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Agency Exercise of Legislative Power and ALJ Veto Authority

By Daniel Manry*

I. INTRODUCTION

Administrative agencies have grown collectively into what some view as an administrative state that is the functional equivalent of a fourth branch of government.¹ That view provides a useful vantage point from which to examine separation of powers problems that occur in the administrative state.

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1. Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 700 (2006) (citing Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1139 (2004)).

Separation of powers problems occur in the administrative state in two stages.² First-stage problems occur when Congress or a state legislature delegates legislative authority to an administrative agency of the executive branch, and the delegated legislative authority lacks adequate standards to guide agency action required to implement the enabling statute.³ Second-stage problems occur when agency action, undertaken through either rulemaking or adjudication of individual cases, arrogates legislative power by enlarging or modifying adequate standards that Congress or the legislature provides in the terms of the enabling statute.⁴

Second-stage problems may present a greater threat to separation of powers protections because second-stage problems are more subtle and less likely to be challenged by a party in an administrative proceeding, especially a pro se party.⁵ State courts have been vigilant of first-stage problems but do not typically see second-stage problems as a separation of powers issue.

This article examines second-stage agency action in the administrative state as a separation of powers issue. The article concludes that the separation of powers doctrine requires the exercise of second-stage power in the administrative state to be coextensive with first-stage powers delegated by the legislature in the terms of the enabling statute. The article compares approaches to second-stage problems in the federal and Florida administrative states and suggests approaches to three second-stage problems in Florida that may be useful in other administrative states. The article sees the separation of powers doctrine as a self-executing structural aspect of government which defines the role of an ALJ⁶ as a veto point that properly checks the arrogation of legislative power during second-stage agency action.

2. *Id.* at 707-08.

3. *Id.*

4. *Id.* at 695, 707-08.

5. *Id.* at 695.

6. The term "ALJ" includes hearing officers and administrative law judges because the distinction is titular rather than substantive.

II. SIGNIFICANCE AND STRUCTURE

The separation of powers doctrine is as fundamental to federal and state government as the right to vote and the right to a representative government.⁷ The doctrine is a structural aspect of government that parcels power among the three branches, provides a system of checks and balances intended to minimize governmental power, increases the functional veto points in government, and fosters a more deliberative government.⁸

The separation of powers doctrine is sometimes compared to federalism.⁹ Federalism is a vertical division of power between federal and state government.¹⁰ The separation of powers doctrine is a horizontal division of power within separate federal and state governments.¹¹

The federal constitution contains no express separation of powers clause. The federal separation of powers is a doctrine that arises from the structure of the United States Constitution which creates three branches of government and vests separate powers in each branch.¹² In Florida, the separation of powers is an express act in Article II, Section 3 of the Constitution of the State of Florida.¹³ The act provides:¹⁴ “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”¹⁵

7. Garry, *supra* note 1, at 694.

8. *Id.* at 690-92, 695.

9. *Id.* at 691.

10. *Id.*

11. *Id.* at 691-92.

12. *Id.* at 690.

13. FLA. Const. art. II, § 3.

14. For convenience, rather than precision, this article uses the terms “doctrine” and “act” interchangeably to describe federal and state separation of powers protections.

15. FLA. Const. art. II, § 3. Delaware is similar to the federal model of no express separation of powers clause. *See* DEL. Const. art. II – IV. New Jersey, like Florida, has an express separation of powers clause. N.J. Const. art. III para. 1.

No express non-delegation clause exists in either the federal or Florida constitutions. The non-delegation doctrine in Florida is a judicial interpretation of the second sentence in the act.

The [separation of powers] doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power. . . . This Court has repeatedly held that, under the doctrine of separation of powers, the legislature may not delegate the power to enact laws or to declare what the law shall be to any other branch.¹⁶

The people surrendered to the legislative branch of government the power to create legislation but did not surrender the power to create legislators in the administrative state through broad grants of legislative power.¹⁷ The people reserved to themselves the power to create legislators.¹⁸ The separation of powers doctrine, in relevant part, checks second-stage agency exercise of legislative power by requiring an agency to administer legislative programs, through rulemaking or adjudication, pursuant to standards and guidelines that are ascertainable by reference to terms in the statute implemented.¹⁹ When an agency takes action that goes beyond standards and guidelines legislatively prescribed in the enabling statute, the agency becomes a law giver rather than an administrator of the law.²⁰

III. SECOND-STAGE LIFE IN THE FEDERAL ADMINISTRATIVE STATE

16. *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 264 (Fla. 1991) (citations omitted).

17. *Id.*

18. *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 193 (Thomas I. Cook ed., Hafner Publ'g Co. 1947)).

19. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978); FLA. STAT. § 120.52(8) (2007).

20. *Cf. Askew*, 372 So. 2d at 919 (inadequate first-stage standards make agency a law giver).

The federal administrative state traces its roots to the period of the Progressive Movement before World War I.²¹ The administrative state sprouted from the push toward a strong central government during the Great Depression and blossomed in the 1960s and 1970s.²² Strong government was not considered to be a threat to liberty but a means of effective action to help people during and after the New Deal of President Franklin D. Roosevelt.²³ Administrative agencies were to be the agents of effective government action because experts in an administrative agency presumably would be insulated from political corruption and would better serve the people.²⁴

The federal administrative state has flourished, in relevant part, through a de facto complicity between the Legislative and Judicial Branches of government.²⁵ Congress has willingly transferred to agencies the task of legislating complex policies which require politically difficult decisions.²⁶ Broad grants of legislative authority leave operative details to the agency and enable elected members of the legislative branch to simultaneously claim credit and escape blame for agency action implementing the legislation.²⁷

The non-delegation doctrine has not impeded broad grants of legislative power to the federal administrative state.²⁸ Federal courts have not invalidated a statute based on the non-delegation doctrine in more than seventy years.²⁹ The absence of a viable non-delegation doctrine effectively eliminates first-stage separation of powers issues when Congress delegates power to an administrative agency. Broad delegations of power also propagate vague or ambiguous legislative standards that make second-stage violations difficult to resolve as a separation of powers issue.

