A frequently quoted definition is one given by the Supreme Court of Missouri in *State v. Truman*, 64 S.W.2d 105 (Mo. 1933), as follows:

Illustrative of what is meant by "sovereignty of the state" . . . it is said: "if specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or

with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an individual agency, then such functions are a part of the sovereignty of the state.

It appears that the Utah Supreme Court in the *Thatcher* and *Barlow* cases has used a broad interpretation of "governmental power" (or "sovereign power"), i.e., it is not limited to the powers of taxation and eminent domain and the police power of the State. In *Thatcher*, the court said the duties of the Board of Construction in supervising the construction of buildings for the Agricultural College and expending the funds appropriated therefore involved an important "public trust"; and in *Barlow*, the court held that the duties of the Legislative Council involved the exercise of "governmental powers." Neither of these cases involved powers or duties that were regulatory in nature. It appears, therefore, that the definition of "sovereign power" in the *Truman* case, *supra*, provides a reasonably good guideline as to what constitutes "governmental" or "sovereign" power.

Bearing in mind this definition, the criteria used by the Supreme Court of Montana in the *Hawkins* case, *supra*, provides an appropriate description or definition of positions that constitute an "office." These are the same as those given in Black's Law Dictionary which were followed by the Utah Supreme Court in *Barlow* except that the term "sovereign power" was used instead of "governmental power." The criteria are:

- (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature;
- (2) It must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;
- (3) The powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority;
- (4) The duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature and by it placed under the general control of a superior officer or body;
- (5) It must have some permanency and continuity, and not be only temporary or occasional.

With the above criteria in mind, it is possible to address which state personnel, by office title, should take the constitutional oath of office. Attached is a list of these officers, which was compiled by carefully going through each volume of the Utah Code and listing all of the offices, boards, commissions and committees found therein. Because of the magnitude of the task it is possible that some offices may have been overlooked. There apparently is no other compiled list of all these offices. The Legislative General Counsel's Office furnished a computer list of offices wherein the words "oath of office" were used. This list revealed that while a considerable number of officers are required by statute to take the oath many important officers are not required by statute to do so.

In going through the Code, the duties of each position were examined in an attempt to apply the above criteria for an "office" to the position. This was extremely difficult for several reasons, particularly in areas of whether the duties could be performed independently by the holder of the position and whether the duties involved the exercise of governmental or sovereign power. There are numerous variations of this problem throughout the Code, but many statutes provide that the director of a division shall appoint division directors who shall perform their duties under his supervision. In most instances, it is reasonably clear that the division director may act independently but in others it appears that his decisions are subject to approval by the director of the department, raising a question as to whether the position is that of an assistant or employee rather than that of an officer. Case law is not too helpful in making the determination because court decisions are not consistent. For example, in *Martin v. Smith*, 1 N.W.2d 163 (Wis. 1941), it was held that the President of the University of

Wisconsin was an employee, not an officer, for the reason that he did not exercise any part of the sovereign power of the state since such power was exercised by the Board of Regents and the President merely had power to manage the University and carry out the policies and duties set forth by the Board of Regents. On the other hand, in *Alvey v. Bingham*, 150 S.W.2d 935 (Ky. 1940), it was held that one appointed by the board of trustees of a city library as librarian and secretary of the board was an officer where, in maintaining the library, the city was exercising a governmental function and the board of trustees was charged with a public duty, including that of receiving and disbursing funds in which the librarian played a part. This latter case appears to be more typical of the court decisions than the one regarding the President of the University of Wisconsin.

Two other observations must be made concerning the attached list of offices. First, there are numerous boards, commissions and committees, some of which are designated as "advisory." It was concluded that some of the "advisory" bodies meet the criteria for an "office." Secondly, a number of agencies are authorized to employ investigators, conservation agents, etc., who by statute are given the status of peace officers. There apparently are no statutes requiring peace officers to take the constitutional oath of office, but from case law it appears that peace officers are generally held to be officers who exercise sovereign power. Thus, it is recommended that they take the oath of office.

In the many instances where it could not be conclusively determined whether a position possessed independent authority or exercised "sovereign" or "governmental" powers, the position was included as an office. For those positions which did not appear to constitute an office, an "X" was placed at the right of the position.

## *II. Legal Effect of Actions Taken by "Officers" Who Inadvertently Failed to Take the Constitutional Oath of Office.*

An issue in the lawsuit involving the Commissioner of Financial Institutions was whether, after her appointment and inadvertent failure to take the constitutional oath, she failed to qualify for the office within sixty days after the beginning of the term for which she was appointed as required by Section 52-2-1, and whether the actions taken by her were nevertheless valid on the theory she was a de facto officer.

Section 52-2-1 establishes the time in which a person must qualify for an office:

Whenever any person duly elected or appointed to any office of the state or any of its political subdivisions, fails to qualify for such office within sixty days after the date of beginning of the term of office for which he was elected or appointed, such office shall thereupon become vacant and shall be filled as provided by law. Whenever the bond of any officer of the state or of any of its political subdivisions is canceled, revoked, annulled or otherwise becomes void or of no effect, without another proper bond being given so that continuance of bonded protection is afforded, the office of such officer shall thereupon become vacant and shall be filled as provided by law . . . .

Under a strict reading of the above provision, if a person does not qualify for the office within sixty days of the date of the commencement of term of office for any reason (arguably including a failure to take and subscribe to the required oath provided for in Article IV, Section 10, of the Constitution), then the office becomes vacant.

However, because of strong countervailing public policy, when such technical vacancies occur in public offices and the elected or appointed person continues to occupy the office and exercise the duties thereof, the person is generally held to be an officer de facto whose acts are valid as to the public and third persons. The basis for the de facto doctrine is stated in 63 Am.Jur.2d, Public Officers, Section 493, as follows:

The de facto doctrine was engrafted upon the law as a matter of policy and necessity to protect the interests of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. Thus, it is generally recognized that until a

statute has been declared unconstitutional, it is sufficient to confer on an officer acting under it such color of title as will constitute him an officer de facto. It was seen that it would be unreasonable to require the public to inquire on all occasions into the title of an officer, or compel him to show title, especially since the public has neither the time nor opportunity to investigate the title of the incumbent. In other words, the doctrine rests upon the principle of protection of the public and third parties, and not to protect or vindicate the acts or rights of the particular de facto officer or the claims or rights of rival claimants to the particular office. The law validates the acts of de facto officers as to the public and third persons on the ground that, although not officers de jure, they are, in virtue of the particular circumstances, officers in fact whose acts public policy requires should be considered valid.

