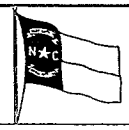

IN THE EXECUTIVE BRANCH

& IN THE LEGISLATURE

Executive-Legislative Relations in North Carolina: Where We Are and Where We Are Headed

These regular departments of Insight *examine policymaking in the executive and legislative branches of state government. The following article traces the history and the policymaking impact of relations between the executive and legislative branches of state government.*

When Gov. James G. Martin testified before the N.C. House of Representatives in 1985 in favor of veto power for the office of the governor, a central part of his argument was that the worries about the evils of the Royal Governors in the 18th century were no longer relevant as we neared the end of the 20th century. "I understand the 18th century concern about Royal Governors," he said, "and how that carried over into the early 19th century: They are not coming back. We have not had a Royal Governor for 209 years. We won!"

The N.C. General Assembly has declined to grant Martin's request for veto power and has had major disagreements over his budget proposals. These differences continue a tradition that dates back to 1731–1734, the tenure of the first royal governor, George Burrington. As Lefler and Newsome wrote in their comprehensive history of North Carolina, "Many of the executive-legislative conflicts had to do with finance, and the assembly consistently and persistently used its 'power of the purse' to force concessions from the governor. . . ."

Burrington's lack of success in salary negotiations with the legislature caused him to write that no governor could have kept peace with a people who were "subtle and crafty to admiration, who could be neither outwitted nor cajoled, who always behaved insolently to their Governors, who maintained that their money could not be taken from them save by appropriations made by their own House of Assembly, a body that had always usurped more power than they ought to be allowed."[1]

Not voting the governor a salary and arguing over matters of taxation were certainly low points in executive-legislative relations, and it is no accident that the Revolutionary War followed 45 years of experience with Royal Governors. However, in the Reconstruction politics after the Civil War, North Carolina Gov. William W. Holden became the first governor of an American state to be impeached and removed from office. In 1871, the N.C. House of Representatives brought eight charges of "high crimes and misdemeanors" against Holden—including unlawfully declaring an insurrection, declaring martial law, raising troops illegally, illegally arresting and imprisoning citizens, and refusing to obey a writ of *habeas corpus*. After a trial in the state Senate, Holden was convicted and removed from office. Former wartime Gov. Zebulon B. Vance said, "It was the longest hunt after the poorest hide I ever saw."

With that kind of history, it is no surprise that

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in 1990, the N.C. governor is still the only one in the country without veto power and that the governor shares the executive powers with nine other officials elected statewide—the most of any state save North Dakota, Louisiana, and Mississippi.[2] Still, during the last several decades the governor has gained the power to reorganize the nine executive departments under his control and the right to succeed himself, and a key court decision has strengthened his budgetary powers.

From the low points preceding the Revolutionary War and following the Civil War, both the executive and the legislature in North Carolina have improved their power bases....

The legislature has gained in stature and power also, as it has added four new staff divisions (Fiscal Research came first in 1971, then General Research in 1973, Bill Drafting in 1977, and Automated Systems in 1984), stripped the lieutenant governor of his traditional power to appoint Senate committees, allowed its officers (e.g., the speaker and president pro tem) and important committee chairs to succeed themselves, and increased the length of its time in sessions in Raleigh.

From the low points preceding the Revolutionary War and following the Civil War, both the executive and the legislature in North Carolina have improved their power bases and their relations with each other. Where are we now in 1990? And where are we likely to be by the beginning of the 21st century?

Where Are We Now?

The most momentous recent changes in executive relations came as a result of two main forces—the new power of a governor to succeed himself and the evolution of North Carolina into a two-party state. In 1977, the voters passed a constitutional amendment allowing the governor and lieutenant governor to succeed themselves to a second four-year term. This has altered the balance of powers in a number of key ways, including enhancing the governor's powers and slowing down the production of new leaders.

North Carolina has also become much more of a two-party state, and many observers ascribe the legislature's denial of veto power to Governor Martin to partisan motives—Democrats refusing to grant power to Republicans. Though that is assuredly part of the current equation, such analysis ignores the fact that every governor since Luther Hodges (1954–61) has asked for, and been denied, veto power. This includes five Democrats and two Republicans. Thus, some disputes between the branches rest more on institutional differences and would occur regardless of which party held the governorship and which party held the majority of seats in the legislature.

These two factors have exacerbated seven key tension points between the legislative and the executive branches. Those tension points are:

Tension Point #1:
A New Budget Process as a* Bone *of Contention

One of the common battlegrounds for executive-legislative skirmishes is adoption of the state budget. However, a key court decision (*State ex rel. Wallace v. Bone*)[3] in 1982 changed the balance of power in formulating and enacting a state budget. The two branches spent much of the 1980s adjusting to this change, with some parts still unresolved.

Prior to 1982, the legislature held the upper hand in putting together a state budget. Though the state constitution said, "The Governor shall prepare and recommend to the General Assembly a comprehensive budget . . .,"[4] in actual practice the Advisory Budget Commission (ABC) prepared the budget. At the time, the ABC had two gubernatorial appointees, to be sure, but it also had eight legislators on it, four appointed by the speaker and four by the lieutenant governor. These eight legislators also were usually chairs of the major appropriations committees or subcommittees. Thus, the actual balance of power in preparing a budget was heavily weighted toward the legislature.

The *Bone* decision entirely changed executive-legislative relations in the budgetary arena. As the ABC's real powers declined, the governor's powers ascended, albeit with a governor (James B. Hunt Jr.) who was very uncomfortable about the new arrangement and how it might affect his ability to get what he wanted. Since the 1983 statutory changes in the institutional powers of the ABC (in order to comply with the court decision), the budget is much more a governor's budget as proposed

but a legislative budget as disposed.

During the seven years between the *Bone* decision in January 1982 and the beginning of the 1989 General Assembly, the General Assembly parried succession, loss of some of its budgetary power, and election of a Republican governor with the following five counterthrusts, of which two were on the budget battlefield, two on the appointments battlefield, and one on the rulemaking battlefield:

- increased use of special provisions within budget bills to direct the executive or limit the uses of state funds;
- restrictions on the executive's ability to settle lawsuits against the state;
- removing the powers of the lieutenant governor to appoint Senate committees, appoint chairpersons, and assign bills to committee;
- giving the speaker of the House, lieutenant governor, and lately the president pro tempore of the Senate increased appointments to boards in the executive branch; and
- increasing its oversight over executive agency rules and regulations.

Tension Point #2:
The Use of Special Provisions in Budget Bills

Prior to the 1980s, special provisions had been used in an appropriate fashion by the legislature to explain the purpose of an expenditure of funds or to limit the use of such funds to what the legislature intended. However, in the years following succession, the *Bone* decision, and election of a Republican governor, the legislature increasingly used special provisions in an inappropriate fashion to try to direct the executive branch. (For more on this, see the December 1990 issue of the *Wake Forest Law Review* or the two special reports by the N. C. Center in 1986 and 1987. Special provisions were used to amend state laws, create new programs, and change tax laws.)