21. Garry, *supra* note 1, at 699.

22. *Id.*

23. *Id.* at 699-700.

24. *Id.*

25. *Id.* at 702.

26. *Id.*

27. *Id.* at 703.

28. *Id.* at 702.

29. *Id.*

Rather than resuscitate the non-delegation doctrine, federal courts have tolerated broad delegations of legislative power to the administrative state when accompanied by procedural safeguards.³⁰ Courts have chosen to exercise more judicial oversight of agency action during rulemaking or adjudication. The Hard-Look Doctrine, for example, requires an agency to provide a reasoned analysis that will enable a reviewing court to conduct a hard-look review of agency action.³¹ Courts have become immersed in the technical details of agency action through more oversight in the formulation of agency rules and the application of agency rules to agency adjudication; determinations of whether agency rules are legislative or interpretative; and the determination of whether agency action is entitled to judicial deference.³² In addition, federal courts have become more involved in determining when an agency can use rulemaking or adjudication to implement delegated legislative authority.³³

Broad delegations of legislative power to the administrative state, coupled with increased judicial oversight, facilitates more judicial control over legislative power exercised in the administrative state than the judiciary could ever impose on legislative power exercised in Congress. Some legal scholars associate the demise of the non-delegation doctrine with increased judicial power and decreased congressional power.³⁴

IV. RULEMAKING IN FLORIDA

The separation of powers doctrine is alive and well in Florida, at least insofar as the doctrine applies to second-stage agency action in the form of rulemaking. The relationship of the doctrine to second-stage agency action in the form of adjudication of individual cases is discussed later in this article.

The separation of powers doctrine did not evolve to its current vitality in rulemaking without a struggle between the legislative and

30. *Id.* at 709.

31. *Id.* at 710-15.

32. *Id.* at 710-12.

33. *Id.* at 710-15.

34. *Id.* at 709.

judicial branches of government. The struggle included two judicial doctrines and the legislative responses to each. The judicial doctrines are discussed as judicial functionalism and the judicial “prove-up” exception to rulemaking.

A. Judicial Functionalism

Differences in legislative and judicial interpretations of the non-delegation doctrine in Florida parallel two schools of thought described as formalism and functionalism. Formalism insists on clear distinctions between the separate powers of government and does not recognize the existence of an entity beyond the three branches.³⁵ Functionalism values a working government over adherence to strict divisions between branches of government and insists that strict separation of powers would impede government efficiency.³⁶

Early Florida cases expressly rejected attempts to import functionalism from the federal administrative state.

Appellants urge . . . that the modern trend in administrative law is to relax the doctrine of unlawful delegation of legislative power in favor of an analysis which focuses upon the existence of procedural safeguards in the administrative [state]

. . . .

Although the Davis view is an entirely reasonable one as demonstrated by its adoption in the federal courts and a minority of state jurisdictions, nonetheless, it clearly has not been the view in Florida. . . . Regardless of the criticism of the courts’ application of the [non-delegation] doctrine, we nevertheless conclude that it represents a recognition

35. *Id.* at 704.

36. *Id.* at 708; Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 362-73 (2000).

of the express limitation contained in the second sentence of Article II, Section 3 of our Constitution.³⁷

Judicial repudiation of functionalism was largely limited to first-stage separation of powers problems. Courts utilized the functionalism standard to deal with second-stage problems, but the legislature expressly rejected the functionalism standard for rulemaking.

The legislature regulates agency action in Florida through Chapter 120, the Administrative Procedure Act (the APA).³⁸ Prior to 1996, Subsection 120.52(8) defined an invalid exercise of delegated legislative authority more broadly than it does today.³⁹ Florida courts construed the statutory definition to mean that a rule was valid if the rule was reasonably related to the enabling statute and was not arbitrary or capricious.⁴⁰ The legislature responded in 1996 by replacing the judicial test with a legislative standard.⁴¹ The legislative standard added additional requirements which stated:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the *particular powers and duties*

37. *Askew*, 372 So. 2d at 918, 924 (citing K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, § 2.04, at 30 (1976)).

38. FLA. STAT. § 120 (2007). References to chapters, sections, and subsections are to Florida Statutes (2007) unless otherwise stated.

39. A rule was an “invalid exercise of delegated legislative authority” if the rule: materially failed to follow statutory rulemaking procedures; exceeded the grant of rulemaking authority; enlarged, modified, or contravened the specific provisions of the law implemented; was vague, failed to establish adequate standards for agency decisions, or vested unbridled discretion in the agency; or was arbitrary and capricious. FLA. STAT. § 120.52(8) (2005).

40. *St. Johns River Water Mgmt. Dist. v. Consol.-Tomoka Land Co.*, 717 So. 2d 72, 78-79 (Fla. Dist. Ct. App. 1998).

41. *See id.* at 77 (because rulemaking in Florida is an exclusive legislative function, courts agree the Legislature has authority to replace a judicially created test with a legislative standard for determining when a rule is an invalid exercise of delegated legislative authority, and courts are not required to differentiate between legislative and interpretative rules).

granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the *particular powers and duties* conferred by the same statute.⁴²

In 1998, an appellate court interpreted the reference to “particular powers and duties” as a “functional test.”⁴³ Under the functional test, a rule was valid if the rule fell within the range of powers delegated by the legislature or if the rule regulated a matter directly within the class of powers and duties identified in the statute implemented.⁴⁴

The legislature disagreed. In 1999, the legislature rejected the court’s functional test and amended the statutory definition of an invalid exercise of delegated legislative authority by replacing the reference to “particular powers and duties” with a requirement that rules may implement or interpret only specific powers and duties granted in the enabling statute.⁴⁵

The legislative requirement for “specific powers and duties” in the enabling statute may, or may not, end judicial functionalism in the administrative state. In 2000, a court interpreted the “specific powers and duties” standard to require that a reviewing court determine only whether the enabling statute: “contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough.”⁴⁶ The open issue is how unspecific a legislative grant of authority may be and still provide standards and guidelines that, by reference to the statute implemented, are adequate

42. FLA. STAT. § 120.52(8) (1996) (amended 1999) (emphasis added).

43. *Consol.-Tomoka*, 717 So. 2d at 80.

