

Separation of Powers: An Old Doctrine Triggers a New Crisis

by John V. Orth

"The only prize much cared for by the powerful is power."

— Oliver Wendell Holmes

On January 12, 1982, the N.C. Supreme Court handed down a decision that has triggered a virtual constitutional crisis in state government. The state's highest judicial panel ruled that the legislature cannot appoint its own members to the Environmental Management Commission (EMC), a regulatory body in the executive branch, because such appointments violate the separation of powers provision of the North Carolina Constitution. "It is crystal clear to us," the landmark decision read, "that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws."¹

In rapid-fire sequence, the Governor, the legislative leadership, the Attorney General, and the Supreme Court Justices themselves issued a series of memos, letters, opinions, and position statements on how the separation-of-powers concept affects the day-to-day functioning of state government. The various documents, of both an official and informal nature, questioned the very existence of the most fundamental bodies in state government — from the Advisory Budget Commission, the principal budgetary vehicle for governors and legislators since 1925, to the Joint Legislative Committee to Review Block Grant Funds, a group created just last October to deal with the Reagan Administration initiative in consolidating federally-funded programs.

The first three months of 1982 may well be recorded as the period that permanently altered the way in which North Carolina's government is organized (see chronology of events on pages 38-43). In their June 1982 fiscal session, the lawmakers will begin to sort out the various legal and administrative questions. Related court cases, administrative rulings, and legislative actions are sure to follow.

What exactly did take place during this period regarding the separation of powers of the three branches of government? And why are the various events interrelated? Most importantly, how will these events affect the future of North Carolina's government?

An American Tradition

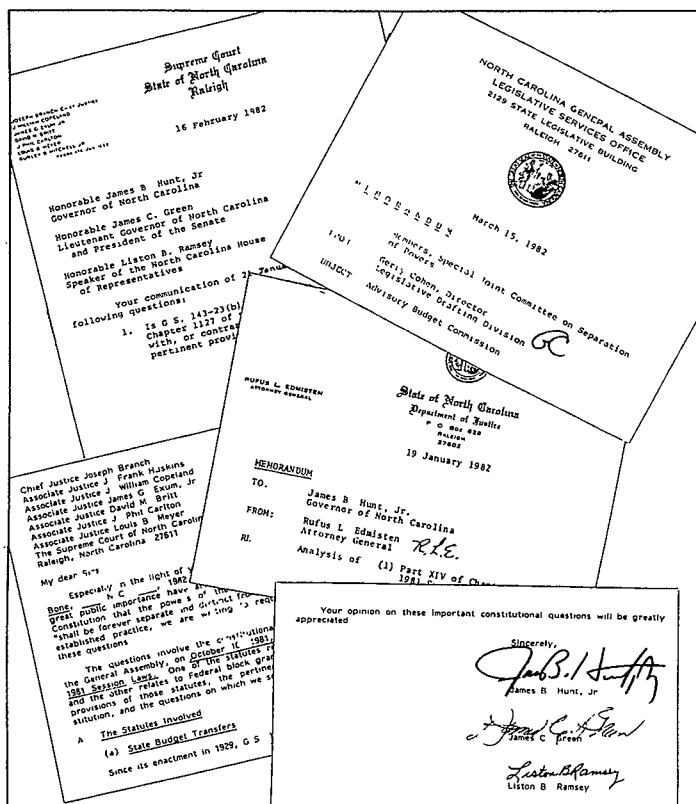
America's founding fathers, having just led a violent revolution against the excesses of the British king and parliament, feared concentrations of power. Consequently, in the U.S. and state Constitutions, they limited the powers of government and divided them among the executive, legislative, and judicial branches. This separation of powers took two forms: a "vertical" separation between the federal and state levels of government; and a "horizontal" separation on both the state and federal levels among the legislative, executive, and judicial branches.

Not only were the powers separated among the three branches, but the individuals exercising them were separated as well. The N.C. Constitution, for instance, prohibits a person from holding a federal and state office at the same time. Within the state, no person may fill two elective offices, such as a legislative seat and a judgeship, at the same time. Finally, no one in the state may hold two or more appointive offices or any combination of elective and appointive offices, unless the legislature specifically authorizes it.

To provide an effective mechanism for regulating disputes over which branch should control which governmental powers, the founding fathers set one branch against another through a system of "checks and balances." Within this system, the three branches of government operate in a permanent and profound interdependence. Consider these examples in North Carolina:

- the legislature enacts laws which the executive branch must administer;
- the lieutenant governor is second-in-command of the executive branch and also presides over the state Senate;
- the governor and the Advisory Budget Commission (which by law has at least eight legislative members) propose a budget to the legislature; the legislature adopts a budget which is administered by the governor;
- the attorney general, elected directly by the voters, serves as counsel for both the executive and legislative branches; the legislature funds the De-

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partment of Justice, headed by the attorney general;

- the judiciary has the power to review the acts of the legislative and executive branches; the legislature determines the structure and budget of the judiciary and creates new judgeships; the governor fills judicial vacancies and appoints persons to new judgeships.

As the size and scope of state government has grown in recent years, the interdependence of the three branches has increased. For example, legislators now hold more than 200 positions on 90 boards, commissions, and councils in the executive branch; 50 of these groups have been created in the last eight years.²

Even as government grows and interdependence increases, the 18th-century philosophy of the founding fathers retains a powerful influence. Throughout the history of the republic, the wisdom of the framers of the federal and state constitutions has reasserted itself as the rationale for landmark judicial decisions. The recent ruling by the N.C. Supreme Court regarding the Environmental Management Commission (*Wallace v. Bone*) has dramatized once again the power of longstanding constitutional principles. In its declaration, the high court relied on language in the N.C. Constitution that could hardly be more plain: "The legisla-

tive, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."³

The Judiciary Breaks a Logjam

The EMC decision illustrates a critically important fact about the tripartite nature of both the federal and state governments: The buck often stops at the courthouse. Relying on judicial precedents and constitutional principles, the appellate courts often interpret legislative and executive actions. This process catapults the judiciary into a policymaking role, a role that can break logjams of controversy (see "The Role of the Judiciary in Making Public Policy," *N.C. Insight*, Vol. 3, No. 1).