Although there are a variety of definitions of a de facto officer, a widely accepted definition set forth in 63 Am.Jur.2d *supra*, in Section 494, reads:

A person is a de facto officer where the duties of the office are exercised (1) without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; (2) *under color of a known and valid appointment or election but where the officer had failed to conform to some precedent requirement, or condition, such as to take an oath, give a bond, or the like*, (3) under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reasons of some defect or irregularity in its exercise, such ineligibility, want of power, or defect being unknown to the public; (4) under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such. (Emphasis added.)

The Utah Supreme Court has uniformly applied the de facto officer doctrine, with the exception of two cases, *Page v. McAfee*, 487 P.2d 861 (Utah 1971), and *Salt Lake Homebuilders, Inc. v. Colman*, 518 P.2d 165 (Utah 1974), which to a limited extent place a cloud on the doctrine. These cases will be discussed later.

In *Tidewell v. Anderson*, 5 Utah 88, 12 P. 638 (1886), on petition for rehearing, appellant contended Judge Powers, who sat in the hearing on the case in the Supreme Court, was not at that time a member of the court. The court denied the petition, stating that Judge Powers was a de facto officer and the attention of the court was not at the time called to any irregularity in his sitting on the case, nor was any doubt cast upon his authority to act.

In *Peterson v. Benson*, 38 Utah 286, 112 P. 801 (1910), plaintiff was elected city marshal for a two-year term and served from January 6, 1908 to March 1, 1910. In 1909, the law was changed, making the office appointive rather than elective and increasing the salary. Upon taking office in January of 1910, the Mayor and City Council failed to appoint a city marshal. The court held that plaintiff was the de facto city marshal during the period between the expiration of this term and March 1, 1910, and was entitled to the increased salary during that time in the absence of a de jure city marshal.

In *In Re Thompson's Estate*, 72 Utah 17, 269 P. 103 (1928), a district court judge was requested by the Supreme Court to participate in a case in place of a Supreme Court justice who had recently died. The court held that the judge had de jure authority to sit on the case by virtue of Article VIII, Section 2, of the Utah Constitution. However, the court said that even assuming the judge was not a de jure judge he was certainly a judge de facto and that the decision concurred in by him was as binding as though he had been a judge de jure.

*Stain v. Christensen*, 35 P.2d 775 (Utah 1934), was a proceeding in quo warrant to determine who was the treasurer of the State of Utah. Stain was elected treasurer in 1932 and took the oath of office on the first Monday in January of 1933, but failed to give any bond. The Second Special Session of the Legislature of 1933 enacted what is now Section 52-2-1, *supra*, effective October 2, 1933, providing that if a person elected or appointed to an office fails to qualify for the office within sixty days

after the beginning of the term of office, the office becomes vacant and shall be filled as provided by law. On December 12, 1933, the Governor appointed Hoge as State Treasurer. In the meantime, Christensen, the former State Treasurer, had continued to serve in the office and contended that there was no vacancy in the office and he could continue to serve until his successor was duly elected and qualified. Stain contended the Act of 1933 was unconstitutional, and Hoge contended he was entitled to the office. The court held the Act of 1933 was constitutional, that there was a vacancy and Hoge was entitled to the office and that Christensen was the de facto State Treasurer until Hoge was appointed and qualified.

In *Tooele County v. De La Mare*, 59 P.2d 1155 (Utah 1936), the court held that an elected County Treasurer who failed to file her bond was the de facto County Treasurer and had the same degree of accountability as a de jure officer.

*Colorado Development Co. v. Creer*, 80 P.2d 914 (Utah 1938), was a mandamus proceeding to compel defendants who comprised the Board of Supervisors of Utah County Drainage District No. 4 to levy an assessment for the purpose of paying a judgment previously rendered in favor of the plaintiff and against the Drainage District. Defendants contended they were not officers of the Drainage District for the reasons that they never took the oath of office or filed a bond and for fifteen years had not acted as officers of the District and had abandoned their office. The court held they were de facto officers, saying:

It is by answer denied that the said supervisors have ever taken an oath of office or qualified as such supervisors. Conceding this to be true, still they show that they have acted in such capacity and performed many of the duties in connection with the office and have never resigned. They are de facto officers, and no other finding could be made upon that issue . . . .

The question as to whether the supervisors had qualified or not goes only to their official status as to their right, duty and power to perform the functions they have assumed to perform as de facto officers; until the right to that office is attacked by someone claiming a superior right, their official status in this case would not be changed.

*State v. Grover*, 132 P.2d 125 (Utah 1942), involved an application for rehearing in an original quo warranto proceeding in the Supreme Court on the ground that Justice Pratt, who was one of the three judges who participated in the majority opinion, was disqualified on the day the decision was handed down because he was on active duty in the army. Prior to being granted a leave of absence for military duty Justice Pratt sat on the case but the decision was made after he had gone on active duty. In denying the application for rehearing, the court held that Justice Pratt was at least a de facto judge at the time the decision was rendered and that the validity of his acts could not be collaterally attacked. With respect to collateral attack, the court said.

It must be conceded that the petition for rehearing is a direct attack on the judgment or decision thus assailed; but it is a collateral or indirect attack upon the authority of the court which rendered it. We are asked to determine incidentally to the issue raised in the case before us a question as to the capacity or lack of capacity of Justice Pratt to participate de jure in any respect in the proceedings of this court after commencement of his leave of absence. This should not be done. The considerations of public policy and necessity upon which the doctrine which gives validity to the acts of de facto officers, in my opinion preclude the method of attack here attempted on the decision of one who is at least a de facto judge.