44. *Id.*

45. FLA. STAT. § 120.52(8) (1999).

46. *Sw. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 599 (Fla. Dist. Ct. App. 2000) (emphasis omitted).

to check second-stage agency exercise of legislative power through rulemaking.⁴⁷

B. The Prove-up Exception Swallowed the Rule

Under the APA, agency action is generally based on a rule, non-rule policy, or both.⁴⁸ The legislature defines a rule in Subsection 120.52(15) as a written or oral statement of general applicability that implements, interprets, or prescribes law or policy, or describes procedural or practice requirements of an agency and does not fall within an express statutory exception.⁴⁹ An agency statement of policy that does not satisfy the statutory definition of a rule is non-rule policy. Non-rule policy has been described as incipient agency policy because it is policy that is still emerging and has not yet flowered into general applicability.⁵⁰

For many years, the APA did not contain an express requirement that agencies adopt policy statements of general applicability as rules. The requirement for rulemaking was a judicial interpretation of the APA.

The APA does not in terms require agencies to make rules of their policy statements of general applicability, nor does it explicitly invalidate action taken to effectuate policy statements of that character which have not been legitimated by the rulemaking process. But that is the necessary effect of the APA if the prescribed rulemaking procedures are not to be atrophied by nonuse.⁵¹

Early court decisions required an agency to explicate, or prove-up, non-rule policy each time the agency adjudicated an individual

47. *Askew*, 372 So. 2d at 925; *accord Chiles*, 589 So. 2d at 266.

48. *McDonald v. Dep't of Banking and Fin.*, 346 So. 2d 569, 582 (Fla. Dist. Ct. App. 1977).

49. FLA. STAT. § 120.52(15); *See Dep't of Highway Safety & Motor Vehicles v. Schluter*, 705 So. 2d 81 (Fla. Dist. Ct. App. 1997) (agency statement need not be reduced to writing to satisfy the definition of a rule).

50. *McDonald*, 346 So. 2d at 581.

51. *Id.* at 580.

case, but courts did not impose the same requirement for agency policy that had been adopted as a rule.⁵² Rulemaking was held to displace proof and debate of policy in an administrative hearing.⁵³ Courts reasoned that the burden of repeatedly proving-up non-rule policy in the adjudication of individual cases would impel agencies to move from vague standards, to definite standards, to broad principles, to rules:

The APA does not chill the open development of policy by forbidding all utterances of it except within the strict rulemaking process of Section 120.54. Agencies will hardly be encouraged to structure their discretion progressively by vague standards, then definite standards, then broad principles, then rules if they cannot record and communicate emerging policy in those forms without offending Section 120.54. The folly of imposing rulemaking [requirements] on all statements of incipient policy is evident.

....

Florida's APA does not have those bizarre effects. . . . [R]ulemaking [requirements] are imposed only on policy statements *of general applicability*, i.e., those statements which are intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law. That is the meaning of the essentially identical "rule" definition in the federal Administrative Procedure Act, which "obviously could be read literally to encompass virtually any utterance by an agency. . . ." ⁵⁴

The judicial requirement for agencies to prove-up non-rule policy did not impel agencies to rulemaking. Later judicial decisions

52. *Id.* at 583.

53. *Id.*

54. *Id.* at 580-81 (citations omitted).

expanded the prove-up exception to allow agencies to prove-up agency policy of general applicability. Courts regarded attempts to distinguish non-rule policy from a rule to be “academic endeavors” that had been “largely discarded.”⁵⁵ The judicial requirement for rulemaking atrophied into nonuse.

The prove-up exception blurred the legislative distinction between a rule and non-rule policy, allowed an agency to exercise discretion in choosing whether to implement delegated legislative authority through rulemaking or adjudication, and had a chilling effect on the separation of powers doctrine, because Florida courts did not typically view second-stage agency action as a separation of powers problem. The prove-up exception for non-rule policy eventually “swallowed the rule”⁵⁶ and prompted a legislative response.

The legislative response initially codified the judicial prove-up exception for unadopted rules in Subsection 120.57(1)(e) but added requirements similar to those in Subsection 120.52(8) to ensure that an unadopted rule was not an invalid exercise of delegated legislative authority. After further review, the legislature amended Subsection 120.57(1)(e), effective January 1, 2009, to limit the use of the prove-up exception to situations where an agency has not had adequate time to adopt a rule but is expeditiously engaged in the rulemaking process.⁵⁷

Unlike the federal administrative state, rulemaking is no longer a matter of agency discretion in Florida.⁵⁸ The legislature placed an affirmative duty on state agencies to codify policy statements which satisfy the statutory definition of a rule by adopting those policy statements as rules in accordance with statutorily prescribed rulemaking procedures and promulgating the adopted rules in the Florida Administrative Code.⁵⁹

55. *Barker v. Bd. of Med. Exam'rs*, 428 So. 2d 720, 722 (Fla. Dist. Ct. App. 1983).

56. Patricia Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U. L. REV. 437 (1991) [hereinafter *Dore I*].

57. 2008 Fla. Laws. 104.

58. FLA. STAT. § 120.54 (2007).

59. *Consol.-Tomoka*, 717 So. 2d at 80.

V. ADJUDICATION OF INDIVIDUAL CASES IN FLORIDA

In order to understand the role of an ALJ as a veto point that checks agency arrogation of legislative power during the adjudicatory process, one must first understand the adjudicatory process. APA procedures for disputing agency action can be confusing for a stranger to the act, due in part to distinctions between proposed, recommended, and final agency action. It helps to keep in mind the truism that agency action by any name is still agency action in the administrative state and must comply with the separation of powers doctrine.