When the controversy concerns the respective powers of the different branches of government, the judiciary functions as a kind of policeman, "checking and balancing" the other two branches. Before the EMC decision, a series of legislative and executive assertions of power had built into a logjam of interdependence, burying beneath it the constitutional requirement of "forever separate and distinct" branches of government. When the Supreme Court issued the *Wallace v. Bone* opinion in January, it unleashed a torrent of questions that had lain unanswered behind the logjam. At least

six legislative and executive trends are now under scrutiny because of the clarity of the *Bone* decision.

1. **Legislative Incursion in Executive-Branch Boards, Commissions, and Councils.** In 1980, the legislature enlarged the membership of the Environmental Management Commission (EMC) from 13 to 17 and required that two House members be chosen by the speaker of the House and two Senators be selected by the lieutenant governor (in his capacity as president of the Senate); the governor appoints the other 13. Placing four legislators on the EMC by statute, the legislature gave itself a say in the day-to-day operations of the EMC, a regulatory body in the Department of Natural Resources and Community Development which makes decisions on everything from pollution standards to dam-building.

In February 1981, four of the non-legislative members of the EMC challenged the constitutionality of the statute. Eleven months later, the N.C. Supreme Court ruled in their favor, striking down the part of the statute adding legislators to the EMC. The *Bone* decision affects all other similarly constituted commissions. Consequently, actions of some 90 groups, including powerful bodies like the Advisory Budget Commission and the Board of Transportation, could be challenged if legislators continue participating as voting members of these executive-branch groups (see box on page 46 for a list of the 36 groups most affected by the ruling).

The ruling might also affect other types of legislative appointments. The governor has chosen to

appoint legislators to 45 positions on 32 groups with functions similar to those of the EMC; does the Constitution prohibit this form of dual office holding (as legislator and board member)? A number of statutes provide for various legislative leaders to make appointments to boards, commissions, and councils; are appointments of non-legislators made by legislative leaders now under question? Finally, must judges serving on state commissions resign their appointive posts?

On January 26, 1982, Speaker of the House Liston B. Ramsey asked Attorney General Rufus L. Edmisten for an opinion on whether legislators can serve on executive-branch boards and commissions in an *ex officio*, non-voting capacity. On February 1, Edmisten wrote Ramsey that "where the board or commission exercises a part of the administrative or executive sovereign power of the State, a legislator may not serve in any capacity on that board or commission."⁴ On February 19, Edmisten sent a five-page letter to all legislators outlining his opinion regarding the impact of the *Bone* decision and including a list of 41 boards and commissions. He suggested that all legislators — "regardless of how or by whom appointed" — should *resign* from those 41 groups. "Should you continue to remain on the board or commission," Edmisten went on to say, "it is my opinion that any action taken by that board or commission will be subject to question." Edmisten also advised five judges to remove themselves from three state commissions (Governor's Crime Commission,

Separation of Powers

— Landmark Events

in North Carolina

Compiled by Lacy Maddox

- 1925 — General Assembly creates the Advisory Budget Commission (ABC) (G.S. 143-1 *et seq.*).
- 1929 — General Assembly authorizes governor to transfer budgeted funds within departments (G.S. 143-23).
- 1970 — Voters ratify third North Carolina constitution. First two said the three branches

of government "*ought to be forever separate and distinct.*" The 1970 constitution changes this provision to "*shall be forever separate and distinct*" and strengthens the governor's powers regarding administering the state's budget (emphasis added in both sentences).

- 1975 — General Assembly creates Joint Legislative Commission on Governmental Operations "which shall conduct evaluative studies of the programs, policies, practices and procedures of the various departments, agencies and institutions of State government" (G.S. 120-73).
- 1977 — General Assembly establishes the Administrative Rules Review Committee (ARRC) and empowers it to consider all regulations promulgated by state agencies under the N.C. Administrative Procedures Act. Under this statute, if the ARRC finds that a regulation is beyond an agency's statutory authority, the ARRC must report its objection to the Legislative Research Commission, which may report back to the full legislature

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N.C. Criminal Justice and Education Training Standard Commission, and Art Museum Building Commission).

In taking such an aggressive stance, Edmisten has brought bristles to the backs of some powerful legislators. Sen. Kenneth C. Royall, Jr., chairman of the Advisory Budget Commission and Senate majority leader, charged that "Edmisten has 'gone crazy' in his efforts to get legislators to comply with recent Supreme Court rulings," reported the *News and Observer* of Raleigh on February 28. The *News and Observer* went on to say that Gov. Hunt "has carefully left the dirty work of interpreting [the court decisions] to Edmisten." While Edmisten has taken the lead on requesting that the legislators resign, Hunt says that "if the Attorney General recommends that the legislators resign, I certainly think that's what we ought to do."

2. Legislative Incursion into the Executive Budget Powers. In its budget session in October 1981, the General Assembly took two actions in an effort to broaden its control over budgetary matters. First, it required the executive branch to gain prior approval from the Joint Legislative Commission on Governmental Operations — a committee of 13 legislators and the president of the Senate — for any executive transfer of more than 10 percent of the money from one budget line item to another.⁵ Since 1929, the governor had been authorized by statute to transfer budgeted money within departments.⁶ The legislature had created the Commission on Governmental

Operations in 1975 to provide for "the continuing review of operations of State government."⁷ In 1975, James E. Holshouser, Jr. — the first Republican to be elected governor in the 20th century — headed the executive branch and the Democrats controlled the legislature. This committee thus became a valuable check for legislators during a time of political partisanship between the executive and legislative branches.