Tension Point #3:
Settlement of Lawsuits by the Executive Branch

Just as the executive branch was distressed over what it viewed as a legislative incursion into executive territory by use of special provisions, so was the legislature angered over what it viewed as executive incursion into its appropriations powers.

Gov. Jim Martin, left, and Lt. Gov. Jim Gardner, who presides over the N.C. Senate, have found themselves increasingly at odds with the predominantly Democratic N.C. General Assembly.

Karen Tam

This occurred when executive agencies committed the state to an expenditure of funds by agreeing to settle lawsuits against state agencies, thereby committing the state to future expenditures.

If there's one area of legislative powers that the General Assembly guards jealously, it is its power of the purse strings. Three suits in particular are noteworthy here—the first involving treatment of emotionally disturbed youth, the second over conditions in state prisons, and the third concerning the mental hospital system.

The advent of class action suits raised the budgetary stakes and brought new sources of tension between all three branches of government. In September 1979, attorneys filed a class action lawsuit against the state[5] in federal district court in Charlotte on behalf of all minors who "now or in the future will suffer from severe emotional, mental, or neurological handicaps" accompanied by violent or assaultive behavior and for whom the state provided no treatment. On the eve of what became known as the *Willie M.* case, the two sides reached a settlement, avoiding a prolonged court fight. The Attorney General's Office, representing the N.C. Departments of Human Resources and of Public Instruction, agreed that the state would provide individual medical and treatment plans in the least restrictive setting for all 18-year-old children in the class.

In fiscal year 1981-82—the first year of the program—the state spent $4.6 million to set up a delivery system for this new program for emotionally disturbed youngsters. By FY 1990–91, the cost of the program was $36.3 million a year. The state, when it settled the suit, anticipated a class of 200 to 800 children. The current program serves 1,000 children a year.

Ironically, the legislature's anger over what it viewed as an incursion upon its power over the purse strings surfaced in a special provision. In the 1982 short budget session, a special provision was inserted into a budget bill which limited the executive branch's ability to enter into such consent judgments in the future. However, a little more than a year later, an out-of-court settlement in a five-year-old lawsuit *(Hubert v. Ward)* committed the state to another large expenditure of funds—$12.5 million to remedy constitutional deficiencies affecting inmates confined in 13 prison units in the south Piedmont area of the state prison system.[6] On the heels of that agreement came another *(Small v. Martin)* in April 1989 costing $29 million and covering 49 more prison units.[7] These two suits and settlements have made corrections one of the three fastest growing areas of expenditure in the state budget.

There are three ways such settlements create tension between the executive and legislative branches. First, no group of elected officials likes to be presented with a *fait accompli.* Yet Governor Hunt agreed to set up an expensive *Willie M.* program and "send the bill to the legislature," said senior fiscal analyst Jim Johnson of the legislature's Fiscal Research Division at the time.[8]

The second way such situations increase inter-branch tension is that they heighten the suspicions about motives that already naturally exist between branches. Legislators regularly fulminate about empire-building and bureaucratic red tape by executives, while executive agencies lament the legislature being penny-wise-and-pound-foolish and its tendency to ignore problems, saying, "So sue me, then." In the wake of the *Hubert* prison litigation, Lucien "Skip" Capone III, special deputy attorney general, said, "The consent judgement contained a great many things that the Department of Correction already wanted to do."[9] A few legislative observers have wondered whether the consent decree was a way for an executive department to get the legislature to do what it would not have otherwise done if the department had submitted the same reform package as part of its normal budget proposals.

The third way in which settlements increase tension is that legislators see them as a violation of their prerogatives to set the state's budget priorities. It is highly doubtful that the legislature would have voted to make prison reform one of the top three budget priorities in recent years, but that is indeed what the judicial and executive branches have forced upon them.

And these vignettes are not the end of the litigation scenario. Yet to be played out is a pending class action suit contesting the constitutional adequacy of the state mental hospital system,[10] as well as a possible future challenge to the state's system of public school finance.[11]

Tension Point #4:
Suits by One Branch of Government Against Another

Suits by outside parties against executive agencies do not exactly create warm and fuzzy feelings between the executive and the legislature. But in recent years, antagonism between the branches has become so strong that they are actually suing each other.

In a special session in October 1981, the legislature met to deal with the tidal wave of changes

Karen Tam

While tensions have been high between the legislative and executive branches, relations between the parties have been slightly warmer in the House, where House Minority Leader Johnathan Rhyne (R-Lincoln) and other Republicans helped Democrat Joe Mavretic (D-Edgecombe) win the speakership in 1989. A new speaker will preside in 1991.

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occurring as a result of President Ronald Reagan's policy of New Federalism, which shifted major responsibilities from the federal government to state or local governments.

Both the governor and the legislature were quick to recognize these block grants as an opportunity to gain control over a new pot of money. The legislature established the Joint Legislative Committee to Review Federal Block Grant Funds and required the governor to get prior approval of any actions the executive proposed to take with block grant funds. The legislature also required the executive branch to get prior approval from the legislature's Joint Legislative Commission on Governmental Operations for transfers of more than 10 percent from one budget line item to another.

On Feb. 16, 1982, the N.C. Supreme Court issued an advisory opinion that both the limit on transfers and the new block grant committee were unconstitutional, as they violated the separation of powers clause and the governor's power to administer the budget and represented an unlawful delegation of legislative power.[12]

That fight over the parameters of control of the budget was between a Democratic governor and lieutenant governor and Democratic leaders and majority in the legislature. The next legal skirmish was a square-off between a Republican governor (Martin) and a Democratic legislature. This subsequent fight also was a contest over the limits of the power of the governor, this time augmented by partisan differences.

In *State ex rel. Martin v. Melott*,[13] the governor ostensibly sued the head of the Office of Administrative Hearings (OAH), but he was really in a contest with the Democratic majority in the legislature. The 1985 General Assembly passed a law providing that the director of the OAH be appointed by the chief justice of the N.C. Supreme Court. Governor Martin sued, saying that the legislation was an incursion on his appointment

powers.[14] He also invoked the separation of powers clause, saying that because the OAH was in the executive branch, the General Assembly could not place the power to appoint the head of the OAH outside that branch. The General Assembly recognized that it was playing at the edge of constitutional limits because it included a provision in the law asking the Supreme Court for an advisory opinion on whether its action was constitutional. If unconstitutional, the appointment was to be made by the attorney general, also a Democrat.[15]

After earlier declining to issue an advisory opinion, the state Supreme Court could arrive only at a plurality decision in *Melott*, but the net effect was to uphold the right of the legislature to delegate the power to appoint the director of the OAH to the chief justice. The court also commented that the 1970 constitution had greatly reduced the governor's appointive powers.

