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The Folly in Finality: The Constitutionality of ALJ Final Decision-Making Authority in North Carolina

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The Folly in Finality: The Constitutionality of ALJ Final Decision-Making Authority in North Carolina*

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

—N.C. CONST. art. I, § 6

The Governor shall take care that the laws be faithfully executed.

—N.C. CONST. art. III, § 5

INTRODUCTION

In recent years, two major innovations have transformed the modern landscape of administrative law.[1] First, many states have elected to hold administrative hearings in "central panels" rather than within regulatory agencies themselves.[2] Administrative law judges ("ALJs") housed in central panels, like North Carolina's Office of Administrative Hearings ("OAH"), are institutionally independent from the regulatory agencies whose cases they hear, and thus provide greater independence in the administrative hearings process.[3] The second innovation, "ALJ finality," grants final decision-making authority to ALJs.[4] On June 18, 2011, the North Carolina General Assembly voted to ratify the Regulatory Reform Act of 2011

1. *See* James F. Flanagan, *An Update on Developments in Central Panels and ALJ Final Order Authority*, 38 IND. L. REV. 401, 401 (2005) ("States are in the vanguard of a two-pronged revolution in administrative law.").

2. *Id.*; *see also* Hon. John W. Hardwicke, *The Central Panel Movement: A Work in Progress*, 53 ADMIN. L. REV. 419, 420 (2001) (discussing "the constitutional and statutory policies underlying the creation of the central hearing agency").

3. *See* Flanagan, *supra* note 1, at 401.

4. *Id.* at 402. "ALJ finality" may be used to refer to both "de facto" finality and "de jure" finality. Jim Rossi, *Final, but Often Fallible: Recognizing Problems with ALJ Finality*, 56 ADMIN L. REV. 53, 54 (2004). De jure finality exists when a state's administrative procedure act expressly provides that ALJ decisions are final, giving agencies "no legal opportunity to review the ALJ order and take action prior to appeal." *Id.* at 60. De facto finality exists when "a state's APA may impose legal presumptions that, in effect, make the ALJ recommendations final." *Id.* at 64.

("RRA"),[5] which falls under this second category of innovation. The RRA takes final decision-making authority in contested cases[6] away from regulatory agencies and gives it to ALJs housed in the OAH.[7] Governor Beverly Perdue vetoed the bill, stating in her veto message that the Attorney General had "repeatedly declared" that such a reform was "in violation of the North Carolina Constitution."[8] Less than one-month later, Governor Perdue's veto was overridden, and the RRA became law.[9]

The North Carolina General Assembly has considered giving final decision-making authority to the OAH before. Governor Perdue's vague assertion that the North Carolina Attorney General had "repeatedly" found ALJ finality unconstitutional[10] was likely referring to an informal opinion[11] generated in 1999 by the Attorney General's office on a bill containing provisions nearly identical to the

5. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1686–87 (codified as amended at N.C. GEN. STAT. § 150B-34 (2011)); 2 N.C. GEN. ASSEMBLY, JOURNAL OF THE SENATE OF THE 2011 GENERAL ASSEMBLY OF THE STATE OF NORTH CAROLINA FIRST SESSION 1047 (2011), http://www.ncleg.net/DocumentSites/SenateDocuments/Journals/2011%20Senate%20Journal%20(01-26-2011)%20Volume%202.pdf (noting the Senate's ratification on June 18th).

6. "Contested case" is the administrative law term for a proceeding to resolve a dispute between a regulatory agency and a party whose "rights, duties, [and] privileges," have been affected by agency action. N.C. GEN. STAT. § 150B-2(2) (2011). For example, if the North Carolina Department of Environment and Natural Resources assesses a civil penalty against a person who has violated a permit issued under one of North Carolina's environmental statutes, *e.g.*, N.C. GEN. STAT. § 143-215.1 (2011) (requiring a permit for various activities that affect water quality), that person would have the right to a hearing before an ALJ in the OAH.

7. Regulatory Reform Act, ch. 398, § 18, 2011 N.C. Sess. Laws at 1686–87.

8. Memorandum from Governor Beverly Eaves Perdue to Clerk of the N.C. Senate (June 30, 2011) [hereinafter Veto Message], http://www.ncga.state.nc.us/sessions/2011/S781Veto/govobjections.pdf (containing Governor Perdue's objections and veto message regarding Senate Bill 781).

9. 2 N.C. GEN. ASSEMBLY, *supra* note 5, at 1078; *see also Senate Bill 781/S.L. 2011-398 Regulatory Reform Act of 2011*, N.C. GEN. ASSEMBLY, http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=S781&submitButton=Go (last visited Aug. 20, 2012) (providing a history of events during the RRA's passage and noting the veto override on July 25, 2011).

10. Veto Message, *supra* note 8.

11. *See* Letter from the N.C. Office of the Att'y Gen. to Ronald G. Penny, State Pers. Dir., Office of State Pers. (July 6, 1999), *in* MARY SHUPING, CONTESTED CASES UNDER ARTICLE 3 OF THE APA, BACKGROUND INFORMATION & OPINIONS ON THE CONSTITUTIONALITY OF OAH FINAL DECISION MAKING AUTHORITY, PRESENTED TO THE JOINT LEGISLATIVE ADMINISTRATIVE PROCEDURE OVERSIGHT COMMITTEE 11 (Feb. 13, 2000) [hereinafter BACKGROUND INFORMATION & OPINIONS] (on file with the *North Carolina Law Review*).

contested case provisions in the RRA.[12] In 1999, the policy debate surrounding the proposed revisions to the Administrative Procedure Act ("APA") was much the same as it is today. The regulated community supported giving ALJs final decision-making authority because it "improved their odds—leveled the playing field in their view—in challenges to state agency action, especially over environmental permits and fines."[13] The bill's primary opponents were the North Carolina Hospital Association, which opposed procedural changes to certificate of need proceedings; environmental groups; state agencies; and Governor James Hunt, who believed the bill undermined executive branch authority.[14] Just as the policy debate has survived, so too has the constitutional debate surrounding ALJ finality.

ALJ finality poses apparent constitutional concerns.[15] First, because of the striking resemblance of the OAH to an article IV court under the RRA, the new law may pose a threat to judicial power. Second, because the OAH, which has complete independence from executive agencies, is now free to invalidate agency actions, the RRA poses a threat to executive power. Several provisions of North Carolina's constitution are relevant to this two-pronged constitutional

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12. *See* H.R. 968, v.2, sec. 3, 1999 Gen. Assem., Reg. Sess. (N.C. 1999), http://www.ncga.state.nc.us/Sessions/1999/Bills/House/PDF/H968v2.pdf ("[I]n each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law.").

13. Brad Miller, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. REV. 1657, 1659 (2001).

14. *Id.* at 1659–60.

15. The constitutionality of ALJ finality in contested cases has been affirmed in one state—Louisiana. *See* Wooley v. State Farm Fire & Cas. Ins. Co., 2004-0882, p. 18–19 (La. 1/19/05); 893 So. 2d 746, 772. In Louisiana, not only do ALJs have final say in contested cases, but the state APA bars state agencies from seeking judicial review. *See* LA. REV. STAT. ANN. § 49:992(B)(2) (2012) (providing that "in an adjudication commenced by the division [of administrative law], the administrative law judge shall issue the final decision or order"); LA. REV. STAT. ANN. § 49:964(A)(2) (2003) (providing that "[n]o agency or official thereof, or other person acting on behalf of an agency or official thereof shall be entitled to judicial review under this Chapter"). In addition, the Florida First District Court of Appeal has upheld the authority of the Division of Administrative Hearings (DOAH) to issue final orders in rule change proceedings. Dep't of Admin. v. Stevens, 344 So. 2d 290, 293 (Fla. Dist. Ct. App. 1977) (relying on a constitutional provision allowing the Florida legislature to grant quasi-judicial powers to a board or agency); *see also* Rossi, *supra* note 4, at 64 (discussing the Florida court's failure to consider "alternative functional arguments" such as whether granting decision-making authority to the DOAH violated "separation of powers norms"). While the Louisiana Supreme Court's decision in *Wooley v. State Farm* and the issues raised in the national debate over ALJ finality provide some guidance to this Recent Development's analysis, the constitutionality of ALJ finality in North Carolina inevitably depends upon the relevant provisions of the North Carolina Constitution and the idiosyncrasies of North Carolina's constitutional jurisprudence.

dilemma: article I, section 6 provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other,"[16] and article IV, section 1 expressly prohibits the General Assembly from establishing or authorizing "any courts other than as permitted by this Article."[17] Furthermore, the Supreme Court of North Carolina has noted that "for more than 200 years, [North Carolina] has strictly adhered to the principle of separation of powers."[18] However, an important caveat to North Carolina's "strictly adhered to" separation of powers doctrine is that the constitution explicitly condones the delegation of certain judicial powers to the executive branch.[19] This express constitutional allowance for some overlap between the judicial branch and the executive branch significantly complicates the constitutional analysis.

This Recent Development explores whether the RRA violates North Carolina's separation of powers doctrine through two different inquiries: First, does ALJ finality unconstitutionally encroach on the power of the judiciary? Second, does ALJ finality unconstitutionally undermine executive branch authority? This Recent Development first argues that ALJ finality is not an unconstitutional encroachment on the judiciary because ALJ finality falls within the ambit of what is "reasonably necessary" to fulfill the OAH's purpose (as it has been statutorily re-defined by the legislature), and because the RRA stops short of transforming the OAH into a de facto court of law. However, this Recent Development further argues that ALJ finality *is* an unconstitutional encroachment on North Carolina's *executive* branch because ALJ finality vests regulatory decision-making power in an appointee of the North Carolina judiciary, supplanting the regulatory obligations of the Governor and executive agencies.