The APA serves several legislative purposes. The APA is a legislative mechanism for intra-branch dispute resolution within the administrative state.⁶⁰ The APA is also a legislative mechanism for checking the arrogation of legislative power by the administrative state.⁶¹ Achievement of both purposes is ensured through procedures prescribed in the APA, including inter-branch judicial review.⁶²

The APA defines the term “agency” to include the twenty-five state departments defined in non-APA statutes⁶³ and each departmental unit; the Governor, in the exercise of executive powers other than those derived from the constitution; a state officer; a state board, including the Board of Governors of the State University System; a state university board of trustees; a commission, including

60. Patricia Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 965, 967, 970, 1017 (1986) [hereinafter *Dore II*].

61. FLA. STAT. §120.52(8) (2007); *Dore II*, *supra* note 60, at 982, 1017. This article does not reach the doctrine of administrative deference to an agency's statutory interpretation. Deference is limited to situations in which the statutory interpretation is within the substantive expertise of the agency, the evidentiary record in the administrative hearing supports a finding that an interpretation of statutory terms requires special agency insight or expertise, the agency articulates in the record underlying technical reasons for deference to agency expertise, and the agency's interpretation is not clearly erroneous. *Johnston v. Dep't of Prof'l Regulation*, 456 So. 2d 939, 943-44 (Fla. Dist. Ct. App. 1984). For a discussion of judicial deference to agency action, see Anuradha Vaitheswaran & Thomas A. Mayes, *The Role of Deference in Judicial Review of Agency Action: A Comparison of Federal Law, Uniform State Acts, and the Iowa APA*, 27 J. NAALJ 402 (2007).

62. FLA. STAT. § 120.65 (2007). See also *Dore II*, *supra* note 60, at 965, 967, 970, 1017.

63. FLA. STAT. § 20.02(2) (2007).

the Commission on Ethics and the Fish and Wildlife Conservation Commission (a constitutional commission in Florida) when acting pursuant to statutory authority; a regional planning agency; multi-county special districts; educational units; and each other unit of government in the state, including counties and municipalities.⁶⁴

When an agency undertakes agency action through adjudication of an individual case, the agency must notify each person whose substantial interests are affected by the agency action.⁶⁵ The notice must include a point of entry, which, in relevant part, prescribes a deadline for a substantially affected person to dispute the agency action.⁶⁶ Agency action is proposed agency action while the point of entry remains open.⁶⁷ If the point of entry closes without a timely challenge, proposed agency action becomes final agency action.⁶⁸ If a substantially affected party challenges proposed agency action within the point of entry, the agency action remains proposed during the adjudicatory process.⁶⁹

A substantially affected party challenges proposed agency action by filing a request for hearing with the agency. The agency refers the request to a sister agency, the Division of Administrative Hearings (DOAH), to assign an ALJ to conduct an administrative hearing pursuant to Subsection 120.57(1) (a 120.57 proceeding) if the challenge to proposed agency action involves a disputed issue of material fact and the agency head chooses not to conduct the hearing.⁷⁰ If a challenge does not involve a disputed issue of material fact, all of the parties may agree to refer the dispute to DOAH.⁷¹

At the conclusion of a 120.57 proceeding, the presiding ALJ issues a recommended order, which recommends agency action to the sibling agency that referred the dispute to DOAH.⁷² The

64. FLA. STAT. § 120.52(1) (2007).

65. FLA. STAT. § 120.569 (2007).

66. *Id.*

67. *See McDonald*, 346 So. 2d 569.

68. *Id.*

69. *Id.*

70. FLA. STAT. § 120.57(1) (2007).

71. FLA. STAT. §§ 120.569, 120.57(1) (2007).

72. *Id.*

referring agency issues a final order that is final agency action subject to an inter-branch judicial review.⁷³

A 120.57 proceeding may be viewed in some states as a two-tier proceeding. The first tier culminates in recommended agency action. Recommended agency action becomes final agency action, in the second tier, when the referring agency adopts the recommendation in a final order. If the final order were to modify the recommendation in accordance with express limits prescribed by the legislature,⁷⁴ the modified recommendation would become final agency action subject to inter-branch judicial review.⁷⁵

A challenge to agency rulemaking may be viewed as a single-tier proceeding. A substantially affected party files a rule challenge with DOAH rather than the agency engaged in rulemaking.⁷⁶ DOAH assigns an ALJ to conduct an administrative hearing pursuant to Section 120.56 (a 120.56 proceeding) to determine the validity of a proposed, adopted, or unadopted rule.⁷⁷ The ALJ issues a final order that determines whether the rule is an invalid exercise of delegated legislative authority within the meaning of Subsection 120.52(8).⁷⁸ The agency engaged in rulemaking must appeal an adverse final order in an inter-branch judicial review.⁷⁹

A substantially affected party may challenge an agency's non-rule policy in a 120.57 proceeding.⁸⁰ The party may also challenge the validity of a rule in a 120.56 proceeding.⁸¹ If agency action is based on both non-rule policy and rulemaking, a substantially affected person may challenge each type of policy in separate 120.57 and 120.56 proceedings that are customarily consolidated and heard in one administrative hearing.⁸²

73. *Id.*

74. FLA. STAT. §120.57(1)(j) (2007).

75. FLA. STAT. § 120.68 (2007).

76. FLA. STAT. § 120.56 (2007).

77. *Id.*

78. FLA. STAT. § 120.52(8) (2007).

79. FLA. STAT. § 120.56 (2007). A proposed rule must be challenged before it morphs into an adopted rule. FLA. STAT. § 120.56(2)(a) (2007).

80. *See* FLA. STAT. § 120.57 (2007).

81. *See* FLA. STAT. § 120.56 (2007).

82. FLA. STAT. § 120.56(4)(f) (2007).

*A. The Unexamined Life of Non-Rule Policy*⁸³

One type of second-stage separation of powers problem occurs in a 120.57 proceeding when proposed agency action is based on non-rule policy that goes beyond the statute implemented, and a substantially affected party does not challenge the non-rule policy. The issue is whether the presiding ALJ has authority to independently examine the non-rule policy and, if necessary, conform the non-rule policy to the statute implemented.