... in recent years, antagonism between the branches has become so strong that they are actually suing each other.

Martin v. Melott is the first case interpreting the appointments clause of the 1970 constitution and thus is a significant case. Its importance may be diminished somewhat by the fact that it is only a plurality decision, and it has received some criticism that it is inconsistent with previous separation of powers decisions. As one writer concluded, "By concentrating on the power to appoint, which it views as neither legislative nor executive, the court permits the General Assembly to grant to any person, or to keep to itself, all appointments not provided for in the constitution. This power opens the door for legislative hegemony, threatening the integrity of the executive and judicial branches."[16]

In any event, tension between the actors is heightened both when branches of government sue each other—as was the case in the 1982 request for an advisory opinion and in *Martin v. Melott*—and when executive officials sue each other. The tension sometimes shows up in budget battles and sometimes in litigation, but the amount of such litigation has definitely increased in the 1980s.

Tension Point #5:
Conflicts Between the Governor and the Constitutionally Hybrid Office of the Lieutenant Governor

One member of the Council of State who has consistently been a source of tension with governors of all parties at least since 1977 has been the lieutenant governor. This section will argue that this is due to a constitutional flaw which places the lieutenant governor in both the executive and legislative branches and a political system which has the lieutenant governor elected separately from the governor—rather than running under a team ticket arrangement.

The constitution places the lieutenant governor in the executive branch by declaring him or her a member of both the Council of State and the State Board of Education, giving him the right to succeed the governor, and allowing him to serve as acting governor in the governor's absence from the state or during the physical or mental incapacity of the governor. The lieutenant governor also has the power to perform such additional duties as the governor may assign—all of which places him or her squarely within the executive branch, which is what Article III of the constitution deals with and where the authority for most of these powers originates.

However, in Article II, the legislative article, the constitution outlines a legislative role for the same official. The lieutenant governor is given the power to preside over the Senate and vote in case of ties and has the duty to sign bills when presiding over the Senate. Prior to the 1989 session, the Senate also gave the lieutenant governor the power to appoint committees and committee chairs, as well as the power to assign bills to committee. These powers were based in Senate *rules*, however—not in the constitution—so when Republican James C. Gardner was elected in 1988, the 1989 Senate voted to shift these powers to the president pro tempore of the Senate, a Democrat.[17]

Depending on whether the lieutenant governor is considered an executive or legislative official, this power-stripping either increased tensions *between* the two branches or *within* the legislative branch. Regardless, the lieutenant governor has increasingly been a thorn in the governor's side. Lt. Gov. James C. Green was a continual burr in the saddle of Governor Hunt, though both were Democrats. Green opposed Hunt on gubernatorial succession, ratification of the Equal Rights Amendment, chairmanship of the State Board of Education, allocation of tax checkoff money for political parties, a bluebook plan for children's

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House Majority Leader Dennis Wicker (D-Lee), a potential future candidate for Speaker, with Rep. Harry Grimmer (R-Mecklenburg) in background. Wicker has insisted that measures to strengthen the executive branch not be at the expense of the legislative branch.

services, and countless other issues during Green's two terms as lieutenant governor.

Green's successor, Robert B. Jordan III, became the titular leader of the Democratic party in 1985 and opposed Republican Governor Martin on tax issues, education, and eventually in the 1988 gubernatorial election. Currently, Republican Lieutenant Governor Gardner is questioning fellow Republican Martin on the need for a hazardous waste incinerator and the need for an increase in the sales tax to fund education improvements. He may even have cost the governor veto power by running television ads criticizing legislative Democrats as spendthrifts in the weeks before they were to decide whether to give the governor veto power during the 1990 short session.

One reason for this tension is that the last six lieutenant governors (Gardner, Jordan, Green, Hunt, H. Pat Taylor Jr., and Robert W. Scott) became candidates for governor. Thus, as each governor approached the end of his term and took on more and more characteristics of a lame duck, each lieutenant governor began to differ with the governor in order to stake out his own territory. This heightens tension, and it is one of the chief reasons that many other states have gone to team elections (see discussion on page 75) or removed the lieutenant governor from the legislative arena. "Twelve states have now placed the lieutenant governor completely in the executive branch, and others have reduced the lieutenant governor's legislative roles,"[18] reported Larry Sabato of the University of Virginia in 1983.

Tension Point #6:
Legislative Incursion into the Executive Branch Power of Appointments

Most students of government assume that most of the appointment power lies with the governor. But by the time of the *Wallace v. Bone* case in 1982, 90 of the approximately 400 boards, commissions, and councils in the executive branch had legislators as members in a total of 203 positions. Even after the legislature removed its members from 41 boards as a result of *Bone*, legislators still held 142 positions on 56 groups.[19] Prior to *Bone*, the speaker of the House and the lieutenant governor made these appointments on their own. In order to get around the constitutional question *Bone* raised about an unlawful delegation of legislative power to these two officials, the legislature ostensibly began making these decisions in the body as a whole. Even now, however, the appointments come in bills in the form of recommendations by the speaker of the House and by the lieutenant governor and

president pro tem of the Senate (more frequently the latter official now that the Senate has stripped the lieutenant governor of some of his legislative powers). Though the full House votes on the recommended appointees from the speaker, and the full Senate on the appointees recommended by the lieutenant governor or president pro tem, the recommendations are merely rubber-stamped and *never* have been overturned.

Ignoring the fact that legislators still serve on *advisory* bodies in the executive branch (*Bone* removed them only from *policymaking* bodies) and ignoring the fact that the speaker and Senate officials still make appointments in actuality, the key point is the erosion of the governor's appointment power during the last decade. By 1989, the lieutenant governor controlled 195 appointments to 87 boards in the executive branch of state government, though 106 of those had to be approved by the General Assembly before becoming effective. The speaker also had 129 appointments to 62 executive boards.

By its very nature, this reduction of gubernatorial appointment power and increase in legislative officials' appointment powers increases tension between the branches. But it also creates tension on the boards themselves, as appointees loyal to the governor may follow one policy, while appointees of the lieutenant governor may follow another, and those of the speaker yet another.