Part I provides background on the RRA's amendments to the APA, outlining the changes made to ALJ decision-making authority and judicial review of administrative decisions. Part II discusses the constitutional issues associated with the judicial power granted to the executive branch under the RRA. Part II ultimately seeks to address whether or not the RRA usurps powers constitutionally reserved to the judiciary either by granting judicial powers to the OAH not

16. N.C. CONST. art. I, § 6.

17. N.C. CONST. art. IV, § 1.

18. State *ex rel.* Wallace v. Bone, 304 N.C. 591, 599, 286 S.E.2d 79, 83 (1982).

19. *See* N.C. CONST. art. IV, § 3 ("The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created.").

"reasonably necessary" to the fulfillment of its purpose or by creating a de facto court of law. Part II also explains why the RRA would likely survive a constitutional challenge based on this approach. Part III argues that while the RRA may not encroach upon powers traditionally reserved to the judiciary, the extent to which the RRA undermines executive power is unconstitutional. First, the RRA gives an appointee of the chief justice of the Supreme Court of North Carolina the power to overrule regulatory decisions made by appointees of the Governor and other executive branch officials.[20] Second, the RRA significantly undermines executive policymaking authority.

I. THE TRANSFORMATIVE EFFECTS OF THE RRA ON ADMINISTRATIVE DECISION-MAKING

For nearly forty years, the Administrative Procedure Act[21] has provided the rules of the road for administrative adjudications in North Carolina.[22] Under the APA, a "person aggrieved" by an administrative decision can file a petition for a contested case hearing before an ALJ.[23] In contrast to administrative adjudications occurring at the federal level[24] and in other states,[25] in North Carolina these hearings are not held by the administrative agency whose action is being challenged, but by the OAH.[26] North Carolina's choice to house ALJs in a central panel, though executed by statute, also affects a constitutionally sanctioned design. The constitution not only empowers the General Assembly to confer judicial power upon executive agencies[27] but also implicitly provides for the creation of a central panel. Article III, section 11 provides that "[r]egulatory, quasi-judicial, and temporary agencies may, *but need not*, be allocated

20. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1686–87 (codified as amended at N.C. GEN. STAT. § 150B-34 (2011)).

21. N.C. GEN. STAT. § 150B-1 to 150B-53 (2011).

22. Act of Apr. 12, 1974, ch. 1331, 1973 N.C. Sess. Laws 691; *see* Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. REV. 1571, 1574 (2001).

23. N.C. GEN. STAT. § 150B-23 (2011).

24. *See* Hardwicke, *supra* note 2, at 419 ("Although efforts have been made from time to time to create a central panel within the federal system, none of these efforts has gotten off the ground.").

25. A growing number of states have elected to carry out the executive branch's adjudicative functions before a central panel of ALJs. Rossi, *supra* note 4, at 57 (noting that in 2005, twenty-six states had central panels).

26. N.C. GEN. STAT. § 7A-750 (2011) (detailing the creation, status, and purpose of the Office of Administrative Hearings).

27. N.C. CONST. art. IV, § 3.

within a principal department."[28] Thus, the constitution anticipates the vesting of quasi-judicial functions in an agency set apart from the agency whose actions are the subject of the adjudication. ALJs are hired by the director of the OAH, the chief ALJ, who is appointed by the chief justice of the Supreme Court of North Carolina.[29]

With respect to the APA's contested case provisions, controversy has generally arisen in two related areas: (1) the decision-making authority of regulatory agencies in contested cases; and (2) judicial review of final decisions in contested cases. Laws effecting changes in these areas must inevitably strike a balance between agencies' regulatory authority and the right of litigants to receive a fair hearing.[30] The RRA made important changes to both the decision-making authority of state agencies in contested cases and the scope of judicial review in contested cases. These changes are outlined below.

A. Pre-RRA Decision-Making

Prior to the enactment of the RRA, ALJ decisions were not final.[31] However, agencies were restricted in their ability to reject ALJ decisions.[32] An ALJ presiding over a contested case made a decision based on "the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency."[33] After making a decision, the ALJ was required to "return the decision to the agency for a *final* decision."[34] The agency in making its final decision could only reject an ALJ's findings of fact where they were "clearly contrary to the preponderance of the admissible evidence, giving due regard to the opportunity of the administrative law judge to evaluate the credibility of witnesses."[35] The agency was required to adopt the overall decision of the ALJ

28. N.C. CONST. art. III, § 11 (emphasis added).

29. N.C. GEN. STAT. § 7A-752 (2011).

30. *See* Miller, *supra* note 13, at 1660.

31. Act of July 12, 2000, ch. 190, § 6, 2000 N.C. Sess. Laws 1284, 1286 ("[T]he administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for final decision . . . .") (amending N.C. GEN. STAT. § 150B-34(a) (2011)).

32. Prior to the 2000 Amendments to the APA, agencies were unrestricted in their ability to reverse ALJ decisions. ALJ decisions were merely "recommended decision[s]." Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Sess. Laws 987, 1000 (amending N.C. GEN. STAT. § 150A-34 (2011)). For a detailed narrative of the evolution of agency decision-making power under the APA, see Daye, *supra* note 22, at 1573–87.

33. Act of July 12, 2000, ch. 190, § 6, 2000 N.C. Sess. Laws at 1286.

34. *Id.* (emphasis added).

35. *Id.* § 7, 2000 N.C. Sess. Laws at 1287.

unless it found that the ALJ decision was contrary to the preponderance of the evidence in the record.[36] If the agency chose not to adopt the ALJ's decision, it was required to set forth its reasoning for doing so.[37] Despite these restrictions, the agency was still empowered to make its own findings of fact and conclusions of law and to issue a final decision.[38]

B. Post-RRA Decision-Making

Under the RRA, the ALJ must continue to give due regard to the demonstrated knowledge and expertise of the agency, but no longer must the ALJ return its decision to the agency for a final decision.[39] The agency is reduced to the role of a litigant in the proceeding, maintaining the right to seek judicial review of the ALJ's decision but not to issue a decision based on its own interpretation of the law and view of the facts.[40] Thus, the RRA has taken final decision-making authority completely out of the agency's hands and placed it within the ALJ's control.

C. Pre-RRA Judicial Review

Prior to the RRA, the scope of judicial review of agency decisions was dependent upon whether or not the agency chose to adopt the ALJ decision. If the agency adopted the ALJ decision, an article IV court could reverse the agency's decision if it was:

> (1) In violation of constitutional provisions; (2) In excess of the statutory authority or jurisdiction of the agency; (3) Made upon unlawful procedure; (4) Affected by other error of law; (5) Unsupported by substantial evidence . . . in view of the entire record . . . or (6) Arbitrary, capricious, or an abuse of discretion.[41]

Reviewing courts divided these grounds for reversal into two categories: the first four grounds for reversing an agency's decision were considered "law-based" inquiries, and the final two grounds were considered "fact-based" inquiries.[42]

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36. *Id.*
37. *Id.*
38. *Id.*
39. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1686–87 (codified as amended at N.C. GEN. STAT. § 150B-34 (2011)).
40. *See id.*
41. Act of July 12, 2000, ch. 190, § 11, 2000 N.C. Sess. Laws at 1291.
42. *See* N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citing Daye, *supra* note 22, at 1592 n.79).

Under the pre-RRA scheme, "law-based inquiries" received *de novo* review while "fact-based inquiries" received greater deference under the "whole record test."[43] Under the *de novo* standard, "the court considers the matter anew and freely substitutes its own judgment."[44] The whole record test, on the other hand, requires an "examination of the entire record, including the evidence which detracts from the agency's decision,"[45] but the reviewing court must limit its inquiry to determining "whether the administrative decision had a rational basis in the evidence."[46] Case law reveals no "self-executing" test for determining whether a particular issue involves a question of fact or a question of law,[47] and judges are likely to disagree on the matter.[48] Ultimately, whether a particular issue on review involves a question of law or a question of fact will depend upon how much deference the judge accords the conclusions drawn below.[49] Thus, prior to the RRA, "fact-based inquiries" were matters the court concluded should fall predominantly to the agency, whereas "law-based inquiries" were matters the court concluded ought to receive less deference.

In contrast, if the agency chose to reverse the ALJ decision, the reviewing court did not distinguish between fact-based and law-based inquiries, but rather, the entire case was reviewed *de novo*.[50] The application of *de novo* review would seem to place the ALJ decision and the agency decision on equal footing because the judge, applying *de novo* review, accorded no less deference to one decision over the other. However, the Supreme Court of North Carolina has held that while *de novo* review permits an appellate court to make its own findings of fact and conclusions of law, "an agency's interpretation of a statute is traditionally accorded some deference by appellate courts conducting de novo review."[51] The court may give "appropriate

43. *Id.* (citations omitted).

44. *In re* Appeal of the Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003).

45. Walker v. N.C. Dep't. of Human Res., 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990).

46. Henderson v. N.C. Dep't. of Human Res., 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988).

47. Daye, *supra* note 22, at 1593.

48. *See id.*

49. *See id.* at 1593–94.

50. *See* N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citing Daye, *supra* note 22, at 1592 n.79).

51. Rainey v. N.C. Dep't of Pub. Instruction, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007) (citing N.C. Sav. & Loan League v. N.C. Credit Union Comm'n, 302 N.C. 458, 465–66, 276 S.E.2d 404, 410 (1981); *see also* Miller, *supra* note 13, at 1666 ("If the agency can

weight to an agency's demonstrated expertise and *consistency in applying various statutes.*"[52]

D. Post-RRA Judicial Review

The most important change to judicial review under the RRA results naturally from the fact that the agency has been stripped of its authority to reject the ALJ decision and issue its own decision.[53] As a result, not only does the agency's decision no longer receive deference under the qualified *de novo* standard of review as discussed above, but the reviewing court does not even have the option of adopting a decision made by the agency charged with executing the regulatory program. Attorneys representing the agency may submit an appellate brief defending the challenged agency action, but the agency itself does not have an opportunity to review action taken by its employees and issue a final decision. The RRA also codified the standards judges previously applied when the agency chose to adopt the ALJ decision.[54] Where it is claimed that the ALJ decision is "[in violation of constitutional provisions," "[i]n excess of . . . statutory authority or jurisdiction," "[m]ade upon unlawful procedure," or "[a]ffected by other error of law," the court must apply the *de novo* standard of review.[55] Where it is claimed that the ALJ decision is "[u]nsupported by substantial evidence" or is "[a]rbitrary, capricious, or an abuse of discretion," the court applies the whole record test.[56]

II. THE RRA AND POWERS RESERVED TO THE JUDICIAL BRANCH

When the legislature first considered giving ALJs final decision-making authority in 1999, the constitutional debate was largely framed by the question of whether the RRA granted too much judicial authority to the executive branch.[57] This question continues

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show that the agency has consistently applied that interpretation of the law . . . then the agency's interpretation should be accorded [deference] . . . .").