Florida courts suggest that an ALJ serves the public interest by independently critiquing an agency's non-rule policy in a 120.57 proceeding.⁸⁴ The court decisions are consistent with separation of powers protections but do not expressly cite the doctrine.⁸⁵

The role of an ALJ in a 120.57 proceeding is not confined to making findings of fact and conclusions of law:

We are accustomed to think that the principal use of hearings is to develop records for "adjudicatory" or "quasi-judicial" decisions. That was the limited role of administrative hearings in years past, when the "universe of administrative law was hierarchical, with the judiciary at its apex." [The] [c]urrent . . . administrative process . . . recognizes that a hearing independently serves the public interest by providing a forum to expose, inform and challenge agency policy⁸⁶

The ALJ independently plows a sibling agency's policy to cultivate responsible agency policymaking (RAP). The ALJ "is also charged to . . . critique agency policy . . . to promote [RAP]. . . . The

83. "An unexamined life is not worth living." PLATO, THE APOLOGY OF SOCRATES 77 (D. F. Nevill trans., F. E. Robinson & Co. 1901).

84. See *McDonald*, 346 So. 2d 569, State ex rel. Dep't. of Gen. Servs. v. Willis, 344 So. 2d 580, 591-92 (Fla. Dist. Ct. App. 1977).

85. See, e.g., *id.*

86. State ex rel. Dep't. of Gen. Servs. v. Willis, 344 So. 2d 580, 591-92 (Fla. Dist. Ct. App. 1977) (citations omitted) (cited for different issue in *Clemons v. State Risk Mgmt. Trust Fund*, 870 So. 2d 881, 884 (Fla. Dist. Ct. App. 2004) (Benton, J., concurring)).

[ALJ] does not merely find the facts and supply the law, as would a court. The [ALJ] ‘independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discretion.’”⁸⁷

RAP is not defined by statute or rule and may vary with the facts and circumstances in each case. At a minimum, however, RAP avoids agency action that is susceptible to mandatory remand in an inter-branch judicial review.⁸⁸ Remand is mandatory if agency action violates a constitutional provision, such as the separation of powers doctrine, or a statutory provision, such as the statutory definition of an invalid exercise of delegated legislative authority.⁸⁹

A determination of whether unchallenged non-rule policy exceeds delegated legislative authority is considered “fair game” for an ALJ during a 120.57 proceeding.⁹⁰

Thus the APA infuses [a 120.57 proceeding] with concern for agency policy as well as for facts and law. The [ALJ] . . . is . . . charged to . . . critique agency policy as it is revealed in the record. . . . [T]he [ALJ's] duty to respond to the evidence in that way cannot fail to promote [RAP]. The [ALJ's] function . . . encourages an agency to fully and skillfully expound its nonrule policies by conventional proof methods; and, in appropriate cases, subjects agency policymakers to the sobering realization their policies lack convincing wisdom, and requires them to cope with the [ALJ's] adverse commentary.

....

[n. 12] This type of constraint upon agency action will not tend to be limited—as is judicial review—to overseeing the good faith of agency policy choices. Rather, exposure of the agency's decisional referents

87. *McDonald*, 346 So. 2d at 582-83 (citation omitted).

88. See FLA. STAT. § 120.68 (2007).

89. FLA. STAT. § 120.68(7)(e)(4) (2007).

90. *McDonald*, 346 So. 2d at 583.

to the critical scrutiny of others possesses a potential . . . for improving the degree of objective rationality of agency decisions.

. . . .

120.57 proceedings, in which the agency's nonrule policy is fair game . . . concludes by a final agency order which explicates "policy *within the agency's exercise of delegated discretion.*" . . .⁹¹

The legislative definition of "an invalid exercise of delegated legislative authority" in Subsection 120.52(8) is not limited to rulemaking but includes any agency action that goes beyond the statute implemented.⁹² The first two sentences in the statute make clear that invalid rulemaking is only one form of an invalid exercise of delegated legislative authority: "Invalid exercise of delegated legislative authority means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if . . . any one of [subparagraphs (a) through (g) apply]."⁹³ DOAH and the referring agency are each an agency in the administrative state, and neither agency may accomplish through non-rule policy and the adjudication of individual cases that which the separation of powers doctrine prohibits them from accomplishing through rulemaking.⁹⁴

B. Rule Challenges in 120.57 Proceedings

Another second-stage separation of powers problem arises when disputed agency action in a 120.57 proceeding is based on an invalid rule, and the substantially affected party challenges the rule in the 120.57 proceeding but does not file a 120.56 rule challenge. The issue is whether the absence of a 120.56 rule challenge requires an

91. *Id.* at 582-83 (emphasis added).

92. FLA. STAT. § 120.52(8) (2007)

93. *Id.*

94. FLA. STAT. § 120.52(8) (2007).

ALJ to enforce an invalid rule that is challenged in a 120.57 proceeding but not in a duplicative 120.56 proceeding.

The APA, in relevant part, requires a reviewing court to remand a final order if the agency action is outside delegated legislative authority or is inconsistent with an agency rule.⁹⁵ If an invalid rule is not challenged in a 120.56 proceeding and must be enforced in a 120.57 proceeding, then the presiding ALJ must recommend agency action that either enforces the statute and is inconsistent with the rule or enforces the rule that is at odds with the statute. Final agency action in either form requires remand.⁹⁶

An ALJ can solve the problem without offending either the APA or the separation of powers doctrine. A substantially affected party initiates a 120.57 proceeding to change proposed agency action. If the proposed agency action were based on a rule at odds with a statute, the presiding ALJ would not need to invalidate the rule. The ALJ would merely interpret the rule to conform to the statute in order to preserve the validity of the rule. This administrative approach is analogous to the judicial approach of a court which does not interpret a statute literally if a literal interpretation would render the statute invalid under the relevant constitution.⁹⁷

Although a determination that a rule is invalid is not necessary in a 120.57 proceeding, no legal impediment prohibits a recommended order from invalidating an adopted rule which goes beyond the statute implemented. No statutory requirement, similar to that applicable to a 120.56 proceeding, would require an agency to publish a notice of the invalidity of the rule. The recommended order

95. FLA. STAT. § 120.68(7)(d), (e) (2007).

96. *Compare* State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985) (a valid existing rule has the force and effect of law), *and* Collier County Bd. of Comm'rs v. Fish and Wildlife Conservation Comm'n., Nos. 2D07-1744, 2D07-11777, 2D-1796, 2008 WL 4180264 (Fla. Dist Ct. App. Sept. 12, 2008) *and* Clemons, 870 So. 2d at 884 (Benton, J., concurring) (both cases holding that a rule is presumptively valid until challenged in a 120.56 proceeding) *with* Askew, 372 So. 2d at 918-25, *and* Save the Manatee Club, 773 So. 2d at 598 (rule is valid only if adopted under proper delegation of legislative authority).