... the decade of the 1980s was a time of political *reduction of the executive's appointment powers coupled with a* legal *weakening of the governor's constitutional base for the power of appointment.*

An effort by the state Child Day Care Commission to ban corporal punishment provides a good example of this. In 1985, the commission passed rules banning corporal punishment when the membership comprised a majority of Democratic appointees forged from holdover appointments of Governor Hunt and Lieutenant Governor Jordan. These appointees outvoted those of Governor Martin. Since then, through appointments by Martin and Jordan's successor, the Republican Lieutenant Governor Gardner, Republicans gained a solid majority. When that occurred, the commission first retracted the ban and then voted in August 1990 to say it lacked even the authority to ban spanking in day care centers. And to make matters really testy within the commission, 13 church day care centers who support corporal punishment filed suit against the commission. Two of the commission members were among the 13 plaintiffs, in effect suing themselves and the rest of the commission.

Thus, the decade of the 1980s was a time of *political* reduction of the executive's appointment powers coupled with a *legal* weakening of the governor's constitutional base for the power of appointment. Neither improved relations between the branches of government, nor did it slow down the trend of increased rivalry between the governor and lieutenant governor.

Tension Point #7:
Legislative Oversight of Executive Rulemaking

In 1974, the N.C. General Assembly enacted an Administrative Procedure Act (APA) for North Carolina.[20] In its broadest sense, the purpose of such acts is for the executive to provide the specifics in rules for the broad outlines of the bills passed by the legislature. As the Institute of Government's Robert Joyce put it, "Law-making is a legislative function, law-enforcing is executive. The delegation of rule-making and -enforcing powers by the legislature to administrative agencies creates a gray area."[21]

From its infancy, the APA was a new source of tension between the executive agencies and the legislature. Though the act only went into effect on July 1, 1976, that same year, Sen. I.C. Crawford (D-Buncombe and chair of the Senate Government Operations Committee) asked the state auditor to perform an operational audit on how the act was functioning. By the late 1970s, outright legislative opposition to the APA began to surface as legislators began to get calls from constituents complaining not about laws legislators had passed, but about rules the executive agencies had promulgated. By Jan. 1, 1985, there were more than 18,000 pages of rules on file at the state Department of Justice, the official repository of the APA rules.

By the 1981 session, legislators who opposed the APA process were demanding the right to veto administrative rules that members did not like. In 1977, the General Assembly established an Ad-

ministrative Rules Review Committee (ARRC) to review all agency rules.[22]

A 1985 debate is a good illustration of how the line between legislation and rulemaking is a source of tension between the legislative and executive branches. The late Rep. William T. Watkins (D-Granville), a vociferous opponent of the APA, would frequently cite two examples of bureaucratic poaching on the legislative preserve. The Division of State Parks had adopted a rule which prohibited consumption of beer in boats on Kerr Lake, which was in Watkins' district and caused constituents to complain to him. However, Watkins contended, there was no such prohibition in the state's alcoholic beverage control laws. In the second example, the Wildlife Resources Commission adopted a rule requiring hunting and fishing licenses to be filled out only with ball point pens. In both cases, violations of the rules amounted to misdemeanors, punishable by fines, jail terms, or both.

Watkins argued that such rulemaking was the equivalent of executive agencies writing criminal laws without the authority to do so. "This bill will stop these agencies from writing criminal law," he said of his legislation in 1985. "That is the legislature's function, not the executive branch's." Governor Martin replied, "This problem is not the result of the executive branch usurping the legislative branch. Rather it is the failure of the General Assembly to exercise appropriate care in delegating rulemaking authority."[23]

The legislative interest in oversight of rulemaking continued in the 1986 short session with the fourth incarnation of the ARRC. Under provisions which largely continue in effect today, the ARRC's main duties are "to determine whether each rule reviewed is (1) within the statutory authority of the adopting agency, (2) clear and unambiguous, and (3) reasonably necessary (a) to enable the agency to perform a statutorily assigned function or (b) to enable or facilitate the implementation of a program or policy."[24] No newly adopted permanent rule may be filed until it is reviewed by the ARRC. If that body determines that the new rules do not meet the three tests above, the rules' effective dates are delayed, and the agency is notified and asked to submit revisions. The agency has 90 days in which it can either fix the rule to satisfy the ARRC's objections or it can file the rules with the Office of Administrative Hearings with a notation of the ARRC's objections. Ignoring such an objection is at the executive agency's peril, however. The General Assembly may by statute disapprove and invalidate the objected-to rule. These provisions are sure to be a source of future tension between the legislative and executive branches.

Summary of Tension Points

Think of tension points in an anatomical sense. They might be described as points where bone, muscle, and nerve meet, much like the three branches of government. Over the last 20 years, both the legislature and the executive have tried to muscle in on each other's constitutional territory, and the judiciary has had to referee the wrestling matches. However, just like physical aches and pains, these tension points are likely to flare up at any time because of institutional differences or suspicions among the branches or because of partisan splits. The most likely flashpoints are the budget arena, the power of appointments, the line between rulemaking and lawmaking, the role of the lieutenant governor, or sometimes actual lawsuits between the branches of government. These tension points emphasize the *legal* concept of *separation* of powers and largely legal solutions to problems in the courts. However, as can be seen in the comments of the governors and legislative leaders in the sections above, the *political* concept of a *balance* of powers is also at work. It is in the political arena that future battles over the boundaries between the branches are more likely to be fought.

Where We May Be Headed

If one thing is clear from the extensive debate in the 1989–90 legislative session over whether to grant the governor veto power, it is that neither the legislature nor the governor are likely to give major increases in one branch's institutional powers without receiving a corresponding grant of power. Thus, in the horsetrading atmosphere of the final weeks of the 1990 session, the legislature was considering giving the governor veto power in exchange for the governor's support for four-year terms for legislators and subjecting more appointees to legislative confirmation.

One way of predicting the future of executive-legislative relations is to examine possible future power shifts in terms of gainers and losers. In that respect, the major balancing points are depicted in the table on page 73.

Possible Trades in the Balance of Power Between the Executive and Legislative Branches

A. Measures Which Would Increase the Governor's and Executive Branch's Powers

1. Veto power for the governor
2. Team elections with the lieutenant governor (which would remove a possible adversary in dealing with the General Assembly)
3. Merit selection of judges (which would increase the number of the governor's appointments and the governor's ability to affect the judicial branch)
4. Reducing the number of officials who are elected statewide as part of the 10-member Council of State (thereby putting more of the executive departments under the governor's control)
5. Limiting the speaker of the House of Representatives and/or the president pro tempore of the Senate to two terms (limiting the longevity and thereby the power of the legislative leadership)
6. Limiting the length of legislative sessions (the legislature is less a force when it is not in session)
7. Limiting the number of terms a legislator can serve (In 1990, Oklahoma, Colorado, and California limited the tenure of legislators)

B. Measures Which Would Increase the Legislative Branch's Powers

1. (a) Repealing succession, or (b) limiting the governor to one six-year term
2. Removal of all legislative functions from the office of the lieutenant governor (including presiding over the Senate and voting in case of ties)
3. Requiring legislative confirmation of judicial appointments by the governor
4. Placing the state auditor under the legislative branch or have the state auditor appointed by the legislature for a fixed term
5. Four-year terms for legislators
6. Making more of the governor's appointments subject to legislative confirmation or increasing the number of legislative appointments to boards and commissions in the executive branch

C. Other Measures Which Would Affect the Balance of Power

Moving state elections to non-presidential election years. (Removing the tie-in to presidential elections generally weakens the party holding the presidency, which can affect both the governor and the majority in the legislature)

Toward Veto Power For the Governor

North Carolina is the only state in the country where the governor has no veto power. Of the other 49 states, 43 allow their governor an item veto, while six states—Indiana, Maine, Nevada, New Hampshire, Rhode Island, and Vermont—allow a regular veto but not an item veto.