In *Shippers Best Express, Inc. v. Newsom*, 579 P.2d 1316 (Utah) Utah 1978), the court denied a petition for rehearing, holding that a retired Utah Supreme Court Justice was qualified to sit on a case. The court quoted from *People v. Tidwell*, *supra*, to the effect that the justice was a de facto officer and that at the time the case was heard the attention of the court was not called to any irregularity in the justice's sitting on the court.

In *Jenkins v. State*, 585 P.2d 442 (Utah 1978), the plaintiff contended that acts passed by the Forty-Second Utah Legislature were invalid because some members who were school administrators and teachers were precluded from serving in the Legislature by Article VI, Section 6, of the Utah Constitution since they held an office of profit and trust. The court made no holding as to administrators and teachers serving in the Legislature because proper parties defendant were not before the court, but the court did hold that it was at least a de facto Legislature and that the laws enacted by it were not invalid by reason of its membership.

As previously mentioned, to some extent the cases of *Page v. McAfee* and *Salt Lake Homebuilders, Inc. v. Colman, supra*, place a cloud on the de facto doctrine. The *Page* case is short and the facts and holding of the court cannot be more succinctly stated than in the opinion of the court, so the following is the complete majority opinion:

Appeal from a summary judgment for plaintiffs in a quiet title action. Reversed with instructions to dismiss the complaint and enter judgment on the counterclaim. Costs to defendants.

Plaintiffs purchased defendants' property at the so-called "May Sale" conducted to sell property to satisfy delinquent taxes. The county auditor must conduct the sale under our statute. Plaintiffs then sued defendants to quiet title thereto, and defendants counterclaimed, urging that the sale was conducted by one Hibler, not the auditor, and an unqualified person. Plaintiffs conceded that he was not qualified de jure, but claimed he was a de facto deputy auditor and as such capable of conducting the sale and effectively passing title.

Mr. Hibler was a tax accountant, taking care of tax work and the preparation of tax rolls for submission to the county treasurer. He was strictly an employee of the auditor and never attained the status, de facto or otherwise, of deputy auditor or anything else.

Under the statute, it was possible that Hibler could have become a true deputy auditor, and could have legally conducted the sale, but he never qualified as such.

Under our statute, to have become a deputy auditor, three facts were absolutely necessary:

1. His appointment must have been made in writing, which admittedly was not done;
2. Such written appointment must have been filed in the office of the county clerk, which obviously was not done;
3. He was required to take the oath, which was not done.

The statute then, in the same paragraph in crystal clear language says:

Until such appointment is so made and filed and until such deputy shall have taken the oath of office, no one shall be or act as such deputy. [Emphasis added.]

Plaintiffs strongly urge that inasmuch as Hibler had been accustomed to performing some duties that the auditor was charged to do, he was a de facto officer. They cite considerable respectable authority for their position, but we are constrained not to subscribe to the employment of a couple of Latin words to circumvent the clear intent of the legislature. When a person's real property is at stake, and its title hinges on statutory construction in tax sales procedures, we are committed to two other Latin words: "strictissimi juris," which we believe, hold and have held, to apply to a case like this.

Justice Ellett dissented, pointing out that while there was no record of Hibler's appointment in writing, he had been paid his salary for some eight years and no question had been raised as to his official capacity; that Hibler testified that an oral oath was administered to him under the predecessor to the present County Auditor, but he did not recall if he subscribed his name to a written oath; and that Hibler was designated by the auditor to cry the "May sale" as he had done for the past four years. Justice Ellett then concluded that Hibler was a de facto deputy whose actions were valid.

The *Colman* case arose under facts similar to those in *Page*, i.e., who had title to property sold for delinquent taxes at a "May sale," conducted by Hibler. Other issues were raised, but with respect to the de facto officer doctrine the court said:

We agree that there are many areas in the law where the status and the acts of de facto officers are deemed valid as to third parties. But as in most situations, there is another side of the coin. There are also to be considered the difficulties which may sometimes result from taking for granted that any person who assumes to have authority to perform official acts and does them should be deemed to have such authority as a de facto officer. This is particularly true when it is asserted and relied on as part of the "taxing-forfeiture" procedure where the rule of *strictissimi juris* applies.

Whenever rules appear to overlap it is the responsibility of the court to determine and to apply that rule which is the more fundamental in that it best harmonizes with and carries out the purpose and policy of the law. In that regard it is appropriate to have in mind that the main purpose of all of the taxing procedures is to enforce the payment of taxes, and not the confiscation of property. Although it is true that confiscation may be the final and drastic measure, it should result only as the ultimate necessity to the accomplishment of the main objective. It is evident that that is the intent of our statutes; and consistent therewith it is also the practically universal rule of decisional law: that the sovereign (taxing authority) is required to follow procedures prescribed by law with accuracy and particularity before it can forfeit one's property. In the *Page* case we held that that standard was not met by sale of the property by one not authorized to do so; and we are not inclined to change that position.

Justice Ellett, with Justice Tucket concurring, again dissented with the following concluding remark:

The holding of the instant case and of *Page v. McAfee*, *supra*, is, in my opinion, wrong and not based upon reason or common sense. What these cases do is to apply the "strictissimi" idea, which this Court has heretofore applied to tax sale procedures, to a general law regarding all deputy county officers. They in effect hold that there is no such thing as a de facto deputy auditor. If there can be no such thing as a de facto deputy county auditor, then there can be no de facto deputy county attorney. Would anyone believe that this court would reverse a murder conviction simply because the acting deputy county attorney had not filed a written oath when he had prosecuted criminal cases under the direction of the duly elected and qualified county attorney for eight years? Or that this Court would permit the State to retry a defendant after an acquittal because the trial was a nullity? Such holdings would be consistent with the holding in this case.

The *Page* and *Colman* cases can be readily distinguished from the situation where a properly elected or appointed officer qualifies for the office in every respect other than the inadvertent failure to take the oath of office.