97. Unlike the statutory remedy in a 120.57 proceeding, a substantially affected party initiates a 120.56 proceeding for the sole remedy of obtaining a determination that the challenged rule is an invalid exercise of delegated legislative authority.

would be subject to modification in the final order of the agency;⁹⁸ would be limited to the parties and facts of record; and would not preclude the agency from relying on the rule in other cases, except to the extent the doctrine of stare decisis may preclude reliance on the rule in cases involving similar facts and law.⁹⁹

The APA literally requires a 120.57 proceeding whenever a challenge to a rule involves a disputed issue of material fact.¹⁰⁰ If the remedies afforded in a 120.57 proceeding are adequate for the ends sought by the substantially affected party, the APA does not require a duplicative 120.56 proceeding.¹⁰¹ However, a substantially affected party “may” file a 120.56 proceeding if the party seeks the additional remedies available in that statute.¹⁰²

The separation of powers doctrine is self-executing and does not require legislative enactment of Section 120.56 to prohibit the enforcement in a 120.57 proceeding of a rule that arrogates legislative power. Federal courts have expressly stated that the separation of powers doctrine is self-executing.¹⁰³ No Florida decisions were found that use the term “self-executing” to describe the separation of powers doctrine, but courts have held: “the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches.”¹⁰⁴

Constitutional provisions are presumed to be self-executing,¹⁰⁵ and the judicial test for a specific provision is whether the provision

98. FLA. STAT. § 120.57(1)(j) (2007).

99. An agency is bound by administrative stare decisis to follow its final order in like cases involving similar facts. *Gessler v. Dep’t. of Bus. and Prof’l. Regulation*, 627 So. 2d 501, 504 (Fla. Dist. Ct. App. 1993).

100. FLA. STAT. § 120.569(1)(2007)(“s.120.57(1) applies whenever the proceeding involves a disputed issue of material fact”).

101. *See* FLA. STAT. § 120.56 (2007).

102. FLA. STAT. § 120.56(1) (2007)(“Any person substantially affected by a rule . . . may seek an administrative determination of the invalidity of the rule. . . .”) (emphasis added).

103. *Morrison v. Olson*, 487 U.S. 654, 693-94 (1988); *Buckley v. Valeo*, 424 U.S. 1, 121 (1976).

104. *Chiles*, 589 So. 2d at 268-69.

105. *NAACP v. Fla. Bd. of Regents*, 876 So. 2d 636, 639 (Fla. 2004).

requires legislative enactment to activate the provision.¹⁰⁶ The separation of powers doctrine does not require legislative enactment of the APA in order to activate restrictions that the doctrine imposes on the administrative state.

If the separation of powers doctrine were not self-executing, the legislature could use the APA to “reallocate the balance of power” among the “four” branches of government by requiring enforcement of an invalid rule that arrogates legislative power unless the substantially affected party complies with a legislative enactment in Section 120.56. The result would apply unequally to numerous pro se parties in 120.57 proceedings because pro se parties are disproportionately poor, uneducated, disabled, and are ill-equipped to comprehend an APA provision that would require them to comply with a legislative enactment in Section 120.56 before they could enjoy the protection of the separation of powers doctrine.

The APA is not a statutory prerequisite to the operation of the separation of powers doctrine. The APA supplements separation of powers protections and enhances the availability of the doctrine to the people.¹⁰⁷ The fact that the separation of powers doctrine may be supplemented by legislative enactment in the APA, further protecting the doctrine or making it more available, does not of itself preclude a determination that the doctrine is self-executing.¹⁰⁸

The legislature has stated for many years that, “[f]ailure to proceed under [Section 120.56] shall not constitute failure to exhaust administrative remedies.”¹⁰⁹ One Florida court rejected the notion that the APA requires a substantially affected party to file a duplicative 120.56 proceeding before the party can challenge an agency rule in a 120.57 proceeding:

An understanding of 120.57’s centrality makes clear that the [language] . . . “Failure to proceed under

106. Fla. Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478, 486 (Fla. 2008); Advisory Opinion of the Att’y Gen., Re Extending Existing Sales Tax to Non-Taxed Servs., etc., 953 So. 2d 471, 484 (Fla. 2007); Smith v. Coal. to Reduce Class Size, 827 So. 2d 959, 962 (Fla. 2002); St. John’s Med. Plans, Inc. v. Gutman, 721 So. 2d 717, 719 (Fla. 1998); Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960).

107. See *Gray*, 125 So. 2d at 851.

108. *Id.*

109. FLA. STAT. § 120.56(1) (2007).

[Section 120.56] shall not constitute failure to exhaust administrative remedies”— enhance[s] remedies available under the [APA] *The legislative purpose is simply to avoid any appearance of requiring a substantially affected party to initiate [a] duplicative [120 .56] proceeding . . . if his rule challenge is regularly presented with other grievances under 120.57*¹¹⁰

Although the court relied on direct review in Article V, Section 4(b)(2) of the Florida Constitution, the ruling that appellate courts may review a rule challenge in a 120.57 proceeding without a duplicative 120.56 proceeding is consistent with the separation of powers doctrine.

*C. The Road to the Invalid Rule Not Challenged*¹¹¹

The last second-stage problem involves disputed agency action based on a rule that goes beyond the statute implemented, but the substantially affected party in a 120.57 proceeding does not challenge the invalid rule in that proceeding and does not file a separate 120.56 proceeding. The first issue is whether an appellate court will review a rule challenge not asserted in the administrative hearing, and the second issue is whether the presiding ALJ in the 120.57 proceeding must give effect to an unchallenged rule that goes beyond the statute implemented.