In the 1989–90 session, the N.C. Senate passed a measure granting the governor veto power, but the bill failed in the House by only 10 votes on July 5, 1990. The bill had been 12 votes shy of clearing the House in the 1989 session. The 1990 bill may be a harbinger of the future in that it attempted to grant new powers to both the executive and the legislative branches. The voters would have been faced with one yes-or-no-vote in November 1990 on a five-part measure that included: (a) veto power for the governor, with a 60 percent legislative majority required to override a veto; (b) a limit on the number of days in the legislative session; (c) four-year terms for legislators, instead of the current two-year terms; (d) legislative confirmation of some gubernatorial appointees; and (e) legislative elections coinciding with presidential elections. The bill also included a sixth provision by which voters would have faced a separate ballot question of whether to adopt a system of appointment of appellate court judges by the governor, with the advice and consent of the General Assembly.

North Carolina may also choose to make its lieutenant governor less a constitutional hybrid and more an official of the executive variety by peeling away the legislative duties.

The concept of balance of powers was in clear evidence in this package—a Republican governor gets veto power, the Democrat-controlled legislature gets longer terms and more appointment power, and the Republicans get to tie legislative elections to presidential elections, years in which the GOP historically does better. In this case, both parties accused each other of loading up the legislative horse with too many riders to parade before the voters. "They loaded it up and misled people," said Rep. Frank Sizemore (R-Guilford). Rep. Johnathan Rhyne (R-Lincoln), the House minority leader, said the veto package was doomed when Lawrence Davis, chairman of the state Democratic Party, criticized the package because it lumped together veto and four-year terms. By contrast, the Democrats criticized the Republicans for trying to tip the balance of power in their favor. "It got scrambled in rhetoric," said House Speaker Josephus Mavretic (D-Edgecombe). "It became a partisan issue of who's gonna win seats and who's gonna lose seats in the House." Ironically, Mavretic had been a supporter of veto power for the governor.

Toward Four-Year Terms for Legislators

Of the baseball cards likely to be traded in exchange for veto power, the governor is most likely to pitch the idea of support for four-year terms for legislators. The main reason for this is that it is easier for a governor to support an accompanying increase in the legislature's power than it is to give up a power he or she already has, such as succession. In the 1989–90 session, at least four bills were introduced to repeal succession, two bills would have limited the governor to one six-year term, and three bills would have granted four-year legislative terms. Under this rationale, a governor is least likely to give up succession, moderately likely to agree to a six-year term plus veto power, and more likely to agree to support longer legislative terms in exchange for the veto.

A second reason the veto-for-four-year-terms exchange is the most likely scenario is the recent history of voter actions on succession and four-year terms. It has been only 13 years since the voters *approved* a constitutional amendment granting succession[25] by a 52.5 percent to 47.5 percent margin, and it has been only eight years since the voters *turned down* an amendment granting four-year terms for legislators by a whopping 76 percent to 24 percent.[26] In this political equation, a governor can argue that the people have shown their support for increased gubernatorial powers, but not for increased legislative powers, and that the legislators need the governor's support—to convince the voters of the need for four-year terms—more than the governor needs theirs to convince the voters of the need for veto power.

Though the voters have a shown strong disin-

clination to vote for four-year terms, such a measure could pass (a) if it had the governor's support and (b) if it were linked with a grant of veto power, though submitted as a separate measure on the ballot. The main reasons given for longer legislative terms are (1) to preserve the citizen legislature by countering the increased length of legislative sessions with a reduction in the number of times a legislator has run for office; (2) to reduce the cost of running for office by reducing the number of times one has to run: and (3) to make the terms of North Carolina's legislators consistent with the majority of other states.

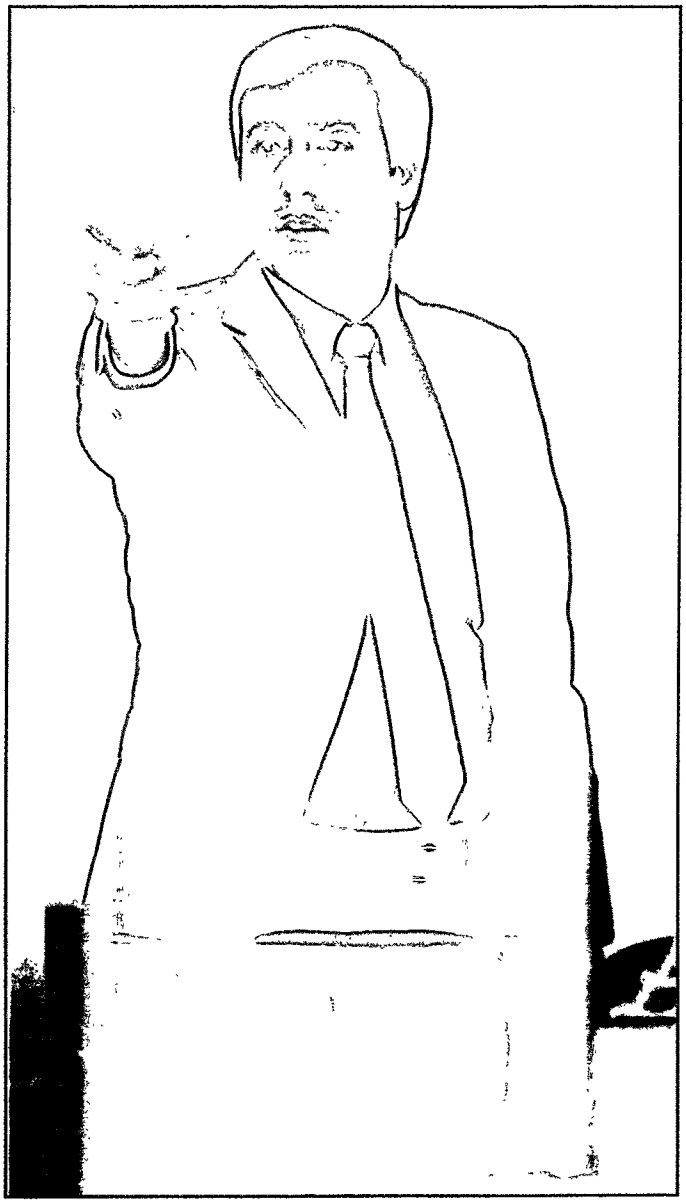
Toward a Redefinition of the Office of Lieutenant Governor as an Executive Office

For the first time in recent memory, two bills were introduced in the 1989 General Assembly to provide that the governor and lieutenant governor run on a team ticket in the general election. Such team tickets are modeled after the federal system of having the president and vice-president elected as a team. Unlike the federal system, the state proposal would not give the governor power similar to the president's to name his or her running mate. It leaves to the parties the decision as to how a candidate for lieutenant governor is chosen. However, simply by tying the lieutenant governor and governor together as a team, the proposal would increase the power of the governor because the lieutenant governor would no longer have a separate electoral power base; instead, the lieutenant governor would owe his or her election to the governor.