52. *Rainey*, 361 N.C. at 681, 652 S.E.2d at 252 (emphasis added).

53. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1686 ("In each contested case the administrative law judge shall make a final decision . . . .") (codified as amended at N.C. GEN. STAT. § 150B-34(a) (2011)).

54. *Id.* § 27, 2011 N.C. Sess. Laws at 1689–90.

55. *Id.*

56. *Id.*

57. *See, e.g.*, Thomas F. Moffitt & Mary Penny Thompson, *Finality of ALJ Hearings*, *in* BACKGROUND INFORMATION & OPINIONS, *supra* note 11, at 20, 28 (arguing that proposed version of House Resolution 968 is unconstitutional because it creates a de facto court and because ALJ finality is not reasonably necessary to the fulfillment of OAH's purpose).

to be the focal point in the constitutional debate surrounding the RRA. This Part discusses two arguments as to why the RRA is unconstitutional based on this approach. The first argument focuses on whether the RRA fulfills the constitutional requirement that executive agencies only be granted judicial powers that are "reasonably necessary" to fulfill their purpose. The second argument focuses on whether the RRA turns the OAH into a de facto court. For reasons stated below, this Recent Development argues that the RRA does not exceed either of these limits, and thus is not an impermissible encroachment on powers constitutionally reserved to the judiciary.

A. ALJ Finality is "Reasonably Necessary" for the OAH to Fulfill Its Purpose

One argument raised by opponents of ALJ finality in 1999, and which has resurfaced with the enactment of the RRA, is that final decision-making authority falls outside of the scope of the OAH's statutory purpose.[58] Article IV, section 1 states that the "judicial power of the State shall, *except as provided in Section 3 of this Article*, be vested in the Court for the Trial of Impeachments and in a General Court of Justice."[59] In turn, article IV, section 3 permits the General Assembly to "vest in administrative agencies . . . such judicial powers as may be *reasonably necessary* as an incident to the accomplishment of the purposes for which the agencies were created."[60] In *State ex. rel. Lanier v. Vines*,[61] the Supreme Court of North Carolina explained that the question of whether a judicial power is reasonably necessary as incident to the accomplishment of the purpose for which an administrative office or agency was created must be determined "in each instance in the light of the purpose for which the agency was established and in the light of the nature and extent of the judicial power undertaken to be conferred."[62]

The first step in the *Lanier* analysis thus requires identifying the purpose for which the OAH was created. Section 7A-750 of the North Carolina General Statutes provides:

> There is created an Office of Administrative Hearings. The Office of Administrative Hearings is an independent, quasi-

58. *Id.* at 28.
59. N.C. CONST. art. IV, § 1 (emphasis added).
60. *Id.* § 3 (emphasis added).
61. 274 N.C. 486, 164 S.E.2d 161 (1968).
62. *Id.* at 488, 164 S.E.2d at 161.

> judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution.... The Office of Administrative Hearings is established to ensure that administrative decisions are made in a fair and impartial manner to protect the due process rights of citizens who challenge administrative action and to provide a source of independent administrative law judges to conduct administrative hearings in contested cases... and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process.[63]

Thomas Moffitt, the former Special Deputy Attorney General who co-authored the 1999 Attorney General opinion finding ALJ finality unconstitutional, has argued that the "OAH was created to provide ALJs to serve a *supporting* function for other agencies...."[64] Yet a plain reading of the statute supports a different view, namely that the purpose of the OAH is to provide heightened levels of fairness, independence, and due process in administrative hearings and to preserve the independent functions of each governmental branch.[65] An examination of the history of the statutory language supports this interpretation. In 2000, the General Assembly changed the description of the OAH personnel from "hearing officers" who "preside in administrative cases" to "administrative law judges" who "conduct administrative hearings."[66] Also, prior to 2000, section 7A-750 did not contain any reference to due process.[67] Therefore, it would be unwise to interpret the purpose of the OAH as providing a mere "supporting function" when the legislature apparently intended to highlight the ALJ's role as "judge" and the importance of due process to the purpose of the OAH. The General Assembly also intended for the OAH to prevent "the commingling of legislative, executive, and judicial functions."[68] One possible interpretation of this clause is that the OAH was created to assure "that the same person within the agency does not turn out to be investigator,

63. N.C. GEN. STAT. § 7A-750 (2011) (emphasis added).

64. Thomas F. Moffitt, *The New Contested Case—Administrative Law Judge As Final Decision Maker—Is this Constitutional?*, *in* REGULATING THE REGULATORS: NEW LEGISLATIVE RESTRICTIONS ON STATE AND LOCAL GOVERNMENTS III-A-4, III-A-9 (2011) (emphasis added) (on file with the *North Carolina Law Review*).

65. *See* Memorandum from Karen Cochrane Brown, Staff Att'y, Research Div., Legislative Serv. Office, N.C. Gen. Assembly, to Speaker Tillis & President Pro Tempore Berger (July 7, 2011) (quoting § 7A-750) (on file with the *North Carolina Law Review*).

66. Act of July 12, 2000, ch. 190, § 2, 2000 N.C. Sess. Laws 1284, 1285 (codified as amended at § 7A-750).

67. *See id.*

68. *Id.*

prosecutor, and judge—all in the same case."[69] Thus, to interpret the function of the OAH without reference to the limits the General Assembly imposed on agency control over contested cases is to ignore a major policy choice.

The second step in the *Lanier* analysis requires determining the "nature and extent" of the judicial power conferred upon the OAH. As discussed in Part I, the RRA charges the OAH with making findings of fact and conclusions of law and issuing final decisions in contested cases, which are subject to judicial review.[70] However, the OAH does not have the power to enforce its own decisions. The OAH is reliant upon the judiciary to provide injunctive relief and impose civil penalties.[71]

Having performed the analytical steps required by *Lanier*, it is now possible to answer the question: Is the grant of final decision-making authority to the OAH reasonably necessary for the purpose of providing fair and independent adjudication and greater due process in order to prevent the commingling of the three branches of government? The requirements of due process alone do not necessitate the grant of final decision-making authority. In *Harrell v. Wilson County Schools*,[72] the North Carolina Court of Appeals stated that "[t]he fact that an administrative tribunal acts in the triple capacity of complainant, prosecutor and judge is not violative of the requirements of due process."[73] In other words, even if the agency itself were conducting the administrative hearing, and thus acting as complainant, prosecutor, and judge, due process would not be violated. It follows that were due process all that section 7A-750 sought to accomplish, ALJ finality would not be "reasonably necessary . . . to the accomplishment of the purposes for which the OAH was created."[74]

However, with regard to the OAH's purpose in achieving fairness and independence in administrative decision-making, the argument for ALJ finality seems more convincing. In his article on

69. Daye, *supra* note 22, at 1576.

70. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1686–87 (codified as amended at N.C. GEN. STAT. § 150B-34 (2011)).

71. *See* N.C. GEN. STAT. § 7A-756(3) (2011) (giving ALJs the authority to apply to the Superior Court for an order to enforce their powers); *see also* N.C. GEN. STAT. § 7A-240 (2011) (giving the General Court of Justice original jurisdiction over all civil matters); N.C. GEN. STAT. § 7A-245 (2011) (giving the Superior Court jurisdiction over civil actions for injunctive relief compelling enforcement of statutes).

72. 58 N.C. App. 260, 293 S.E.2d 687 (1982).

73. *Id.* at 266, 293 S.E.2d at 691 (citation omitted).

74. N.C. CONST. art. IV, § 3.

the 2000 amendments to the APA, Professor Charles Daye analyzed data on the outcomes of administrative hearings in the OAH from 1985 through 1999. His analysis showed that agencies prevailed in front of ALJs seventy-five percent of the time and when agencies lost, they rejected the ALJ's decision nearly half of the time.[75] Daye observed that the regulated community could reasonably believe "the deck was stacked against them."[76] Daye's analysis suggests, at the very least, that the General Assembly could reasonably conclude that preventing the agency from rejecting an ALJ decision enhances the independence and fairness of the administrative hearing process.[77]

The standard by which the necessity of vesting judicial powers in executive agencies must be evaluated is one of reasonableness—not strict necessity. A proper reading of the requirement thus accords some leeway to the General Assembly in determining what is reasonably necessary. Because it was reasonable for the General Assembly to conclude that ALJ finality enhances the fairness and independence of the administrative hearing process, ALJ finality would likely pass the "reasonably necessary" test as articulated by the supreme court in *Lanier*.[78]

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75. Daye, *supra* note 22, at 1611.

76. *Id. But see* Richard Whisnant, *Apology for the Final Agency Decision, in* REGULATING THE REGULATORS: NEW LEGISLATIVE RESTRICTIONS ON STATE AND LOCAL GOVERNMENTS V-A-14 (2011) (arguing that statistics do not necessarily suggest agency bias but rather "that the agency usually makes the right decision to begin with") (on file with the *North Carolina Law Review*). Some scholars argue that "a high agency success rate should be expected in an efficient enforcement system." Flanagan, *supra* note 1, at 422 (arguing that litigants are frustrated with giving agencies final decision making authority not because agency decision-making is unfair, but because "the laws and regulations prohibit the conduct under review"); *see also* Mathews v. Eldridge, 424 U.S. 319, 346 (1976) ("Bare statistics *rarely* provide a satisfactory measure of the fairness of a decision-making process." (emphasis added)).

