Coates' Canons Blog: Perspective on the Separation of Powers Case

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Earlier this month a panel of three superior court judges held that the General Assembly's appointment of a majority of members to the new Oil and Gas, Mining and Coal Ash commissions violates the state constitutional provision on separation of powers. The decision, which is subject to direct appeal to the state supreme court, is the most recent litigation in a 30+ years' tug-of-war between the governor and legislature over administrative agencies. Some perspective on that conflict, and a brief look at how the courts' view of separation of powers has evolved in recent years, may be useful in thinking about what comes next.

The seeds of executive/legislative conflict

The modern era of separation of powers litigation in North Carolina began in the early 1980s, most often involving disputes between the governor and legislature. Several developments in the 1970s and earlier gave rise to these conflicts.

First, North Carolina was evolving into a two-party state, in 1972 electing Jim Holshouser the first Republican governor since Reconstruction. The General Assembly, on the other hand, remained solidly Democratic for another couple of decades. Conflict was inevitable.

Second, the governor's office, regardless of the party of the incumbent, had become a more forceful part of state government, and more of a threat to legislative preeminence. The growth in government from the 1930s through today has overwhelmingly been in the executive branch, as government at all levels has taken on more and more functions. Additionally, in North Carolina the governor's office itself started changing significantly in the 1970s. Beginning in 1977 the governor no longer was limited to a single term. Jim Hunt became the first governor to serve two terms, from 1976 to 1984 — and then he did it a second time, from 1992 to 2000. (The gubernatorial veto did not come until 1996, as North Carolina was the last state to adopt it.)

A third factor in the increasing conflict between the executive and legislative branches was the change taking place in the General Assembly. Stirred partly by a 1971 national report listing North Carolina third from the bottom in effective legislatures, the General Assembly began beefing up its own operation and reducing its dependence on the executive. The legislature, which had not hired its first full-time employee until 1969, created its own fiscal research division in 1971. Soon lawyers were employed to do general research and advise committees. In 1979 the legislature started its in-house bill drafting office rather than relying on the Attorney General. Equally significant, in 1973-74, with the oil crisis playing havoc with the state budget, and a Republican in the governor's office, the legislature began meeting annually rather than every other year. Thus, just as the governor was becoming a stronger office the legislature, too, was moving toward a more assertive institution with greater interest in the day to day operation of state government.

Finally, state government increasingly turned to administrative agencies to do its work, making separation of powers issues almost unavoidable. The typical administrative agency just does not fit neatly into the classic categorization of three branches of government. Such agencies often blend all three functions — a commission will be empowered to adopt rules (legislative), to issue permits and investigate violations (executive), and hear and decide disputes about violations (judicial). When an agency has a mix of legislative, executive and judicial functions it is harder to say how much control each branch ought to be able to exert over it.

Wallace v. Bone and other litigation

Fueled by the factors just discussed, skirmishes between the legislature and governor began breaking out in the late

1970s. Among the disputes:

- State senator I. Beverly Lake, Jr., (at the time a Democrat but later a Republican and later still chief justice) sued over the constitutionality of the Advisory Budget Commission (ABC), a powerful body — notwithstanding the misleading "advisory" in its title —responsible for preparing and overseeing the state budget. The ABC had eight legislators among its twelve members. Lake later withdrew his lawsuit.
- The General Assembly created a Rules Review Committee to examine and potentially suspend rules adopted by administrative agencies that exceeded their authority.
- A legislative committee took over the state employees' health plan despite an opinion from Attorney General Rufus Edmisten that the move was unconstitutional.
- The new Joint Legislative Commission on Government Operations, created in the mid-1970s, required the governor to seek approval before transferring more than ten percent from any agency line item appropriation.

The disagreements between the governor and legislature came to a head in 1982 in the state supreme court's decision in *State ex rel. Wallace v. Bone*, 304 NC 591 (1982). Environmental issues were near the top of the political agenda at that time, and the legislature in 1979 had decided that legislators should occupy four of the thirteen seats on the Environmental Management Commission, two senators and two representatives. Jimmy Wallace, an NC State faculty member, environmentalist and mayor of Chapel Hill, sued, claiming a violation of separation of powers. The supreme court agreed. The court examined the duties of the commission, decided they were clearly executive or administrative in character — drafting regulations, issuing permits, investigating violations, etc. — and held that the legislative branch could not exercise control over the implementation of its acts by appointing legislators to the commission.