Second, the legislature established the Joint Legislative Committee to Review Federal Block Grant Funds. As part of President Reagan's "new federalism," Congress had enacted a federal budget that consolidated large sums of money available to the states in the form of block grants. The legislature claimed control over the money and granted its new Block Grant Review Committee the power (when the full legislature was not in session) of prior approval of any actions proposed to be taken by the governor with respect to the block grants.⁸ Historically, state executive branches generally had administered federal funds that came into a state. But the large new source of funds to be distributed at the state level — the new block grants — stimulated legislative interest throughout the country. In North Carolina, the legislature went a step further than did many states, not only establishing a committee to review all block grant actions but also giving that committee the power of prior approval of any executive action.

After the October session, Gov. Hunt asked the Attorney General to review the two legislative

- June 1979 — with recommendations for action (G.S. 120-30.26 *et seq.*).
— Sen Julian Allsbrook (D-Halifax) files a bill to abolish the ABC on the grounds that it violates the N.C. Constitution's separation of powers provision. No action taken on bill.
- Aug. 1979 — Sen. I. Beverly Lake, Jr. (D-Wake) files a lawsuit challenging the constitutionality of the ABC. Lake later withdrew the suit.
- March 1980 — "The Advisory Budget Commission — Not as Simple as ABC" by Mercer Doty is released by N.C. Center for Public Policy Research. It states that the ABC violates two constitutional provisions — separation of powers and governor's responsibility for the preparation and administration of the budget.
- June 1980 — General Assembly increases the membership of the Environmental Management Commission (EMC) from 13 to 17, adding two members each from both the state House of Representatives and the state Senate [G.S. 143B-283(d)].
- Feb. 18, 1981 — Two lawsuits, filed in Wake County Superior Court (consolidated for trial into *State ex rel. Wallace v. Bone*), challenge the constitutionality of the 1980 action

- March 18, 1981 — of the General Assembly adding four legislators to the EMC.
Wake County Superior Court Judge James H. Pou Bailey, ruling on *State ex rel. Wallace v. Bone*, finds that legislative membership on EMC is constitutional; Bailey reasons that since legislators are a minority of the EMC, no legislative attempt was made to usurp executive functions.
- June 2, 1981 — The N.C. Supreme Court allows a direct appeal of Judge Bailey's ruling, bypassing the N.C. Court of Appeals.
- June 25, 1981 — General Assembly increases the powers of its Administrative Rules Review Committee to review executive rules and regulations (G.S. 120-30.28).
- July 8, 1981 — General Assembly establishes the Committee on Employee Hospital and Medical Benefits and empowers it to adopt a hospitalization and medical insurance plan for the state's employees, teachers, retired workers, and their dependents, a power formerly exercised by the Board of Trustees of the Teachers' and State Employees' Retirement System (G.S. 135-33).
- Oct. 10, 1981 — General Assembly creates a Joint Legislative Committee to Review Block Grant

actions, and various legal analysts questioned their constitutionality (see "Legislators and Governor Clash over Budget Provisions — The Legal Issues at Stake," *N.C. Insight*, Vol. 4, No. 4). Edmisten provided the Governor with an informal (and therefore unpublished) opinion regarding the actions. But in the wake of the EMC decision, these two budget actions took on added legal significance.

On January 19, a week after the *Bone* decision was released, the Attorney General sent a 38-page legal memorandum to the Governor, Speaker of the House Ramsey, and Lt. Gov. James C. Green advising them that both the Block Grant Review Committee's powers and the Commission on Governmental Operation's new authority over executive transfers of appropriated funds violate the state constitution. Two days later, Gov. Hunt, Speaker of the House Ramsey, and Lt. Gov. Green sent a formal request for an "advisory opinion" to the N.C. Supreme Court about the statutes in question. (See conclusion section for an explanation of such advisory opinions.)

On February 16, 1982, the seven Supreme Court justices sent an eight-page advisory opinion to Hunt, Green, and Ramsey which said that the legislative actions violated both the separation of powers language in the Constitution (Article I, Section 6), as well as Article III, Section 5(3), which "explicitly provides that 'the Governor shall administer the budget as enacted by the General Assembly.'" ⁹

Finally, the justices found that the Block Grant Review Committee would in some cases be "exercising legislative functions. In those instances there would be an unlawful delegation of legislative power." ¹⁰ This finding — that the legislature cannot delegate full legislative authority to a group of its members — could affect a broad range of groups, from the Advisory Budget Commission to the Governmental Operations Commission.

The question regarding the budget matters was easier for the justices to answer than the issue raised in the EMC case. The executive branch's powers in respect to the budget are spelled out in the Constitution. The justices did not have to rely solely on the theory of separation of powers but could be guided as well by the specific constitutional provision on the budget.

3. Legislative Incursions into the Judicial Branch. In 1981, the legislature gave the Joint Legislative Commission on Governmental Operations (the same committee discussed above regarding executive transfer of funds) control over a restricted reserve fund which may affect the expenditure of funds for judicial personnel. ¹¹ This action may conflict with General Statute 7A-102(a) which gives the Administrative Office of the Courts authority to set the number of employees and salaries of personnel in the judicial branch and to perform other fiscal functions. In the November/December 1981 issue of the N.C. Bar Association's *Barnotes*, N.C. Superior Court Judge