It is also important to note that sometimes the party challenging the agency decision is not a "regulated party" in the traditional sense, but rather, has been affected *indirectly* by the agency action. *See* N.C. GEN STAT. § 150B-2(6) (2011) (" 'Person aggrieved' means any person . . . directly or *indirectly* affected . . . by an administrative decision." (emphasis added)). For example, in *Anson County Citizens Against Chemical Toxins in Underground Storage v. North Carolina Department of Environment & Natural Resources*, a citizens group challenged the issuance of a permit to a company seeking to build a solid waste landfill. 167 N.C. App. 341, 341, 606 S.E.2d 350, 351 (2004). The ALJ found the agency had had "acted erroneously, failed to follow proper procedure, acted arbitrarily or capriciously, and failed to act as required by law or rule" in deciding to issue the permit. *Id.* at 342, 606 S.E.2d at 352. However, after the ALJ issued its ruling, the Department of Environment and Natural Resources chose not to adopt the ALJ's findings. *Id.*

77. *See* Daye, *supra* note 22, at 1611.

78. In Part III, this Recent Development discusses how the power to make final decisions in contested cases often involves deciding questions of regulatory policy. While

B. *The RRA Does Not Turn the OAH into a De Facto Court of Law*

Another argument for finding the RRA unconstitutional is that it turns the OAH into a de facto court of law.[79] While the General Assembly may grant an executive agency judicial powers that are reasonably necessary for the fulfillment of a statutory purpose,[80] the proposition that the General Assembly cannot do so to the extent that it creates a de facto court of law should be relatively uncontroversial. Article IV, section 1, prohibits the General Assembly from depriving the judicial branch of any "power or jurisdiction that rightfully pertains to it."[81] Were the OAH to function as a de facto court of law, the General Assembly would have deprived the judicial branch of jurisdiction. Furthermore, the General Assembly may not grant judicial power to the extent that the OAH is elevated beyond the status of a "quasi-judicial agency," as defined in section 7A-750.[82] Were the OAH to function as a de facto court of law, it would no longer be a "quasi-judicial agency." Although the North Carolina Constitution certainly allows for significant overlap between the executive and judicial branch, the OAH may not perform duties that the constitution reserves *solely* to the judiciary.

The North Carolina Court of Appeals has previously affirmed ALJ finality under certain circumstances—vitiating the argument that the OAH has become a de facto court. In *Employment Security Commission v. Peace*,[83] the court upheld the right of ALJs to issue final decisions in cases deferred by a federal agency, the Equal

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this Recent Development does not pursue it, there is an argument to be made that deciding policy matters goes beyond the scope of what is "reasonably necessary" to the purpose for which the OAH was created. *See, e.g.*, Moffitt & Thompson, *supra* note 57, at 28. This Recent Development approaches this problem through the lens of the separation of powers doctrine. Part III will attempt to show that while the North Carolina Constitution allows the legislature to vest judicial powers in an executive agency, because a judicial appointee directs the OAH, it cannot do so to the extent that it gives the OAH control over executive policymaking functions.

79. *See* Letter from the N.C. Office of the Att'y Gen. to Ronald G. Penny, State Pers. Dir., Office of State Pers. (July 6, 1999), *in* BACKGROUND INFORMATION & OPINIONS, *supra* note 11, at 12 ("[W]hen the General Assembly vests a power constitutionally reserved to the judiciary in an administrative agency, it creates a court in violation of Article IV, § 1 of the Constitution."); Moffitt, *supra* note 64, at 29 ("Granting ALJs the authority to make final agency decisions also would convert OAH into a de facto court system in violation of Article IV, § 2 of the Constitution of North Carolina.").

80. N.C. CONST. art. IV, § 3.

81. *Id.* § 1.

82. N.C. GEN. STAT. § 7A-750 (2011); *see also* Letter from the N.C. Office of the Att'y Gen. to Ronald G. Penny, *supra* note 79, at 13.

83. 128 N.C. App. 1, 493 S.E.2d 466 (1997).

Employment Opportunity Commission ("EEOC").[84] This matter arose from a petition filed by the North Carolina Employment Security Commission ("ESC") seeking judicial review of an ALJ final decision reinstating an employee, Peace, who had filed a retaliatory discharge claim under Title VII of the Civil Rights Act of 1964.[85] The ESC argued that by making a final decision in the case, the OAH was "functioning as a court in violation of N.C. Const. art. IV, §1."[86] The court concluded that "because OAH was established as part of the executive branch pursuant to N.C. Const. art. III, §11, it is not a court, and does not function as such when making final agency decisions on charges deferred from EEOC."[87] Proponents of the de facto court argument have contended that when ALJs find facts, apply the law to the facts, and decide the outcome of controversies, they act as courts in the exercise of "the power of Judging."[88] While the *Peace* decision should not be understood to validate all instances of ALJ finality,[89] it does implicitly reject this line of argument. In *Peace*, the OAH exhibited all of the characteristics said to belong to a de facto court. The ALJ made findings of facts, applied the law to the facts, and decided the outcome of controversy, issuing a final agency decision that Peace be reinstated.[90]

The precise question of whether ALJ finality turned a central panel into a de facto court was also discussed by the Louisiana Supreme Court in *Wooley v. State Farm*.[91] While many of the

84. While the RRA constitutes a significant expansion of OAH authority, the OAH has always had final decision-making authority in a few exceptional cases. *See, e.g.*, N.C. GEN. STAT. § 7A-759(e) (2011) (providing that in its role as deferral agency for cases deferred by the EEOC, the OAH has authority to issue a "final agency decision [that] is binding on the parties").

85. *Peace*, 128 N.C. App. at 5–6, 493 S.E.2d at 469.

86. *Id.* at 7, 493 S.E.2d at 470.

87. *Id.* at 8–9, 493 S.E.2d at 471 (citing Utils. Comm'n v. Finishing Plant, 264 N.C. 416, 422, 142 S.E.2d 8, 12 (1965)) ("Administrative agencies . . . are distinguished from courts. They are not constituent parts of the General Court of Justice.").

88. Letter from the N.C. Office of the Att'y Gen. to Ronald G. Penny, *supra* note 79, at 12 (quoting State *ex rel.* Wallace v. Bone, 304 N.C. 591, 597, 286 S.E.2d 79, 82 (1982)).

89. *See infra* note 120 (arguing that the ruling in this case is not dispositive with respect to the separation of powers argument discussed in Part III).

90. *Peace*, 128 N.C. App. at 5, 493 S.E.2d at 469.

91. 2004-0882, p. 5 (La. 1/19/05); 893 So. 2d 746, 753. In *Wooley*, the Louisiana Supreme Court heard a Petition for Declaratory Judgment filed by the Louisiana Commissioner of Insurance alleging that Louisiana's APA was unconstitutional (the Commissioner could not seek direct judicial review of the ALJ decisions because the Louisiana APA prohibits state agencies from seeking judicial review of administrative rulings). *Id.* at p. 6; 893 So. 2d at 753. The petition stemmed from an administrative hearing in which an ALJ found that the Department of Insurance had erred in failing to approve a Rental Condominium Unit owners' policy form (RCU form) submitted by State

constitutional provisions at issue in *Wooley* differ significantly from those at issue in North Carolina, the court's rationale and discussion of this precise question present a convincing argument for why the OAH might not be considered a de facto court under the RRA.

Louisiana, like North Carolina, has a central panel agency—the Division of Administrative Law ("DAL").[92] The Louisiana APA delegates authority to conduct adjudications for certain agencies to the DAL and provides that those agencies shall have no authority to override the DAL's decision or the order of the ALJ employed by the DAL.[93] Furthermore, unlike the North Carolina APA, the Louisiana APA precludes agencies from seeking judicial review of adverse rulings issued by the DAL.[94]

A Louisiana district court found the Louisiana APA unconstitutional on various grounds, including that it "divest[ed] the district courts of original jurisdiction by creating a new and independent judiciary within the executive branch."[95] In other words, the district court essentially concluded that the Louisiana APA created a de facto court of law within the executive branch. The Louisiana Supreme Court disagreed, holding that the DAL differed in constitutionally significant ways from a court in the judiciary.[96] First, the court explained that the DAL's decisions did not have the force of law: "ALJs do not have the power to enforce their decisions and orders, a power that unquestionably lies in Article V courts."[97] Second, the court found significant the fact that the DAL's rulings occurred in what the court called a "regulatory context."[98] The court concluded that "[w]hile the adjudicative and fact-finding powers exercised by the ALJ mimic those exercised by Article V courts, . . .

Farm Fire and Casualty Insurance Company. *Id.* at p. 2–4, 751–52. The Department of Insurance determined that the RCU form filing "did not comply with applicable sections of the Insurance Code." *Id.* at p. 3; 893 So. 2d at 751–52. The ALJ presiding in the case disagreed, finding that the RCU form "complied in wording and meaning with the applicable law," and so ordered the Department of Insurance to approve the RCU form. *Id.* at p. 4; 893 So. 2d at 752.

92. *See id.* at p. 1; 893 So. 2d at 750.

93. *See* LA. REV. STAT. ANN. § 49:992(B)(2) (2006 & Supp. 2012) (providing that "in an adjudication commenced by the division [of administrative law], the administrative law judge shall issue the final decision or order").

94. *See* LA. REV. STAT. ANN. § 49:964(A)(2) (2006) (providing that "[n]o agency or official thereof, or other person acting on behalf of an agency or official thereof shall be entitled to judicial review under this Chapter").

95. *Wooley*, 2004-0882 at p. 20; 893 So. 2d at 762.

96. *Id.* at p. 23–24; 893 So. 2d at 764.

97. *Id.* at p. 23; 893 So. 2d at 764.

98. *Id.* at p. 22; 893 So. 2d at 763.

they occurred in the regulatory context and were a quasi-judicial function rather than a strictly judicial function."[99] The court therefore concluded, "the Act does not confer judicial power on an executive branch agency."[100]

Notwithstanding the differences between the Louisiana Constitution and the North Carolina Constitution, the rationale underlying the *Wooley* court's conclusions can be easily applied to the question of whether the OAH constitutes a de facto article IV court under the RRA. Like the Louisiana DAL, the OAH is reliant upon the judiciary for enforcement of its decisions, and, to the extent that the DAL can be said to adjudicate within a "regulatory context," the OAH functions in a regulatory context as well. These key differences between the OAH and article IV courts—the OAH's limited jurisdiction and lack of enforcement power—provide compelling reasons for concluding that ALJ finality does not pose a threat to powers reserved to the judiciary under the constitution.