Appellate courts generally do not consider an issue on appeal that was not raised in the administrative hearing,¹¹² but they do review unchallenged rules at odds with a statute. The decisions expressly rely on the power of direct review in Article V, Section 4(b)(2) of the

110. *State ex rel. Dep't. of Gen. Servs. v. Willis*, 344 So. 2d 580, 592 (Fla. Dist. Ct. App. 1977) (emphasis added).

111. “Two roads diverged in a yellow wood, And sorry I could not travel both” ROBERT FROST, *Road Not Taken* (1916), reprinted in COMPLETE POEMS OF ROBERT FROST 131 (Henry Holt and Co. 1949).

112. *See Werner v. Dep't. of Ins. and Treasurer*, 689 So. 2d 1211, 1213 (Fla. Dist. Ct. App. 1997) (refusing to hear objection to sufficiency of administrative complaint for the first time on appeal).

Florida Constitution, but the opinions echo both separation of power and APA protections.

We reject the [agency's] contention that a court must give an administrative rule effect, unless it has been invalidated in proceedings under section 120.56, even if the rule is unmistakably at odds with clear statutory language. Executive branch rulemaking is authorized in furtherance of, not in opposition to, legislative policy. Just as a court cannot give effect to a statute (or administrative rule) in any manner repugnant to a constitutional provision, so a duly promulgated administrative rule, although “presumptively valid until invalidated in a section 120.56 rule challenge,” must give way in judicial proceedings to any contradictory statute that applies.¹¹³

A subsequent decision observed that an ALJ in a 120.57 proceeding “will deem controlling” a rule not challenged in the administrative hearing.¹¹⁴

While an [ALJ] presiding in a section 120.57 proceeding will deem controlling duly promulgated administrative rules never challenged under section 120.56, it is open to a reviewing court to adjudicate an administrative rule at odds with the statute it purports to implement, even when there has been no administrative rule challenge proceeding below. *See State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d

113. *Willette v. Air Prods.*, 700 So. 2d 397, 399 (Fla. Dist. Ct. App. 1997) (citation omitted). *See also*, *One Beacon Ins. v. Agency for Health Care Admin.*, 958 So. 2d 1127, 1129 (Fla. Dist. Ct. App. 2007); *Zimmerman v. Fla. Windstorm Underwriting Ass'n.*, 873 So. 2d 411, 415 (Fla. Dist. Ct. App. 2004); *Broward Children's Ctr., Inc. v. Hall*, 859 So. 2d 623, 627 (Fla. Dist. Ct. App. 2003); *Greenburg v. Cardiology Surgical Ass'n. & Claims Ctr. - Lakeland*, 855 So. 2d 234, 238 (Fla. Dist. Ct. App. 2003). *Dep't. of Children & Family Servs. v. L.G.*, 801 So. 2d 1047, 1053 (Fla. Dist. Ct. App. 2001).

114. *Clemons*, 870 So. 2d at 884 (Benton, J., concurring).

580, 592 (Fla. [Dist. Ct. App.] 1977) (“[P]rovisions [now codified at section 120.56(1)(e)] are addressed . . . to district courts of appeal, which might otherwise rebuff rule challenges by petitions to review 120.57 proceedings because petitioner did not ‘exhaust’ the rule-challenge remedies of 120.54 and .56.”)¹¹⁵

The decisions in *Willette* and *Clemons* raise the issue of whether there is a judicial requirement for an ALJ to deem controlling an unchallenged rule that arrogates legislative power by going beyond the statute the rule purports to implement. A requirement to deem controlling a rule at odds with a statute would necessarily require the presiding ALJ to refuse to apply a statute at odds with the rule. An ALJ is an officer of the executive branch of government.¹¹⁶ The Florida Supreme Court held in a case involving a property appraiser that an officer of the executive branch cannot refuse to administer statutes not yet judicially declared to be invalid.¹¹⁷ The requirement for officers of the executive branch to abide by statutes is “rooted in the doctrine of separation of powers.”¹¹⁸ As the Florida Supreme Court explained:

[A]llowing executive officers to refuse to administer statutes . . . would result in “chaos and confusion” and that the “people of this state have the right to expect that each and every . . . state agency will promptly carry out and put into effect the will of the people . . . expressed in the legislative acts of their duly elected representatives.”

. . . .

115. *Id.*

116. DOAH is not a court created in Article V of the Florida Constitution (an Article V court), and an ALJ is not a so-called Article V judge. DOAH is an administrative agency organized with the executive branch of government.

117. *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, No. SC07-1556, 2008 Fla. Lexis 1222, at *16 (Fla. July 3, 2008).

118. *Id.* at *20.

[N]o common law or statutory developments . . . have altered the basic principle, rooted in the doctrine of separation of powers, that [executive officers] must abide by . . . statutes¹¹⁹

VI. CONSTITUTIONAL AND APA SYMMETRY

The term “will,” as it is used in the *Clemons* decision, does not necessarily mean “must.” The term “will” also means likelihood, willingness, intention, probability, expectation, and customary or habitual action.¹²⁰ The beauty of the many definitions of “will” is in the eye of the beholder. However, any definition which enforces a rule that goes beyond the statute implemented is not beautiful in the eye of the separation of powers doctrine.

A valid, existing rule has the force and effect of law,¹²¹ but the terms “valid” and “existing” are not synonymous. The emphasis in the separation of powers doctrine is on a valid rule rather than an existing rule. A valid rule does not go beyond the statute implemented.¹²²

Rulemaking disposes of proof and debate of agency policy in a 120.57 proceeding.¹²³ However, proof and debate of agency policy is not synonymous with the separation of powers doctrine. Rulemaking may dispose of proof and debate of agency policy, but statutory rulemaking requirements are powerless to dispose of separation of powers protections.¹²⁴

The principal goal of statutory rulemaking requirements is transparency rather than the enforceability of invalid rules.¹²⁵ The requirement for rules to be adopted and promulgated in accordance with statutory requirements and the requirement for final orders in individual cases to be catalogued in a public, subject-matter index,

119. *Id.* at *16, *20.

120. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1968 (4th ed. 2000).