*First*, those cases involved an employee of an officer unilaterally assuming the duties of a deputy officer without formal appointment.

*Second*, the statute involved in those cases is different than the typical statute relating to taking the oath. With respect to the appointment of deputies by county, precinct or district officers, Section 17-16-7 states that the appointment shall be in writing and filed in the office of the county clerk and then provides: "Until such appointment is so made and filed and until such deputy shall have taken the oath of office, no one shall be or act as such deputy." This quoted provision was emphasized by the court in *Page*. Although I have not examined all statutes requiring particular officers to take an oath of office, Section 7-1-102(3) relating to the Commissioner of Financial Institutions appears to be the more usual statute. It provides: "The Commissioner shall qualify by taking the constitutional oath of office and by giving to the state a bond . . . ." This section when read in conjunction with Section 52-2-1, *supra*, which provides that if a person elected or appointed to an office fails to qualify within sixty days the office shall become vacant, indicates that an officer may assume his office before being

fully qualified -- at least he would be a de facto officer.

*Thira*, the *Colman* case sheds some light on the court's applying the rule of strictissimi juris in *Page*. It should be noted in the quotation set forth above from *Colman* the court observed that the main purpose of the taxing procedures is to enforce the payment of taxes, and not the confiscation of property. This, it appears, would distinguish these two cases from most other situations where the duty of the elected or appointed officer is to administer laws which are for the benefit and protection of the public generally.

From the foregoing, it is reasonably clear, except for some limited exceptions, that in the circumstances where an appointed or elected officer has not taken the oath of office but has continued to serve in his office, he would have the status of a de facto officer whose acts would be valid insofar as they affect third persons or the public.

### III. *CONDITION IN BOND AS SATISFYING OATH REQUIREMENT*

The oath provided for in Article IV, Section 10 of the Utah Constitution focuses on (1) supporting, obeying and defending the constitution law of the United States and of Utah, and (2) on discharging the duties of the office with fidelity.

Most often, compliance bonds which are required to hold a particular office address the same two concerns: compliance with the law, and faithful performance of the duties of the office. See generally Sections 52-1-7, 8, 10 and 11. Accompanying your letter was a copy of the bond executed by the Commissioner of Financial Institutions. You asked if the "Condition of this Obligation" contained in the bond would satisfy the requirement of an oath. The bond states:

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that, if the principal shall well, truly and faithfully execute and perform the duties of said office during said term, according to all laws now in force or which may be enacted subsequent to the execution of this bond, then this obligation shall be void; otherwise it shall remain in full force and effect.

This is not an oath but is a mere condition of the bond and, although it was signed by the Commissioner of Financial Institutions, it was not sworn to.

As stated earlier, the terms of Article IV, Section 10, appear to be mandatory -- requiring that all officers before entering upon the duties of their offices shall take and subscribe to the oath or affirmation. Moreover, the procedure for filing the oath is different than it is for a bond. Section 52-1-2 provides:

Whenever state officers, officials of state institutions, or other persons are required to give official bonds to the state, the bonds, unless otherwise provided, shall be approved by the division of finance, and recorded by the lieutenant governor in a book kept for that purpose. When so recorded, the lieutenant governor shall deliver the originals to the state treasurer, except the bond of the state treasurer, of which the treasurer shall be the legal custodian thereof, but the bond of the state treasurer shall remain in the custody of the lieutenant governor. The oaths of office of all state officials shall be filed with the lieutenant governor.

Based upon the foregoing, the filing of a compliance bond does not satisfy the constitutional oath requirement.

### IV. *Potential Criminal Liability for Failure to Take the Oath of Office.*

Section 76-8-203 of the Criminal Code defines the offense of "unofficial misconduct" as follows:

(1) A person is guilty of unofficial misconduct if he exercises or attempts to exercise any of the functions of a public office when:

(a) He has not taken and filed the required oath of office; or

- (b) He has failed to execute and file the required bond; or
  - (c) He has not been elected or appointed to office; or
  - (d) He exercises any of the functions of his office after his term has expired and the successor has been elected or appointed and has qualified, or after his office has been legally removed.
  - (e) He knowingly withholds or retains from his successor in office or other person entitled to the official seal or any records, papers, documents, or other writings appertaining or belonging to this office or mutilates or destroys or takes away the same.
- (2) Unofficial misconduct is a class B misdemeanor.

Notably, the portion of the statute which refers to failure to take the oath of office, does not allude to any particular mental state required for the offense.

Section 76-2-101 provides in pertinent part that:

No person is guilty of an offense unless his conduct is prohibited by law and:

- (1) He acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or
- (2) His acts constitute an offense involving strict liability. . . .

Section 76-2-102 states that:

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state.

The overall context of the unofficial misconduct statute does not clearly indicate a legislative purpose that the offense be one of strict liability. In fact, one of the subsections expressly provides for a specific mens rea. (See subsection (e).) Thus, a conviction under the statute based upon a failure to take the oath of office, must be predicated upon at least one of three mental states enumerated in Section 76-2-102, because Section 76-8-203 does not specify a culpable mental state. The three mental states are intent, knowledge, or recklessness. Notably, the mental state of criminal negligence is not listed in Section 76-2-102, and therefore would not apply to the offense of unofficial misconduct. In summary, unless an elected or appointed official intentionally, knowingly or recklessly failed to take his oath of office, no criminal culpability would be present. Those three mental states are further defined in Section 76-2-103 as follows:

- (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
- (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conducts when he is aware that his conduct is reasonably certain to cause the result.
- (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Inadvertent failure of an officer to take the required oath of office should not subject the official to criminal liability for unofficial misconduct.

NOTE: This informal opinion does not deal with issues of such broad public import that it would justify detailed scrutiny by the Attorney General himself or official publication in the manner of a formal opinion. Nevertheless, it is authoritative for the purposes of the agency requesting it and with respect to the specific questions presented, represents the position of the Attorney General as expressed through his assigned staff member.[ATTACHMENT]

*STATE OFFICERS REQUIRED TO TAKE OATH OF OFFICE*

(An "X" to the right of the office indicates a position which does not appear to meet the criteria for an office.)

