LEGISLATIVE RESEARCH COMMISSION

SEPARATION OF POWERS

REPORT TO THE
1981 GENERAL ASSEMBLY
OF NORTH CAROLINA
1982 SESSION

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STATE OF NORTH CAROLINA
LEGISLATIVE RESEARCH COMMISSION
STATE LEGISLATIVE BUILDING
RALEIGH 27611

June 3, 1982

TO THE MEMBERS OF THE 1981 GENERAL ASSEMBLY (REGULAR SESSION, 1982):

The Legislative Research Commission herewith reports to the Regular Session, 1982 of the 1981 General Assembly of North Carolina on the matter of Separation of Powers. The report is made under the authority of G.S. 120-30.17(1).

This report was prepared by the Legislative Research Commission Committee on Separation of Powers, and the report and recommendations are approved and transmitted by the Legislative Research Commission to the members of the 1981 General Assembly (Regular Session, 1982) for their consideration.

Respectfully submitted,

Liston B. Ramsey

W. Craig Lawing

Liston B. Ramsey
W. Craig Lawing
Cochairmen
LEGISLATIVE RESEARCH COMMISSION

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INTRODUCTION

The Legislative Research Commission, established by Article 6B of Chapter 120 of the General Statutes, is composed of twelve legislators who study a broad range of subjects authorized for study by the General Assembly.

On January 12, 1982, the North Carolina Supreme Court rendered the Wallace v. Bone decision (304 N.C. 591 (1982) -- (See Appendix B). That decision reviewed statutes placing legislators on the Environmental Management Commission in light of the Separation of Powers provision of the North Carolina Constitution (Article I, Section 6 - Appendix C) and held that:

> the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality [at 608].

The President Pro Tempore of the Senate and the Speaker of the House of Representatives as co-chairmen of the Legislative Research Commission pursuant to G.S. 120-30.17(1) appointed a committee to study the impact of the Bone decision on other agencies of State Government. The President Pro Tempore and Speaker appointed themselves as co-chairmen of the Committee on Separation of Powers. The other members of the Committee were: Representatives Allen Adams, Parks Helms, Robert Hunter, Robert Jones, Martin Lancaster, George Miller, James F. Morgan, Margaret Tennille, Walter T. Watkins, Dennis A. Wicker and Richard Wright; and Senators Julian R. Allsbrook, Henson P. Barnes, Kenneth C. Royall, Jr., and Robert Swain.

COMMITTEE PROCEEDINGS

The Committee met on March 17, 1982, and discussed the impact of the Bone decision and the following opinions on State agencies:

1. Memorandum dated February 1, 1982, to Liston B. Ramsey, Speaker, from Rufus L. Edmisten, Attorney General. Subject:
   May legislators constitutionally serve as members of State boards and commissions if they do not have voting rights, but otherwise fully participate in the conduct of the board or commission's business, in light of State ex rel. Wallace v. Bone.

2. Memorandum dated January 18, 1982, to Liston Bryan Ramsey, Speaker of the House, from Gerry Cohen. Subject:
   Separation of Powers. (Appendix E)

3. Advisory opinion of the North Carolina Supreme Court dated February 16, 1982. Subjects:
   (a) Is G.S. 143-23(b), as enacted by Section 82 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N. C. Constitution?
   (b) Is G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N. C. Constitution? (Appendix F)

4. Memorandum dated February 17, 1982, to Liston B. Ramsey, Speaker, from Donald B. Hunt. Subject:
   Explanation of Advisory Opinion of the N. C. Supreme Court on Transfer Authority and Block Grants. (Appendix G)

5. Letter, dated February 19, 1982, to all legislators from Rufus L. Edmisten. Subject:
   List of 41 Boards and Commissions (Appendix H)

6. Memorandum dated February 25, 1982, to Liston B. Ramsey, Speaker, from Gerry Cohen. Subject: Legislators on Boards and Commissions (Appendix I)

7. Memorandum dated March 10, 1982, to Liston B. Ramsey, Speaker, from Rufus L. Edmisten. Subjects: May the General Assembly appoint non-legislators to State boards and commissions which exercise a part of the administrative or executive sovereign power of the State? May the General Assembly delegate that authority to the Speaker of the House and the President of the Senate? (Appendix J)

8. Memorandum dated March 16, 1982, to Members of Committee on Separation of Powers from Gerry Cohen. Subject: Advisory Budget Commission (Appendix K)

9. Letter dated March 17, 1982, to Liston B. Ramsey, Speaker, from Rufus L. Edmisten, Attorney General. Subject: Legislators on Boards and Commissions (Appendix L)

10. Memorandum to Liston Ramsey, Speaker of the House, from Gerry Cohen. Subject: Separation of Powers (Appendix M)

After a full discussion by the Committee members on the separation of powers issues raised in the above-cited opinions and memoranda, the Committee directed the cochairmen to appoint four subcommittees, and to assign to each subcommittee a group of the 41 boards and commissions. The Attorney General had indicated problems in membership in light of the Bone decision.

The membership of those subcommittees is attached as Appendix N.

The subcommittee chairmen met on March 9, 1982, to develop guidelines for the subcommittees to use in reviewing the boards and commissions assigned and in making recommendations to the

full Committee. These guidelines were:

1. determine whether the board or commission should be continued,

2. determine which functions of the board or commission are executive in nature,

3. if it is to be continued, determine whether its executive powers:
   (a) can and should be transferred to another agency, thus making the board or commission advisory and retaining legislative members, or
   (b) should be retained and legislative members be removed and either:
      1. decrease the number of members of the board or commission, or
      2. keep the same number of members and allow the Governor or other authority to make additional non-legislator appointments.

The subcommittees met to review the assigned boards and commissions at various times.

On May 14, 1982, the subcommittees reported their recommendations to the full committee. After a general discussion the Committee made a number of decisions, but referred back to a special subcommittee questions on legislative appointments, procedures for appointments, vacancies, and drafting of a proposed bill.

The subcommittee met on May 28, 1982, and made recommendations to the full committee on these topics.

The full committee met on June 2, 1982, to receive the report of the subcommittee. After a general discussion the Committee made the following recommendations to the 1981 General Assembly (Regular Session, 1982). Appendix O contains the proposed legislation in the sequence indicated below.

The Committee on Separation of Powers has determined, after studies of the various cases and opinions of the North Carolina Supreme Court, and review of opinions of the North Carolina Attorney General and the legal staff of the Legislative Services Office that numerous changes in the Executive Organization Act of 1973 and other State statutes are necessary to keep a constitutionally permissible structure.

At the same time, the Committee believes that it is important for the General Assembly to exercise its right of oversight and in gathering information for legislation, as well as carrying out its constitutional mandate to determine the procedures for making appointments.

The Committee recommends that on boards retaining executive powers where the Speaker of the House and President of the Senate in the past have made appointments, the General Assembly appoint non-legislators. The Committee in a number of cases has determined that several boards are or should be, advisory in nature, and it is proper for the Speaker and President of the Senate to continue to appoint legislators.

As for appointments by the General Assembly the Committee is recommending that appointments be made of non-legislators by passage of a bill. This recommendation, made in light of the legislative power of appointment upheld by the Supreme Court in State Prison v. Day and in Mial v. Ellington and in light of the decision in State ex rel. Wallace v. Bone, avoids both the problem of legislators serving in executive office as well as the issue of delegation of power raised in the Supreme Court's

Advisory Opinion.

The Committee believes that its recommendations to the 1982 General Assembly solve the immediate constitutional problem. However, the Committee believes that further study and recommendations to the 1983 General Assembly will allow study in greater detail of the relationship between the legislative and executive branches in areas which have raised more controversy. Except for provisions concerning bond approval of the State Ports Authority, recommendations of this Committee do not cover the Advisory Budget Commission.

Listed below are general recommendations on appointment procedures, and then summaries of recommendations on the 41 boards and commissions which the Attorney General interposed objections to the current statutes or procedures.

Two bills are proposed for enactment by the 1982 General Assembly; first, an omnibus bill, second, a bill dealing with approval of bonds of the State Ports Authority.

A. GENERAL PROVISIONS.

1. Legislative Appointments. The Committee recommends that appointments of the General Assembly be made by passage of a bill, upon recommendation of the Speaker or President of the Senate. The constitutional history of the State includes many examples of this practice such as appointment of justices of the peace, boards of education, and executive officers. Appointments by bill avoid the cumbersome and time-consuming practice of holding joint sessions.

The Committee recommends that appointments made upon

recommendation of the Speaker of the House and appointments made upon recommendation of the President of the Senate be made in separate bills. However, this is not carried in the statute, as it is a procedural question and should be dealt with in the rules of the Senate and House.

After ratification of the omnibus bill, it will be in order for the introduction of a bill in the House and a bill in the Senate making appointments until the 1983 Session. The Committee recommends that all legislative appointees serve for terms beginning on July 1 beginning in 1983, rather than at various times of the year under current law.

2. Vacancies. It is recommended that when the General Assembly is not in session appointments be made by the Governor to serve until the General Assembly can act. The Governor, however, would have to ask for a recommendation from the Speaker or Lieutenant Governor (as appropriate) and could not appoint any person other than the one recommended. The Governor could choose to leave the office vacant.

3. Prohibition of Legislators serving. By law, members of the General Assembly would be prohibited from serving on 32 named boards which have executive powers.

B. SPECIFIC BOARDS AND COMMISSIONS.

The Committee has individually examined the 41 Boards and Commissions that the Attorney General has cited and makes the following recommendations:

1. The Board of Agriculture has 11 members, the Commissioner of Agriculture and 10 members appointed by the Governor with the

consent of the Senate to represent various agricultural interests. The Board performs a multitude of executive functions. Although the statute does not require legislative members on this Board, two Senators are on the Board because they were appointed by the Governor. Because the executive functions of the Board cannot realistically be removed, the Committee finds that the best solution is not to require legislative members and to leave the statute as it is. The Committee therefore recommends that no change be made to the Board of Agriculture.

2. The Art Museum Building Commission has 15 members, nine of whom are appointed by the Governor and six of whom are appointed by either the President of the Senate or the Speaker of the House. G.S. 143B-59 requires the President of the Senate to appoint three persons who have served in the Senate, and requires the Speaker to appoint three persons who have served in the House. Of the six legislative appointees, only one is currently a legislator. The Commission was created in 1967 for the specific purpose of building a new art museum and will expire when the new museum is completed. Because the Commission will probably expire in 1983, and because the statute does not require current legislators as members, the Committee recommends that no change be made in the statute.

3. The Apprenticeship Council has 13 members, 11 of whom are appointed by the Commissioner of Labor and two of whom are State officials designated by the Departments of Public Instruction and Community Colleges. The Council administers the apprenticeship program, which tries to match people and jobs and to give people

skills. Because no legislative members are required, the Committee recommends that no change be made.

4. The Board of Telecommunications Commissioners has 27 members, four of whom are required by statute to be legislators. The Board manages the Telecommunications Agency and has a number of executive duties. The Committee recommends that the statute be amended to remove the requirement of legislative members and to replace the legislative members with legislative appointees. The Committee recommends that four persons be apppointed to the Board by the General Assembly, two upon the recommendation of the Speaker, and two upon the recommendation of the President of the Senate in accordance with G.S. 120-121.

5. The Board of Transportation has 24 members, two of whom are required by statute to be legislators. Twenty-one Board members are appointed by the Governor, one from each of the 14 highway engineering divisions and seven at large. The Board has numerous executive duties. The Committee recommends that the requirement of legislative members be removed, and that the legislative members be replaced by legislative appointees. The Committee recommends that two persons be appointed to the Board by the General Assembly, one upon the recommendation of the Speaker, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121.

6. The Board of Trustees Teachers' and State Employees' Retirement System has 13 members, nine of whom are appointed by the Governor to represent various interests and professions and two of whom are required to be legislators. The Board

administers the State Employee Retirement System and has numerous executive functions. The Committee recommends that the requirement of legislative members be repealed and that the legislative members be replaced by legislative appointees. The Committee recommends that two persons be appointed to the Board by the General Assembly, one upon the recommendation of the Speaker, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121.

7. The Child and Family Services Interagency Committee has 10 members, two of whom are required to be legislators. The Committee recommends that the legislators remain on this Committee because it performs no executive functions. The Committee recommends, however, that G.S. 143B-426.4(7) be amended to make clear that the Committee can perform only advisory functions.

8. The Governor's Advocacy Council on Children and Youth has 17 members, four of whom are required to be legislators. The Council has no executive duties. The Committee recommends that, because of the advisory nature of this Council, the legislators remain on the Council and that G.S. 143b-414(8) be amended to make clear that the Council can have only advisory duties. The Committee recommends that of the gubernatorial appointments, at least one come from each congressional district.

9. The Coastal Resources Commission has 15 members, all appointed by the Governor. Although no legislative members are required, the Governor appointed a legislator to the Commission. Because no legislative members are required, the Committee

recommends that no change be made.

10. The Governor's Crime Commission has 38 members, four of whom are required to be legislators and several of whom are required to be judges. The Commission has primarily advisory duties, but it has several executive duties. The Committee recommends that, because of the importance to the Commission of having input from legislators and judges, the executive functions of the Commission be removed and given to the Secretary of Crime Control and Public Safety, and that the legislators and judges remain on the Commission.

11. The Economic Development Board currently has two legislative members of a total membership of 25. The Committee feels that it is important to have legislators serve a liaison function with this Board. Therefore it recommends that the Board be made advisory. It also recommends that the Board meet monthly instead of bimonthly and that in view of the large number of Board members, each congressional district be represented by at least one member.

12. The Education Commission of the States is a national commission having seven North Carolina members (two of whom are legislators). The Committee believes that the Commission does not perform any executive function of the State. Therefore, the Committee recommends that legislators continue to serve on the Commission.

13. The position of four legislators on the 17-member Environmental Management Commission has been addressed by this State's Supreme Court in the Wallace v. Bone decision. In

compliance with that decision, the Committee recommends the passage of a statute allowing the General Assembly to make four appointments, upon the recommendation of the Speaker and the President of the Senate in the place of the present legislative appointments by those officers. The Committee also recommends that the Legislative Research Commission be authorized to study the membership, powers and duties of the Environmental Management Commission and report to the 1983 General Assembly.

14. The statutes setting up the membership of the State Fire Commission, the Committee believes, should be amended to allow the General Assembly to make two non-legislator appointments upon the recommendation of the Speaker and the President of the Senate, in place of the present legislative appointments by those officers.

15. The Governor's Advocacy Council for Persons with Disabilities has 22 members, two of whom are legislators appointed by the Governor. The Committee recommends that all the Council's executive powers be removed and placed with the Secretary of Administration, that legislative membership be retained on this Council, and that at least one gubernatorial appointee come from each congressional district.

16. The Committee recommends the statutes governing the ten-member Public Officers and Employees Liability Insurance Commission be amended to the General Assembly to make two appointments upon the recommendation of the Speaker and the President of the Senate, in place of the present legislative appointments by those officers.