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| | Funds (G.S. 120-84.1) and empowers Joint Legislative Commission on Governmental Operations to give prior approval to executive transfer of more than 10 percent of appropriated funds in any budget line item [G.S. 143-23(b)]. | | legislative control over executive-branch boards and commissions and the budget. |
| Oct. 1981 | — Gov. James B. Hunt, Jr. asks Attorney General Rufus L. Edmisten for opinion on constitutionality of legislative actions taken on October 10, 1981 (see above). | Jan. 19, 1982 | — In a 38-page, legal memorandum, Att. Gen. Edmisten advises Gov. Hunt, Speaker of the House Ramsey, and Lt. Gov. James C. Green that the Joint Legislative Commission on Governmental Operations' authority over executive transfers of funds violates three provisions of the N.C. Constitution, as Edmisten put it: "Separation of Powers," "Governor's budget power," and "impermissible legislative delegations of authority by the General Assembly to legislative committees" (p. 38). |
| Jan. 12, 1982 | — N.C. Supreme Court rules on EMC case, <i>State ex rel. Wallace v. Bone</i> , stating that the "challenged enactment of the General Assembly violates [separation of powers] section of the state constitution." | | |
| Jan. 18, 1982 | — Director of Legislative Bill Drafting Gerry Cohen submits a memorandum to Speaker of the House Liston B. Ramsey regarding <i>Bone</i> decision, which said: "Specific problems may exist for the Advisory Budget Commission, the Joint Legislative Committee to Review Federal Block Grant Funds, the Joint Legislative Commission on Governmental Operations, and the Committee on Employee Hospital and Medical Benefits." The memorandum outlines problems on various types of legislative appointments and presents six alternative methods of | Jan. 21, 1982 | — Gov. Hunt, Lt. Gov. Green, and Speaker of the House Ramsey request an advisory opinion from the N.C. Supreme Court regarding the constitutionality of Joint Legislative Committee to Review Federal Block Grant Funds and Joint Legislative Commission on Governmental Operations' authority over executive transfer of appropriated funds. |
| | | Jan. 21, 1982 | — Donald B. Hunt, staff counsel to the Governmental Operations Commission, sends a memo to that committee regarding executive branch power to settle suits which commit the state to actions (that |

Frank W. Snapp expressed alarm over such actions: "The independence and integrity of the judicial branch have come under increasing assaults from the General Assembly. . . . This trend must be reversed if the separation of powers between the legislative and judicial branches of government is to be maintained."

In finding that the Block Grant Review Committee cannot perform the functions granted it, the Supreme Court might well have taken a major step towards reversing the trend to which Judge Snapp refers. In issuing a formal opinion regarding administration of block grants — an area of conflict between the legislative and executive branches — the Supreme Court may also have provided a "check and balance" on the legislature as it affects the functioning of the judicial branch. Because the Supreme Court found "an unlawful delegation of legislative power" to the Block Grant Committee,¹² the Court might find a similar unconstitutional delegation of power to the Governmental Operations Commission in its authority to control some aspects of a restricted reserve fund affecting judicial personnel.

4. Legislative Committee Taking Over an Executive Agency Program. In July 1981, the General Assembly established its Committee on Employee Hospital and Medical Benefits and empowered it to adopt a hospitalization and medical insurance plan for the state's employees, teachers, retired workers, and their dependents.¹³ Formerly, the Board of Trustees of the Teachers' and State

Employees' Retirement System, a board within the Department of the State Treasurer chaired by state Treasurer Harlan Boyles, had exercised this function. The legislative committee took quick action, freezing the benefit levels (effective September 30, 1981) available under the current insurance contract between Blue Cross/Blue Shield of North Carolina and the N.C. Teachers' and State Employees' Retirement System, thereby greatly affecting benefits after October 1, 1981.

Following the *Bone* decision in January 1982, the constitutionality of this committee began to be questioned. "Specific problems may exist for . . . the Committee on Employee Hospital and Medical Benefits," Director of Legislative Bill Drafting Gerry Cohen wrote Speaker of the House Ramsey on January 18, 1982. On February 1, Treasurer Boyles wrote the Attorney General, asking whether the legislative committee is unconstitutional. Edmisten responded on February 23 that the statute creating the Committee on Employee Hospital and Medical Benefits is unconstitutional on two grounds — separation of powers and delegation of the full legislature's functions to a committee.

On February 25, the Board of Trustees of the Teachers' and State Employees' Retirement System met, and Treasurer Boyles told the group that the legislative committee would probably return powers for negotiating a new contract to the executive branch board. But the same day, Rep. Billy Watkins (D-Granville), co-chairman of the committee, and other legislative leaders decided

- usually cost money) without legislative approval.
- Jan. 26, 1982 — Speaker of the House Ramsey asks Att. Gen. Edmisten for an opinion on whether legislators can serve on executive branch boards and commissions in an *ex officio*, non-voting capacity.
- Feb. 1, 1982 — Att. Gen. Edmisten, in a six-page legal memorandum, advises Speaker of the House Ramsey that: "Where the board or commission exercises a part of the administrative or executive sovereign power of the State, a legislator may not serve in any capacity on that board or commission."
- Feb. 1, 1982 — State Treasurer Harlan Boyles asks the Attorney General how the *Bone* decision affects the Board of Trustees of the Teachers' and State Employees' Retirement System, which Boyles chairs, and whether the Committee on Employee Hospital and Medical Benefits is constitutional (see July 8, 1981).
- Feb. 2, 1982 — Joint Legislative Committee to Review Federal Block Grant Funds meets. Committee Co-Chairman, Rep. Al Adams (D-Wake), says the delegation of the legislature's power to this committee is probably unconstitutional but that the com-

- mittee could make recommendations to the full legislature.
- Feb. 3, 1982 — In wake of *Bone* decision, a group of farmers sue Board of Transportation, alleging that legislative membership invalidates the Board's decision to run Interstate Highway 95 through their land. (*Citizens for Preserving Farm Land, Inc. v. N.C. Dept. of Transportation, N.C. Board of Transportation*).
- Feb. 11, 1982 — N.C. Center for Public Policy Research releases "Separating the Executive and Legislative Branches: Boards, Commissions, and Councils with Legislative Members." It lists 90 boards and commissions with legislative members, and says 36 of them violate the separation of powers provision of the state constitution (see box on page 46).
- Feb. 16, 1982 — In response to Hunt/Green/Ramsey letter of January 21, N.C. Supreme Court issues an "advisory opinion" finding that the Joint Legislative Commission on Governmental Operations' authority over executive transfer of funds and the Joint Legislative Committee to Review Federal Block Grant Funds are unconstitutional under Article I, Section 6 (separation of powers) and Article III,

that control of the new health insurance contract would remain with the legislative committee. In an interview on April 5, Ed Barnes, director of the Division of Retirement and Health Benefits put it this way: "Our current mode of operation is acting strictly as an administrative staff to the legislative committee."