North Carolina may also choose to make its lieutenant governor less a constitutional hybrid and more an official of the executive variety by peeling away the legislative duties. As discussed above, the state Senate has already stripped the lieutenant governor of the power to appoint committees and committee chairs, as well as the power to refer bills to committee. Those changes were made through simple changes to the Senate *rules*, however. Further changes would require traveling the more difficult route of statutory changes or the very arduous journey of submitting a constitutional amendment to the voters. For these reasons, it is much less likely that the legislature would attempt to change the lieutenant governor's power to preside over the Senate or vote in case of ties, both of which are constitutionally based grants of power.

It is much more likely that the decade of the 1990s will see a slow rollback of the lieutenant

House Appropriations Committee Chairman David Diamont (D-Surry) was a key figure in the legislature's development of a state budget independent of the executive branch in recent years.



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governor's appointment powers. Many of the office's 195 appointments to 87 boards or commissions in the executive branch are likely to be given gradually to the president pro tempore of the Senate. This might occur for two reasons, one institutional and one political. Institutionally, the Senate is more likely to give such appointment powers to one of its own, since the president pro tem is a fellow senator. Politically, the likelihood of this increases if the lieutenant governor is a member of the opposite party. During the 1989 – 90 session, the Democrats in the Senate gradually gave more appointments to their fellow Democrat, President Pro Tempore Henson Barnes (D-Wayne), and may be likely eventually to reduce the number of appointments given to a Republican, Lt. Gov. James C. Gardner. This is particularly likely since Gardner has been highly critical of Democrats in the legislature.

Looking outside North Carolina, there is also a clear national trend toward reducing the legislative role of the lieutenant governor. Since 1953, 22 states have adopted measures requiring the governor and lieutenant governor to run as a team.[27] Though 28 of the 42 states with lieutenant governors allow the lieutenant governor to preside over the Senate, and 25 allow that official to vote in case of ties, only six allow him or her to make appointments to boards in the executive branch. And only seven states allow the lieutenant governor to appoint committees and committee chairs, while only 15 are allowed to assign bills to committee.

"Twelve states have now placed the lieutenant governor completely in the executive branch, and others have reduced the lieutenant governor's role," concludes political scientist Larry Sabato. While South Dakota voters recently rejected a proposal to strip the lieutenant governor of legislative duties, a legislative study committee in Kansas has considered abolishing the office. And in a suit brought by a state senator, a Mississippi state court struck down—on separation-of-powers grounds—the practice of the lieutenant governor acting as a legislative leader.[28]

Toward Merit Selection of Judges

Nationally, 30 states have switched to a form of merit selection of judges since Missouri first enacted the idea in 1940. Seventeen states use the model most often proposed in North Carolina during the 1980s, a system that includes: (1) a nominating commission to screen judicial candidates, (2) gubernatorial appointments of judges from a list of those nominees, sometimes with legislative confirmation, and (3) retention elections in which voters determine whether a judge serves another term.

Institutionally, it could be argued that a move to merit selection dramatically increases the governor's appointment power. If all judges in North Carolina were to be appointed by the governor instead of elected by the people, legislators might argue that such a measure represents a sea change. However, in a study published in September 1990, the N.C. Center for Public Policy Research found that of the 261 judges sitting on the bench as of July 31, 1990, 61 percent first had been *appointed*, not elected, to their posts.[29] That is, though they may have won election since that first appointment, they got to their judgeship through an appointment by the governor. In actual practice, then, one can argue that the governor already is appointing three-fifths of North Carolina's judges.

Politically, however, Democrats in the legislature are wary of giving a Republican governor more judicial appointments without an offsetting curb on other executive appointments. Democrats have been bothered by two trends in judicial elections. First, they are starting to lose a few elections. In 1988, Judge Robert Orr was the first Republican to win a statewide appellate race for the N.C. Court of Appeals. In 1980, 99 percent of the judgeships on the Supreme Court, Court of Appeals, and Superior Court were held by Democrats. But as vacancies occur on the Supreme Court, Court of Appeals, Superior Court, and Special Superior Court, Governor Martin has been able to fill those posts with Republicans. As of July 31, 1990, almost 15 percent of the state's judges are Republicans, with the largest GOP gains having occurred on the Court of Appeals and on the District Court bench.

The second trend causing legislative Democrats to go slow on merit selection is the increase in partisanship in judicial races. In 1986, the two parties fought bitterly over five seats on the state Supreme Court. A group calling itself Citizens for a Conservative Court attacked Chief Justice James Exum's record, saying he was not sufficiently conservative, particularly on death penalty cases. As it turned out, Exum also had voted to uphold the death penalty in other cases. In any event, the Republican effort failed, but Democratic legislators and many lawyers were disturbed by campaigns which attempted to put the law to a popular vote. The 1990 judicial elections evidenced similar partisan spats.

If the proponents of merit selection expect to move this issue off square one, it likely will be due to what the governor is willing to give up in other appointment powers. There are two ways this could occur. One way is for the governor to agree to let the legislature continue to make inroads in the appointments area by appointing more officials to executive boards upon the recommendations of the speaker of the House and president pro tem of the Senate.

Another way is to agree to submit more of the governor's appointments for confirmation by one or both houses of the General Assembly. Already, the legislature votes to confirm or reject the governor's 11 appointees to the State Board of Education,[30] the seven members of the Utilities Commission, and the commissioner of banks.[31] The legislature solely nominates and elects the 32 members of the 16-campus University of North Carolina Board of Governors.[32] The veto package which finally failed on the House floor in July 1990 might be a forecast of the future for this kind of trading. In exchange for giving the governor veto power, the legislature would have gained four-year terms and confirmation by the House and Senate for 10 different boards and commissions and other state posts.