(Two other decisions followed *Wallace v Bone*. A month later the supreme court issued an advisory opinion, *Advisory Opinion in re Separation of Powers*, 305 NC 767 (1982), that the legislature could not make the governor seek approval for budget transfers since the constitution says the governor administers the budget. Five years later the court in *State ex rel. Martin v. Melott*, 320 NC 518 (1987), turned away Governor Jim Martin's objection to the legislature having the chief justice appoint the director of the Office of Administrative Hearings (OAH). The court held that even if OAH was considered an executive branch agency, which was not altogether clear, the appointment of the director was not itself an exercise of executive power. Executive power, it said, is the power of executing the laws, and appointment of the director was not execution of the laws.)

The effect of the*Wallace v. Bone* decision

The fallout from *Wallace v. Bone* was considerable. The General Assembly removed legislators from 32 boards and commissions, including the Environmental Management Commission, the Board of Transportation, the Wildlife Resources Commission, and the Social Services Commission. At the same time, though, legislators found other ways to keep a hand on those agencies, such as taking from the Social Services Commission and giving to the legislature itself the authority to set eligibility standards and rates or fees for services.

Five boards, including the Advisory Budget Commission, retained their legislator members but were made advisory. That is, the Advisory Budget Commission actually became advisory. Again, however, the General Assembly found ways to continue its involvement, such as giving itself rather than the governor and ABC the authority to set salaries for various offices including the secretary of revenue, chair of the Alcoholic Beverage Control Commission and commissioner of motor vehicles.

The legislature removed legislator members from another 25 boards and commissions but retained its authority to appoint non-legislators. Attorney General Edmisten had opined that legislative appointment of non-legislators was still allowed under *Wallace v. Bone*, that the problem was appointment of legislators themselves. This view appeared to be upheld by the court of appeals in *North Carolina State Bar v. Frazier*, 62 NC App 172 (1983), when a lawyer being disciplined by the State Bar said the disciplinary committee violated separation of powers because some members were appointed by the General Assembly. The court of appeals, echoing the earlier AG's opinion, only touched on the issue briefly but said the appointment of non-legislators by the legislature did not raise separation of powers issues.

The*McCrory v. Berger* decision

Now to the three-judge panel's decision in *McCrory v. Berger*. In holding that the General Assembly's appointment of non-

legislators to a majority of seats on the three commissions is unconstitutional the panel relied on and quoted extensively from *Wallace v. Bone*. The panel's written opinion does not mention the court of appeals' *Frazier* opinion which seemed to say it was okay for legislators to appoint commission members so long as they were not legislators. The panel, rather, stuck closely to the analysis of *Wallace v. Bone*. That is, the panel examined the responsibilities of the three commissions, decided that they all were similar to the Environmental Management Commission when it was litigated in 1982, and that they all clearly were to perform executive functions. The panel concluded, therefore, that the General Assembly cannot encroach on the executive branch by controlling a majority of the members. The panel's opinion does not discuss the difference between appointing legislators and appointing non-legislators or whether it might be okay to appoint some members provided they are not a majority.

The changing view of separation of powers

The three-judge panel's reliance on *Wallace v. Bone* harkens back to a time when the courts took a more rigid approach to separation of powers. Today the judiciary — including the North Carolina supreme court — tends toward a more lenient standard. The supreme court's analysis in *Wallace v. Bone* in 1982 was simple and straightforward. Are the duties of the commission executive or legislative in nature? If the duties are executive or administrative, the legislature may not appoint legislators, to do so would be attempting to control the execution of the law, even if legislators were a minority of members. End of discussion.

The analysis might not be the same today. When *Wallace v. Bone* was being decided, and since then, other courts generally have followed a more flexible, Madisonian view of separation of powers. Most prominent is the United States Supreme Court's decision in *Nixon v. Administrator of General Services*, 433 US 425 (1977), the final fight between Richard Nixon and Congress over the Watergate tapes. When Nixon resigned he made a deal with the General Services Administration (GSA) allowing him to control access to his White House recordings. Congress was not happy with that agreement and decided that the GSA should take custody and have control of all recordings though Nixon could still assert executive privilege. Nixon sued, claiming the congressional directive violated separation of powers.