Rep. Watkins says the committee will review bids from insurance companies and recommend an action to the full legislature. This process might accommodate any constitutional questions over delegating full legislative authority to a committee. However, it may not resolve the separation of powers questions. Furthermore, the full legislature cannot act on a new health insurance contract until it meets in June; under that timetable, the new contract would not go into effect until October 1, 1982.

The current \$160 million contract (half of which is paid by the state and half by employees and retirees) covers some 400,000 people (including dependents) and is scheduled to expire June 30. As of early April, the *old* contract had not been extended for the three months — July, August, and September — during which the *new* contract will not be in effect. The separation of powers issue has thus contributed to a degree of uncertainty regarding proper administration of one of the largest contracts in state government. "It's a hell of a way to run a railroad," Boyles told the Board of Trustees of the Teachers' and State Employees' Retirement System at their February

25 meeting.

5. Executive Infringement on the Legislature's Constitutional Authority to Appropriate Funds. In February 1981, the executive branch settled a highly controversial suit in federal district court (*Willie M. v. Hunt*), agreeing that the state would identify violent juveniles who are emotionally disturbed and would design and operate programs appropriate for this group of youngsters. While the settlement in federal court carried no promise of a specific amount of money with it (except attorneys' fees, which are still being appealed), it did require the executive branch of the state to undertake substantial new programs — even though the legislature had not appropriated money for those programs.

In the spring of 1981, the Department of Human Resources (DHR) and Department of Public Instruction submitted supplemental budget requests to the legislature covering "Willie M." services for almost \$2 million. In October 1981, DHR returned to the General Assembly with a request of \$2.2 million for Willie M. services. The \$4.2 million thus far appropriated by the legislature represents only the beginning of the full amount necessary to meet the timetable agreed upon between executive agencies, the plaintiffs, and the court. Legislative analysts have estimated that the amount could reach \$15 million before the services are all in place.

Executive agencies have been entering into consent judgments for a number of years but

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| Feb. 19, 1982 | <p>Section 5(3) (governor's power to administer the budget). And where the Block Grant Review Committee exercised legislative functions, the Justices determined there "would be an unlawful delegation of legislative power."</p> <p>Edmisten writes to all legislators, suggesting that those serving on 41 executive branch boards and commissions resign from them. The letter also asks those legislators on the ABC to act in an advisory capacity only and states that the statute creating the Committee on Employee Hospital and Medical Benefits (see July 8, 1981) is an unconstitutional encroachment on executive branch powers and, therefore, "null and void."</p> <p>Gov. Hunt says he will comply with the Attorney General's request that the Governor ask the legislators whom he appointed to about 40 boards and commissions to resign.</p> <p>Att. Gen. Edmisten writes to Treasurer Boyles (in response to the Boyles' request of February 1) that the statute creating the Committee on Employee Hospital and Medical Benefits is unconstitutional on separation of powers and</p> | <p>delegation grounds.</p> <p>Feb. 23, 1982 — Attorney General writes judges suggesting they resign from executive branch boards and commissions.</p> <p>Feb. 25, 1982 — Director of Legislative Bill Drafting Cohen, at the request of Speaker of the House Ramsey, reviews the Attorney General's opinion regarding the 41 boards and commissions and recommends that Ramsey ask legislative members to resign from 37 of the 41.</p> <p>Feb. 25, 1982 — The Board of Trustees of the Teachers' and State Employees' Retirement System meets. Board chairman, State Treasurer Boyles, says the legislature's newly created Committee on Employee Hospital and Medical Benefits would probably return control over the contracting procedures to the Board in February. The Board's two legislative members do not attend.</p> <p>Feb. 25, 1982 — Rep. Billy Watkins (D-Granville), co-chairman of Committee on Employee Hospital and Medical Benefits, and other legislative leaders decide the committee will retain control of developing a new health insurance plan for state employees and teachers and will make recommendations in the June session for</p> |
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usually for much smaller amounts of money. In *Huntley v. Morrow*, for example, a case also settled in federal court, the consent decree required DHR to meet the schedule for appeals established by federal regulations on certain public assistance rulings. The consent decree necessitated hiring a new hearing officer, a position for which DHR previously had no funds.

Because of the amount of money involved, the *Willie M.* case began attracting a lot of attention in 1981. After the *Bone* decision of January 1982, the funding process triggered by an executive consent decree came under further scrutiny. On January 21, 1982, Donald B. Hunt, counsel to the Governmental Operations Committee, sent that committee a memo regarding such executive-branch court settlements. Because of the *Bone* decision, Hunt wrote, "the General Assembly cannot establish a committee with legislative members to decide whether the State will compromise a particular suit." But Hunt went on to suggest how the legislature could become involved in the court settlement at an earlier phase of the process, for example: "filing on behalf of the General Assembly friend of the court briefs in institutional cases to put before the court the legislature's view of the impact of the litigation upon the legislature's power to allocate resources."

The ongoing appropriations process necessary to meet the *Willie M.* settlement, taken in the context of the *Bone* decision, dramatizes a dilemma state officials must face because of the separation

of powers doctrine. Following the signing of a consent decree in court, the executive branch in effect presents the legislature with a *fait accompli*, giving the legislature little choice but to fund the new programs required by the court settlement. If the legislature chooses not to appropriate the required funds, the federal court could find the state executive departments involved in contempt of the consent decree.