<i>Office</i>	<i>Statute Creating Office</i>	<i>Statute Requiring Oath</i>
<i>Board of Abstract Commissioners</i>	1-1-2	1-1-2
<i>Aeronautical Committee</i>	2-1-11	None
<i>Commissioner of Agriculture</i>	4-2-3	None
<i>Agricultural Advisory Board</i>	4-2-7	None X

*(The Agriculture Code vests various powers in the Department of Agriculture which is under the direction and control of a Commissioner. It provides for the following divisions but does not specify that division directors shall be appointed or their particular powers. It appears, however, that division directors would*

*exercise governmental powers, so I have*

*listed them as officers.)*

*State Chemist, Director,*

*Division of Laboratories*

*4-2-4*

*None*

*Director, Division of*

*Consumer Services*

*4-2-4*

*None*

*Director, Plant Industry Div.*

*4-2-4*

*None*

*Director, Agricultural*

*Marketing Division*

*4-2-4*

*None*

*Director, Brand Inspection Div.*

*4-2-4*

*None*

*Director, Animal Health Div.*

*4-2-4*

*None*

*Director, Meat Inspection Div.*

*4-2-4*

*None*

*Dairy Advisory Board*

*4-3-15*

*None X*

*Bedding, Upholstered Furniture*

*and Clothing Advisory Committee*

*4-10-12*

*None X*

*Pesticide Committee*

*4-14-10*

*None X*

<i>Soil conservation Commission</i>	<i>4-18-4</i>	<i>None</i>
<i>Taylor Grazing Act Advisory Board</i>	<i>4-20-1</i>	<i>None X</i>
<i>Utah Dairy Commission</i>	<i>4-22-2</i>	<i>None</i>
<i>Agriculture and Wildlife Damage Prevention Board</i>	<i>4-23-4</i>	<i>None</i>
<i>Livestock Market Committee</i>	<i>4-30-2</i>	<i>None</i>
<i>Commissioner of Financial Institutions</i>	<i>7-1-202</i>	<i>7-1-202</i>
<i>State Board of Financial Institutions</i>	<i>7-1-203</i>	<i>None</i>
<i>Chief Examiner, Department of Financial Institutions</i>	<i>7-1-204</i>	<i>None</i>
<i>Consumer Funds Transfer Facilities Board</i>	<i>7-16-4</i>	<i>None</i>
<i>Director, Department of Business Regulation</i>	<i>13-1-3</i>	<i>None</i>

<i>Director of Division of Consumer Protection, Department of Business Regulation</i>	20-1-7.3	None
<i>Executive Director, Department of Health</i>	26-1-8	None
<i>Health Advisory Council</i>	26-1-7.5	None X
<i>Director of Community Health Nursing</i>	26-1-26	None
<i>Medical Examiner Committee</i>	26-4-3	None X
<i>State Medical Examiner</i>	26-4-4	None
<i>State Emergency Medical Services Committee</i>	26-8-3	None
<i>Director of Family Health Services Programs</i>	26-10-3	None
<i>Water Pollution Control Committee</i>	26-11-5	None
<i>Executive Secretary of Water Pollution Control Committee</i>	26-11-2	None

<i>Utah Safe Drinking Water Committee</i>	26-12-4 26-1-7	None
<i>Executive Secretary of Utah Safe Drinking Water Committee</i>	26-12-1 26-13-9	None
<i>Air Conservation Committee Executive Secretary to Air Conservation Committee</i>	26-13-4	None
<i>Solid and Hazardous Waste Committee</i>	26-14-4	None
<i>Hazardous Waste Facilities Authority</i>	26-14b-4	None
<i>Health Facilities Committee</i>	26-21-3	None
<i>Utah Health Project Review Advisory Committee</i>	26-22-8	None X
<i>Members, Health Systems Agency</i>	26-33-5	None
<i>Members of State Highway Patrol</i>	27-10-1	None
<i>Commissioner of Insurance</i>	31-2-2	31-2-2

<i>Deputy Commissioners of Insurance, Chief Examiner, and investigator in Department of Insurance</i>	31-2-5	31-2-5
<i>Health Maintenance Advisory Council</i>	31-42-25	None X
<i>Liquor Control Commission</i>	32-1-5	32-1-5
<i>Director of the Liquor Control Commission</i>	32-1-5.5	32-1-5.5
<i>Citizens Council (Liquor Control Act)</i>	32-1-45	None
<i>Director, Liquor Division, Department of Public Safety</i>	32-10-4	None
<i>Enforcement Agents, Liquor Div., Department of Public Safety</i>	32-10-5 32-10-7	None
<i>Labor Relations Board (Industrial Commission designated as this Board</i>	34-20-3	None
<i>Anti-discrimination Div. (composed</i>		

<i>of members of Industrial Comm.)</i>	34-35-4	None
<i>Industrial Commission</i>	35-1-1	35-1-5
<i>State Council, Industrial Comm.</i>	35-1-17	None X
<i>Administrative Law Judge, Industrial Commission</i>	35-1-82.52	None
<i>Manager, State Insurance Fund</i>	35-3-1	None
<i>Administrator, Department of Employment Security</i>	35-4-11	None
<i>State Advisory Council, Dept. of Employment Security</i>	35-1-116	None X
<i>Appeal Referees, Department of Employment Security</i>	35-4-10(c)	None
<i>Board of Review, Department of Employment Security</i>	35-4-10(a)	None
<i>Apprenticeship Council</i>	35-8-2	None
<i>Administrator, Division of</i>		

<i>Occupational Safety and Health</i>	35-9-4	None
<i>Occupational Safety and Health Advisory Council</i>	35-9-7	None X
<i>Utah Occupational, Safety and Health Review Commission</i>	35-9-12	None
<i>Legislative Compensation Comm.</i>	32-6-4	None
<i>Legislative General Counsel</i>	36-12-12	None
<i>Legislative Fiscal Analyst</i>	36-12-13	None
<i>Legislative Auditor General</i>	36-12-15	None
<i>Board of Control of State Law Library (composed of Governor, Secretary of State and Justices of Supreme Court)</i>	37-1-1	None X
<i>State Library Board</i>	37-4-3	None
<i>Director of Libraries</i>	37-4-5	None
	63-33-3	