17. The statutes governing the nine-member North Carolina Land Conservancy Corporation should be amended to permit the General Assembly to make four appointments upon the recommendation of the Speaker and the President of the Senate, in place of the present legislative appointments by those officers.

18. The Committee recommends that the General Assembly be allowed to make two non-legislator appointments to the nine member Capital Building Authority upon the recommendation of the Speaker and the President of the Senate in place of the present legislative appointments by those officers and that the Legislative Research Commission be authorized to study the membership and powers of the Authority and report to the 1983 General Assembly.

19. The Committee feels that the legislators and the judge should be removed from the 26-member Criminal Justice Education and Training Standards Commission, that the General Assembly be allowed to make two non-legislator appointments upon the recommendation of the Speaker and the President of the Senate, in place of the present legislative appointments by those officers, and that the chairman ought to be elected by the Commission.

20. The statutes governing membership of the North Carolina Housing Finance Agency should be amended to allow the General Assembly to make eight appointments upon the recommendation of the Speaker and the President of the Senate, in place of the present legislative appointments by those officers. The Committee feels also that the Joint Legislative Commission on Governmental Operations should be authorized to study the

membership, powers and duties of the Agency and report to the 1983 Session of the General Assembly.

21. The Committee recommends for the North Carolina Seafood Industrial Park Authority that the General Assembly should make two appointments upon the recommendation of the Speaker and President of the Senate, in place of the present legislative appointments by those officers, and that the Legislative Research Commission be authorized to study the powers and duties of the Authority and report to the 1983 Session of the General Assembly. The Authority consists of 11 members.

22. The Committee for Review of Applications for Incentive Pay for State Employees consists of seven members. The Lieutenant Governor and the Speaker each appoint one person "who has experience in administering incentive as used in industry". No legislative members are required. The Committee recommends that the appointments now made by the President of the Senate and the Speaker be made by the General Assembly, upon the recommendation of the President of the Senate and the Speaker of the House.

23. The Board of Trustees of the North Carolina School of Science and Mathematics consists of 26 members. The Lieutenant Governor appoints a Senator and a superintendent of a local school administrative unit. The Speaker appoints a Representative and a principal of a local school administrative unit. The Committee recommends that the Senator and the Representative be removed from the Board. Also, the Committee recommends that the President of the Senate recommend two persons for appointment by the General Assembly, one of whom shall be a

superintendent, and that the Speaker recommend two persons for appointment by the General Assembly, one of whom shall be a principal.

24. The Board of Science and Technology has 15 members, including a Senator appointed by the Lieutenant Governor and a Representative appointed by the Speaker. The Committee recommends that the appointment of a Senator by the Lieutenant Governor and of a Representative by the Speaker be deleted. In lieu thereof, the Committee recommends that the General Assembly appoint two non-legislators upon the recommendation of the President of the Senate and the Speaker of the House.

25. The Southern Growth Policies Board is a regional board composed of five members from each party state. In the view of the Committee, the board does not perform any executive function of the State. Accordingly, the Committee recommends that legislators continue to serve on the board.

26. The State Farm Operations Commission consists of seven members. The Committee recommends that the Chairman of the Committee on Agriculture of the House of Representatives and the Chairman of the Committee on Agriculture of the Senate be deleted from the Commission. Also, the Committee recommends that the statute be amended to provide for appointment by the General Assembly upon the recommendation of the President of the Senate and the Speaker of the House of Representatives of two farmers whose principal residence is on a farm, whose principal occupation is farming or farm operations, and whose principal source of income is from farming or farm operations.

27. The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund consists of 10 members. The Committee recommends that the two legislators be deleted from the board. In lieu thereof, the Committee recommends the appointment of two non-legislators by the General Assembly upon the recommendation of the President of the Senate and the Speaker of the House.

28. The Board of Trustees of the North Carolina Museum of Art consists of 22 members. The Committee recommends that the two legislative members of the board be deleted. In lieu thereof, the Committee recommends the appointment of two non-legislators by the General Assembly upon the recommendation of the President of the Senate and the Speaker of the House. Also, the Committee recommends that the appointments by the North Carolina Art Society, the North Carolina Museum of Art Foundation, and the Board of Trustees of the North Carolina Museum of Art be decreased by one each and that the appointments of the Governor be increased to one from each congressional district.

29. The Board of Trustees of the University of North Carolina Center for Public Television consists of 22 members. The Committee recommends that the member of the Senate and the member of the House be deleted. In lieu thereof, the General Assembly would appoint two non-legislators upon the recommendation of the President of the Senate and the Speaker of the House.

30. The Commission for Mental Health, Mental Retardation and Substance Abuse Services consists of 25 members. The Committee recommends that the four members of the General Assembly be

removed from the Commission. In lieu thereof, the General Assembly would appoint four non-legislators upon the recommendation of the President of the Senate and the Speaker of the House. The Governor would be required to appoint at least one member from each congressional district. The 1981 rewrite of the statute omitted the authorization for members of the Commission who are not State employees to receive per diem compensation and travel expenses. The Committee recommends that the statute specifically authorize per diem compensation and travel expenses for members who are not State employees.

31. The Governor's Waste Management Board consists of 15 members. The Committee recommends deleting the House member and the Senate member. In lieu thereof, the General Assembly would appoint two members upon the recommendation of the President of the Senate and the Speaker of the House.

32. The Municipal Board of Control was established in 1917, abolished in 1969, and reestablished in 1971. The Committee believes that the granting of a municipal charter is a legislative power which should not be delegated, and therefore recommends the abolition of the board effective October 1, 1982.

33. The North Carolina Alcoholism Research Authority currently has a member of the General Assembly serving by appointment of the Governor, but no statute requires that appointment. Therefore, the Committee feels that the statute does not need any change.

34. The North Carolina Capital Planning Commission currently has several advisory duties, but it is responsible for locating

and naming most State government buildings in the City of Raleigh. The Committee feels that it is important for legislators to continue to be involved in the process, so that the Committee's function in locating and naming buildings should be advisory to the Governor. In addition, its advisory scope should be expanded to all of Wake County, and the role of locating and naming legislative buildings should be transferred to the Legislative Services Commission.

35. The North Carolina Ports Railway Commission currently has a member of the General Assembly serving by appointment of the Governor, but no statute requires that appointment. Therefore, the Committee feels that the statute does not need any change.

36. The North Carolina State Ports Authority currently has nine members; of those, one is a Senator appointed by the Lieutenant Governor and one is a Representative appointed by the Speaker. The Committee feels it is important for the General Assembly to continue to appoint members of the Ports Authority, and legislative appointments should be increased from two to four in 1983 by expanding the State Ports Authority from nine to eleven members. The Committee feels that the legislative appointment of non-legislators should be made by the General Assembly, upon the recommendation of the Speaker and President of the Senate. The Committee also feels that bond issuance by the Ports Authority should be subject to the approval of the Governor, upon the recommendation of the Advisory Budget Commission.

37. The Property Tax Commission currently has five members,

three appointed by the Governor, and one each by the Lieutenant Governor and Speaker. The Committee feels it is important for the General Assembly to continue to appoint members of the Commission, and that legislative appointments should be made by the legislature upon the recommendation of the Speaker and President of the Senate. The Committee believes that, because of the increasing workload in this area, consideration be given to either a full-time Property Tax Commission, or creation of a Tax Court.

38. The Social Services Commission currently has a member serving by appointment of the Governor, but no statute requires that appointment. Therefore, the Committee feels that no change need be made in the appointment process. However, the Committee feels that the rulemaking powers granted by the Social Services Commission under G.S. 143B-153 and under Chapter 108A of the General Statutes are excessive delegations of legislative authority. The Committee feels that although many rules are purely administrative, issues such as eligibility standards for programs are legislative and after July 1, 1983, should require legislative enactment. The Committee feels that if the General Assembly is in recess, the Commission should be able to enact interim regulations to allow receipt of federal assistance, but these should expire on July 1 after issuance.

39. The North Carolina Commission of Indian Affairs consists of 22 persons, including the Speaker and Lieutenant Governor. The Committee feels it is important for the General Assembly to continue to appoint members of the Commission, and that

legislative appointments should be made by the legislature, upon the recommendation of the Speaker and President of the Senate.

40. The Wildlife Resources Commission currently has one Senator appointed by the Lieutenant Governor, and one House member appointed by the Speaker. The Committee feels it is important to continue to have legislative appointments, and that two appointments should be made by the legislature, upon the recommendation of the Speaker and President of the Senate.

41. The Council on the Status of Women currently has a member of the General Assembly serving by appointment of the Governor, but no statute requires that appointment. Therefore, the Committee feels that the statute does not need any change.

C. TECHNICAL CORRECTIONS.

A mistake made in a conference committee report to House Bill 297, later enacted as Chapter 765 of the 1981 Session Laws, resulted in an ambiguously worded statute, G.S. 90-270.25. The amended statute, in part, provided for appointments by legislative officers in excess of the specified maximum number of members of the North Carolina Board of Physical Therapists. The Committee proposes that the appointments by legislative officers be removed.

APPENDIX A

STATE OF NORTH CAROLINA

LEGISLATIVE RESEARCH COMMISSION

STATE LEGISLATIVE BUILDING

RALEIGH 27611

MEMBERSHIP

1981-1983

House Speaker Liston B. Ramsey, Jr.	Senate President Pro Tempore
Cochairman	W. Craig Lawing, Cochairman
Representative Chris S. Barker, Jr.	Senator Henson P. Barnes
Representative John T. Church	Senator Carolyn Mathis
Representative Gordon H. Greenwood	Senator William D. Mills
Representative John J. Hunt	Senator Russell Walker
Representative Lura S. Tally	Senator Robert W. Wynne

ON—Continued

Mar. 22*†, Mar. 29*†; April 5†*; April 12†*, April 19†*; April 26*†; May 3*†; May 10†*; May 17†*; May 24*†; June 7*†; June 21*†.

Twenty-Ninth District—Judge Kirby

Henderson—Feb. 1*; Feb. 8*, Feb. 15*(A); Mar. 1†; Mar. 8†; April 19*, April 26*; May 17†; May 24†.
McDowell—Jan. 11*(A); Feb. 15†; Feb. 22†; Mar. 29*(A); April 5*; May 31*(A); May 31*(A); June 21*.
Polk—Jan. 18*, Jan. 25†(A).
Rutherford—Jan. 4*(A); Jan. 11†; Jan. 18†, Mar. 1*(A); Mar. 8*(A); Mar. 15*, April 19†(A); April 26†(A); May 3*; May 10*, May 24*(A).
Transylvania—Jan. 25*; Mar. 22*, Mar. 29†; June 7†.

Thirtieth District—Judge Gaines

Cherokee—Mar 22(2).
Clay—April 19.
Graham—Mar. 8; May 24.
Haywood—Jan. 11†(2); Feb. 8(2); April 26†(2); May 31(2).
Jackson—Jan. 4*(A); Jan. 25(2); May 10(2).
Macon—April 5(2).
Swain—Feb. 22(2).

† For Civil Cases.
* For Criminal Cases.
# Non Jury and Adm. Matters.
(A) Judge to be Assigned.

STATE OF NORTH CAROLINA, EX REL. JAMES C. WALLACE AND DAVID HOWELLS v. ROGER W. BONE AND ROBIE L. NASH

FREDERICK S. BARKALOW AND BRENDA ARMSTRONG v. J. J. HARRINGTON, R. P. THOMAS, ROGER W. BONE AND ROBIE NASH

No. 55

(Filed 12 January 1982)

Constitutional Law § 5— separation of powers—legislators on Environmental Management Commission—legislative act unconstitutional

G.S. 143B-283(d), increasing the membership of the Environmental Management Commission by providing two members of the N.C. House of Representatives, appointed by the Speaker of the House, and two members of the N.C. Senate, appointed by the President of the Senate, shall be members of the EMC, is unconstitutional as it violates the Separation of Powers Clause of the North Carolina Constitution. The principle of separation of powers is a cornerstone of our state and federal governments which can be discerned from early N.C. cases, all three versions of the N.C. Constitution, records with respect to the drafting and adoption of our first N.C. Constitution and of the federal constitution, and from the failure of various constitutional amendments. Decisions of sister states also demonstrate an adherence to the separation of powers principle. Therefore, as the duties of the EMC, G.S. 143B-282 *et seq.*, are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws, the legislature cannot constitutionally, under Section 6 of Article I of the N.C. Constitution, create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality. Section 1, Articles II, III and IV of the N.C. Constitution.

APPEAL by plaintiffs from *Bailey, J.*, 18 March 1981 Session, WAKE Superior Court.

On 18 February 1981, pursuant to leave granted by the Attorney General, plaintiffs Wallace and Howells instituted an action in the nature of *quo warranto* against defendants Bone and Nash, members of the North Carolina House of Representatives, challenging the legality of their serving as members of the North Carolina Environmental Management Commission (EMC). On the same day, plaintiffs Barkalow and Armstrong instituted an action against defendants Bone and Nash, and also defendants Harrington and Thomas, the latter two being members of the North Caro-

lina Senate, challenging the legality of defendants serving on the EMC.

The gist of the complaints is that the service of defendants on the EMC at the same time they are serving as members of the General Assembly violates the Separation of Powers clause of the North Carolina Constitution. Plaintiffs allege that Section 6 of Chapter 1158 of the 1979 Session Laws (Second Session) [codified as G.S. 143B-283(d)] is unconstitutional. This section increases the membership of the EMC by four and provides that two of the additional members shall be members of the House of Representatives appointed by the Speaker of the House, and that the other two shall be members of the Senate appointed by the President of the Senate.

Defendants filed answers in which they admitted most of the allegations of the complaints. However, they denied that the act of the General Assembly complained of is unconstitutional and that their service on the EMC is invalid. They asked that the act be declared constitutional.