The Pennsylvania legislature, for example, has recently cut off funds to carry out two federal court orders, one to implement an automobile emissions inspection program and another to create an office overseeing court-ordered transfers of residents from a state home for the retarded. Pennsylvania legislators, according to *State Legislatures* magazine,¹⁴ claim exclusive authority to raise state funds and decide how to spend them. "There is a strong body of thought here that the courts have stepped across constitutional boundaries," Assembly Majority Leader Samuel E. Hayes told *The New York Times*.¹⁵

6. Legislative Committee Exercising a Form of Veto Over Executive Decisions. In 1981, the legislature empowered its Administrative Rules Review Committee to suspend rules that exceed the statutory authority of the departments issuing them.¹⁶ Appeals from the committee's decisions may be taken to the top of the executive branch, either to the governor (by departments under his direction) or to the Council of State, a body composed of the persons heading executive departments

- Feb. 26, 1982 — action by the full General Assembly. ABC begins to function by making "recommendations to the Governor;" formerly, the ABC took direct action on budget requests. Also, the Board of Awards, a subsidiary panel of the ABC which had been responsible for awarding most state contracts, begins acting in an advisory capacity.
- March 3, 1982 — Gov. Hunt says he will assume full authority over state budget decisions which had previously been made by the ABC, now acting only in an advisory capacity.
- March 5, 1982 — Speaker of the House Ramsey and President Pro Tempore of the Senate Craig Lawing establish a joint House-Senate Committee on Separation of Powers to address constitutional questions regarding separation of powers between the legislative and executive branches of government.
- March 10, 1982 — Attorney General Edmisten issues an advisory opinion to Speaker of the House Ramsey responding to two questions: (1) May the General Assembly appoint non-legislative members to executive-branch boards and commissions? Yes. (2) May the General Assembly delegate

- that authority to the speaker of the House and the president of the Senate? Probably.
- March 17, 1982 — The Committee on Separation of Powers, co-chaired by Speaker of the House Ramsey and President Pro Tempore of the Senate Lawing, holds its first meeting and agrees that the legislature has some constitutional problems as pointed out in the *Bone* decision, the Supreme Court advisory opinion (see Feb. 16, 1982) and several Attorney General opinions (see Jan. 19, Feb. 1, and Feb. 23, 1982). They decide to address the 41 boards and commissions questioned by Edmisten one at a time, in four subcommittees, and to report to the full General Assembly in June with recommendations. The Committee also plans to ask the Supreme Court for a further advisory opinion addressing several related issues.
- March 18, 1982 — The Administrative Rules Review Committee meets in executive session where Senior Deputy Att. Gen. Andrew A. Vanore, Jr. gives his opinion that the Committee's power to suspend regulations issued by state agencies and departments is probably unconstitutional.

who are elected officials. If either the governor or Council of State does not overturn the rule suspension within a time specified by the new 1981 legislation, the legislative committee action — the repeal of a rule — automatically goes into effect. Given this appeal procedure, the executive branch can still have the last say. Nonetheless, the Attorney General's office notified the committee on March 18, 1982, that the suspending power is probably unconstitutional. Like the questions about legislative membership on the EMC and the block grant committee dispute, this conflict also may end up in front of the state Supreme Court.

This North Carolina dispute parallels a current national clash between Congress and the President. For 50 years, the Congress has claimed a veto power over executive actions far in excess of the type of veto power recently asserted by the N.C. General Assembly. This congressional veto has taken many forms. Some executive actions may be blocked by either house; others may be blocked by both houses acting together. In certain cases the veto may even be exercised by a congressional committee. The most recent example of the congressional veto that attracted national attention involved the sale of five radar planes to Saudi Arabia. By statute the President was empowered to sell the planes to Saudi Arabia unless both houses of Congress disapproved the sale. The U.S. House of Representatives promptly voted against it, and for weeks the nation awaited the vote in the Senate, which finally voted in favor of the sale.

The President has recently decided to challenge the congressional veto power in the courts. Unlike the N.C. Supreme Court, the Supreme Court of the United States does not offer advisory opinions; consequently, the President has been waiting for situations in which to raise the issue. One case is now before the U.S. Supreme Court,¹⁷ and others seem to be on their way up.¹⁸ The U.S. Attorney General, who normally defends the constitutionality of federal statutes, is in these cases attacking it. The two houses of Congress, each represented by its own counsel, are arguing in favor of their claimed powers.

At this writing, the U.S. Supreme Court has not resolved the dispute. The cases raise many issues in addition to the legislative veto, and each may be decided on other grounds. But if the issue is ever decided on the national level, it could indirectly affect the North Carolina dispute. The effect would only be indirect because of the differences between the North Carolina and the federal constitutions. But it could be real nonetheless. In the EMC case the state Supreme Court looked to the federal Constitution for guidance in interpreting the N.C. Constitution.¹⁹ The same process could occur in the litigation on the legislative veto issue.

Judicial Common Ground

As the six trends discussed above show, the constitutional crisis in state government has spread very far in a very short time. These six areas of concern, despite their many differences, share much in common because of the far-reaching power of the judicial branch as it assumes its policymaking role. In turning to the separation of powers concept in the *Bone* decision, the judicial branch drew clear lines between the functions of the legislative and executive branches. While the "jury is still out" on many of the questions discussed in the section above, several judicial characteristics affecting the outcomes are clear.

- *A statute is presumed constitutional until challenged through litigation.* Thus, statutes authorizing legislators to serve on other boards and commissions in the executive branch — while questionable under the *Bone* decision — are presumed to be constitutional until challenged. Similarly, while the Attorney General has said the legislative Committee on Employee Hospital and Medical Benefits is unconstitutional, the committee may well continue to function until challenged in court.