121. *Jenkins*, 469 So. 2d at 734.

122. *Askew*, 372 So. 2d at 918-25; *Save the Manatee Club.*, 773 So. 2d at 598.

123. *McDonald*, 346 So. 2d at 583 (rulemaking requirements dispose of proof and debate of agency policy in a 120.57 proceeding).

124. *Id.* at 580 n.6.

125. See FLA. STAT. § 120.536 (2007).

both serve the purpose of transparency by closing the gap between what the agency staff knows about the agency's law and policy and what a regulated party can know.¹²⁶ Nowhere in the APA does the legislature say that rulemaking requirements are intended as a mechanism for mandatory enforcement of an adopted rule which arrogates legislative power by going beyond the statute implemented.

A judicial requirement for an ALJ to deem controlling rules or non-rule policies that are at odds with a statute would deprive the administrative state of the ability to resolve an intra-branch dispute without arrogating legislative power and without the need for inter-branch judicial review. A requirement to deem controlling agency policy at odds with a statute would require the presiding ALJ to arrogate legislative power when acting pursuant to a mechanism that is legislatively intended to check agency arrogation of legislative power.

A 120.57 proceeding is not bound by judicial principles of appellate review that arguably would deprive an ALJ of authority to review second-stage separation of powers problems not raised by the parties.¹²⁷ A 120.57 proceeding is not a type of appellate trial¹²⁸ that reviews previously taken agency action. A 120.57 proceeding is a de novo proceeding that is intended to formulate final agency action.¹²⁹ “The [ALJ's] decision to permit evidence of circumstances as they existed at the time of hearing was correct. . . . Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily.”¹³⁰ An ALJ must independently determine whether his or her order complies with

126. *McDonald*, 346 So. 2d at 580. See also *Straughn v. O’Riordan*, 338 So. 2d 832, 834 n.3 (Fla. 1976) (A principal goal of the APA is the abolition of 'unwritten rules' by which agency employees can act with unrestrained discretion to adopt, change, and enforce legislative policy).

127. See FLA. STAT. § 120.57(1)(l) (2007).

128. ALJ John G. Van Laningham coined the reference to an “oxymoronic appellate trial” when discussing the distinction between the de novo review authorized in FLA. STAT. § 120.57(3) for so-called bid protests and the de novo hearing conducted in a 120.57 proceeding. *Syslogic Techn. Servs., Inc. v. S. Fla. Water Mgmt. Dist.*, No. 01-4385BID, slip op. at 19 (Fla. Div. of Admin. Hearings January 18, 2002), available at <http://www.doah.state.fl.us/ros/2001/01004385.PDF>.

129. FLA. STAT. § 120.57(1)(e)(l) (2007).

130. *McDonald*, 346 So. 2d at 584; *Young v. Dep’t. of Cmty. Affairs*, 625 So. 2d 831, 833 (Fla. 1993).

standards and guidelines prescribed in the terms of the enabling statute.

VII. THE HARMONY OF INDEPENDENCE AND IMPARTIALITY¹³¹

Second-stage problems pertaining to unchallenged rules and unchallenged non-rule policy bring into play judicial independence and impartiality, but the interplay of the two principles is harmonious rather than discordant. Independence is rooted in structural aspects of government that insulate the decisional process from the electorate and other branches of government, including the appointment process, protection of tenure and salary, and limits on the ability of other branches of government to change an ALJ's decision.¹³² Impartiality is more about neutrality and personal attributes, but structural aspects such as statutory bans on *ex parte* communications encourage impartiality.¹³³

An ALJ is the functional equivalent of a judge in the judicial branch of government.¹³⁴ “There can be little doubt that the role of the modern . . . administrative law judge is ‘functionally comparable’ to that of a judge.”¹³⁵ The quasi-judicial duties required to issue recommended and final orders do not preclude either type of order from being agency action, and agency action by any name must comply with the separation of powers doctrine. In that sense, the statute implemented in an ALJ’s recommended or final order defines his or her jurisdictional limits. Judicial impartiality does not preclude an ALJ, or an Article V Judge, from a *sua sponte* determination of whether he or she has jurisdiction to undertake agency action that goes beyond the statute implemented.¹³⁶

131. “Such harmony is in immortal souls.” WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, Act 5, sc.1.

132. See James E. Moliterno, *The Administrative Judiciary’s Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1200-01 (2006), reprinted in 27 J. NAALJ 53 (2007).

133. *Id.* See *Dore II*, *supra* note 60, at 1016-17; FLA. STAT. § 120.57(1)(j) (2007) (limiting the grounds upon which an agency may alter an ALJ’s findings of fact and conclusions of law).

134. Moliterno, *supra* note 132, at 1209.

135. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

136. See *Consol.-Tomoka*, 717 So. 2d at 72.

The separation of powers doctrine is self-executing because the doctrine operates without the need for legislative enactment.¹³⁷ It would distort impartiality to argue that separation of powers protections are not self-executing and do not protect a substantially affected party from an invalid rule or non-rule policy unless the substantially affected party asks for protection.

The requirement for an ALJ to independently harrow a sibling agency's rule and non-rule policies does not offend judicial impartiality. An ALJ does not favor the party of record who benefits from the harrowing experience. The ALJ favors the public interest served by RAP.

VIII. CONCLUSION

Variations between administrative states make it difficult to generalize about the role of an ALJ in a particular state. The separation of powers doctrine in a particular administrative state may require an ALJ to independently actuate the doctrine by ensuring that the ALJ's recommended and final orders do not constitute agency action that goes beyond the terms of the enabling statute. Agency policy, in the form of either a rule or non-rule policy, which is at odds with a statute may have to give way to the statute to preserve the validity of the policy. Second stage agency action cannot exceed the first-stage powers delegated in the enabling statute without violating the separation of powers doctrine. An ALJ, who issues recommended or final agency action in a manner that is consistent with the enabling statute, will find comfort in knowing, "All's well that ends well."¹³⁸

137. See *Morrison*, 487 U.S. at 693.

138. WILLIAM SHAKESPEARE, *ALL'S WELL THAT ENDS WELL*, Act 4, sc. 5.