By consent of the parties, the actions were consolidated for trial and disposition. On 13 March 1981 the parties agreed to a pre-trial order which contains the following undisputed facts:

a. James C. Wallace is a citizen, resident, and taxpayer of Orange County, North Carolina.

b. David H. Howells is a citizen, resident and taxpayer of Wake County, North Carolina.

c. Frederick S. Barkalow is a citizen and resident of Wake County, North Carolina.

d. Brenda Armstrong is a citizen and resident of Durham County, North Carolina.

e. Wallace, Howells, Barkalow, and Armstrong are members of the Environmental Management Commission appointed by the Governor, pursuant to G.S. 143B-283(a).

f. Roger W. Bone is a citizen and resident of Nash County, North Carolina, and is an elected member of the North Carolina House of Representatives. He is Vice Chairman of the House Committee on Water and Air Resources.

g. Robie Nash is a citiz North Carolina, and is an Carolina House of Represe Water and Air Resources House.

h. J. J. Harrington is County, North Carolina, ar North Carolina Senate. He s Manufacturing, and Public

i. R. P. Thomas is a ci County, North Carolina, ar North Carolina Senate. He Government & Regional Af tees.

j. Senators Harrington Environmental Managemen Lieutenant Governor, pursu

k. Representatives Bon Environmental Managemen Speaker of the House on Fe office on February 12, 1981

l. The Environmental quasi-independent regulator legislative and quasi-jud enumerated in G.S. 143B-28

m. Members of the Env sion are public officers.

n. The provision pursua and Thomas and Represent pointed [G.S. 143B-283(d)] Assembly in June 1980 as 1979 Session Laws (2nd Ses

o. Prior to the enactm vironmental Management C (13) members appointed by ment of G.S. 143B-243(d), Commission consists of seve

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elected member of the North
atives. He is Vice Chairman of
er and Air Resources.

g. Robie Nash is a citizen and resident of Rowan County, North Carolina, and is an elected member of the North Carolina House of Representatives. He serves on both the Water and Air Resources and Energy Committees of the House.

h. J. J. Harrington is a citizen and resident of Bertie County, North Carolina, and is an elected member of the North Carolina Senate. He serves on the Senate Agriculture, Manufacturing, and Public Utilities and Energy Committees.

i. R. P. Thomas is a citizen and resident of Henderson County, North Carolina, and is an elected member of the North Carolina Senate. He serves on both the Senate Local Government & Regional Affairs and Manufacturing Committees.

j. Senators Harrington and Thomas are members of the Environmental Management Commission appointed by the Lieutenant Governor, pursuant to G.S. 143B-283(d)(2).

k. Representatives Bone and Nash are members of the Environmental Management Commission appointed by the Speaker of the House on February 11, 1981, and inducted into office on February 12, 1981, pursuant to G.S. 143B-283(d)(1).

l. The Environmental Management Commission is a quasi-independent regulatory agency of the State with quasi-legislative and quasi-judicial powers and duties as enumerated in G.S. 143B-282.

m. Members of the Environmental Management Commission are public officers.

n. The provision pursuant to which Senators Harrington and Thomas and Representatives Bone and Nash were appointed [G.S. 143B-283(d)] was enacted by the General Assembly in June 1980 as Section 6 of Chapter 1158 of the 1979 Session Laws (2nd Session 1980).

o. Prior to the enactment of G.S. 143B-243(d), the Environmental Management Commission consisted of thirteen (13) members appointed by the Governor. After the enactment of G.S. 143B-243(d), the Environmental Management Commission consists of seventeen (17) members of which thir-

teen (13) are appointed by the Governor, two (2) are appointed by the Speaker of the House from the membership of the House, and two (2) are appointed by the President of the Senate (Lieutenant Governor) from the membership of the Senate.

In the pre-trial order the parties also agreed that the contested issue to be determined by the court is

> Whether the provisions of G.S. 143B-243(d) [1979 S.L., Ch. 1158, § 6 (2nd Session, 1981)], by which two representatives and two senators were appointed to membership on the Environmental Management Commission, violate the separation of powers provision of the Constitution of North Carolina (N.C. Const., Art. I, § 6).

Following a hearing at which Judge Bailey considered the pleadings, the stipulations, briefs filed by all parties, and arguments of counsel, he entered a judgment in which he found facts substantially as stipulated by the parties. He concluded as a matter of law, *inter alia*, the following:

> 5. The legislative members of the Environmental Management Commission (defendants) are in a clear minority position on the Commission. The statutory composition of the Commission does not represent an attempt by the General Assembly to usurp the functions of the executive branch of State government, but represents a cooperative effort between the executive and legislative branches. This court wishes to make it clear that the clear minority position of the legislators on the Commission is a critical factor in the court's decision.
>
> 6. Under the circumstances presented in this case, individual members of the legislature may serve on the Environmental Management Commission, without violating the separation of powers provision in Article I, § 6 of the Constitution of North Carolina, where such service falls in the realm of cooperation on the part of the legislature and there is no evidence of an attempt to usurp functions of the executive branch of our State government.

Judge Bailey also concluded that the challenged statute is constitutional. He further concluded that plaintiffs are not entitled to the relief sought and dismissed the actions.

Plaintiffs appealed and defe
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peals. Defendants contended that
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joined in the request that we by
court allowed the petition on 2 J

Attorney General Rufus L. E
General Thomas F. Moffitt, for d

Thomas S. Erwin for plaintif

BRITT, Justice.

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smissed the actions.

Plaintiffs appealed and defendants petitioned this court for discretionary review prior to determination in the Court of Appeals. Defendants contended that the appeal has significant public interest and that the legal principle involved in these cases is of major significance to the jurisprudence of the state. Plaintiffs joined in the request that we bypass the Court of Appeals. This court allowed the petition on 2 June 1981.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas F. Moffitt, for defendant-appellees.

Thomas S. Erwin for plaintiff-appellants.

BRITT, Justice.

Section 6 of Article I of our state constitution provides: "*Separation of powers.* The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other." We hold that the challenged enactment of the General Assembly violates this section of the state constitution and that the judgment appealed from must be reversed.

In arriving at this conclusion, we have considered, among other things, the history of the principle of separation of powers in our state and nation, the decisions of other jurisdictions in our nation respecting the principle, and the specific provisions of our constitution and the statutes involved.

I.

Since North Carolina became a state in 1776, three constitutions have been adopted: In 1776, in 1868 and in 1970. The first two documents provided that "[t]he legislative, executive and supreme judicial powers of Government, ought to be forever separate and distinct from each other." The 1970 rewrite contains the language first quoted above, changing "ought to be" to "shall be". Thus each of our constitutions has explicitly embraced the doctrine of separation of powers.[1]

Section 1 of Article II of our present constitution provides that "[t]he legislative power of the State shall be vested in the

1. N.C. Constitution, Sec. 4, Declaration of Rights (1776); N.C. Constitution, Art. I, Sec. 8 (1868); N.C. Constitution, Art. I, Sec. 6 (1970).

General Assembly, which shall consist of a Senate and a House of Representatives." Section 1 of Article III provides that "[t]he executive power of the State shall be vested in the Governor." Section 1 of Article IV provides:

> The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.

Previous constitutions contained similar provisions.

Our first state constitution was adopted on 18 December 1776.[2] While records with respect to the drafting and adoption of our first constitution are sparse, history has recorded the instructions given by their constituents to two county delegations participating in the drafting of the first constitution—the delegations from Mecklenburg and Orange Counties. Instructions to the Mecklenburg delegation included the following:

* * *

> 4. That you shall endeavor that the form of Government shall set forth a bill of rights containing the rights of the people and of individuals which shall never be infringed in any future time by the law-making power or other derived powers in the State.
>
> 5. That you shall endeavour that the following maxims be substantially acknowledged in the Bills of Rights (viz):
>
> 1st. Political power is of two kinds, one principal and superior, the other derived and inferior.

2. This constitution was adopted at the Fifth Provincial Congress which met in Halifax, N.C. The constitution was not submitted to a vote of the people. *The History of a Southern State, North Carolina*, Lefler and Newsome, 3rd ed., pg. 221. In commenting on the first constitution, Professors Lefler and Newsome record: "The political theory of the new constitution, stated in Articles 1, 2 and 4, emphasized popular sovereignty, separation of powers, and three separate branches of government." *Id.*

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Instructions to the Orange deleg

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> Seventhly. That the exe
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3. *The Colonial Records of North Ca*

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2nd. The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.

6. That you shall endeavor that the Government shall be so formed that the derived inferior power shall be divided into three branches distinct from each other, viz:

The power of making laws
The power of executing laws and
The power of Judging.

* * *

9. The law making power shall be restrained in all future time from making any alteration in the form of Government.[3]

Instructions to the Orange delegation included the following:

* * *

Fourthly. We require that in framing the civil constitution the derived inferior power shall be divided into three branches, to wit: The power of making laws, the power of executing and the power of judging.

Fifthly. That the power of making laws shall have authority to provide remedies for any evils which may arise in the community, subject to the limitations and restraints provided by the principal supreme power.

* * *

Seventhly. That the executive power shall have authority to apply the remedies provided by the law makers in that manner only which the laws shall direct, and shall be entirely distinct from the power of making laws.

Eighthly: That the judging power shall be entirely distinct from and independent of the law making and executive powers.

Ninthly: *That no person shall be capable of acting in the exercise of any more than one of these branches at the same*

3. *The Colonial Records of North Carolina*, Saunders, Vol. X, 870a, 870b.

time lest they should fail of being the proper checks on each other and by their united influence become dangerous to any individual who might oppose the ambitious designs of the persons who might be employed in such power.[4] (Emphasis added.)

The federal constitution was drafted and adopted in 1787, eleven years after our first state constitution was adopted. While the federal constitution contains no explicit provision regarding separation of powers, the principle is clearly implied. Article I, Section 1, provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a senate and house of representatives." Article II, Section 1, provides that "[t]he executive power shall be vested in a president of the United States of America . . . ." Article III, Section 1, provides that "[t]he judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish . . . ."

There is abundant evidence that the drafters of the federal constitution had the separation of powers principle in mind, and, for the most part, the principle has been championed and adhered to throughout the history of our republic.

Alexander Hamilton, one of the drafters of the federal constitution and keeper of copious notes, wrote:

> In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and the usurpations are guarded against, by a division of the government into *distinct and separate* departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among *distinct and separate* departments. (Emphasis added.) *The Federalist*, No. 51.

4. Id., 870g, 870h. Professors Lefler and Newsome tell us that "it was only the pressure from a few county delegations notably Orange and Mecklenburg, that compelled the Congress to add a Bill of Rights to its constitution." *The History of a Southern State, North Carolina, supra*, pg. 221.

It appears that George Wash try, feared the destruction of o abuse of the principle of separatio dress, he said:

> It is important, likewise, free country should inspire c its administration, to confine tive constitutional spheres, powers of one department spirit of encroachment tends the departments in one, and form of government, a real d love of power, and proneness in the human heart, is suffici this position.[5]

There are many indications than 200 years, has strictly adher of powers. One indication is that not the only state, in the Union nor with the power to veto Numerous efforts to change our c that power have failed. The clear not want the chief executive to h legislative branch.

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5. Quoted by the Supreme Court of *Commission*, 238 Ind. 120, 149 N.E. 2d 27

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and Newsome tell us that "it was only the otably Orange and Mecklenburg, that com- hts to its constitution." *The History of a* g. 221.

It appears that George Washington, the father of our country, feared the destruction of our form of government by an abuse of the principle of separation of powers. In his Farewell Address, he said:

> It is important, likewise, that the habit of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position.[5]

There are many indications that North Carolina, for more than 200 years, has strictly adhered to the principle of separation of powers. One indication is that ours is one of the few states, if not the only state, in the Union that does not provide its governor with the power to veto enactments of the legislature. Numerous efforts to change our constitution to give the governor that power have failed. The clear implication is that our people do not want the chief executive to have any direct control over our legislative branch.

Another indication is the absence of cases which have come to this court contending that a branch of our state government violated the separation of powers principle. While the case at hand appears to be one of first impression in our jurisdiction, we have found two instances in which members of the judiciary have expressed themselves on the principle.

In the fifth case reported in our reports, *Bayard v. Singleton*, 1 N.C. 5 (1787), it is recorded that Ashe, J., deviated from the case under consideration to make "a few observations on our Constitution and system of government." Obviously referring to our national government, he said:

5. Quoted by the Supreme Court of Indiana in *Book v. State Office Building Commission*, 238 Ind. 120, 149 N.E. 2d 273 (1958).

> [A]t the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a marooned island—without laws, without magistrates, without government or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the Constitution, dividing the powers of government into separate and distinct branches, to wit: The legislative, the judicial, and executive, and assigning to each several and distinct powers, and prescribing their several limits and boundaries; . . . .

1 N.C. at 6.

In *State v. Bell*, 184 N.C. 701, 115 S.E. 190 (1922), this court was confronted with the interpretation and application of a criminal statute relating to support of children. A majority of the court gave the statute a liberal interpretation and upheld the conviction of the defendant. Stacy, J., (later C.J.), dissented on the ground that the statute should be strictly construed. The following is from his dissenting opinion:

> We must hew to the line and let the chips fall wherever they may. And though we may think the law ought to be otherwise, this should not blind our judgment to what it really is. The duty of legislation rests with another department of the Government. It is ours only to declare the law, not to make it. *Moore v. Jones*, 76 N.C. 187. The people of North Carolina have ordained in their Constitution (Art. I, sec. 8) that the legislative, executive, and supreme judicial powers of the Government should be and ought to remain forever separate and distinct from each other. Such is their expressed will, and from the earliest period in our history they have endeavored with sedulous care to guard this great principle of the separation of the powers. In this country, those who make the laws determine their expediency and wisdom, but they do not administer them. The chief magistrate who executes them is not allowed to judge them. To another tribunal is given the authority to pass upon their validity and constitutionality, "to the end that it be a government of laws and not of men." From this unique political division results

our elaborate system of che
and refinement which repu
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184 N.C. at 719.

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Georgia, 233 Ga. 667, 212 S.E. 2
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990, 341 N.E. 2d 254 (1976) (Thi
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N.W. 2d 780 (1973).

A review of a representati
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> our elaborate system of checks and balances—a complication and refinement which repudiates all hereditary tendencies and makes the law supreme. In short, it is one of the distinct American contributions to the science of government; . . . .

184 N.C. at 719.

There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments.

II.

Numerous decisions from sister states show strict adherence to the separation of powers principle and do not tolerate legislative encroachment or control over the function and power of the executive branch. *See Book v. State Office Building Commission, supra; State ex rel. State Building Commission of West Virginia v. Bailey*, 151 W. Va. 79, 150 S.E. 2d 449 (1966); *Greer v. Georgia*, 233 Ga. 667, 212 S.E. 2d 836 (1975); *Stockman v. Leddy*, 55 Colo. 24, 129 P. 220 (1912). *See also Bradner v. Hammond*, 553 P. 2d 1 (Alaska 1976); *Ahearn v. Bailey*, 104 Ariz. 250, 451 P. 2d 30 (1969); *In re Advisory Opinion to the Governor*, 276 So. 2d 25 (Fla. 1973); *In re Opinion of the Justices to the Governor*, 369 Mass. 990, 341 N.E. 2d 254 (1976) (This case stated flexibility in allocation of functions may sometimes be permissible, but only if it creates no interference by one department with the power of another.); *Dearborn TP. v. Dail*, 334 Mich. 673, 55 N.W. 2d 201 (1952); and *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W. 2d 780 (1973).

A review of a representative number of those decisions is in order.

In *Book v. State Office Building Commission, supra*, the Supreme Court of Indiana declared unconstitutional that part of the State Office Building Act which provided that certain members of the legislature should be members of the State Office Building Commission.. The court held that this part of the act violated the division of powers provision of the state constitution because it attempted to confer executive-administrative duties upon members of the legislature. Referring to the separation of powers provision of the Indiana Constitution, the court said:

Article 3, § 1, supra, is not a law against dual office holding. It is not necessary to constitute a violation of the Article, that a person should hold an office in two departments of Government. It is sufficient if he is an officer in one department and at the same time is performing functions belonging to another. *State ex rel. Black v. Burch*, supra, 1948, 226 Ind. 445, 462, 80 N.E. 2d 294, 560, 81 N.E. 2d 850; *Monaghan v. School District No. 1, Clackamas County*, Or. 1957, 315 P. 2d 797, 802-804.