- *Because of the legal rule of following prior decisions in similar cases, the EMC decision also could apply to all similarly constituted commissions.* This doctrine prompted the Attorney General to advise legislators to resign from some 41 executive branch boards and commissions. But legislators continue to function on some very powerful bodies — such as the Advisory Budget Commission — which may be constituted like the EMC. On February 26, the ABC began to function by making "recommendations to the Governor" rather than by taking direct action on budget requirements. If someone challenges an ABC action taken even in this manner, the *Bone* decision is a legal precedent on which to stand.

- *The EMC case or similar cases cannot go into the federal court system.* When a state supreme court interprets the state constitution on a matter solely of significance to the state, there is no basis for an appeal to the Supreme Court of the United States.

- *When the N.C. Supreme Court issues an advisory opinion, it is not binding in the same way that a decision in litigation is binding.* Even so, an advisory opinion indicates how that same group of judges would adjudicate a similar question. Since the earliest days of the republic, the U.S. Supreme Court has refused to issue advisory opinions. Only a handful of state courts issue such opinions, and the N.C. Supreme Court has not issued one since 1969. Moreover, perhaps alone among American state courts, the N.C. Supreme Court issues advisory opinions without

express constitutional or statutory authorization. Ironically, one of the major arguments in other states against advisory opinions is that they violate the separation of powers doctrine. Judicial power, it is said, should be limited to deciding litigated cases. When justices issue opinions on contentions that have not yet been the subject of legal dispute, these justices approach the status of lawmakers.

Conclusion

Because the N.C. Supreme Court took an active policymaking role in issuing an advisory opinion of far-reaching influence on February 16 (regarding the two budgetary matters), those seven justices may be called upon once again to wade into uncharted separation-of-powers territory. On March 5, Speaker of the House Ramsey and President Pro Tempore of the Senate Craig Lawing established a joint House-Senate Committee on Separation of Powers. The committee held its first meeting on March 17 and agreed that the legislature has some constitutional problems as pointed out in the *Bone* decision, the Supreme Court's advisory opinion, and several Attorney General's opinions.

The Committee decided to examine the 41 executive-branch boards and commissions questioned by Edmisten one at a time, through four subcommittees, and to report to the full General Assembly in its June session with recommendations. In addition, the committee planned to ask the Supreme Court for another advisory opinion on a variety of separation of powers questions, including the following:

- Can executive branch officials (like the governor and lieutenant governor) appoint legislators to executive-branch boards instead of having legislative officials (like the speaker of the House and president pro tempore of the Senate) make the appointments?
- Can the legislature appoint non-legislators to executive boards and commissions, and if so, can it also delegate that power to its presiding officers?
- How far can the legislature go in restricting the use of state money without treading on the power of the governor?
- Must someone resign his or her seat on a board or commission if he or she is elected to the legislature?

Whatever the Special Committee on Separation of Powers may decide to do and whatever any future Supreme Court advisory opinions may finally say, the sorting out process triggered by the *Bone* decision is just beginning. The business of state government in North Carolina has grown so rapidly — the state budget has more than doubled since 1973 — that separation-of-powers questions

have been obscured under a sweeping tide of government programs and actions. The contests for power among the executive, legislative, and judicial branches signal not a breakdown of the system but a return to health.

The founding fathers were pessimistic about the ability of the powerful to exercise self-restraint. But they were optimistic about their own ability to construct a constitutional order in which one power would restrain another. As James Madison put it in No. 51 of *The Federalist*:

The great security against a gradual concentration of the several powers in the same [branch] consists in giving to those who administer each [branch] the necessary constitutional means and personal motives to resist encroachments of the others.

The experience of the last two centuries seems to confirm that Madison and his colleagues understood the value of restraints in keeping men and women free. In the coming months and years, the N.C. Supreme Court, the legislature, and executive officials will have to separate some of their powers, even as their work becomes more intertwined and interdependent. Against such a difficult task, the words of James Madison might well assist them in discovering exactly what "constitutional means and personal motives" can best "resist encroachments of the others." □

FOOTNOTES

¹ *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982).

² The North Carolina Center for Public Policy Research will publish this summer a comprehensive analysis of the more than 400 boards, commissions, and councils that exist.

³ N.C. Constitution, Art. 1, Section 6.

⁴ Memorandum from Rufus L. Edmisten, Attorney General, to Liston B. Ramsey, Speaker, House of Representatives, February 1, 1982, page 1.

⁵ N.C.G.S. 143-23(b).

⁶ N.C.G.S. 143-23.

⁷ N.C.G.S. 120-71.

⁸ N.C.G.S. 120-84.5

⁹ Advisory Opinion in *re* N.C.G.S. 143-23(b) and 120-84.1 through 120-84.5, 305 N.C. ____ (1982), p. 7.

¹⁰ *Ibid.*

¹¹ Chapter 964 of the 1981 Session Laws (HB 42), Section 20.

¹² Advisory Opinion, *op. cit.*

¹³ N.C.G.S. 135-33.

¹⁴ *State Legislatures*, January 1982, p. 5.

¹⁵ *Ibid.*

¹⁶ N.C.G.S. 120-30.28.

¹⁷ *Immigration and Naturalization Service v. Chadha*, 634 F.2d 408 (9th Cir., 1980), cert. granted, 102 S.Ct. 87 (1981).

¹⁸ For example, *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, ____ F.2d ____ (D.C. Cir., 1982). In a vigorous opinion, the U.S.

Court of Appeals for the District of Columbia held that the legislative veto violates the federal Constitution.

¹⁹ "While the federal constitution contains no explicit provision regarding separation of powers, the principle is clearly implied. Article I, Section 1, provides that '[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a

Legislators Serve on Ninety Executive Boards — Oversight or Overkill?

by Lacy Maddox

In the summer of 1981, the N.C. Center for Public Policy Research began a 12-month project surveying and analyzing the approximately 400 boards, commissions, and councils functioning in state government. Because the number of these groups has increased so rapidly in recent years, few persons in the state understand the growing and complex role that boards, commissions, and councils play. Yet no compendium of this unwieldy collection of groups exists.