<i>National Guard (required to take oath prescribed by 32 USC, § 312)</i>	39-1-30	32 USC
<i>State Armory Board (composed of Governor, Secretary of State and Adjutant General)</i>	39-2-1	None
<i>Officers, Utah State Guard</i>	39-4-1	39-4-10
<i>Civil Defense Compact Committee Member</i>	39-5-2	None
<i>Driver License Medical Advisory Board, Div. of Driver's License and Accident Reports</i>	41-2-40	None
<i>Administrator, Dept. of Motor Vehicle Business Administration</i>	41-3-7(g) 41-3-8	None
<i>Advisory Board, Dept. of Motor Vehicle Business Administration</i>	41-3-9	None
<i>Hearing Examiners, Div. of Safety and Financial Responsibility</i>	41-12-2(c)	None
<i>Commissioner of Public Safety</i>	41-13-1	None

*Director, Division of Utah*

*Highway Patrol;*

*Director, Division of Drivers'*

*License and Accident Records;*

*Director, Division of Safety*

*Education and Promotion;*

*Director, Division of Safety*

*and Financial Responsibility*

*41-13-7*

*None*

*Section 41-13-7 provides for these Divisions. There are no statutes providing for the office of director for each division, but Section 41-13-1 creates the Department of Public Safety, which shall consist of a Commissioner of Public Safety and of such officers and employees as may be required.)*

*State Traffic Coordinating*

*Committee (composed of*

*State officers*

*41-14-1*

*None*

*Commissioner, Vehicle Equipment*

*Safety Commission (Vehicle*

*Equipment Safety*

*41-15-6*

*None*

Board of Security Licensing, Dept. of Public Safety	58-54-4	None
Director, Div. of Comprehensive Emergency Management, Dept. of Public Safety	63-5-3 41-13-5	None
Disaster Emergency Advisory Council	63-5-4	None X
Notaries Public	46-1-1	46-1-1
Commissioner of Deeds	46-2-1	46-2-1
Utah State Retirement Board	49-9-3	49-9-3
Executive Director, State Retirement Office	49-9-4	None
State Money Management Council	51-7-16	None
State Board of Education	53-2-1	53-2-1
Coordinating council for children in custody	53-2-12.3	None X

State Textbook Commission	53-13-1	None
State Course of Study Commission (same as State Textbook Comm.)	53-14-1	None
State Board for Vocational Education (same as State Board of Education)	53-16-2	None
Director, Division of Vocational Rehabilitation	53-17-11	None
Director of Special Education of Handicapped Children	53-18-2	None
Advisory Committee for Handicapped Children	53-18-8	None X
Director of Adult Education	53-30-4	None
Members of Police or Security Departments of Universities and Colleges (Peace Officers)	53-45-5	None
State Board of Regents	53-48-5	53-48-5

Commissioner of Higher Education	53-48-6	None
Institutional Councils for institutions of Higher Education	53-48-19	53-48-19
Presidents of Institutions of Higher Education	53-48-6	None
Public Service Commission	54-1-1.5	None
Director, Div. of Public Utilities	54-4a-1	None
Inspectors for Public Service Commission (Peace Officers)	54-6-16	None
Committee for Consumer Services	54-10-2	None
Manpower Planning Council	55-17-2	None
Director, Div. of Registration, Dept. of Business Regulation	58-1-2	58-1-2
Special Appeals Board, Division of Registration	58-1-35.1	None

Architectural Examining Board, Division of Registration	58-3-3 58-1-6	None
Podiatry Committee, Division of Registration	58-5-15 58-1-6	None
Representative Committee for Dentists and Dental Hygienists, division of Registration	58-7-1.5 58-1-6	None
State Board of Funeral Service, Division of Registration	58-9-3.5 58-1-6	None
Board of Cosmetology and Barbering, Div. of Registration	58-11-3 58-1-6	None
Board of Osteopathic Medical Examiners, Div. of Registration	58-12-1 58-1-6	None
Physicians Licensing Board, Division of Registration	58-12-29.5 58-1-6	None
Chiropractor Advisory Committee, Division of Registration	58-12-51.5	None
Accupuncture Board, Division	58-12-58	None

of Registration	58-1-6	
Optometric Committee, Division of Registration	58-21-2(2) 58-1-6	None
State Board of Pharmacy, Division of Registration	58-1-6	None
Committee for Practice of Sanitarian, Div. of Registration	58-21-2(2) 58-1-6	None
Committee for Engineers and Land Surveyors, Div. of Registration	58-22-3 58-1-6	58-22-3
Committee for Physical Therapists, Division of Registration	58-24-4 58-1-6	None
Committee for Psychologists, Division of Registration	58-1-6 58-25-3	None
Committee for Veterinarians, Division of Registration	58-1-6 58-28-3(a)	None
State Board of Nursing, Division of Registration	58-31-5 58-1-6	None

Interdisciplinary Board for Division of Registration	58-1-6 58-28-3(a)	None
Board of Social Work Examiners, Division of Registration	58-35-2.5 58-1-6	None
Investigators, Dept. of Business Regulation, for Enforcement of Controlled Substances Act (Peace Officers)	58-37-9	None
Committee of Marriage and Family Therapists, Div. of Registration	58-39-3(4) 58-1-6	None
Board of Recreational Therapists, Division of Registration	58-40-4.5 58-1-6	None
Committee for Speech Pathology and Audiology, Division of Registration	58-41-6 58-1-6	None
Board of Occupational Therapy, Division of Registration	58-42-14 58-1-6	None
Committee of Certified Nurse Midwifery, Div. of Registration	58-44-4 58-1-6	None

Committee of Hearing Aid Dealers, Division of Registration	58-46-2 58-1-6	None
Board of Massage, Division of Registration	58-47-3 58-1-6	None
Director, Div. of Contractors, Dept. of Business Regulation	58A-1-5	58A-1-5
Contractors Advisory Board, Division of Contractors	58A-1-7	None
Plumbers Board, Division of Contractors	58A-2-4 58A-1-9	None
State Electrical Board, Division of Contractors	58A-3-11	None
State Tax Commission	59-5-37	59-5-39
Executive Director, State State Tax Commission	59-5-41	None

(The Tax Code seems to vest all powers in  
the Tax Commission. However, Section

59-5-41 provides for the appointment of an Executive Secretary, and Section 59-5-41 also provides for an Internal Audit Manager, an Appeals Office, and for Division Directors to be appointed by the Tax Commission. The duties of Division Directors are not enumerated and it is not clear whether they are officers exercising governmental powers or are employees of the Commission. I have listed them as officers.)