149 N.E. 2d at 296.

In *State ex rel. State Building Commission of West Virginia v. Bailey, supra*, the Supreme Court of Appeals of West Virginia declared unconstitutional that portion of a statute which named certain members of the legislature to the State Building Commission on the ground that the statute violated the separation of powers provision of the state constitution. We quote from the opinion:

[I]t is manifest that the powers granted and the duties imposed upon the State Building Commission of West Virginia by the legislative enactment here involved, Chapter 8, Acts of the Legislature, Regular Session, 1966, are executive or administrative and not legislative in character and that the provision of Section 1 of the statute that the president of the senate, the speaker of the house of delegates, the minority leader of the senate and the minority leader of the house of delegates shall be members of the commission is violative of Article V of the Constitution of this State in that it attempts to confer and impose executive or administrative powers and duties upon those members of the Legislature and for that reason is null and void and of no force and effect.

150 S.E. 2d at 456.

In *Greer v. State of Georgia et al., supra*, the Supreme Court of Georgia declared unconstitutional legislation naming certain legislators to serve on the governing body of the World Congress Authority. The legislative act created said agency, a public corporation, to plan, construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate and manage the Georgia World Congress Center. The act also provided that the

governing body of the authority v
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The question here is w
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212 S.E. 2d at 838.

In *Stockman v. Leddy, supra*
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129 P. at 223.

In *O'Donoghue v. United S*
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Court of Appeals of West Virginia
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reated said agency, a public cor-
ct, acquire, own, repair, remodel,
e, equip, operate and manage the
r. The act also provided that the

governing body of the authority would consist of 20 members, six of whom would be members of the General Assembly. In holding that the part of the act providing for members of the legislature to serve on the authority violated the separation of powers provision of the state constitution, the Georgia court said:

> The question here is whether the legislature can constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality. Appellants' argument is that there is no constitutional defect in this arrangement. Carried to its logical extreme, this arrangement would permit the General Assembly to appoint an ad hoc committee of its own members to implement specific legislation. The case at bar does not present such a logical extreme, but it evidences the same constitutional infirmity. We have to conclude that a legislator who participates as a member of the governing body of a public corporation such as the World Congress Center Authority is performing executive functions.

212 S.E. 2d at 838.

In *Stockman v. Leddy*, *supra*, the Supreme Court of Colorado declared unconstitutional an act of the Colorado legislature creating a joint committee of its members to conduct an investigation on which the committee would come to a conclusion and act in prosecuting or defending certain actions for the benefit of the state. In holding that the legislation violated the principle of separation of powers, the Colorado court said:

> [T]he General Assembly not only passed an act—that is, made a law—but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members. This is contrary to article 3 of our Constitution, ...

129 P. at 223.

In *O'Donoghue v. United States*, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933), the U.S. Supreme Court, after stating that

our federal constitution distributes the power of government between the three branches, said:

> This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, *Springer v. Philippine Islands*, 277 U.S. 189, 201, 72 L.Ed. 845, 849, 48 S.Ct. 480, namely, to preclude a commingling of these essentially different powers of government in the same hands.

77 L.Ed. at 1360.

In his judgment, Judge Bailey recited that he found the decision of the Supreme Court of South Carolina in *State ex rel. McLeod v. Edwards*, 269 S.C. 75, 236 S.E. 2d 406 (1977), to be very persuasive. He also cited *State ex rel. Schneider v. Bennett*, 219 Kan. 265, 547 P. 2d 786 (1976). A study of these cases reveals that South Carolina and Kansas have deviated from the separation of powers principle.

In *State ex rel. McLeod v. Edwards, supra*, the constitutionality of two members of the South Carolina General Assembly serving as *ex officio* members of the State Budget and Control Board was challenged. This board is composed of the governor, the state treasurer, the controller general, the chairman of the senate finance committee, and the chairman of the house ways and means committee. All members of the board are *ex officio*. Relying on its previous decisions, the court held that the inclusion of members of the legislature on the board did not violate the separation of powers provisions of the state constitution. In defending its holdings, the court said:

> While the foregoing disposes of the present separation of powers issue, we think that an examination of the principle, as applied to the present facts, reveals the basis for the result reached in our prior decisions. Important in this case is the fact that the General Assembly has been careful to put the legislative members in a minority position on The Board. The statutory composition of The Board does not represent an attempt to usurp the functions of the executive department, but apparently represents a cooperative effort by making available to the executive department the special knowledge and expertise of the chairman of the two finance committees in the fiscal legislative process in gen membership of the legislato with the executive in matter tion as legislators and not u executive department.

236 S.E. 2d 408-09.

In *State ex rel. Schneider v* the constitutionality of members state finance council was preser governor, the speaker of the ho the majority and minority leade the chairmen of the ways and m senate. The council was created cy to approve the rules and reg ministration and thereby to che coordinate the activities of st specifically authorized to exercis state department of administra and all rules and regulations wi formance of *any* power or duty tion of any business of the dep business with other state agenci by any state agency from final secretary of administration; and prove expenditures by a state a the state finance council for t ticipated and unbudgeted needs prescribed by the legislature.

In commenting on the sep Kansas court said:

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committees in the fiscal affairs of the State and the legislative process in general. We view the ex officio membership of the legislators on The Board as cooperation with the executive in matters which are related to their function as legislators and not usurpation of the functions of the executive department.

236 S.E. 2d 408 09.

In *State ex rel. Schneider v. Bennett, supra*, the question of the constitutionality of members of the legislature serving on the state finance council was presented. This council consists of the governor, the speaker of the house, the president of the senate, the majority and minority leaders of the house and senate, and the chairmen of the ways and means committees of the house and senate. The council was created as a "legislatively oriented" agency to approve the rules and regulations of the department of administration and thereby to check the power of the governor to coordinate the activities of state agencies. The council was specifically authorized to exercise control and authority over the state department of administration as a whole; to approve any and all rules and regulations with respect to the manner of performance of *any* power or duty of the department and the execution of any business of the department and its relations to and business with other state agencies; to hear and determine appeals by any state agency from final decisions or final actions of the secretary of administration; and to make allocations to, and approve expenditures by a state agency from any appropriations to the state finance council for that purpose, of funds for unanticipated and unbudgeted needs, under conditions and limitations prescribed by the legislature.

In commenting on the separation of powers doctrine, the Kansas court said:

> In our judgment a strict application of the separation of powers doctrine is inappropriate today in a complex state government where administrative agencies exercise many types of power including legislative, executive, and judicial powers often blended together in the same administrative agency. The courts today have come to recognize that the political philosophers who developed the theory of separation of powers did not have any concept of the complexities of

government as it exists today. Under our system of government the absolute independence of the departments and the complete separation of powers is impracticable. We must maintain in our political system sufficient flexibility to experiment and to seek new methods of improving governmental efficiency. At the same time we must not lose sight of the ever-existing danger of unchecked power and the concentration of power in the hands of a single person or group which the separation of powers doctrine was designed to prevent.

547 P. 2d at 791.

However, the Kansas court also said:

The separation of powers doctrine does not in all cases prevent individual members of the legislature from serving on administrative boards or commissions created by legislative enactments. Individual members of the legislature may serve on administrative boards or commissions where such wervice falls in the realm of cooperation on the part of the legislature and there is no attempt to usurp functions of the executive department of the government. (Citations.)

547 P. 2d at 792.

The Kansas court then proceeded to hold, however, that many, if not most, of the duties assigned to the state finance council were executive in nature and the exercise of those powers by legislators was unconstitutional. We quote again from the opinion:

All of these powers concern the day-to-day operations of the department of administration and its various divisions. The vesting of such powers in the state finance council in our judgment clearly grants to a legislatively oriented body control over the operation of an executive agency and constitutes a usurpation of executive power by the legislative department.

547 P. 2d at 797.

III.

Having stated the history of the separation of powers principle, and having considered its application by other states, we now

relate the principle to the challe four members of our General Ass

The Environmental Manageme to G.S. 143B-282 *et seq.* Its purpo follows:

There is hereby created t Commission of the Departm Community Development wit mulgate rules and regulation tion, preservation, and enha resources of the State.

Within the limitations of G.S. health and safety, the EMC has th things, to grant and revoke perm sources of air and water pollutio suant to certain statutes to any finds responsible for causing or water within a watershed or poll for which standards have been es that investigations be conducted conduct public hearings, institute agree upon or enter into settl 143-215.3; to direct the investiga wildlife pursuant to G.S. 143-215. oversight and supervision over grams pursuant to certain statu when it finds a generalized dang pollution pursuant to certain stat use within capacity use areas p direct that investigations be cond out duties regarding capacity use and approve subject to condition struction pursuant to G.S. 143-21 pursuant to G.S. 143-215.29; to ha over the maintenance and opera 143-215.31; and to have jurisdictio tion pursuant to Article 21A of C

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III.

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relate the principle to the challenged legislation providing for four members of our General Assembly to serve on the EMC.

The Environmental Management Commission exists pursuant to G.S. 143B-282 *et seq.* Its purpose is stated in G.S. 143B-282 as follows:

> There is hereby created the Environmental Management Commission of the Department of Natural Resources and Community Development with the power and duty to promulgate rules and regulations to be followed in the protection, preservation, and enhancement of the water and air resources of the State.

Within the limitations of G.S. 143-215.9 concerning industrial health and safety, the EMC has the power and duty, among other things, to grant and revoke permits with regard to controlling sources of air and water pollution; to issue special orders pursuant to certain statutes to any person whom the commission finds responsible for causing or contributing to any pollution of water within a watershed or pollution of the air within the area for which standards have been established; to conduct and direct that investigations be conducted pursuant to certain statutes; to conduct public hearings, institute actions in superior court, and agree upon or enter into settlements, all pursuant to G.S. 143-215.3; to direct the investigation of any killing of fish and wildlife pursuant to G.S. 143-215.3; to review and have general oversight and supervision over local air pollution control programs pursuant to certain statutes; to declare an emergency when it finds a generalized dangerous condition of water or air pollution pursuant to certain statutes; to grant permits for water use within capacity use areas pursuant to G.S. 143-215.15; to direct that investigations be conducted when necessary to carry out duties regarding capacity use areas; to approve, disapprove and approve subject to conditions all applications for dam construction pursuant to G.S. 143-215.28; to halt dam construction pursuant to G.S. 143-215.29; to have jurisdiction and supervision over the maintenance and operation of dams pursuant to G.S. 143-215.31; and to have jurisdiction and supervision over all pollution pursuant to Article 21A of Chapter 143. G.S. 143B-282(1).

The EMC is also given the power and duty to establish standards and adopt rules and regulations for air quality standards,

emission control standards, and classifications for air contaminant sources pursuant to G.S. 143-215.107; for water quality standards and classifications pursuant to certain statutes, to implement the issuance of permits for water use within capacity use areas; and for the protection of sand dunes pursuant to certain statutes. G.S. 143B-282(2).

Prior to 1979, the EMC consisted of 13 members, all appointed by the Governor. The statute also sets forth certain vocational qualifications for members of the commission.

It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in *Greer*, that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality.

We agree with the Kansas and South Carolina courts that there should be cooperation between the legislative and executive branches of government. For many years North Carolina has recognized and benefited from cooperative efforts between the branches of its government. The best examples of this are various study commissions on which legislators and non-legislators, including persons from other branches of government, have served. Many recommendations of these commissions have been enacted into law beneficial to the citizens of our state.

Counsel for defendants have set forth in an exhibit to their brief a list of 49 other boards and commissions on which legislators serve as members pursuant to statutes. We do not find it appropriate to comment on any board or commission except the one which is the subject of this appeal. Suffice it to say, the people of North Carolina on at least three occasions – the last opportunity being as late as 1970 – explicitly adopted the principle of separation of powers. It behooves each branch of our government to respect and abide by that principle.

For the reasons stated, we conclude that Section 6 of Chapter 1158 of the 1979 Sessions Laws [codified at §§ (d) of G.S.

143B-283] violates Section 6 of
Constitution. Consequently, the

Reversed.

STATE OF NORTH CARO

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1. Homicide §§ 4.2, 21.6 – felony-mu
discharging firearm into occupied pr

The Supreme Court will not ad
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2. Homicide §§ 4.2, 14.2; Constitutional
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The felony-murder rule set f
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3. Homicide § 4.2 – felony-murder rul
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The 1977 revision of G.S. 14-17
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4. Arrest and Bail § 1; Homicide § 2
thief – fleeing into fleeing automobile

The defendant in a felony mur
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a private person may detain and
presence. G.S. 15A-404, where th
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principle.

we conclude that Section 6 of
ons Laws [codified at §§ (d) of G.S.

143B-283] violates Section 6 of Article I of the North Carolina Constitution. Consequently, the judgment appealed from is

Reversed.

STATE OF NORTH CAROLINA v. JOHN WALL, JR.

No. 22

(Filed 12 January 1982)

1. **Homicide §§ 4.2, 21.6— felony-murder rule—doctrine of merger—felony of discharging firearm into occupied property**

The Supreme Court will not adopt the merger doctrine which would bar a defendant's conviction of first degree felony murder based upon a felony which is an integral part of the homicide and is an offense included in fact within the offense charged. Therefore, defendant's conviction of first degree felony murder could properly be based upon the underlying felony of discharging a firearm into an occupied vehicle in violation of G.S. 14-34.1.

2. **Homicide §§ 4.2, 14.2; Constitutional Law § 28— felony-murder statute—constitutionality**

The felony-murder rule set forth in G.S. 14-17 does not establish a presumption of premeditation and deliberation in violation of due process and equal protection since premeditation and deliberation are not elements of the crime of felony-murder and the statute involves no presumption at all.

3. **Homicide § 4.2— felony-murder rule—discharging firearm into occupied property as underlying felony—intent of legislature**

The 1977 revision of G.S. 14-17 makes it clear that the legislature intended that the discharging of a firearm into occupied property be included as an underlying felony for the purposes of the felony-murder rule.

4. **Arrest and Bail § 1; Homicide § 23— misdemeanor larceny—right to detain thief—firing into fleeing automobile—no justification or excuse**

The defendant in a felony-murder prosecution was not entitled to an instruction on justification or excuse based upon the statute setting forth when a private person may detain another who has committed a crime in his presence, G.S. 15A-404, where the evidence showed that the victim and another took two six packs of beer from the store in which defendant was working without paying for them, and that defendant fired a pistol into the vehicle occupied by the victim as the vehicle was exiting the store parking lot, since (1) defendant could no longer "detain" the victim once the victim was beyond defendant's control, and (2) neither an officer nor a private citizen could employ deadly force to detain a fleeing misdemeanant. G.S. 15-401(d).