The North Carolina Court of Appeals' reasoning in *Peace*,[101] along with surviving limits on OAH authority—limits which the Louisiana Supreme Court found so crucial to its analysis in *Wooley*—provide persuasive reasons for rejecting the de facto court of law argument discussed above. Yet the proposition that ALJ finality does not unconstitutionally strip the *judicial* branch of authority does not necessarily mean that the separation of powers analysis will not yield a different result when focused on potential threats to *executive* authority. Thus, this Recent Development considers whether ALJ finality impermissibly undermines powers constitutionally reserved to the executive branch in Part III.

99. *Id.*
100. *Id.* at p. 22–23; 893 So. 2d at 763.
101. *See supra* text accompanying notes 83–90.

III. THE RRA AND POWERS RESERVED TO THE EXECUTIVE BRANCH[102]

In North Carolina, a potent history of distrust for executive power is traceable to the mid-18th century, when Royal Governors' unbridled authority over all aspects of government incensed the colonists into revolution.[103] In 1776, the fledgling state chose to severely limit the Governor's power, ratifying a constitution under which the legislature elected the Governor[104] as well as a seven-person council to "advise the Governor in the execution of his office."[105]

The institutional effects of this distrust for executive power subsisted long after North Carolina's nascent years, even as the state distanced itself from its colonial past. As a frustrated Governor James G. Martin remarked as recently as 1985 during a North Carolina House of Representatives committee hearing on the gubernatorial veto, "I understand the 18th century concern about Royal Governors and how that carried over into the early 19th century. It is now nearing the end of the 20th century: they are not coming back. We have not had a Royal Governor for 209 years. We won!"[106] Nevertheless, a 1991 study ranked North Carolina's Governor as the

102. Part III of this Recent Development is primarily informed by the policy arguments of administrative scholars who oppose ALJ finality. Several scholars have voiced concerns that ALJ finality violates separation of powers norms but none has analyzed the constitutional implications of ALJ finality in any particular jurisdiction. For example, Professor Jim Rossi contends that courts have failed to consider what he terms "alternative functional arguments" when considering ALJ finality; for instance, "whether giving ALJs the authority to issue final adjudicative decisions undermines the legislature's delegation of regulatory authority to administrative agencies or interferes with core executive branch functions considered essential to accountability under separation of powers norms." Rossi, *supra* note 4, at 65. While Rossi notes the potential for alternative functional arguments, he focuses his analysis on the potential for remedying problems associated with ALJ finality through judicial review. *Id.* at 66. *See generally* Flanagan, *supra* note 1, at 429 (arguing that judicial deference to ALJ final decisions should be limited to questions of "historical or empirical facts, or those dependent upon credibility determinations by the ALJ"); Frank Sullivan, Jr., *Some Questions to Consider Before Indiana Creates a Centralized Office of Administrative Hearings*, 38 IND. L. REV. 389 (2005) (arguing that ALJ finality is inconsistent with the traditional prerogatives of the executive branch).

103. Ran Coble, *Pro: North Carolina Should Adopt a Gubernatorial Veto*, N.C. INSIGHT, Mar. 1990, at 13, http://www.nccppr.org/drupal/sites/default/files/protected/insight_article/pdf/PRO-NC_Should_Adopt_a_Gubernatorial_Veto.pdf.

104. N.C. CONST. of 1776, § 15.

105. *Id.* § 16.

106. *See* Coble, *supra* note 103, at 13.

third least powerful Governor in the country,[107] and it wasn't until 1996 that North Carolina became the *last* state to give its Governor the veto power.[108]

Advocates of executive authority in North Carolina have been mildly successful at invigorating the executive branch through constitutional revision.[109] However, a lingering distrust of executive power, political differences between the General Assembly and executive branch officials,[110] and rampant frustration amongst members of the business community[111] has led the General Assembly to place further restrictions on executive authority through the RRA.

The legislature's success at eliminating executive decision-making authority in contested cases through the RRA was perhaps made easier by the fact that the text of the constitution is largely silent with respect to the content of "executive power." In fact, what constitutes executive power is mostly left to the General Assembly. While article III, section 5 provides that "[t]he Governor shall take care that the laws be faithfully executed," it also states that "the General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State. . . ."[112] This

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107. Thad L. Beyle, *The Powers of the Governor in North Carolina: Where the Weak Grow Strong—Except for the Governor*, N.C. INSIGHT, Mar. 1990, at 27, 43, http://www.nccppr.org/drupal/sites/default/files/protected/insight_article/pdf/The_Powers_of_the_Governor_of_NC.pdf.

108. N.C. CONST. art. II, § 22; *see also Last Governor Without Veto Could Get It*, N.Y. TIMES, Feb. 12, 1995, at 27, *available at* http://www.nytimes.com/1995/02/12/us/last-governor-without-veto-could-get-it.html.

109. *See* Arch T. Allen, III, *A Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049, 2067–69 (1999).

110. In November of 2010, Republicans took control of the North Carolina General Assembly for the first time in over a century. *See* Lynn Bonner & Michael Miesecker, *GOP Takes the General Assembly*, NEWS & OBSERVER (Raleigh, NC), Nov. 3, 2010, at 1A, *available at* http://www.newsobserver.com/2010/11/03/777711/gop-takes-the-general-assembly.html. The next year, Governor Beverly Perdue, a Democrat, would exercise her veto power more times than any previous North Carolina Governor. Fannie Flono, *Gov. Bev Perdue and Women in Politics*, CHARLOTTE OBSERVER, Jan. 27, 2012, at 11A, *available at* http://www.charlotteobserver.com/2012/01/27/2962272/gov-bev-perdue-and-women-in-politics.html.

111. *Cf.* Miller, *supra* note 13, at 1659 (noting the business lobbies' support for revisions to the APA in 2000 limiting agency decision-making authority).

112. N.C. CONST. art. III, § 5(10) ("The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration."). Article III, section 5, subsection 8 of the state constitution provides that the Governor shall "nominate . . . all officers whose appointments are not otherwise provided for." *Id.* However, the state's supreme court has interpreted this clause to mean not otherwise provided for by the

imbalance in constitutional authority leaves the executive vulnerable to incremental encroachments upon the regulatory functions traditionally reserved to the executive branch.[113] This vulnerability is evidenced by the legislative evolution of the APA and significant growth in OAH power.[114] The three major revisions to contested case procedure under the APA—in 1985, 2000, and 2011—have each significantly reduced the authority of state agencies in the context of administrative adjudication.[115]

Yet while the constitution gives the General Assembly authority to define the scope of regulatory programs, North Carolina's separation of powers jurisprudence makes clear that the General Assembly may not vest in other branches powers that undermine the executive branch's constitutional obligation to execute those programs.[116] Under the RRA, ALJs make findings of fact and conclusions of law, and issue final decisions in contested cases,[117] leaving state agencies without the opportunity to render decisions concerning the regulatory programs they administer.[118] When courts review ALJ decisions, they show the same deference previously accorded to regulatory agencies under prior versions of the APA.[119] This Part argues that ALJ finality undermines authority

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constitution *or by statute. See* State *ex rel.* Martin v. Melott, 320 N.C. 518, 524, 359 S.E.2d 783, 787 (1987). The General Assembly therefore has the power to vest the authority to appoint the Governor's own officers in someone other than the Governor. *Id.*; *see, e.g.*, N.C. GEN. STAT. § 7A-750 (2011) (vesting the power to appoint the chief ALJ in the chief justice of the Supreme Court of North Carolina).

113. *See* Karen Cochrane-Brown, *The Constitutionality of Administrative Law Judges as Final Decision Maker*, *in* REGULATING THE REGULATORS: NEW LEGISLATIVE RESTRICTIONS ON STATE AND LOCAL GOVERNMENTS III-A-16 (Oct. 27, 2011) ("The Constitution provides that the General Assembly shall determine what agencies are created and what their relative functions, powers and duties shall be.") (on file with the *North Carolina Law Review*).

114. The three major revisions to the APA have incrementally increased the power of the OAH. ALJ decisions under the APA began as "recommended decisions" under the 1985 revisions to the APA. Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Sess. Laws 987, 1000 (amending the now codified N.C. GEN. STAT. § 150B-34 (2011)). ALJs were then allowed to make decisions, but required to accord state agencies deference under the 2000 amendments to the APA. Act of July 12, 2000, ch. 190, § 11, 2000 N.C. Sess. Laws 1284, 1286 (requiring ALJs to decide the case with "due regard to the demonstrated knowledge and expertise of the agency"). Today, ALJ decisions are "final decision[s]" under the RRA. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1686 (codified as amended at § 150B-34).

115. *See supra* Part I.

116. *See infra* text accompanying notes 125–26.

117. Regulatory Reform Act, ch. 398, § 18.

118. *Id.*

119. *Id.* at 1689–90 (codified as amended at N.C. GEN. STAT. § 150B-51 (2011)).

constitutionally reserved to the executive branch by vesting in an appointee of the chief justice the power to overrule regulatory decisions made by executive officers, and by stripping state agencies of policymaking authority required for the enforcement of state regulatory programs.[120]

A. *The Express Separation of Powers Doctrine in North Carolina*

Unlike the Federal Constitution, the North Carolina Constitution contains an express provision mandating the separation of the three branches of government.[121] There are two foundational cases interpreting this constitutional provision: *State ex rel. Wallace v. Bone*[122] and *Advisory Opinion in re Separation of Powers*.[123] In *Bone*, the court considered whether legislators, serving in the General Assembly, could serve as members of a statutorily created agency within the executive branch—specifically the Environmental Management Commission.[124] The court stated that North Carolina has "strictly adhered to the principle of separation of powers . . . for more than 200 years" and that separation of powers principles "do not tolerate legislative *encroachment or control over the function and power of the executive branch.*"[125] The court concluded that once the legislature creates a government body to implement a regulatory program it cannot "retain some control over the process of implementation by appointing legislatures to the governing body of the instrumentality."[126]

In *Advisory Opinion in re Separation of Powers*, the advising justices stated that under article III, section 5(3), which provides for the administration of the state budget by the Governor, and under article I, section 6, the separation of powers provision, the Governor, not the General Assembly, controls transfers within the budget and

120. In *Employment Security Commission of North Carolina v. Peace*, the North Carolina Court of Appeals considered the constitutionality of ALJ finality when the OAH functioned as a deferral agency for cases deferred by the Equal Employment Opportunity Commission (a federal agency). 128 N.C. App. 1, 7–9, 493 S.E.2d 466, 470–71 (1997). This case did not involve OAH review of a state agency's regulatory action. Because the OAH itself was functioning as a principal agency, OAH's final decision-making authority did not threaten the regulatory authority of other state executive agencies. *Id.*

121. *See* N.C. CONST. art. I, § 6.