In any debate over shifts in appointment power, the concept of balancing power is likely to be in the forefront of the legislative debate. Rep. Harry Payne (D-New Hanover) objected to the 1990 veto-terms-appointments package using three vivid images of cats, buttons, and glasses of milk. Payne argued, "The cat is out of the bag, but the cat is not one which should be left alone in the house. This issue is about the governor having more buttons than anybody in the House or Senate [both houses vote by pushing buttons connected to an electronic voting machine]. When you have kids, you spend a lot of time balancing how much milk is in the glass of each child. You've got to be fair. What we're doing here is sloshing a lot of milk from one glass [the legislature's] to another [the executive's]." Future debates over merit selection may involve a trade—pouring a bit more milk in the governor's glass for appointing judges, but also filling up the legislature's glass for confirming more gubernatorial appointments.

Toward a Reduced Number of Officials Elected Statewide?

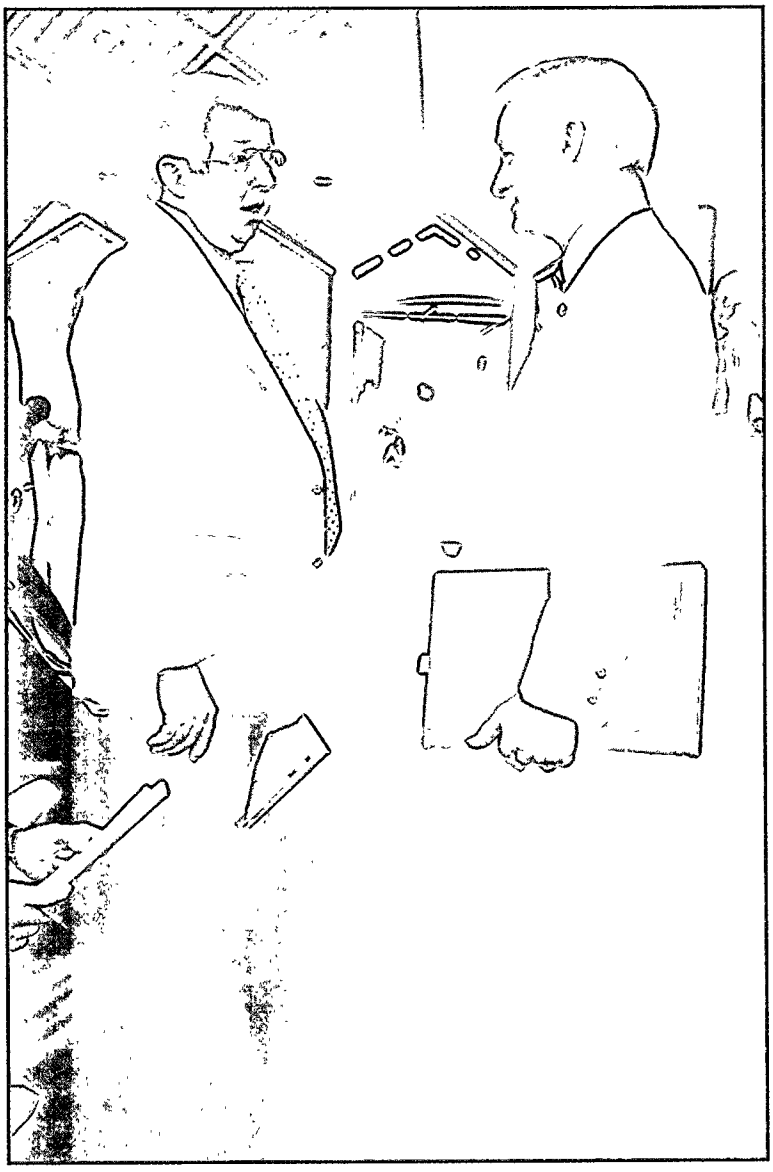
For years, there has been talk of reducing the long number of North Carolina officials elected on the statewide ballot. Proponents of reducing the list point out that North Carolina elects a larger number of officials than all but three other states, and that shortening the list would reduce confusion in election years. Currently, a number of groups, headed by N.C. Citizens for Business and Industry, are pushing to make the superintendent of public instruction appointive. But the recent history of efforts to convert statewide elective positions into appointive posts is not encouraging for supporters of such measures. For more on this, see the pro/con discussion on whether to elect or appoint the superintendent of public instruction in the September 1990 issue of *North Carolina Insight*, pp. 2-22.

Conclusion

From the Royal Governors before the Revolutionary War to the rise of the Republican Party in the 1970s and 1980s, and from post-Civil War days to the era of succession, executive-legislative relations have had their ups and downs in North Carolina. Because public attention is usually focused on the protagonists themselves—the governor, the lieutenant governor, the speaker of the House, and the president pro tem of the Senate, this article has attempted to look at the institutional differences between the two branches. One primary theme running throughout is that the system of *separation of powers* has undergone a metamorphosis in the last two decades. The butterfly that emerges is not a kingly Monarch but a system which includes a greatly strengthened governor and a greatly strengthened legislature. Constitutional changes have given the executive the power to reorganize the nine executive departments under the governor's control and the power of succession, and an important court case has increased the executive's budgetary powers.

The executive branch also has had its wings clipped in the areas of appointment powers and in a reduced legislative role for the lieutenant governor. The legislature has gained in power through increases in staff and oversight of executive rulemaking.

Although many of the battles described here have a partisan element to them, one of this article's main contentions is that the many disputes between the governor and the legislature rest more on institutional differences and would occur regardless of which party held the governorship and which party held the majority of seats in the legislature. Veto power for the governor and merit selection of judges are two such issues where partisan elements



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Two former governors each had their successes—and failures—in their relations with the N.C. legislature. Former Gov. James E. Holshouser, left, a Republican, chats with former Democratic Gov. James B. Hunt Jr., right, during lull in a legislative hearing on granting veto to the governor in 1989.

further heat up the argument, but the argument has not and will not disappear—even if both the executive and the legislative majority are of the same party.

The judicial branch has played a key role in resolving disputes between the executive and legislature over the last decade. The 1980s saw the court hand down a major separation of powers case in *Bone*, a major appointment powers case in *Melott*, an important advisory opinion on budgetary powers, and the court even has had to resolve suits by one branch against another.

The 1990s are likely to see a further evolution in relations between the branches. This evolution is likely to be characterized as a *balancing of powers*—sometimes between the governor and the legislature, other times between other statewide elected officials (such as the lieutenant governor or superintendent of public instruction) and the legislature. If the fortunes of the Republican Party continue to rise so that the Republicans approach the status of a majority in either house, the level of tension between the two branches is likely to rise also.. For as Oliver Wendell Holmes once said, "The only prize much cared for by the powerful is power."[33] The role of the courts as arbiter of these

disputes is likely to take on a higher profile.