APPENDIX C

CONSTITUTION OF NORTH CAROLINA

ARTICLE I

DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that:

Sec. 6. *Separation of powers.* The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh
27602

RUFUS L. EDMISTEN
ATTORNEY GENERAL

1 February 1982

MEMORANDUM

To: Liston B. Ramsey, Speaker
House of Representatives

From: Rufus L. Edmisten
Attorney General R.L.E.

Question: May legislators constitutionally serve as members of state boards and commissions if they do not have voting rights, but otherwise fully participate in the conduct of the board or commission's business, in light of State ex rel. Wallace v. Bone?

Answer: Where the board or commission exercises a part of the administrative or executive sovereign power of the State, a legislator may not serve in any capacity on that board or commission.

In the recently decided opinion of State ex rel. Wallace v. Bone,[1] the North Carolina Supreme Court interpreted the Separation of Powers provision of the Constitution of North Carolina. The Court held that a statutory amendment by which two members of the House of Representatives (appointed by the Speaker of the House) and two members of the Senate (appointed by the President of the Senate) were appointed to membership on the Environmental Management Commission violated the Separation of Powers provision of the Constitution of North Carolina.[2] This opinion has far-reaching impact because of the legal analysis by which the Supreme Court reached this conclusion.

You ask whether legislators can constitutionally serve as members of state boards and commissions, which exercise a part of the sovereign power of the State, if they do not have voting rights

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[1] ____N.C.____, ____S.E.2d ____ (No. 55 Fall Term 1981, decided January 12, 1982).

[2] N. C. Const., Art. I, Sec. 6.

but otherwise fully participate in the conduct of the board or commission's business, in light of Bone. I conclude that such an arrangement would violate the Separation of Powers provision of the Constitution of North Carolina.

The Bone Court unequivocally stated that the separation of powers principle must be strictly followed. In reaching this conclusion, the Court reviewed the history of the separation of powers principle in North Carolina and the nation, surveyed decisions from other states, and analyzed the specific provisions of our Constitution and the statutes involved.

Citing Bayard v. Singleton;[3] State v. Bell;[4] instructions to the delegations of Orange and Mecklenburg Counties to the Fifth Provincial Congress, which adopted our first State Constitution on December 18, 1776; George Washington's Farewell Address; and Alexander Hamilton's Federalist Paper No. 51, the Court stated that the separation of powers principle was designed to keep the three branches of government separate and distinct. It is the commingling of the powers of the various branches that the separation of powers principle prohibits.[5]

The Court cited with approval numerous decisions from other states that "show strict adherence to the separation of powers principle ... [and] do not tolerate legislative encroachment or control over the function and power of the executive branch.[6]" The Court cited with approval the case of Book v. State Office Building Commission.[7] In that case, the Indiana Supreme Court held unconstitutional, on separation of powers grounds, a part of the Indiana State Office Building Act. The unconstitutional provisions provided for certain members of the legislature to

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[3] 1 N.C. 5 (1787).

[4] 184 N.C. 701, 115 S.E. 190 (1922).

[5] See, slip opinion at page 16, citing O'Donoghue v. United States, 289 U.S. 516, 53 S.Ct. 740, 77 L.Ed. 1356 (1933).

[6] Emphasis added, slip opinion at page 12.

[7] 238 Ind. 120, 149 N.E. 2d 273 (1958).

serve as members of the State Office Building Commission. The Indiana Court held this to be unconstitutional "because it attempted to confer executive-administrative duties upon members of the legislature.[8]" Our Supreme Court found persuasive the Indiana Court's rationale, that "[i]t is sufficient if he is an officer in one department and at the same time is performing functions belonging to another.[9]"

Our Court further cited with approval State ex rel. Building Commission of West Virginia v. Bailey,[10] where the Supreme Court of Appeals of West Virginia held unconstitutional that portion of a statute which named certain members of the legisalture to the State Building Commission on separation of powers grounds because the statute "attempts to confer and impose executive or administrative powers and duties upon those members of the Legislature...[11]"

The Bone Court cited with approval Greer v. State of Georgia,[12] where the Georgia Supreme Court held unconstitutional, on separation of powers grounds, that portion of the Georgia legislation creating a public corporation to build and operate the Georgia World Congress Center and which designated that six of the twenty members would be legislators. Our Court quoted with approval from the Georgia opinion as follows:

> The question here is whether the legislature can constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of impelementation by appointing legislators to the governing body of the instrumentality ... We have to conclude that

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[8] Slip opinion at page 13.

[9] Id., citing 149 N.E. 2d at 296.

[10] 151 W.Va. 79, 150 S.E.2d 449 (1966).

[11] Slip opinion at page 14, citing 150 S.E. 2d at 456.

[12] 233 Ga. 667, 212 S.E. 2d 836 (1975).

> a legislator who participates as a member of the governing body of a public corporation such as the World Congress Center Authority is performing executive functions.[13]

Our Court also cited with approval the case of Stockman v. Leddy.[14] In Leddy, the Supreme Court of Colorado struck down legislation creating a legislative committee which was given executive power, saying that this was a "conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members.[15]"

Our Court then criticized two opinions by the Supreme Courts of Kansas and South Carolina which adopted a "flexible" approach -- as opposed to a "strict" approach -- to the separation of powers principle. In State ex rel. McLeod v. Edwards,[16] the Supreme Court of South Carolina held constitutional the placing of ex officio members of the legislature on the State Budget and Control Board. In State ex rel. Schneider v. Bennett,[17] the Kansas Supreme Court held unconstitutioal part of the legislation by which legislators served on the state finance council. The Kansas Court held unconstititional, as violating the separation of powers principle, the exercise of those functions of the council which were executive in nature, i.e. those which involved the day-to-day functioning of executive branch agencies. Our Supreme Court commented that "South Carolina and Kansas have deviated from the separation of powers principle.[18]" Our Supreme

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[13] Slip opinion at pages 14-15, citing 212 S.E. 2d at 838.

[14] 55 Colo. 24, 129 P. 220 (1912).

[15] Slip opinion at page 15, citing 129 P. at 223.

[16] 269 S.C. 75, 236 S.E. 2d 406 (1977).

[17] 219 Kan. 285, 547 P. 2d 786 (1976).

[18] Slip opinion at page 16.

Court flatly rejected the "flexible" Kansas approach (followed by South Carolina) which permits some "blending" of the powers of the executive and legislative branches. Under the Kansas approach a court must conclude that there is a "usurpation" of power -- as opposed to a "cooperative blending" of powers -- in order to have a violation of the separation of powers principle. Despite the faulty analysis by the Kansas Court, our Supreme Court noted that the Kansas Court did reach the right result when it held unconstitutional the exercise of powers and performance of duties by legislators which dealt with the day-to-day operation of the Kansas state government.

After surveying the history of the separation of powers principle, our Supreme Court in Bone closely scrutinized the statutory powers of the Environmental Management Commission. The Court found them to be administrative or executive in character and concluded:

> It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in Greer, that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality.
>
> We agree with the Kansas and South Carolina courts that there should be cooperation between the legislative and executive branches of government. For many years North Carolina has recognized and benefited from cooperative efforts between the branches of its government. The best examples of this are various study commissions on which legislators and non-legislators, including persons from other branches of government, have served. Many recommendations of these commissions have been enacted into law beneficial to the citizens of our State.[19]

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[19] Emphasis added, slip opinion at page 21.

Based upon the Supreme Court's reasoning in State ex rel. Wallace v. Bone, it is clear that the Separation of Powers provision in the Constitution will be strictly construed. The Separation of Powers provision prohibits the commingling of power by the executive and legislative branches. The exercise of powers, duties, or functions which are essentially executive or administrative by legislators is constitutionally prohibited. The exercise of powers, duties, and functions include participation in the day-to-day operation of executive or administrative boards and commissions. The participation by legislators in the debate and discussion of these boards and commissions, even excluding voting rights, still amounts to performance of administrative or executive powers, duties, or functions, and is banned by our Separation of Powers provision.

The Bone decision does not prohibit all cooperative efforts between the legislative and executive branches. However, such efforts are limited to study commissions and other joint ventures which are purely advisory in nature.

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January 18, 1982

M E M O R A N D U M

TO: The Honorable Liston Bryan Ramsey
Speaker of the House

FROM: Gerry Cohen, Director of Legislative Drafting GC

SUBJECT: Separation of Powers

Since the Supreme Court of North Carolina handed down its decision in State ex rel. Wallace v. Bone on January 12, 1982, numerous questions have been raised about its applicability to other boards, committees, and commissions.

Although the Supreme Court said, "We do not find it appropriate to comment on any board or commission except the one which is the subject of this appeal." (p. 22), many of the cases it cited deal with situations similar to North Carolina's.

Specific problems may exist for the Advisory Budget Commission, the Joint Legislative Committee to Review Federal Block Grant Funds, the Joint Legislative Commission on Governmental Operations, and the Committee on Employee Hospital and Medical Benefits.

Specific questions that need answering are:

(1) Can the legislature appoint members of other executive boards.

JAN 18 1982

(2) If the legislature cannot appoint the members, does anything prevent the Governor from appointing members of the General Assembly.

(3) Do the Advisory Budget Commission's powers violate Section 5 of Article III of the Governor's powers concerning the budget as established by the Constitution.

(4) Can legislative powers be exercised to a committee if the legislature has delegated those powers.

Following is a discussion of those four questions:

(1) It is apparent from reading the North Carolina case that the North Carolina Supreme Court wants to strictly interpret the separation of powers clause. On page 12 of the opinion, the court notes that, "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments...Numerous decisions from sister states show strict adherence to the separation of powers principle and do not tolerate legislative encroachment or control over the function and power of the executive branch."

The court notes that, "It is crystal clear that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in Greer, that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality." (p. 21)

Thus, if an agency is exercising any executive powers, the legislature may not make appointments to the board.

The court discussed two cases, one each from South Carolina and Kansas, which approved having some legislators on executive boards. These cases had been cited by Judge Bailey in his superior court opinion approving legislative appointments. It seems to me that the North Carolina Supreme Court is showing why it disagrees with those holdings, noting that "A study of these cases reveals that South Carolina and Kansas have deviated from the separation of powers principle.", a deviation that our Supreme Court is apparently not going to tolerate.

The court seems to be using its long quotations from State ex rel. Schneider v. Bennett, 547 p.2d 786 (Kansas 1976), to show what powers are executive and what are legislative.

It seems to me that if an agency is exercising any executive powers, the legislature may not appoint members to it. Specific executive powers listed by the Kansas court are:

(1) The power to fix or approve salaries of officers or employees.

(2) Approvals of pay raises and salary grades, and approval of policies on supplying housing and food to state employees.

(3) Appeals of allotments if there are revenue shortfalls.

(4) Setting inmate pay.

(5) Resolution of architectural disputes.

(6) Setting moving expense payments.

(7) Approval of operating rules for a state department.

(8) Hearing appeals of agency decisions.

(9) Approval of mobile home rules.

(10) Approval of transfer of funds by an agency to other line items.

The Kansas court notes that, "...the legislature could have enacted statutes dealing with the subject matter delegated... but it failed to do so. It chose to enact a law in general terms and conferred the power to execute it upon an administrative board in the executive department. Having done so the legislature could not constitutionally vest the power to execute the law in a body controlled by individual legislators." (at 798).

An important note here is that the Kansas Constitution "...contains no express provision requiring the separation of powers..." (at 790), and thus the Kansas courts limited allowance of some cooperative executive-legislative functions is in the absence of the kind of specific prohibition that the North Carolina Constitution contains.

Thus, the issue is, does the board or commission exercise executive powers. If so, the General Assembly may not make appointments.

(2) If the legislature cannot appoint the members, does anything prevent the Governor from appointing members of the General Assembly.

(3) Do the Advisory Budget Commission's powers violate Section 5 of Article III of the Governor's powers concerning the budget as established by the Constitution.

(4) Can legislative powers be exercised to a committee if the legislature has delegated those powers.

Following is a discussion of those four questions:

(1) It is apparent from reading the North Carolina case that the North Carolina Supreme Court wants to strictly interpret the separation of powers clause. On page 12 of the opinion, the court notes that, "There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments...Numerous decisions from sister states show strict adherence to the separation of powers principle and do not tolerate legislative encroachment or control over the function and power of the executive branch."

The court notes that, "It is crystal clear that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws. We agree with the Georgia court's holding in Greer, that the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality." (p. 21)

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Thus, the issue is, does the board or commission exercise executive powers. If so, the General Assembly may not make appointments.

(2) I do not believe that the North Carolina case prevents the Governor from naming legislators to state boards. The North Carolina Supreme Court did not deal with this issue, although a number of cases cited by the court did deal with the issue. Those cases seemed to say no legislators could serve on the boards, but there is one crucial point: the constitution in those states had different separation of powers provisions.

On page 13 of its opinion, the North Carolina Supreme Court notes that the Indiana Supreme Court in Book v. State Office Building Commission (149N.E. 2d 273, Ind. 1958) stated that the court held that the act violated the division of powers provision of the state constitution because it attempted to confer executive-administrative duties upon members of the legislature.

The court cited a paragraph from the Indiana case stating that it is impermissible not only for a person to hold office in two branches, but to hold office in one branch and exercise powers in the other branch ex officio.

The Indiana Constitution states that, "The powers of the Government are divided into three separate departments, the legislative, the Executive...and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." (emphasis added).

The North Carolina Constitution states only that, "The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.", a restriction which does not include the specific ban on holding office in more than one department. Our Supreme Court has stated that one branch making appointments in another branch usurps authority. Nothing indicates that a Governor choosing to appoint legislators to a commission would constitute a legislative usurpation of executive powers.

Similar language to the Indiana provision is cited by the Colorado court. Article III of the Colorado Constitution stated that, "The powers of the government of this state are divided into three distinct departments...and no person, or collection of persons, charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others." (emphasis added).

Likewise, the West Virginia constitutional provision is that (Article V), "The Legislative, Executive, and Judicial

Departments shall be separate and distinct...nor shall any person exercise the powers of more than one of them at the same time." (emphasis added).

The Georgia Constitution, relied on in Greer by our court as the central source for its holding, also bars any person from holding office in more than one branch.

Not only does our constitution fail to have any such restriction in its separation of powers clause, but Section 9 of Article VI of the North Carolina Constitution specifically allows the General Assembly to provide by law for elected officials to hold appointive office, and that section does not prohibit the General Assembly from allowing the second office to be in another branch.

It is possible that our Supreme Court would hold that there is some inherent provision of the separation of powers concept that would prevent a legislator from holding an executive office, appointed by the Governor. Our constitution is vastly different in this regard from the other states, however, and I think such a holding is not necessary to prevent one branch from usurping powers of the other.

Several important things to remember is that it would probably still be unconstitutional for the legislature to state that a commission were to consist, say, of 11 members, four of whom would be legislators appointed by the Governor. It would have to be in the total discretion of the Governor as whether or not to appoint legislators, and if so, how many. Resolution of that issue is political, rather than legal.