122. 304 N.C. 591, 286 S.E.2d 79 (1982).

123. 305 N.C. 767, 295 S.E.2d 589 (1982).

124. *Bone*, 304 N.C. at 606–07, 286 S.E.2d at 87–88.

125. *Id.* at 599–601, 286 S.E.2d at 83–84 (emphasis added).

126. *Id.* at 608, 286 S.E.2d at 88.

disbursement of federal block grants to the state.[127] The justices noted that the principle of separation of powers is one to which the people of North Carolina are "firmly and explicitly" committed.[128] Thus, the Supreme Court of North Carolina has made clear that it is a fundamental principle of the constitution that one branch of government may not "encroach upon" or "control" the "functions and power" of another branch of government.

B. The Appointment of the Director of the OAH by the Chief Justice of the Supreme Court

How can the enhanced power of the OAH be said to encroach upon executive power when the OAH itself is an executive branch agency? Insofar as the OAH was established pursuant to article III, section 11, the OAH is an executive agency. However, this distinction is largely administrative.[129] Not only does the OAH bear several hallmarks of an article IV court,[130] but the chief justice of the Supreme Court of North Carolina, not the Governor, appoints the chief ALJ.[131] This "executive agency" therefore has no accountability whatsoever to any authority within the executive branch. Because the General Assembly vested authority in the chief justice to appoint the most senior officer of OAH, the separation of powers doctrine, as articulated by the supreme court in *Bone*,[132] should be applied to alterations in the duties and functions of the OAH.

1. *Martin v. Melott* and the Appointment Power

North Carolina's decision to vest the power to appoint the chief ALJ in the chief justice stands in contrast to other states where the Governor possesses that power.[133] In *State ex. rel. Martin v. Melott*,[134] the Supreme Court of North Carolina upheld the constitutionality of vesting this appointment power in the chief justice.[135] The court

127. 305 N.C. at 774–76, 295 S.E.2d at 592–94.

128. *Id.* at 774, 295 S.E.2d at 592.

129. *See, e.g.*, Flanagan, *supra* note 1, at 429 (characterizing central panels as part of the executive branch solely for "administrative purposes").

130. See *supra* Part II.

131. N.C. GEN. STAT. § 7A-752 (2011).

132. State *ex rel.* Wallace v. Bone, 304 N.C. 591, 599, 286 S.E.2d 79, 83 (1982).

133. *See, e.g.*, CAL. GOV'T CODE § 11370.2 (West 1992) (stating that the office of administrative hearings is under direction of one director appointed by the Governor); MINN. STAT. ANN. § 14.48 (West 1997 & Supp. 2012) (creating administrative hearings office headed by the chief ALJ, who is appointed by the Governor).

134. 320 N.C. 518, 359 S.E.2d 783 (1987).

135. *Id.* at 524, 359 S.E.2d at 787.

handed down the *Melott* decision in response to a declaratory judgment action brought by Governor James G. Martin challenging the constitutionality of section 7A-752.[136] The Governor argued that granting the power to appoint the chief ALJ to the chief justice violated the separation of powers clause, as well as article III, section 5(8), which authorizes the Governor to appoint "all officers whose appointments are not otherwise provided for."[137] A three-member plurality[138] affirmed the chief justice's authority to appoint the chief ALJ.[139]

The plurality opinion first addressed whether or not giving the chief justice the power to appoint the chief ALJ violated the Governor's constitutional right to appoint "all officers whose appointments are not otherwise provided for."[140] The plurality's holding hinged on a key doctrinal phrase, addressing whether or not the clause "otherwise provided for" meant otherwise provided for *by the constitution* or otherwise provided for by the constitution *or by statute*. In a prior case, interpreting the North Carolina Constitution of 1868, the court had stated that "the words 'otherwise provided for' meant otherwise provided for by the Constitution."[141] This interpretation would suggest that only the Governor has the power to appoint the chief ALJ, as the chief ALJ's appointment is not "otherwise provided for by the Constitution."[142] However, after examining the history of this provision, the plurality concluded that prior judicial construction of the provision was not sufficiently "well settled" to be binding on the court.[143] The plurality interpreted "otherwise provided for" to mean otherwise provided for by the constitution or by statute.[144]

Next, the plurality considered whether the appointment of the chief ALJ by the chief justice violated the separation of powers

136. *Id.* at 518, 359 S.E.2d at 783. Section 7A-752 of the North Carolina General Statutes provides, "[t]he Chief Administrative Law Judge of the Office of Administrative Hearings shall be appointed by the Chief Justice for a term of office of four years .... A Chief Administrative Law Judge may continue to serve beyond his term until his successor is duly appointed and sworn ...." § 7A-752.

137. *Melott*, 320 N.C. at 520, 522, 359 S.E.2d at 783, 785–86.

138. After the chief justice recused himself, the court was reduced to six members. Allen, *supra* note 109, at 2080. Arch T. Allen was the counsel of record in the *Melott* case, representing Governor James G. Martin. 320 N.C. at 519, 359 S.E.2d at 785.

139. *Melott*, 320 N.C. at 520, 524, 359 S.E.2d at 785, 787.

140. N.C. CONST. art. III, § 5(8); *Melott*, 320 N.C. at 520, 359 S.E.2d at 785.

141. *Melott*, 320 N.C. at 521, 359 S.E.2d at 785.

142. *Id.*

143. *Id.*

144. *Id.* at 524, 359 S.E.2d at 787.

clause.[145] Despite the apparent relevance of *Wallace* and *In Re Separation of Powers*, the plurality stated, without explanation, "*Wallace* is not authority for this case."[146] According to the plurality, the statute could only be said to violate the separation of powers doctrine if "appointment of the [chief ALJ] is the exercise of executive power."[147] "[E]xecutive power," the plurality explained, means "the power of executing the laws," and "[t]he appointing of someone to execute the laws does not require the appointing party to execute the laws."[148] Therefore, the plurality concluded, because the chief justice's appointment of the chief ALJ did not involve the "exercise of executive power," section 7A-752 did not violate the separation of powers clause.[149]

2. *Melott* in the Wake of the RRA

The power of the chief justice to appoint the chief ALJ is more troubling today than it was at the time *Melott* was decided. Indeed, one could argue that the decision reached by the plurality in *Melott* and its failure to engage with separation of powers precedent may have rested upon the limited authority of the OAH at that time. In 1987, when *Melott* was decided, administrative adjudications were governed by the 1985 version of the APA, under which state agencies were the final decision-makers in contested cases.[150] The OAH issued "recommended decisions" and agencies had broad discretion to accept or reject the ALJ's factual findings and conclusions of law.[151] The chief ALJ was not empowered to reverse decisions made by the

145. *Id.* at 522, 359 S.E.2d at 786.

146. *Id.*

147. *Id.* at 523, 359 S.E.2d at 787.

148. *Id.*

149. *Id.* The wisdom of the plurality's decision in *Melott* is persuasively criticized by Arch T. Allen, III, who served as counsel of record for the Governor in the case. Allen, *supra* note 109. Allen argues that "American courts have recognized that the power of appointment is an executive function and that legislative attempts to usurp that power violate the separation-of-powers doctrine." *Id.* at 2070; *see also* State *ex rel.* White v. Barker, 89 N.W. 204, 209–10 (Iowa 1902) (holding that judges cannot constitutionally appoint agency board members); Op. of the Justices, 309 N.E.2d 476, 479–80 (Mass. 1974) (holding that state chief justice cannot constitutionally appoint non-judicial officers or agency board members); State *ex rel.* Young v. Brill, 111 N.W. 639, 651 (Minn. 1907) (holding that district judges cannot constitutionally appoint agency board members); Application of O'Sullivan, 158 P.2d 306, 309–10 (Mont. 1945) (holding that judicial appointment of city attorney is unconstitutional).

150. Act of July 12, 1985, ch. 746, § 1, 1985 N.C. Sess. Laws 1000, 1000 (amending N.C. GEN. STAT. § 150A-34 (2011)).

151. *Id.*

Governor and executive branch officials.[152] Thus, the Governor's inability to appoint or remove the chief ALJ may not have seemed any great threat to executive power at the time *Melott* was decided.

However, the new role of the OAH under the RRA brings into stark relief the problematic nature of the supreme court's ruling in *Melott*. Under the RRA, the OAH, headed by an appointee of the chief officer of the judiciary, has the power to overrule regulatory decisions made by the Governor and his appointees.[153] The chief ALJ no longer has the "inferior status" he once held.[154] Not only do the chief ALJ and his appointees have the power to overrule decisions made by executive agencies, but the chief ALJ is accorded deference by the same governmental branch responsible for his appointment.[155] This is particularly troubling with respect to decisions involving matters of regulatory policy with which the agency—and not the OAH—has been charged with enforcing.[156]

Vesting the appointment power of the chief ALJ in the chief justice thus creates a scenario in which an appointee of the judiciary is in a position to control executive functions. Prior to the enactment of the RRA, ALJs did not have greater authority than executive agencies in reaching decisions in contested cases. With the enactment of the RRA, however, an appointee of the judiciary now has greater authority over contested regulatory decisions than the regulators themselves. This structure of administrative decision-making presents the "form" of the constitutional problem—the substantive implications of the problem are discussed in Part III.C.