Division Directors,

State Tax Commission	59-5-41	None
----------------------	---------	------

Internal Audit Manager,

State Tax Commission	59-5-41	None
----------------------	---------	------

Appeals Officers, State Tax Comm.

59-5-41	None
59-5-46(24)	

Farmland Evaluation Advisory Comm.

59-5-101	None X
----------	--------

Utah Member, Multistate Tax Comm.

59-22-3	None
---------	------

Director, Div. of Securities,

Dept. of Business Regulation	61-1-18	None
Securities Advisory Board, Division of Securities	61-1-18.5	None
Director, Div. of Real Estate, Dept. of Business Regulation	61-2-5	None
Real Estate Commission, Division of Real Estate	61-2-2.5	None
Executive Director, Department of Administrative Services	63-1-4	None
Advisory Committee, Dept. of Administrative Services (composed of State officers)	63-1-8	None X
Director, Division of Finance	63-1-33	None
Director, Div. of Central Services	63-1-24	None X
Director, Div. of Data Processing	63-1-27	None X
Data Processing Coordinator	63-1-32	None

State Building Board	63-1-33	None
Director, Div. of Construction and Facilities Management	63-1-37	None
Risk Manager, Department of Administrative Services	63-1-46	None
State Archivist	63-2-62	None
Records Committee (composed of State officers)	63-2-68	None
Board of Trustees, Utah Conservation and Research Foundation	63-4-2(6)	None
Board of Examiners (composed of State officers)	63-2-68	None
Utah Commission on Interstate Cooperation (composes of State officers)	63-7-4	None
Utah Interstate Commission for Cooperation in Higher Education	63-7-14	63-7-14

Education Commission of the States (Article III A, Compact for Education)	68-7-17	None
Capitol Hill Commission	63-9-32	None
State Building Ownership Authority	63-9a-4	None
Provo-Jordan Parkway Advisory Council, Division of Parks and Recreation	63-11-17.7	None X
Passenger Tramway Safety Committee, Department of Transportation	63-11-39	None
Heritage Trees Advisory Committee, Div. of State Lands and Forestry	63-11-60.4	None
Utah Historic and Cultural Sites Review Committee, Division of State History	63-18-35	None
Utah Athletic Commission	63-24-4	None

Commission on Criminal and Juvenile Justice	63-25-2	None
Executive Director, Commission on Criminal and Juvenile Justice	63-25-3	None
State Planning Coordinator	63-28-1	None
State Advisory Planning Committee	63-28-5	None X
Resource Development Coordinating Committee	63-28a-2	None X
Utah Energy Conservation and Development Council	63-53-2	None
State Fire Prevention Board	63-29-3	None
State Fire Marshall and Investigators (Peace Officers)	63-29-3	None
State Board of Bonding Commissioners	63-2a-93	None
Director Office of Community and Economic Development	63-33-2	None

Advisory Council on Community Affairs	63-33-5	None X
Board of Industrial Promotion	63-31-2	None
Director, Division of Industrial Promotion	63-33-3 63-31-9	None
Board of Expositions	64-4-2	None
Director, Division of Expositions	63-33-3 64-4-5.1	None
Board of Travel Development	63-16-1.1	None
Director, Division of Travel Development	63-33-3 63-16-16	None
Board of Indian Affairs	63-36-2	None
Director, Division of Indian Affairs	63-33-3 63-36-5.5	None
Board of Fine Arts	64-2-4	64-2-8
Director, Div. of Fine Arts	63-33-33	None

	64-2-7	
Board of State History	63-18-4	None
Director, Div. of State History	63-33-3	None
	63-18-5	
Antiquities Committee, Division of State History	63-18-22	None
Federal Research Committee (composed of State officers)	63-33-8	None
Executive Director, Department of Natural Resources	63-34-5	None
Board of Water Resources	63-34-3	None
	73-10-2	
Water Development Coordinating Council	63-34-3	None X
	73-106-3	
Director, Div. of Water Resources	63-34-6	None
	73-10-19	
State Engineer (Director) Div.		

of Water Rights	73-2-1	73-2-2
Board of State Lands, Forestry and Fire Control	63-34-3 65-1-1.1	None
State Public Land Committee	65-11-7	None
Director, Div. of State Lands, Forestry and Fire Control	63-34-6 65-1-3.1	None
State Forests	24-2-2 24-2-4	None
Board of Oil, Gas and Mining	63-34-3 40-6-4	None
Director, Division of Oil, Gas and Mining	63-34-6 40-6-15	None
Board of Parks and Recreation	63-34-3 63-11-14	None
Director, Division of Parks and Recreation	63-34-6 63-11-18	None
Board of Wildlife	63-34-3	23-14-2

	23-14-2	
Director, Division of Wildlife	63-34-6	None
Resources	23-14-7	
Great Salt Lake Advisory Council	65-8a-2	None
Conservation Officers, Division of Wildlife Resources	23-20-1.5	None
Special Deputies, Division of Wildlife Resources	23-20-2	None
Board of Big Game Control	63-34-3 23-14-5	None
Board of State Zoos	63-34-3 63-14-1	None
Board of Geological and Mineral Survey	63-34-3 53-36-3	None
Seismic Safety Advisory Council	63-34a-3	None
Director, Seismic Safety Advisory Council	63-34a-7	None