(3) There are some different issues involved in the problem concerning the Advisory Budget Commission, although some of these problems recur in the other boards which exercise some powers related to the budget.

The Kansas court, for instance, holds that some functions of their state finance council, such as making appropriations from their state-emergency fund are OK, and some powers such as approval of receipts and expenditures of federal funds are legislative in nature.

Article 1, Section 6 of the Constitution of North Carolina states that, "The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

This provision on its own, however, does not necessarily invalidate legislative participation in budget preparation and execution, since these from a historical sense have been in a gray area, partly legislative and partly executive.

Indeed, as history shows, (See The Advisory Budget Commission, Clyde L. Ball, October 1980, and The Advisory Budget Commission--Not as Simple as ABC, N. C. Center for Public Policy Research, Inc., March 1980), the Governor's participation in budget preparation and execution dates only from 1919 legislation of the General Assembly, and in its present form from the Executive Budget Act of 1919.

Prior to 1919, budget preparation was a haphazard process, coordinated occasionally, with legislative responsibility, with budget execution equally unrestrained, with occasional intervention by the Treasurer.

Thus, from 1919 until the present day, budget preparation and execution was by law the function of the Governor and the Advisory Budget Commission.

The problem with the current structure is that the 1969 session of the General Assembly enacted a new State Constitution, which was ratified by the voters in 1970.

That Constitution includes as Section 5(3) of Article III the following language:

"The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor."

This simple provision received little attention by the study commission that recommended the new Constitution to the 1969 session. A committee stated that, "The Commission also approved the proposal that the Governor be empowered by the Constitution to formulate and administer the State budget." (Minutes of Committee on Structure, Organization, and Powers of State Government, October 11, 1968).

The full Commission noted that the provision was to give constitutional status to the Governor's power which had previously been regulated by statute.

Now that the budget preparation and administration power has been constitutionally made an executive power, it would appear that the North Carolina provision formally classifies as executive some powers which other states might hold are proper for the legislature in their states.

Again, the important thing to note is that if the legislature no longer made appointments to the A.B.C., there would be no separation of powers problems, or if the A.B.C. powers were made advisory, there would likewise be no problems in this regard.

Thus, it is a perfectly legitimate legislative function to oversee preparation of the budget. In the Colorado case of Stockman v. Leddy, relied on by the North Carolina Supreme Court, the Colorado Supreme Court notes that permissible legislative functions include investigations or commissions to aid it in preparing future legislation. Likewise, it might also be permissible to require an A.B.C. with legislatively appointed members to be presented with certain executive decisions for review prior to their effective date. This would give the A.B.C. power to comment to the Governor on proposed budget administration detail.

One issue which has not been raised to date is whether the constitutional directive ratified in 1970 that directs the Governor to prepare and administer the budget prevents the General Assembly from requiring the Governor to receive the approval of any kind of commission in administering the budget.

I am listing below some powers of the Advisory Budget Commission that the courts decision in State ex rel. Wallace v. Bone, together with the North Carolina constitutional provision on the Governor's budget powers call into question.

(1) Preparation of budgets for State Auditor, State Treasurer, and Administrative Office of the Courts. G.S. 143-4 gives the A.B.C. sole authority over budget preparation for those agencies. This clearly conflicts with the constitutional provision on the Governor's powers.

(2) Budget execution for those agencies. G.S. 143-2 makes the State Auditor, State Treasurer, and the A.O.C. exempt from fiscal control by the Governor and instead places them under the fiscal control of the A.B.C. This seems clearly an executive function.

(3) Budget Document. G.S. 143-11 states that if the Governor and A.B.C. agree on the budget, "...he shall prepare their report in the form of a proposed budget...." Although there are provisions for the Governor to present his own budget in case of a disagreement, the fact that the A.B.C. and Governor's budgets are so tied together might give the courts some pause. While the General Assembly is perfectly within its power to set up an A.B.C., there is a question about the extent of its power to interfere with the Governor's budget preparation.

(4) Under G.S. 143-25, quarterly allotments must be approved by the Governor and A.B.C. This seems a substantial variance from the constitutional requirement that the Governor administer the budget. It also seems to be an executive power.

(5) Under G.S. 143-25, the A.B.C. must concur in reduction of maintenance appropriations in case of a deficit. This power is similar to one that the Kansas court held to not be necessarily executive.

(6) The A.B.C. in conjunction with the Governor may change the scope of a capital improvements project.

(7) The Governor and A.B.C. may authorize a new capital project under G.S. 143-18.1.

(8) The A.B.C. must approve variances of more than 10 percent in the D.O.T. budget under G.S. 136-44.2. This seems executive.

(9) Under G.S. 136-44.37, the Advisory Budget Commission must approve State funding for federal rail revitalization projects. This seems executive.

(10) A department must have A.B.C. approval to apply for C. and E. funds for liability insurance under G.S. 58-194.1. This seems executive.

(11) The A.B.C. must approve interest transfers on pooled unemployment funds to the State Treasurer's Budget under G.S. 147-86.1(d). This seems executive.

(12) The A.B.C. can allocate Housing Finance Agency funds to the State Treasurer for Administrative expenses under G.S. 122A-8.1. This seems executive.

(13) The A.B.C. must approve supplemental funding for Highway Patrol radio systems under G.S. 20-196.

(14) Expenditures from the equipment reserve fund from sale of surplus property must be approved by the A.B.C. under G.S. 143-49(4). This seems executive.

(15) Certain grants of the Agency for Public Telecommunications must be approved by the A.B.C. under G.S. 143B-426.11(7).

(16) Under G.S. 146-30 funds from timber sales can be used if approved by the A.B.C., and funds from sale of park lands are under a similar restriction.

(17) Under G.S. 58-241.11, the budget of the Burial Association Administration must be approved by the A.B.C.

(18) Certain exemptions from purchasing requirements must be approved by the A.B.C. under G.S. 143-56. This seems executive.

(19) Under G.S. 143-215.73 certain transfers relating to water resources projects must be approved by the A.B.C. This seems executive.

(20) Under G.S. 116-11(9) certain category iii funds may be reallocated with The University with A.B.C. approval. This seems executive.

(21) U.N.C. funds may be transferred from one institution to another with A.B.C. approval under G.S. 116-11(9)c. This seems executive.

(22) The A.B.C. must approve special budgeting procedures for N. C. Memorial Hospital under G.S. 116-37(e). This seems executive.

(23) Under numerous provisions of the General Statutes, salaries of officials are set or approved by the A.B.C. This seems executive.

(24) The A.B.C. adopts many rules dealing with Purchase and Contract under Article 3 of Chapter 143 of the General Statutes. This seems executive.

As can be seen, there are a number of powers above that I did not express an opinion about their executive or legislative nature.

Court opinions seem to indicate that some types of legislative powers can be delegated to the executive branch, if sufficient standards are given to the executive branch.

The nature of these legislative powers are those to administer laws with details that could have been established by the General Assembly. While legislators still could not be appointed by the General Assembly to serve on an executive board exercising delegated legislative powers, the delegation itself might be unconstitutional unless the General Assembly set forth some guidelines, even skimpy ones. This question will be discussed again.

Similar problems to those raised above concerning the Advisory Budget Commission recur concerning the Block Grant Committee, Governmental Operations, and Committee on Employee Hospital and Medical Benefits.

If any power of one of those committees is executive, it cannot be exercised by those committees as currently constituted.

The question as outlined by our Supreme Court is whether what is being delegated is the power to implement specific legislation, that being the heart of the executive power.

The power of the Governmental Operations Committee to approve transfers of funds between line items was held by the Kansas court to be executive.

The Governmental Operations Committee also has the power to allocate judicial personnel. This is in a gray area. Certainly, the legislature by law can allocate personnel, although this begins to tread somewhat on the judicial branch.

The committee on state employee health benefits is given the power not only to formulate a program of hospital and medical benefits, but also to award contracts. The awarding of contracts especially seem to fall in the executive function.

The Legislative Block Grant Committee exercises several different powers. It must approve agency rules, which seems to be an executive function, but it also decides whether to accept funds, and approves distribution formulas, contracts, and reduction procedures.

G.S. 120-84.5 states that certain actions concerning block grant funds cannot be taken without approval of the committee or the General Assembly if it is in session. There is no problem with requiring approval of the entire General Assembly through passage of a bill, since the General Assembly can control appropriation of federal funds.

The power of appropriating federal funds is legislative, as the Pennsylvania Supreme Court said in the case of Shapp v. Sloan, 391A'2d 595 (1978). Thus, the legislature can refuse to accept the funds, or attach conditions or stipulations to their expenditure.

(4) One of the most serious issues is whether, if a particular power is legislative in nature (such as approving expenditure of federal funds), such power may be delegated to a committee of the General Assembly.

The North Carolina Supreme Court did not discuss this point in its recent opinion, but it is quite relevant to the resolution of all these problems.

The North Carolina Supreme Court did list as one of its sources the Massachusetts Supreme Court case in Opinion of the Justices to the Governor, 341N.E. 2d 254 (1976).

In that case, the legislature had required approval of its Senate Ways and Means Committee for certain appointments and approvals of the salary schedules in the executive branch.

The Supreme Court stated that such power was executive, and thus could not be carried out by a committee appointed by the legislature. But the Governor had also asked if such power was legislative, could it be delegated to a committee.

The court cited an earlier opinion where it had stated that as regards monies, "If the power...were to be regarded as legislative in nature, it would be a legislative power of appropriation which cannot be delegated."

In the earlier Massachusetts case, the legislature had provided for an emergency fund, which could only be expended by the Governor with the concurrence of a special interim legislative commission. In Opinion of the Justices, 19N.E. 2d 807 (1939), the court states that such a power is executive in nature, because it is a control on expenditures, out of funds already appropriated.

The court does note that, "The legislative power to appropriate money...cannot be delegated...to any of its members.... This power of appropriation comes within the general principle that the 'legislature cannot delegate its law-making power or any power explicitly reposed in it.'"

The court further notes that, "...it is also clear that the General...[Assembly]...in its exercise of its legislative power of appropriation has a broad scope for determining whether it will prescribe in detail...or, on the other hand, will permit executive or administrative officers or boards to exercise judgement or discretion with a wide field in the expenditure of money appropriated for a given object, to accomplish the general purposes of the appropriation...such a choice - at least within reasonable limits - does not amount to an unconstitutional delegation of legislative powers."

The Massachusetts court in Attorney General v. Brissenden, 171N.E. 82 (1930), states that, "The legislature cannot delegate its law-making power or any power explicitly reposed in it." (at 86).

The Missouri Supreme Court also reached the same conclusion in State ex inf. Danforth v. Merrell, 530S.W. 2d 209 (1975). In that case, the General Assembly had required the approval of the Fiscal Affairs Committee before the purpose of an appropriation could be changed by the Governor.

The Missouri Constitution states that, "The General Assembly shall have no power to permit the withdrawal of money from the treasury except in pursuance of appropriations made by law." This provision is quite similar to the provision found in Section 7 of Article V of the North Carolina Constitution, where it is stated that, "No money shall be drawn from the State Treasury but in consequence of appropriations made by law."

The Missouri Supreme Court notes that, "A state legislative body has the power to enact any law not prohibited by the constitution, and the state constitution, unlike the federal constitution which is a grant of powers, is a limitation of legislative power." (at 213).

The court then states that the requirement that appropriations be by law is a prohibition which precludes "...the enactment of any law which would delegate to individual members of the general assembly authority to do, with respect to appropriations, what the general assembly itself may do only by an Act duly passed and approved."

One can make a similar analogy within the North Carolina Constitution. Section 1 of Article II states that, "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and House of Representatives."

Section 22 goes on to state that, "All bills and resolutions of a legislative nature shall be read three times in each house before they become laws."

Although there are no North Carolina cases on this subject, the Massachusetts and Missouri courts construing similar constitutional provisions, reached the result that the legislature may not delegate its legislative powers to a legislative committee or commission.

In a number of states, there are legislative bodies other than the full General Assembly exercising legislative power. In some of these cases, there may have been no court tests. In others, the State Constitution may have a different structure. For instance, Oregon has an Emergency Board consisting largely of legislators, that exercises some legislative functions. That board was set up by constitutional amendment after it was held that the prior system unlawfully delegated legislative power. (See The Emergency Board: Oregon's System of Interim Fiscal Adjustment, 55 Oregon Law Review 197, (1976).)

In conclusion, my research indicates the following:

(1) If a board exercises executive or administrative functions, the General Assembly may not appoint members to it.

(2) As long as it is permitted by the dual-office holding statutes, the Governor may appoint members of the General Assembly to executive or administrative boards or commissions.

(3) If the General Assembly delegates legislative type powers to an executive agency, some guidelines must be given.

(4) The General Assembly may not delegate legislative powers, especially in the appropriations area, to a committee of legislators.

(5) The 1970 constitutional amendment confirms as an executive function the power to prepare and administer the budget.

An insistence by the North Carolina Supreme Court that the General Assembly strictly adhere to the separation of powers doctrine does not leave the General Assembly powerless, however: The General Assembly, for example, could:

(1) Establish more advisory and oversight boards composed of legislators, with power to summon administrative officials, and with a requirement that proposed actions be reported to the committee.

(2) Establish tighter controls in the appropriations bills, with certain executive changes requiring different levels of action (public hearings, reports to committees, or absolute prohibitions or requirements).

(3) Require confirmation of a broader range of executive and administrative officials by the General Assembly. More research is needed to see if there may be constitutional limits here.

(4) Provide for more frequent short sessions of the General Assembly to deal with specific budgetary matters, such as federal grants and budget transfers.

(5) More use of legislative bodies to advise the Governor.

(6) Amend the constitution as desired.

Unfortunately, many of these above actions are far more costly in terms of money and legislative time than our current system of legislative commissions.

Our State Supreme Court seems intent, however, on preserving a strict separation of powers, and probably will require that legislative actions be approved by the full General Assembly.

This whole discussion takes place within the framework of state law. No federal court, including the U. S. Supreme Court, will interpret or tamper with a state constitutional interpretation unless the U. S. Constitution or a U. S. statute is violated. It is solely up to the state to decide how to proceed here.

GC/no

JOSEPH BRANCH, CHIEF JUSTICE
J WILLIAM COPELAND
JAMES G EXUM, JR
DAVID M BRITT
J PHIL CARLTON
LOUIS B MEYER
BURLEY B MITCHELL, JR
ASSOCIATE JUSTICES

Supreme Court
State of North Carolina
Raleigh

BOX 1841
ZIP CODE 27602

16 February 1982

Honorable James B. Hunt, Jr.
Governor of North Carolina

Honorable James C. Green
Lieutenant Governor of North Carolina
and President of the Senate

Honorable Liston B. Ramsey
Speaker of the North Carolina House
of Representatives

Your communication of 21 January 1982 presents the following questions:

1. Is G.S. 143-23(b), as enacted by Section 82 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

2. Is G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1981 Session Laws, consistent with, or contrary to, in whole or in part, the pertinent provisions of the N.C. Constitution?