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152. *Id.*

153. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1686–87 (codified as amended at N.C. GEN. STAT. § 150B-34 (2011)).

154. Under the United States Constitution, an executive officer can be appointed by a court executive officer as an "inferior officer." N.C. CONST. art. II, § 2, cl. 2. In *Morrison v. Olson*, the United States Supreme Court concluded that an independent counsel, responsible for investigating and prosecuting government officials, was an "inferior officer" under the appointments clause. 487 U.S. 654, 672 (1988). Therefore, the Court concluded that Congress could vest the appointment power in a court. *Id.* at 677. The Court also addressed the question of whether congressional "good-cause" restrictions on removal of an independent counsel violated the principle of separation of powers. *Id.* at 685. To answer this question, the Court said it had to determine "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Id.* at 691. The Court concluded that the removal restrictions did not violate the separation of powers because they did not interfere with the functions of the Executive Branch. *Id.* at 693.

155. *See* Regulatory Reform Act, ch. 398, § 18.

156. *See infra* Part III.C.

C. *Interference with Agency Policymaking Functions*

In the modern administrative state, administrative adjudications are more than just hearings to determine the rights and obligations of regulated parties. They play a key role in agency policy development[157] and agency self-governance.[158] Adjudications also provide an opportunity for agencies to fulfill their responsibility to "provide explanations for [their] policy choices" and to consistently apply interpretations of statutes and rules.[159]

One context in which questions of policy arise during administrative adjudication is statutory interpretation. North Carolina judges have acknowledged the importance of agency policy development by deferring to agency statutory interpretations. At the federal level, it is a long established principle that agency statutory interpretations require deference.[160] While some scholars have criticized such deference on separation of powers grounds,[161] others have argued that the separation of powers doctrine *requires* showing deference to agency statutory interpretations.[162] These scholars correctly recognize that regulatory agencies have a constitutional duty to carry out the matters of regulatory policy assigned to them by the legislature.[163] Interpreting statutory ambiguities in accordance with

157. *See generally* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 49 (2005) (discussing the policy contributions of administrative adjudicators).

158. Richard Whisnant, *Apology for the Final Agency Decision*, *in* REGULATING THE REGULATORS: NEW LEGISLATIVE RESTRICTIONS ON STATE AND LOCAL GOVERNMENTS V-A-15 (2011) ("Agencies are not monolithic, even though they are commonly depicted that way. An especially important distinction exists between appointed and career levels .... The final *agency* decision serves as an important way to force communicating between these agency sub-units." (emphasis added)) (on file with the *North Carolina Law Review*); *see also* Flowers v. Blackbeard Sailing Club, Ltd., 115 N.C. App. 349, 353, 444 S.E.2d 636, 638 (1994) ("The administrative body with expertise in the subject matter of the action should be given the first opportunity to correct any errors.").

159. Rossi, *supra* note 4, at 65.

160. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (establishing a doctrine for according significant deference to agency interpretations if not in conflict with the unambiguously expressed intent of Congress).

161. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 621 (1996) (arguing that *Chevron*'s concept of deference conflicts with the judicial branch's constitutional duty to interpret the law) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).

162. *See, e.g.*, Sullivan, *supra* note 102, at 397 ("[T]he agency ... is also the entity charged under the constitutional order with carrying out the matter at issue—it is the entity under the Constitution with primacy for executing policy on that subject.").

163. *See Chevron*, 467 U.S. at 866 (1984) ("The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the

policy goals falls within the purview of this duty.[164] At the state level, courts do not universally accord deference to regulatory agencies' interpretations of the statutes they implement.[165] However, in North Carolina, courts have accorded *some* deference to agencies' statutory interpretations.[166]

Recently in *Rainey v. North Carolina Department of Public Instruction*, the Supreme Court of North Carolina affirmed the right of a trial court when reviewing an administrative decision *de novo* to "consider[] the agency's expertise, and previous interpretations of the statutes it administers, as demonstrated in the rules and regulations adopted by the agency or *previous decisions outside of the pending case*."[167] The court found that according deference to agency interpretations of law did not conflict with section 150B-51(c)'s definition of the *de novo* standard of review, which provides that the reviewing court "shall not give deference to any prior decision made in the case . . . ."[168] The court interpreted section 150B-51(c) to mean only that the reviewing court could not defer to prior decisions "in the *specific* case."[169] Section 150B-51(c) does not prohibit courts from deferring to an agency's previous interpretations of the same statute in other cases so long as the interpretation has been consistently applied.[170]

Under the RRA, ALJs must give due regard to agency expertise. However, the opportunity to receive deference from a reviewing

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public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.' " (quoting TVA v. Hill, 437 U.S. 153, 195 (1978))).

164. *See id. But see* Hardwicke, *supra* note 2, at 435 ("Ideally, the agency policy, its goals and missions, are statutorily established or published in the code of state regulations.").

165. *See* Rossi, *supra* note 4, at 73.

166. *In re* Appeal of N.C. Sav. & Loan League, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981).

167. Rainey v. N.C. Dep't of Pub. Instruction, 361 N.C. 679, 681, 652 S.E.2d 251, 252 (2007); *see also* Craven Reg'l Med. Auth. v. N.C. HHS, 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006) ("[W]hen a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute . . . as long as the agency's interpretation is reasonable and based on a permissible construction of the statute.' " (quoting Carpenter v. N.C. Dep't of Human Res., 107 N.C. App. 278, 279, 419 S.E.2d 582, 584 (1992))); Miller, *supra* note 13, at 1665–66 ("[I]f the agency's interpretation of the law is not simply a 'because I said so' response to the contested case, then the agency's interpretation should be accorded the same deference to which the agency's construction of the law was entitled [prior to the 2000 amendments to the APA].").

168. *Rainey*, 361 N.C. at 681, 652 S.E.2d at 251–52 (quoting N.C. GEN. STAT. § 150B-51(c) (2011)).

169. *Id.* (citing § 150B-51(c)).

170. *Id.*

court is no longer available to the agency because the final decision being reviewed belongs not to the agency but to the ALJ.[171] Furthermore, because the agency no longer has the ability to issue final decisions in contested cases, the agency loses one of its tools for demonstrating consistency in statutory interpretation. According to the *Rainey* court, consistency in "previous decisions" provides the basis for deference.[172] Implicit in the *Rainey* court's rationale is that consistency in the enforcement and implementation of regulatory programs should be encouraged, not undermined, by the judicial process.

In addition to eliminating the deference traditionally accorded to agency statutory interpretations, the RRA also prevents agencies from making factual determinations that involve questions of policy.[173] While some factual inquiries involve gathering empirical facts and making credibility determinations, non-empirical policy

171. Regulatory Reform Act of 2011, ch. 398, § 18, 2011 N.C. Sess. Laws 1679, 1689–90 (codified as amended at N.C. GEN. STAT. § 150B-34 (2011)).

172. *Rainey*, 361 N.C. at 681, 652 S.E.2d at 252.

173. In North Carolina, agencies have not traditionally been accorded the same latitude in adopting new policies through adjudication as federal administrative agencies. The United States Supreme Court held in *SEC* v. *Chenery Corp.* that "the choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." 332 U.S. 194, 203 (1947) (citations omitted). In North Carolina, however, courts have placed restrictions upon an agency's ability to make ad hoc policy determinations during litigation. In *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau,* the Supreme Court of North Carolina adopted a rule whereby agencies faced with "the alternative of proceeding by rule making or by adjudication," should usually proceed by rulemaking. 300 N.C. 381, 416, 269 S.E.2d 547, 570 (1980). However, the supreme court held that this presumption is by no means absolute. Agencies are permitted to make ad hoc policy decisions where "there is a danger that [proceeding through formal rulemaking] would frustrate the effective accomplishment of the agency's functions." *Id.* Thus the court acknowledged not only that in some instances proceeding ad hoc would be permitted, but also that policymaking through adjudication is sometimes essential to the fulfillment of agency functions. The court cited instances where the "agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule," or where the problem is so "specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Id.* (internal quotations omitted). Thus, while limited as compared with the carte blanche approach to adjudicatory policymaking at the federal level, policymaking nonetheless plays an important role in administrative adjudication in North Carolina. *See, e.g.*, Moffitt, *supra* note 64, at III-A-11 ("Making a final agency decision in a contested case enables an agency . . . to flesh out its interpretation of its regulatory program and to articulate, establish and clarify its policy in specific factual settings—all essential to effective decision-making by executive branch agencies in order to execute the laws enacted by the executive branch."). This section highlights how policy considerations factor into factual inquiries in subtle ways that likely would not exceed the limits that the supreme court places on agency policymaking through adjudication.

determinations may also inhere in questions of fact and mixed questions of fact and law.[174] Policy considerations emerge where a given factual inquiry requires making value judgments in accordance with the regulatory goals the General Assembly has authorized the agency to pursue or determine on its own.[175]

Professor Jim Rossi provides a helpful illustration of a factual inquiry that would involve a policy judgment.[176] The example is derived from a Florida case[177] in which an electrical utility sought a permit to construct power transmission lines across protected wetlands.[178] Under the governing statute, the Florida Department of Environmental Protection was required to determine, based on a variety of factors, whether the permit would be "in the public interest."[179] The construction of transmission lines would have destroyed forested wetlands but expanded herbaceous wetlands.[180] The ALJ treated the public benefits of forested wetlands and those of herbaceous wetlands equally, and therefore determined there would be no net adverse impact from the project.[181] The agency rejected the ALJ recommendation, "weighing the adverse impact of the clear-cutting of trees more heavily than the ALJ and concluding the permit was not in the public interest."[182] On review, the Florida Court of Appeals held that rulings about the state of certain wetlands before and after a local power company began construction of a power line "were within [the] discretion [of the Secretary of the Department of Environmental Regulation] in implementing the wetlands protection statutes."[183] Professor Rossi posed the hypothetical of the same case arising under a regime in which ALJs have final decision-making authority:

> [A]n ALJ evaluating wetland mitigation associated with the sitting of a transmission line can rely on the admissible evidence the ALJ finds most credible and convincing. The ALJ can make policy decisions regarding what kinds of wetlands are important, and if the ALJ had final order authority, these final

174. Sullivan, *supra* note 102, at 398.
175. *Id.* at 393.
176. Rossi, *supra* note 4, at 70–71.
177. Fla. Power Corp. v. Dep't of Envtl. Prot., 638 So. 2d 545, 545 (Fla. Dist. Ct. App. 1994).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. Sullivan, *supra* note 102, at 395.
183. *Fla. Power Corp.*, 638 So. 2d at 561.