In rejecting Nixon's claim, the supreme court said his argument "rests upon an 'archaic view of separation of powers as requiring three airtight departments of government,'" a view that the branches should be entirely free of control or influence from the others. Instead, the court said, it would take "the more pragmatic, flexible approach of Madison in the Federalist Papers." The proper inquiry, the court said, is whether the legislative action prevented the executive branch from accomplishing its constitutionally assigned functions. "Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."

In the limited number of separation of powers cases the North Carolina supreme court has considered since *Wallace v. Bone* it seems to have moved beyond the simple analysis there and appears inclined toward the more flexible approach. In *In re Alamance County Court Facilities*, 329 NC 84 (1991), a case about the court's inherent authority to order county commissioners to provide adequate court facilities, the supreme court emphasized that separation of powers does not mean the three branches are entirely independent of each other. The court said overlap of powers is essential to checks and balances: "The perception of the separation of the three branches of government as inviolable, however, is an ideal not only unattainable but undesirable. An overlap of powers constitutes a check and preserves the tripartite balance." The key to a proper functioning of government, the court said, is not separateness but interdependence and reciprocity. The opinion quoted Madison from the Federalist Papers: "Unless these [three branches of government] be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be fully maintained."

Recognition of the more flexible approach to separation of powers was stated even more explicitly in *Bacon v. Lee*, 353 NC 696 (2001). There the court said it was guided by *Nixon v. Administrator of General Services* in resolving separation of powers issues. The question was not whether a function belonged to one branch of government but whether one branch's action interferes to the extent of preventing the other branch from accomplishing its constitutionally assigned function — and, if so, whether the action by the intervening branch is justified by an overriding need to promote objectives within its own constitutional sphere of authority.

There are about a dozen other state supreme court decisions on separation of powers since the *Alamance County* case and none speaks directly to the difference between the *Wallace v. Bone* analysis and the more flexible approach taken in *Alamance County*

and *Bacon v. Lee*. Still, there is reason to think that when the court gets *McCrory v. Berger* it may not adopt quite the same approach as the three-judge panel.

The appeal of*McCrory v. Berger*

The appeal of *McCrory v. Berger* will offer the supreme court an opportunity to revisit *Wallace v. Bone* and more generally revisit the method by which it decides separation of powers cases. None of us knows, of course, how the supreme court will decide the case, but we have some idea as to the possibilities.

The simplest decision to write would be one saying the three-judge panel got it wrong, the General Assembly's appointment of non-legislators does not present the same threat as the appointment of its own members, regardless of the nature of the commission — therefore, the trial court is reversed, the commissions may continue as enacted by the legislature.

If, however, the supreme court were inclined to uphold the three-judge panel it could be expected to explain why the appointment of non-legislators presents the same harm as the appointment of legislators. And it could be expected to explain in more detail — consistent with the changing view of separation of powers — why the appointment of non-legislators to these particular commissions creates a problem. What is it about the Oil and Gas, Mining and Coal Ash commissions that bars the General Assembly from choosing members? Through such an explanation the court could provide guidance for the many other boards and commissions which presently have legislative appointees. Is the central flaw that the General Assembly appointed a majority of members? If so, how many is acceptable? Is it critical that the commission has functions that overlap with an executive department? May the legislature still appoint members to boards and commissions that seem more remote from gubernatorial power, like the UNC Board of Governors?

Even if the supreme court upholds the decision of the three-judge panel the General Assembly will not lose its ability to influence administrative agencies. One option of particular value might be confirmation of the governor's appointees. In the 1985 decision in *State ex rel. Martin v. Melott*, discussed briefly above, the supreme court considered Article III, Section 5(8) of the state constitution which says that the governor's appointments are subject to the "advice and consent" of the Senate for "all officers whose appointments are not otherwise provided for." Governor Martin wanted the court to say that provision applied only to constitutional offices. The court instead read it more broadly, holding in effect that the legislature can require any appointment to be subject to confirmation unless the constitution says otherwise. Should the legislature be denied the authority to appoint members of boards and commissions by a final decision in *McCrory v. Berger*, it would not be surprising to see many more gubernatorial appointments subject to confirmation — just as the General Assembly found various means to keep a grip on administrative agencies after *Wallace v. Bone*.