In answering these questions we will review briefly the pertinent provisions of the Constitution. We will then discuss each of the statutes in question in light of the constitutional provisions.

I.

The first section of our Constitution pertinent to our inquiry is Section 6 of Article I which provides:

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

This section is commonly referred to as the "separation of powers" provision of our Constitution. In the recent cases

of State of North Carolina ex rel. Wallace et al. v. Bone et al. and Barkalow et al. v. Harrington et al. (joint opinion filed 12 January 1982) we discussed the history and meaning of the separation of powers doctrine. For the sake of brevity we will not restate all that we said in that opinion. It suffices to say that the principle of separation of powers was clearly in the minds of the framers of our Constitution; and that the people of North Carolina, by specifically including a separation of powers provision in the original Constitution adopted in 1776, and readopting the provision in 1868 and 1970, are firmly and explicitly committed to the principle.

After declaring the principle of separation of powers in Article I, our Constitution then provides in Article II, Section 1, that "the legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." Article III, Section 1, provides that "the executive power of the State shall be vested in the Governor." Article IV, Section 1, vests all judicial power in the judicial branch of our government. It is clear that the framers of our Constitution followed the instructions given to them that our government "shall be divided into three branches distinct from each other, viz:

> The power of making laws
> The power of executing laws and
> The power of Judging."[1]

Section 5 of Article III specifies certain constitutional duties of the Governor. Among these duties is that specified by Section 5(3) which provides in pertinent part as follows:

> Budget. The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor. (Emphasis added.)

In Wallace et al. v. Bone et al., supra, after reviewing the history of the separation of powers provisions of our State Constitution, and after reviewing decisions from numerous sister states, we concluded that Section 6 of Chapter 1158 of the 1979 Session Laws which provided for the appointment of two members of the House of Representatives and two members of the Senate to

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[1] The Colonial Records of North Carolina, Saunders, Vol. X, 870a, 870b.

the Environmental Management Commission violated Section 6 of Article I of the Constitution. This is so because "the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government which is to make laws."

II.

We now consider the question presented with respect to Section 82 of Chapter 1127 of the 1981 Session Laws [G.S. 143-23(b)].

Since its enactment in 1929, G.S. 143-23 has provided:

> All appropriations now or hereafter made for the maintenance of the various departments, institutions and other spending agencies of the State, are for the purposes and/or objects enumerated in the itemized requirements of such departments, institutions and other spending agencies submitted to the General Assembly by the Director of the Budget and the Advisory Budget Commission, and/or as amended by the General Assembly. Transfers or changes as between objects and items in the budget of any department, institution or other spending agency, may be made at the request in writing of the head of such department, institution or other spending agency by the Director of the Budget.

By Section 82 of Chapter 1127 of the 1981 Session Laws, the General Assembly enacted the following amendment to the statute quoted above:

> G.S. 143-23 is amended by designating the present language as subsection (a) and by adding a new subsection (b) to read:
>
> (b) Notwithstanding subsection (a), no requested transfer or change from a program line item may be made if the total amount transferred from that line item during the fiscal year would be more than ten percent (10%) of the amount appropriated for that program line item for that fiscal year, unless the Joint Legislative Commission on Governmental Operations has given its prior approval for that transfer. This restriction applies to all State departments with a total General Fund appropriation of at least fifty million dollars ($50,000,000). All other departments shall apply the ten percent (10%) limitation to the summary by object line items. No transfers or changes, regardless of amount, from salary funds may be made without the prior approval of the Joint Legislative Commission on Governmental Operations. The Commission must take action

> within 40 days of receiving a request for approval from the Office of State Budget and Management. Transfers or changes within the Medicaid program are exempt from this subsection.

Consistent with Section 5(3) of Article III of the Constitution, which provides that the Governor shall administer the budget, G.S. 143-2 designates the Governor as ex officio Director of the Budget.

The Joint Legislative Commission on Governmental Operations was established by Chapter 490 of the 1975 Session Laws to provide, among other things, for "the continuing review of operations of State government", and it is composed of the President of the Senate, the Speaker of the House of Representatives and twelve other members of the House and Senate. G.S. 120-71 through 120-79.

Obviously, the intended effect of G.S. 143-23(b), above quoted, is to give to a 13-member commission composed of 12 members of the House and Senate, and the President of the Senate who is usually the Lieutenant Governor, power to control major budget transfers proposed to be made by the Governor in his constitutional role as administrator of the budget.

Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the "Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period." (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own making]. (3) After the General Assembly enacts a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget "as enacted by the General Assembly."

In our opinion the power that G.S. 143-23(b) purports to vest in certain members of the legislative branch of our government exceeds that given to the legislative branch by Article II of the Constitution. The statute also constitutes an encroachment upon the duty and responsibility imposed upon the Governor by Article III, Section 5(3), and, thereby violates the principle of separation of governmental powers.

III.

We next consider the question presented with respect to Section 63 of Chapter 1127 of the 1981 Session Laws [codified as G.S. 120-84].

The 1978 General Assembly enacted G.S. 143-16.1 which provides:

> All federal funds shall be expended and reported in accordance with provisions of the Executive Budget Act. Proposed budgets recommended to the General Assembly by the Governor and Advisory Budget Commission shall include all appropriate information concerning the federal expenditures in State agencies, departments and institutions.

After the enactment of the current operations budget for fiscal 1981-83 by the 1981 General Assembly, Congress passed, and the President signed into law on 13 August 1981, P.L. 97-35, the Omnibus Budget Reconciliation Act of 1981, which made major changes in the organization of federal programs and made large sums of money available to the states in the form of block grants.

On 10 October 1981 the General Assembly enacted as Section 62 of Chapter 1127 of the 1981 Session Laws the following special provisions:

> Notwithstanding G.S. 143-16.1, all federal block grant funds received by the State between August 31, 1981, and July 1, 1983, shall be received by the General Assembly. This section is effective October 1, 1981.

By Section 63 of Chapter 1127 of the 1981 Session Laws, the General Assembly added Sections 120-84.1 through 120-84.5 to the General Statutes. These new statutes establish a Joint Legislative Committee to Review Federal Block Grant Funds (G.S. 120-84.1). This Committee is composed of six members of the House of Representatives and six members of the Senate (G.S. 120-84.2), has organizational rules prescribed by statute (G.S. 120-84.3), and is empowered to review all aspects of the acceptance and use of federal block grant funds and to make recommendations to the General Assembly for legislation relating to federal block grant funds (G.S. 120-84.4). The most significant of these new statutes is G.S. 120-84.5, which provides as follows:

> (a) After federal block grant funds have been accepted by the General Assembly, the Director of the Budget shall propose administration and use of those funds. All proposals shall be submitted to the Committee, or to the General Assembly if it is in session, for its prior approval.
>
> (b) None of the following actions with regard to State use of federal block grant funds may be taken without the prior approval of the Committee or of the General Assembly if it is in session:
>
> (1) acceptance of federal block grants,
>
> (2) determination of pro rata reduction

procedures and amounts for State programs,
(3) determination of distribution formulas,
(4) transfer of funds between block grants,
(5) intradepartmental transfer of block grant funds,
(6) encumbrance of anticipated block grant funds,
(7) adoption of departmental rules relating to federal block grant funds,
(8) contracting between State departments involving block grant funds, and
(9) any other final action affecting acceptance or use of federal block grant funds.

The Committee shall take action within 40 days of receiving a request for approval from the Office of State Budget and Management.

Thus, the new G.S. 120-84, as enacted by Section 63 of Chapter 1127 of the 1980 Session Laws, purports to give to a 12-member committee of legislators (when the General Assembly is not in session) power over action proposed to be taken by the Governor with respect to the administration and use of federal block grant funds.

While we are not asked for an opinion on the validity of Section 62 of Chapter 1127 of the 1981 Session Laws quoted above, we question the validity of any statute which provides that funds accruing to the State or any of its agencies "shall be received by the General Assembly." Although the Constitution gives the General Assembly broad power to raise revenue and make appropriations, we find nothing in the Constitution that authorizes the legislative branch actually to receive funds. Article V, Section 7, provides:

> No money shall be drawn from the State Treasury but in consequence of appropriations made by law, and an accurate account of the receipts and expenditures of State funds shall be published annually.

The inquiry presented relates to federal block grants under the Omnibus Reconciliation Act of 1981[2] and actually presents two questions: (1) Does the General Assembly have the authority to determine if the State or its agencies will accept the grants in question and, if accepted, the authority to determine how the funds will be spent? (2) May the General Assembly delegate to a legislative committee the power to determine if the grants will be accepted, and, if accepted, how they will be spent?

[2] G.S. 20-84.1 provides that "for purposes of this Act, 'block grant' means a block grant under the Omnibus Budget Reconciliation Act of 1981."

We decline to answer question (1) just posed. The briefs and materials submitted to us contain very little, if any, information about the grants, their purposes, for whom they are intended, and the conditions placed on them by Congress. Our independent research discloses that the Omnibus Budget Reconciliation Act of 1981 contains 575 pages and that its numerous sections refer to other federal enactments that are amended by it. The legislature neither being in session nor purporting presently to act, we do not perceive any exigent need to address this part of the inquiry and to engage now in the lengthy research that would be necessary to answer it. If our opinion on this question is deemed urgently needed, we will consider a further request, provided it is accompanied by in-depth information and briefs with respect to the grants being considered.

With regard to part (2) of the inquiry, if the General Assembly has the authority to determine whether the State or its agencies will accept the grants in question, and, if accepted, the authority to determine how the funds will be spent, it is our considered opinion that the General Assembly may not delegate to a legislative committee the power to make those decisions.

In several of the instances set forth in G.S. 120-84.5 the committee would be exercising legislative functions. In those instances there would be an unlawful delegation of legislative power. In the other instances the committee would be exercising authority that is executive or administrative in character. In those instances there would be a violation of the separation of powers provisions of the Constitution and an encroachment upon the constitutional power of the Governor. As stated above, our Constitution vests in the General Assembly the power to enact a budget -- to appropriate funds--, but after that is done, Article III, Section 5(3) explicitly provides that "the Governor shall administer the budget as enacted by the General Assembly."

IV.

In sum, it is the opinion of the undersigned Chief Justice and Associate Justices:

1. That Section 82 of Chapter 1127 of the 1981 Session Laws [codified as Section 143-23(b) in the 1981 Cumulative Supplement to Volume 3C of the General Statutes] violates Section 6 of Article I and Section 5(3) of Article III of our State Constitution; and

2. That those parts of Section 63 of Chapter 1127 of the 1981 Session Laws [codified as Sections 120-84.1 through 120-84.5 in the 1981 Supplement to the 1981 Replacement Volume 3B of the General Statutes] which purport to vest a legislative

committee with certain powers over federal block grants when the General Assembly is not in session constitute an unconstitutional delegation of legislative power, and also violate Section 6 of Article I and Section 5(3) of Article III of our State Constitution.

Respectfully,

Chief Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

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February 17, 1982

TO: Liston B. Ramsey, Speaker of the House

FROM: Donald B. Hunt, Committee Counsel DBH

SUBJECT: Explanation of Advisory Opinion of the N.C. Supreme Court on Transfer Authority and Block Grants

I. The General Assembly May Not Give to a Legislative Committee Legal Control Over Transfers Between Line Items.

G.S. 143-23(b) provides that no transfer between line items in excess of ten percent of the amount appropriated may be requested without the prior approval of Joint Legislative Committee on Governmental Operations. The intended effect of G.S. 143-23(b) is to give to the Joint Legislative Commission on Governmental Operations power to control major budget transfers proposed to be made by the Governor in his constitutional role as administrator of the budget. (p. 4) The Justices stated that:

> "Our Constitution mandates a three-step process with respect to the State's budget. (1) Article III, Section 5(3) directs that the 'Governor shall prepare and recommend to the General Assembly a comprehensive budget . . . for the ensuing fiscal period.' (2) Article II vests in the General Assembly the power to enact a budget [one recommended by the Governor or one of its own making]. (3) After the General Assembly enacts a budget, Article III, Section 5(3) then provides that the Governor shall administer the budget 'as enacted by the General Assembly.' (p. 4)

The Justices stated their opinion that "the power that G.S. 143-23(b) purports to vest in certain members of the legislative branch of our government exceeds that given to the legislative branch of our government by Article II of the Constitution." (p. 4) Also, in the opinion of the members of the Court the statute constitutes an encroachment upon the duty and responsibility imposed upon the Governor to administer the budget as enacted by the General Assembly and thereby violates the principle of separation of governmental powers." (p. 4)

The members of the Court did not state that the General Assembly may not by statute prohibit transfer between line items or place a percentage limitation on the amount of such transfers. Nor did the Justices state the General Assembly may not require notification of legislative committees. The opinion only stated that the General Assembly may not give to a legislative committee power to control transfers between line items after a budget has been enacted by the General Assembly.

II. Provision for Legislature to Actually Receive Funds is Unconstitutional.

Section 62 of Chapter 1127 of the 1981 Session Laws provides that block grant funds "shall be received by the General Assembly." The Justices state that, "Although the Constitution gives the General Assembly broad power to raise revenue and make appropriations, we find nothing in the Constitution that authorizes the legislative branch to actually receive funds." (p. 6)

III. Justices Decline to Answer Whether the General Assembly Has Authority to Determine Whether the State Will Accept Block Grants and, If Accepted, the Authority to Determine How the Funds Will Be Spent.

Since the information submitted to the justices contained little information about the grants and the conditions placed on them by the Congress, the justices declined to discuss the authority of the General Assembly to determine whether the State will accept block grants and to determine how the funds will be spent. (p. 7) This suggests that the authority of the legislature may depend on what the federal law provides. The Justices indicated that they would consider a further request that is accompanied by in-depth information and briefs with respect to the grants being considered. (p. 7)

IV. If the General Assembly Has the Authority to Determine Whether the State Will Accept Block Grants and How the Funds Will be Spent, the General Assembly May Not Delegate the Authority to a Legislative Committee.

The General Assembly may not delegate the legislative power to a committee. Therefore, any functions specified in the block grant statute that are legislative functions may not be exercised by a committee. (p. 7) The other functions exercised by the block grant committee must be executive or administrative in character. (p. 7) The exercise by the legislative committee of executive or administrative functions would violate the separation of powers principle. Also, the exercise of such functions would violate the provision that "the Governor shall administer the budget as enacted by the General Assembly." (p. 7)

RUFUS L. EDMISTEN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh
27602

February 19, 1982

[TO ALL LEGISLATORS]

In the recently decided opinion of State ex rel Wallace v. Bone, (No. 55 fall term 1981, decided January 12, 1982, enclosed as attachment A), the North Carolina Supreme court interpreted the Separation of Powers provision of the Constitution of North Carolina. The Court held that Section 6 of Chapter 1158 of the 1979 Session Laws which provided for the appointment of two members of the House of Representatives and two members of the Senate to the Environmental Management Commission violated the Separation of Powers provision of the Constitution of North Carolina. This opinion has far-reaching impact and, in my opinion, prohibits members of the North Carolina General Assembly, regardless of how or by whom appointed, from serving on any board or commission which exercises a part of the administrative or executive sovereign power of the State of North Carolina.