> decisions will then be reviewed by an appellate court without allowing the agency more than an opportunity to participate as a litigant in the adjudicative proceeding. The ALJ might decide that herbaceous wetlands are somehow equivalent to forested wetlands. Yet this is a policy issue that depends on broader state environmental protection goals.[184]

An example of a North Carolina statute that may require the weighing of facts in accordance with policy considerations is the North Carolina Mining Act of 1971, which directs the Department of Environment and Natural Resources ("DENR") to deny a permit if it finds that the operation of a mine "will have a significantly adverse impact on the purposes of a publicly owned park."[185] In *Clark Stone Co. v. North Carolina Department of Environment & Natural Resources*,[186] DENR revoked a mining permit because the mining operation had a "significantly adverse impact" on the Appalachian Trail.[187] The trial court reversed the Agency's decision despite the existence of testimony that the mine had a "negative acoustic and visual impact."[188] The North Carolina Court of Appeals held inter alia that the trial court ought to have deferred to DENR's evidentiary findings.[189]

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184. Rossi, *supra* note 4, at 70–71. Indiana Supreme Court Justice Frank Sullivan, Jr. discusses another example of the role of policymaking in administrative adjudication, posing the following hypothetical:

> One could well imagine a tavern licensing regime in which the licensing agency was entitled to balance the economic and other benefits of awarding a license with any negative impact on the surrounding community in its decision. The licensing agency, perhaps on direction from the governor, might adopt a policy consistent with the statute to give considerable weight to the position of local community leaders in assessing impact on the surrounding community.... I think that executive branch officials might well be concerned that central panels will create a situation in which ... a tavern license, which an alcoholic beverage commission's policy would grant, would otherwise be denied [or vice versa].

Sullivan, *supra* note 102, at 395–96.

185. N.C. GEN. STAT. § 74-51(d) (2011). The Mining Act also directs the agency to deny a mining permit if other negative impacts on the environment exist, such as impacts on wildlife, air quality, and water quality. *Id.*

186. 164 N.C. App. 24, 594 S.E.2d 832 (2004).

187. *Id.* at 32, 594 S.E.2d at 838.

188. *Id.*

189. *Id.* at 32–33, 594 S.E.2d at 837–38. While the trial court's principal objection to DENR's decision had to do with its statutory permit revocation authority, see *id.* at 33–38, 594 S.E.2d at 838–41, the trial court's evidentiary findings regarding the impact of the mine on the Appalachian Trail demonstrates how fact finders can reach different conclusions when looking at the same record, and how these conclusions can have varying policy implications.

The sort of factual determination involved in *Clark Stone* raises questions of policy falling within the scope of the agency's regulatory authority. The Mining Act directs DENR to determine whether, in its judgment, the impacts of the mine are "significant" and whether they are "adverse" within the context of the "purposes" for which the park was created.[190] Under the separation of powers theory promoted by this Recent Development, these considerations should fall to the agency in which the authority to protect the Appalachian Trail and the surrounding environment has been vested.

Imagine that circumstances similar to those in *Clark Stone* arose under the RRA's regime. An ALJ might accord less weight to certain testimony about the impact of a mine upon a public park than the agency would and may have a different notion of what constitutes a "significantly adverse impact" based on the ALJ's interpretation of the policy underlying the statute.[191] Under the RRA, ALJ findings of fact receive considerable deference under the "whole record test,"[192] which requires only that the reviewing court determine whether the decision had some evidentiary basis.[193] So long as the reviewing court was able to identify evidence in the record that supported the ALJ's finding, the ALJ's decision would be affirmed; in other words, the ALJ—and not the agency charged with implementing the Mining Act—would decide how best to protect the Appalachian Trail from disturbance.

While such deference may be appropriate for ALJ findings of fact that involve "historical or empirical facts, or those dependent upon credibility determinations,"[194] the same cannot be said for factual findings involving policy judgments. The traditionally recognized interests of political accountability and expertise protected by the separation of powers doctrine require these inquiries to be determined by the state agencies in which the given regulatory authority has been vested.[195] The reservation of policy judgments to

190. § 74-51(d).

191. In fact, at the administrative level in *Clark Stone*, the ALJ *did* disagree with the Agency; however, the principal dispute between the Agency and the ALJ had to do with the Agency's authority under the Mining Act to revoke permits. Clark Stone Co. v. N.C. Dep't of Env't & Natural Res. 15 N.C. Reg. 1955, 1957–60 (June 1, 2001).

192. N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894 (2004) (citations omitted).

193. Henderson v. N.C. Dep't. of Human Res., 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988) ("Ultimately, the reviewing court must determine whether the administrative decision had a rational basis in the evidence." (citation omitted)).

194. Flanagan, *supra* note 1, at 429.

195. It is important to note that in North Carolina, ALJs have been required since the

state agencies in administrative adjudications has ensured that such judgments are placed in the hands of politically accountable government officers with expertise in the relevant subject matter.[196] ALJs in North Carolina are hired as merit-appointees by the chief ALJ,[197] and therefore are not subject to the same political accountability constraints as high-level agency decision makers.[198] Moreover, the law does not require ALJs to have any expertise in the subject matter involved in the cases over which they preside.[199]

The constitution gives the General Assembly the authority to grant regulatory authority to state agencies.[200] Once the vesting of regulatory authority in state agencies has occurred, the constitution prohibits other branches from interfering with that authority.[201]

2000 amendments to the APA to "giv[e] due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency." N.C. GEN. STAT. § 150B-34(a) (2011). An ALJ may give due regard for agency expertise by "taking official notice of facts within the specialized knowledge of the agency .... [T]he Administrative Law Judge may see other evidentiary avenues for establishing agency expertise such as expert-witness testimony addressing agency expertise and, perhaps, increased agency rulemaking which codifies the agency's specialized knowledge." N.C. OFFICE OF ADMIN. HEARINGS, PRACTICE BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS: AN OVERVIEW 5, *available at* http://www.ncoah.com/admin/Practice%20Before%20OAH%20-%20An%20Overview.doc (last visited Aug. 20, 2012). However, while the APA still requires ALJs to give due regard for agency expertise, this requirement does not successfully mitigate RRA's encroachment on executive power. Exactly what is *required*, if anything, of an ALJ when giving "due regard" for agency expertise is unclear. Furthermore, given the degree of deference that judges are required to give ALJ factual determinations under the RRA, it is unlikely that an ALJ's failure to accord proper deference to agency expertise is reviewable. Under the "whole record test," the ALJ decision need only demonstrate some consideration of the evidence presented by the agency and provide a "reasonable" justification for rejecting it. *See supra* Part I.D. Therefore, an agency would likely have little recourse when an ALJ fails to recognize its expertise and rejects the agency's weighing of the facts. When an administrative case exits the administrative environment and enters the purview of the judicial branch, the expertise of state agencies is treated as equivalent to the expertise possessed by a common litigant seeking relief from an adverse judgment.

196. *See* Flanagan, *supra* note 1, at 429 ("ALJs, as generalists, often lack the knowledge found in the collective expertise of the agency."); Rossi, *supra* note 4, at 65 ("By leaving law and policy decisions in the hands of non-agency decision-makers, ALJ finality places at risk agency accountability.").

197. N.C. GEN. STAT. § 7A-753 (2011).

198. *See* Rossi, *supra* note 4, at 64 ("[M]ost ALJs operate as merit appointees ... and are not subject to the same political accountability constraints as agency heads ....").

199. However, the chief ALJ may designate certain ALJs as having expertise to preside over a particular case. § 7A-753.

200. N.C. CONST. art. III, § 5(10).

201. *See, e.g.*, State *ex rel.* Wallace v. Bone, 304 N.C. 591, 601, 286 S.E.2d 79, 84 ("[T]he separation of powers principle [does] not tolerate legislative *encroachment or control over the function and power of the executive branch.*" (emphasis added)).

Because of the fundamental changes to administrative procedure that result from the RRA, regulatory agencies' interpretations of the statutes they are charged with executing will no longer be accorded deference by the courts. Policy-laden factual determinations that depend upon agency expertise will now be made by non-expert ALJs to whom the courts will show deference on review. Thus, by vesting in an appointee of the judiciary the power to overrule regulatory decisions and stripping regulatory agencies of policy-making authority, the RRA violates North Carolina's separation of powers clause as interpreted by the Supreme Court of North Carolina.

CONCLUSION

ALJ finality in North Carolina presents a unique constitutional dilemma. The North Carolina Constitution provides that the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," while explicitly permitting the intermingling of the executive branch and the judicial branch.

This Recent Development has analyzed the two main constitutional concerns associated with ALJ finality. It has suggested that a constitutional challenge based on the proposition that the RRA delegates too much judicial power to OAH is suspect. Aside from the obstacles involved in demonstrating that final decision-making authority is not "reasonably necessary" to the broadly framed purpose of the OAH, this approach fails to capture the significant normative issues associated with ALJ finality. These problems are addressed by an argument that focuses on the extent to which the RRA strips power from the executive. Under the RRA, policy decisions that have been traditionally recognized as belonging to the agencies charged with enforcement of North Carolina's regulatory programs now fall to the chief ALJ and his employees. While the OAH plays a crucial role in administrative adjudication, the implementation of regulatory policy is solely the province of the executive branch. Stripping this power away from the executive effects a weakening of this branch that the constitution does not permit.

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