The founders of our constitutional system foresaw those kinds of struggles, and the concept of separation of powers was their answer to the problem of a concentration of power. As James Madison saw it, they spread power among three branches under the theory that "the great security against a gradual concentration of the several powers in the same department [branch] consists in giving to those who administer each department [branch] the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[34] It's a beautiful system—and it still flies.

FOOTNOTES

[1] Hugh T. Lefler and Albert R. Newsome, *North Carolina: The History of a Southern State*, 3rd edition, Univ. of N.C. Press (Chapel Hill, NC: 1973), pp. 150–151 and 498.

[2] Ferrel Guillory, "The Council of State and North Carolina's Long Ballot: A Tradition Hard to Change," *North Carolina Insight*, North Carolina Center for Public Policy Research, Vol. 10, No. 4 (June 1988), p. 43.

[3] *State ex rel. Wallace v. Bone*, 301 N.C. 591, 286 SE 2d 79 (1982).

[4] Article III, Section 5(2) of the Constitution of North Carolina.

[5] *Willie M. et al. v. James B. Hunt Jr. et al.*, "Complaint for Declaration and Injunctive Relief," filed in the U.S. District Court for the Western District of North Carolina, Charlotte Division, October 1979, Civil Action #CC-79-0294, p.1.

[6] *Hubert v. Ward et al.*, No. C-C-80-414-M (W.D.N.C.).

[7] *Small v. Martin*, No. 85-987-CRT (E.D.N.C.).

[8] As quoted in Kendall Guthrie and Bill Finger, "Willie M. Treatment for Disturbed Youngsters," *North Carolina Insight*, North Carolina Center for Public Policy Research, Vol. 6, No. 2–3 (October 1983), p. 59.

[9] As quoted in Joel Rosch, "Litigation: Will the Federal Courts Run N.C.'s Prison System?" *North Carolina Insight*, North Carolina Center for Public Policy Research, Vol. 9, No. 3 (March 1987), p. 33.

[10] *Thomas S. v. Flaherty*, 699 F. Supp. 1178 (1988), 902 F2d 250 (1990) is a class action suit on behalf of 400 – 1600 mentally retarded adults who have been in state psychiatric institutions. The plaintiffs prevailed at both the trial court level and in the 4th Circuit U.S. Court of Appeals. The state's petition for certiorari to the U.S. Supreme Court was denied on Oct. 29, 1990. The legislature has already appropriated $4.5 million for fiscal years 1989–90 and 1990–91 to provide treatment for the plaintiffs.

[11] There are now 35 states which have faced suits or have litigation pending over the constitutionality of their systems of school finance. For more, see a forthcoming report by the N.C. Center for Public Policy Research describing this litigation and the potential for such a suit in North Carolina.

[12] *Advisory Opinion in re: Separation of Powers*, 305 N.C. 767 (Appendix, 1982).

[13] 320 N.C. 518, 359 SE 2d 783 (1987).

[14] Article III, Section 5(8) of the N.C. Constitution, the appointments clause, says "The Governor shall nominate and by and with the advice and consent of the majority of the Senators appoint all officers whose appointments are not otherwise provided for."

[15] Chapter 746 of the 1985 Session Laws, section 19. The Court declined to issue an advisory opinion, apparently having tired of this advisory role in an era of contesting branches. Interestingly enough, one of the reasons given was that "the members of the Supreme Court would have to place themselves directly in the stream of the legislative process." *In Re Response To Request for Advisory Opinion*, 314 N.C. 677 (Appendix, 1985).

[16] Charles Herman Winfree, "State ex rel. Martin v. Melott: The Separation of Powers and the Power to Appoint," *N.C. Law Review*, Vol. 66 (1988), p. 1120.

[17] Votes on these changes in the rules were taken in the N.C. Senate on Jan. 11, 1989. For a description of the evolution in this office, see Ran Coble, "The Lieutenant Governorship in North Carolina: An Office in Transition," *North Carolina Insight*, North Carolina Center for Public Policy Research, Vol. 11, No. 2–3 (April 1989), pp. 157–165.

[18] Larry Sabato, *Goodbye to Goodtime Charlie—The American Governorship Transformed*, CQ Press (Washington, DC), 1983, p. 71.

[19] Both statistics are from studies by the N.C. Center for Public Policy Research and reported in Lacy Maddox, "Separation of Powers in North Carolina," in *Boards, Commissions, and Councils in the Executive Branch of N.C. State Government*, N.C. Center for Public Policy Research, 1984, p. 43–44 and pp. 52–59.

[20] Chapter 1331 of the 1973 Session Laws (2d Session, 1974) which went into effect on July 1, 1976. Now codified as G.S. Chapter 150B.

[21] Robert P. Joyce, "Overview of the 1983 General Assembly," *North Carolina Legislation 1983*, Institute of Government (UNC–Chapel Hill, 1983), p. 11.

[22] Chapter 915 of the 1977 Session Laws.

[23] These examples and quotations are from Bill Finger, Jack Betts, Ran Coble, and Jack Nichols, *Assessing the Administrative Procedure Act*, N.C. Center for Public Policy Research, May 1985, pp. 6–7 and p. 4.

[24] For excellent summaries of the APA changes, see John L. Sanders, "Administrative Procedure," in *North Carolina Legislation 1985* and "State Government" in *North Carolina Legislation 1986*, Institute of Government (UNC–Chapel Hill), pp. 12–16 and 99–102, respectively. The quotation is from the latter publication, p. 100.

[25] Chapter 363 of the 1977 Session Laws, ratified by the voters on Nov. 8, 1977.

[26] Chapter 504 of the 1981 Session Laws, rejected by the voters on June 29, 1982.

[27] *The Lieutenant Governor*, Council of State Governments (Lexington, KY), 1987, p. 7. Although 22 states *elect* the two together, only eight *nominate* the candidates together.

[28] *The Book of the States 1988 – 89 Edition*, Council of State Governments (Lexington, KY), p. 28. The Mississippi case is *Dye v. State ex rel. Hale*, 507 So. 2d 332.

[29] Katherine White, Dale McKeel, and Jack Betts, "The Demographics of the Judiciary: No Longer a Bastion of White Male Democrats," *North Carolina Insight*, North Carolina Center for Public Policy Research, Vol.12, No. 4 (September 1990), pp. 45–46.

[30] Article III, Section 7(1) of the Constitution of North Carolina.

[31] G.S. 62-10 and G.S. 53-92, respectively.

[32] G.S. 116-5 and 116-6.

[33] Michael Jackman, *Crown's Book of Political Quotations* (Crown Publishers, Inc.: New York), 1982, p. 179.

[34] James Madison, *The Federalist Papers*, No. 51 (Mentor Books: New York), 1961, pp. 321–2.