Executive Director, Department of Social Services	63-35-5	None
Administrator on Interstate Compact in the Placement of Children	55-8b-7	None 9
Administrator on Interstate Compact on Juveniles	55-12-1	None
Board of Youth Corrections	55-11b-2	None
Director, Division of Youth Corrections	55-11b-4	None
Director, Office of Assistance Payments	55-15a-13	None
Director, Office of Recovery Services	55-15c-6	None
Board of Family Services	63-35-3 55-15b-3	None
Director, Division of Family	63-35-6	None

Services	55-15b-8	
Board of Corrections	63-35-3 64-13-2	64-13-4
Director, Division of Corrections	63-35-6 64-13-6	None
Warden, State Prison	64-13-8	64-13-8
Deputy Wardens, other officers, State Prison		63-13-11
Board of Pardons	63-35-3 77-27-2	None
Board of Mental Health	63-35-3 26-17-1.1	None
Director, Division of Mental Health	63-35-6 26-17-1.3	None
Board of Aging and Adult Services	63-35-3 63-26-6	None
Director, Division of Aging	63-35-6	None

and Adult Services	63-26-5	
Ombudsman for Institutionalized Elderly	63-26a-4	None
Board of Alcoholism and Drugs	63-35-3	None
Director, Division of Alcoholism and Drugs	63-35-6 63-43-4	None
Board of Services to the Handicapped	55-20-5	None
Director, Division of Services to the Handicapped	55-20-4	None
Director, Office of Community Operations	63-35-13	None
Governor's Commission on State House Fellowships	63-29-2	None X
Utah Member, Western Interstate Nuclear Board	63-41-4	None
Utah Housing Finance Agency		

Member	63-44a-4	None
Advisory Council on Science and Technology	63-45-11	None
State Science Advisor	63-45-4	None
Commission on Status of Women	63-47-2	None
Transportation Commission	63-49-10	None
Director of Transportation	63-49-5	None
Assistant Director of Transportation	63-49-6	None
District Directors, Department of Transportation	63-49-9	None

(Sections 63-49-1 to 63-49-18 provide for the Department of Transportation. Section 63-49-8 provides for several divisions and describes their authority, some of which involve the exercise of sovereign power.

There is no provision establishing an office of "director" over these divisions, but Section 63-49-6 provides that the

Director of Transportation may appoint an assistant director and *employ* such other assistants and advisors as necessary.

Thus, it is not clear if the chiefs or directors of these divisions hold an office and have independent authority or are merely assistants to the Director. However, I have listed them below as officers.)

Director, Preconstruction

Division	63-49-8	None
----------	---------	------

Director, Right-of-Way Division	63-49-8	None
---------------------------------	---------	------

Director, Construction Division	63-49-8	None
---------------------------------	---------	------

Impact Board, Dept. of Community and Economic Development (Board composed of State officers

63-52-2	None
---------	------

Utah Constitutional Revision

Study Commission	63-54-1	None
------------------	---------	------

State Procurement Policy Board	63-56-6	None
--------------------------------	---------	------

Chief Procurement Officer, Division of Procurement	63-56-8	None
State Bonding Commission	63-56a-1	None
Board of Trustees, Schools for the Deaf and Blind (consists of members of the State Board of Education)	64-3-4 64-3-15	64-3-5
Superintendent, Schools for the Deaf and Blind	64-3-11	None
Advisory Council for Deaf and Blind Schools	64-3-25	None X
Chief Executive Officer, Utah State Hospital	64-7-9	None
State Board of Loan Commissioners (composed of Governor, Lieutenant Governor, Attorney General)	66-1-1	None
Executive and Judicial Compensation Commission	67-8-4	None

Deputy State Officers (Secretary (of State, State Treasurer, Attorney General, and Superintendent of Public Instruction may each appoint a deputy -- Section 67-9-1)	67-9-1	None
Special Police Director, Div. of Peace Officer Standards and Training, Dept. of Public Safety	67-12-3 67-15-1	67-12-3 None
Council on Peace Officer Standards and Training	67-15-11	None
Director, Division of Personnel Management	67-19-5	None
Personnel Review Board	67-19-20	None
Commission on Uniform State Laws	68-4-5	None
Council of Advisors on Consumer Credit	70B-6-301	None
Utah Commissioner on Upper	73-13-10	None

Colorado River Commission	Article VIII of Treaty	
Utah Members, Bear River Compact Commission	73-16-4	None
Utah Member, Columbia Compact Commission (Director, Div. of Water Resources, is the Utah member)	73-19-9	None
Administrator, Interstate Compact for the Supervision of Parolees and Probationers	77-27-24(e)	None
Justices, Utah Supreme Court	78-2-1	None
Clerk, Utah Supreme Court	78-2-6	None
Judges, District Court	78-3-1	None
Judicial Council (Consists of Judges and the President of the Utah State Bar who is an ex-officer member with no vote	78-3-21	None

Administrator of the Courts	78-3-23	None
Judges, Juvenile Courts	78-3a-3	None
Juvenile Court Commission	78-3a-7	None
Board of Juvenile Court Judges	78-38-10	None
Administrator, Juvenile Court	78-3a-11	None
District Director, Juvenile Court Services	78-3a-12	None
Referees, Juvenile Court	78-3a-14	None
Juvenile Court Advisory Committee	78-3a-15	None X
Circuit Court Judges	78-4-10	None
Circuit Court Clerk	78-4-25	None
Trial Court Executives	78-4-28	None
Justices of the Peace	78-5-1	None
Commission on Judicial Conduct	78-7-27	None

Administrator, Uniform Unclaimed Property Act	78-44-2	None
Board of Commissioners, Utah State Bar	78-51-2	None
Court Reporters 78-56-1.1	78-56-7	
Representative Committee of Shorthand Reporters	78-56-13	None

### Footnotes

#### Footnotes

- 1 All code references are to Utah Code Ann. (1953), as amended.