On February 11, 1982, as a first installment of the year-long project, the Center released "Separating the Executive and Legislative Branches: Boards, Commissions, and Councils with Legislative Members." Only weeks before, the N.C. Supreme Court had ruled that having four legislators on the Environmental Management Commission (EMC) violated the separation of powers provision in the N.C. Constitution. A series of high-level consultations followed this ruling, including an official advisory opinion from the Attorney General, regarding the legal status of all boards and commissions with legislative members. As staff attorneys in the legislature and the Attorney General's office were furiously researching the N.C. General Statutes for references to boards and commissions, the Center released its February report.

"The N.C. Center for Public Policy Research has found that in addition to legislative membership on 36 boards with executive functions, legislators serve on 54 other boards that are advisory in nature," *The News and Observer* of Raleigh summarized in its editorial of February 17, 1982. "Their legal status is unclear. But it is obvious that the legislature must review, with an eye toward repealing or amending, all statutes mandating legislative membership on non-legislative boards and commissions."

The Center's report had gone a step further: "Unless prompt attention is given to this matter, many of the decisions made by executive

branch boards with legislators on them will be suspect. . . . Some farmers recently sued the Board of Transportation, alleging that having legislators among its membership invalidates the Board's decision to run Interstate Highway 95 through their land. . . . We think the best solution is to remove legislators from all 90 of these boards, commissions, and councils and replace that practice with strong legislative oversight committees."

The report further recommended that the legislature establish a study committee to review legislative membership on executive-branch boards, commissions and councils, and that this committee report to the full General Assembly in its June 1982 session. In early March, the Speaker of the House and the President Pro Tempore of the Senate formed such a committee.

In preparing its report, the Center applied the N.C. Supreme Court ruling on the EMC, as well as similar decisions in Kansas and Colorado, to the 90 groups in question, finding that 36 groups "probably violate the separation of powers provision." Staffs in both the executive branch (Attorney General) and the legislative branch (General Assembly's Bill Drafting Division) subsequently came up with similar lists; all three lists agree that these 36 boards, commissions, and councils have executive or administrative functions and are unconstitutional under the EMC decision.

The 36 groups identified by the Center are listed below by executive department. The Attorney General's staff identified the following six additional groups (a total of 42) with executive or administrative functions:

1. Child and Family Services Interagency Committee;
2. Governor's Advocacy Council on Children and Youth;
3. Education Commission of the States;
4. Southern Growth Policies Board;
5. N.C. Alcoholism Research Authority; and
6. Commission on Indian Affairs.

The legislative staff agreed on 37 of these 42 groups, but said that the first four of those

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senate and house of representatives.' Article II, Section 1, provides that '[t]he executive power shall be vested in a president of the United States of America.' Article III, Section 1, provides that '[t]he judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .'

"There is abundant evidence that the drafters of the federal constitution had the separation of powers principle in mind, and, for the most part, the principle has been championed and adhered to throughout the history of our republic." *State ex rel. Wallace v. Bone*, 304 N.C. 591, 286 S.E.2d 79 (1982). See also text relating to footnote 3 above.

listed above were only advisory in nature. The Center found 54 additional groups, including the six above, that are advisory in nature but which have legislative members. The N.C. Supreme Court has not said whether it sees a constitutional distinction between administrative and advisory functions in executive-branch boards, commissions, and councils. The Court could say that any executive-branch board with legislative members (even though the group's functions are advisory) violates the separation of powers provision.

The full report by the Center includes a listing of all 90 groups with legislative members by executive-branch department, and for each group, the statute authorizing the appointment of legislators, the number of House and Senate members, and the number of legislators appointed by the Governor. The report is available from the Center for \$1.00. The results of the year-long study of all 400 groups will be released later this year. □

EXECUTIVE-BRANCH GROUPS VIOLATING SEPARATION OF POWERS PROVISION

DEPARTMENT OF ADMINISTRATION

1. Board of Public Telecommunications Commissioners
2. Capital Building Authority
3. Capital Planning Commission
4. Governor's Advocacy Council for Persons with Disabilities
5. Housing Finance Agency, Board of Directors
6. Incentive Pay Review Commission
7. Land Conservancy Corporation, Board of Trustees
8. N.C. Council on the Status of Women
9. Public Officers' and Employees' Liability Insurance Commission
10. School of Science and Mathematics, Board of Trustees

DEPARTMENT OF AGRICULTURE

11. Board of Agriculture
12. Farm Operations Commission

DEPARTMENT OF COMMERCE

13. Economic Development Board
14. N.C. Board of Science and Technology
15. Seafood Industrial Park Authority
16. State Ports Authority

DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

17. Governor's Crime Commission
18. State Fire Commission

DEPARTMENT OF CULTURAL RESOURCES

19. Art Museum Building Commission
20. Museum of Art, Board of Trustees

DEPARTMENT OF HUMAN RESOURCES

21. Commission for Mental Health, Mental Retardation, and Substance Abuse Services
22. Social Services Commission
23. Waste Management Board

DEPARTMENT OF JUSTICE

24. Criminal Justice Education and Training Standards Commission

DEPARTMENT OF LABOR

25. Apprenticeship Council

DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT

26. Coastal Resources Commission
27. Environmental Management Commission
28. Wildlife Resources Commission

DEPARTMENT OF REVENUE

29. Property Tax Commission

DEPARTMENT OF TRANSPORTATION

30. Board of Transportation

DEPARTMENT OF TREASURER

31. Law Enforcement Officers Benefit and Retirement Fund, Board of Commissioners
32. Municipal Board of Control
33. Teachers' and State Employees' Retirement System, Board of Trustees

INDEPENDENT GROUPS

34. Advisory Budget Commission
35. Ports Railway Commission Board of Directors
36. UNC Center for Public Television, Board of Trustees