My office has conducted a careful review of all the boards and commissions upon which legislators sit which exercise a part of the administrative or executive sovereign power of the State of North Carolina. Appended hereto as attachment B is a list of those boards and commissions.

If you sit on any board or commission listed in the attachment, I respectfully suggest that you immediately give notice in writing of your resignation to the chairman of the board or commission. Should you continue to remain on the board or commission, it is my opinion that any action taken by that board or commission will be subject to question.

Two bodies upon which legislators sit require special comment.

THE ADVISORY BUDGET COMMISSION

The Advisory Budget Commission presently consists of ten legislators and two other persons. Eight of the twelve members by law must be legislators and four are appointed by the Governor. G.S. 143-4. Two of the Governor's four appointees are legislators.

The Executive Budget Act has, since 1925, prescribed the standing policies, procedures, and mechanisms for the preparation, adoption, and administration of the State Budget. 1925 N. C. Pub. Laws, ch. 89. The General Assembly declared that

> "It is the purpose of this act to vest in the Governor of the State a more direct and effective supervision of all agencies and institutions of the State; for the efficient and economical administration of all such agencies and institutions; and for the initiation and preparation for each session of the General Assembly of a balanced budget of State revenues and expenditures. To this end the Governor shall be ex officio the Director of the Budget, and shall be the head of the Budget Bureau which is hereby created and established in connection with his office [1925 N. C. Pub. Laws, ch. 89, s. 2]"

The Act prescribed in detail the duty of the Governor, with the advice of the Advisory Budget Commission, to prepare and recommend to the General Assembly each two years a comprehensive budget of the expenditures of the State (except those for highways) for the ensuing biennium. It was made clear that the "Commission shall act at all times in an advisory capacity to the Director on matters relating to the plan of proposed expenditures of the State Government and the means of financing the same." [1925 N. C. Pub. Laws, ch. 89, s. 11]

Without going through a detailed history of amendments to the Executive Budget Act between its initial enactment in 1925 and the present, suffice it to say that in recent years, especially after the mid-1970's, the statutes in North Carolina increasingly have provided for budgetary actions to be taken "by the Advisory Budget Commission," without mention of the Governor. Examples (which are not intended to be exhaustive) of such provisions are:

- The Advisory Budget Commission may, on recommendation of the Board of Governors of The University of North Carolina, authorize the transfer of appropriated funds from one constituent institution of The University to another to adjust for over- and under-enrollment or may make any other

inter-institutional adjustment that would "provide for the orderly and efficient operation of the institutions." [1971 N. C. Sess. Laws, Ex. Sess., ch. 1244, s. 1; G.S. 116-11(9)c.]

-The use of the Project Reserve Fund created under the capital improvements appropriation act of 1971 was placed at the discretion of the Advisory Budget Commission. [1971 N. C. Sess. Laws, ch. 693, s. 7.]

-The same arrangement was made with respect to the Legislative Bond Project Reserve Fund of 1971. [1971 N. C. Sess. Laws, Ex. Sess., ch. 1240, s. 4.]

-The capital improvements appropriations act of 1975 provided that the Advisory Budget Commission should approve the method of financing of any self-liquidating capital project during 1975-77. [1975 N. C. Sess. Laws, ch. 874, s. 3.]

-The Advisory Budget Commission was also empowered, during 1975-77, to authorize a new capital construction project when special funding for it became available, e.g., from a federal grant. [1975 N. C. Sess. Laws, ch. 874, s. 9.] During 1977-79, the Governor was reinserted into this procedure so as to require the Governor and the Advisory Budget Commission to concur in giving the authorization. [1977 N. C. Sess. Laws, ch. 681, s. 10.]

-The standing legislation authorizing the head of a principal State department to create departmental committees and councils was amended to require the approval of the Advisory Budget Commission if membership of such a body is to exceed ten. [1977 N. C. Sess. Laws, Ex. Sess., ch. 1219, s. 46; G.S. 143B-10.]

-The Advisory Budget Commission was authorized to designate agencies primarily funded from sources other than State appropriations which are to be charged for the use of offices in State buildings. [1977 N. C. Sess. Laws, Ex. Sess., ch. 1219, s. 48; G.S. 143-342.1.]

-The use of agency-controlled funds to alter or renovate a State building during 1978-79 required the prior approval of the Advisory Budget Commission. [1977 N. C. Sess. Laws, Ex. Sess., ch. 1219, s. 49.]

-The Advisory Budget Commission was empowered to approve the formula to be developed by the State Board of Education for the allocation of funds appropriated in 1979 for children with special needs. [1979 N. C. Sess. Laws, ch. 838, s. 53.]

-The Advisory Budget Commission was empowered during 1979-81 to approve the policy to be adopted by the State Board of Education on paid absences for State-paid public school employees. [1979 N. C. Sess. Laws, ch. 56.]

-The reserve for repairs on and completion of capital improvments projects authorized in 1979-81 was to be allocated by the Advisory Budget Commission. [1979 N. C. Sess. Laws, ch. 731.]

-The Reserve for Loss of Federal Funds for 1979-81 could be allocated only with the approval of the Advisory Budget Commission. [1979 N. C. Sess. Laws, Ex. Sess. ch. 1212, s. 13.]

-The Advisory Budget Commission was authorized in 1981 to approve every contract for professional services that exceeds $10,000 before the State Department of Transportation may let it. [1981 N. C. Sess. Laws, ch. 859, s. 68; G.S. 136-28.1(f).]

In light of the clear mandate set forth by our Supreme Court in State ex rel Wallace v. Bone, supra, and reinforced in an advisory opinion by our Supreme Court on February 16, 1982 (appended as attachment C), it appears that such continued exercise of administrative and executive power would be subject to challenge. I respectfully suggest, therefore, that all functions and duties exercised by the Commission which are other than purely advisory in nature cease immediately. Because the Commission does exercise a very vital role in advising the Governor and the General Assembly in the formulation and preparation of the budget, those legislators who sit on the Commission need not resign therefrom. They should limit their role to matters that are purely advisory in nature.

THE COMMITTEE ON EMPLOYEE HOSPITAL AND MEDICAL BENEFITS

This Committee, consisting entirely of legislators, was created by Sections 13.12 through 13.19 of Chapter 859 of the 1981 Session Laws and amended Article 3 of Chapter 135 of the General Statutes. The functions and duties vested by the 1981 amendment in the Committee on Employees Hospital and Medical Benefits, which include awarding contracts, are clearly executive and administrative. Under State ex rel Wallace v. Bone, supra, legislators cannot exercise these functions and duties without violating the Separation of Powers provision of our Constitution. In addition, the February 16, 1982 advisory opinion by our Supreme Court makes apparent that there are powers which the General Assembly cannot delegate to a legislative commitee or commission. In my opinion, the formulation and establishment of programs concerning teachers and state employees hospital and medical benefits and disability salary continuation fit within this category.

It appears, therefore, that the statute which amended Article 3 of Chapter 135 by creating the Committee on Employee Hospital and Medical Benefits is unconstitutional on both grounds and any decisions made by this Committee may be subject to court challenge. Assuming that the statutory amendment creating the Committee on Employee Hospital and Medical Benefits is unconstitutional, it is my opinion that the statutory amendment is null and void. The statute, as it existed prior to amendment, remains in effect. Allen v. City of Raleigh, 181 N.C. 453, 107 S.E. 463 (1921); Board of Managers v. Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953).

Should you have any questions, please contact me.

Very truly yours,

RUFUS L. EDMISTEN
Attorney General

RLE/tv

Attachments

BOARDS AND COMMISSIONS

1.	Agriculture, The Board of	GS	106-2
2.	Art Museum Building Commission		143B-58
3.	Apprenticeship Council		94-2
4.	Board of Public Telecommunications Commissioners		143B-426.9
5.	Board of Transportation		143B-350
6.	Board of Trustees Teachers & State Employees Retirement System		135-6(b)(4)
7.	Child & Family Services Interagency Committee		143B-426.3
8.	Children & Youth, The Governor's Advocacy Council on		143B-415
9.	Coastal Resources Commission		113A-104
10.	Crime Commission, The Governor's		143B-478
11.	Economic Development Board		143B-434
12.	Education Commission of the States		115C-104
13.	Environmental Management Commission		143B-282
14.	Fire Commission, State		143B-481
15.	Governor's Advocacy Council for Persons with Disabilities		143B-403.2
16.	Insurance Commission, Public Officers' & Employees Liability		143B-422
17.	Land Conservancy Corporation, Board of Trustees		113A-137
18.	North Carolina Capital Building Authority		129-40
19.	North Carolina Criminal Justice Education & Training Standard Commission		17C-3
20.	North Carolina Housing Finance Agency		122A-4
21.	North Carolina Seafood Industrial Park Authority		113-315.25

22.	Review of Application for Incentive Pay for State Employees Committee	126-64
23.	Science & Mathematics, Board of Trustees for North Carolina School of	115C-223
24.	Science & Technology	143B-441
25.	Southern Growth Policies Board	143-492
26.	State Farm Operations Commission	106-26.13
27.	The Board of Commissioners of the Law Enforcement Officers Benefit and Retirement Fund . .	143-166(b)
28.	The Board of Trustees of the North Carolina Museum of Art	140-5.13
29.	The Board of Trustees of the University of North Carolina Center for Public Television	116-37.1
30.	The Commission for Mental Health, Mental Retardation and Substance Abuse Services	143B-148
31.	The Governor's Waste Management Board	143B-216.12
32.	The Municipal Board of Control	160A-6
33.	The North Carolina Alcoholism Research Authority	122-120
34.	The North Carolina Capital Planning Commission of the Department of Admin.	143B-374
35.	The North Carolina Ports Railway Commission	143B-469
36.	The North Carolina State Ports Authority	143B-452
37.	The Property Tax Commission	143B-223
38.	The Social Services Commission	143B-153
39.	The State Commission of Indian Affairs	143B-407
40.	Wildlife Resources Commission	143-240
41.	Women, The Council on the Status of	143B-394

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MEMORANDUM

TO: Liston B. Ramsey, Speaker of the House

FROM: Gerry Cohen, Director
Legislative Drafting Division

DATE: February 25, 1982

SUBJECT: Legislators on Boards and Commissions

You have asked me to review the Attorney General's memo to you of February 19, 1982, and ask whether I agree with his list of 41 Boards and Commissions that legislators must resign from.

The Supreme Court in its decision in State ex rel Wallace v. Bone, and its subsequent advisory opinion of February 16, 1982, it is clear that no legislators may be appointed to any board or commission which has executive powers.

In the table below, I indicate whether I agree or disagree with the Attorney General's opinion that the functions of the Board of Commission are executive. If I disagree, a copy of my reasons are attached at the conclusion.

In addition, if the column "Voluntary" is checked, that indicates that the legislator was appointed by the Governor or other executive officer, rather than the Speaker or Senate President.

I would recommend that as to the 37 agencies where I have indicated agreement with the Attorney General, you inform members that they should resign. As to the four boards I have indicated disagreement, I would suggest that appointees refrain from attending meetings, and the Attorney General examine these again.

		Voluntary	Agree	Disagree
1.	Agriculture, Board of	X	X	
2.	Art Museum Building Comm.		X	
3.	Apprenticeship Council	X	X	
4.	Board of Public Telecomm.		X	
5.	Board of Transportation		X	
6.	Board of Trustees, State Retirement System		X	
7.	Child & Family Service Interagency Com.			X
8.	Children & Youth, Governor's Advocacy Council on			X
9.	Coastal Resources Commission	X	X	
10.	Crime Commission		X	
11.	Economic Development Board		X	
12.	Education Commission of the States			X
13.	Environmental Management Comm.		X	
14.	Fire Commission, State		X	
15.	Governor's Advocacy Council for Persons with Disabilities		X	
16.	Insurance Comm., Public Officers		X	
17.	Land Conservancy Corporation		X	
18.	N. C. Capital Building Authority		X	
19.	N. C. Criminal Justice & Training Standard Comm.		X	
20.	N. C. Housing Finance Agency		X	
21.	N. C. Seafood Industrial Park Authority		X	
22.	Incentive Pay Committee		X	
23.	Science and Mathematics School Board of Trustees		X	
24.	Science and Technology		X	
25.	Southern Growth Policies Board			X

		Voluntary	Agree	Disagree
26.	State Farm Operations Comm.		X	
27.	L.E.O. Benefit Fund		X	
28.	Board of Trustees, N. C. Museum of Art		X	
29.	Bd. of Trustees, Center for Public Television		X	
30.	Commission for Mental Health and Mental Retardation		X	
31.	Governor's Waste Management Board		X	
32.	Municipal Board of Control		X	
33.	N. C. Alcoholism Research Authority	X	X	
34.	N. C. Capital Planning Comm.		X	
35.	N. C. Ports Railway Comm.	X	X	
36.	N. C. Ports Authority		X	
37.	Property Tax Commission		X	
38.	Social Services Comm.	X	X	
39.	State Comm. of Indian Affairs		X	
40.	Wildlife Resources Comm.		X	
41.	Women, Council on the Status of	X	X	

7. The Child and Family Services Interagency Committee is established by G.S. 143B-426.4, and has seven statutory functions. None of them are, I think, executive or administrative.

It can, "improve communication...communicate with federal agencies...identify areas of duplication... identify gaps in existing services...make recommendations... receive and review statistics...develop procedures and guidelines...(and) make recommendations."

I see nothing executive therein, unless the Governor has assigned the function of approving grants under G.S. 143B-426.4(7).

8. The Governor's Advocacy Council on Children and Youth is established by G.S. 143B-414, and has eight statutory functions.

It can "...act as an advocate...provide assistance... perform a continuing review...identify needs...review any new programs...present a written report...and provide information."

I see nothing executive therein, unless the Secretary of Administration has assigned the function of approving grants under G.S. 143B-414(8).

12. The Education Commission of the States is established by Part 5 of Chapter 115C of the General Statutes as part of the Interstate Compact for Education. The powers of the Commission do not appear to me to be executive. Even if they were, I question whether the Court opinion should be extended to Interstate Agencies.

This question needs further research. The Law and Use of Interstate Compacts (Council of State Governments 1976) is the best research work on this subject.

25. The Southern Growth Policies Board is established by the Southern Growth Policies Agreement, Article 55 of Chapter 143 of the General Statutes. My comments are the same as for paragraph 12 above.

RUFUS L. EDMISTEN
ATTORNEY GENERAL

State of North Carolina
Department of Justice
P. O. Box 629
Raleigh
27602

10 March 1982

MEMORANDUM

TO: Liston B. Ramsey, Speaker
House of Representatives

FROM: Rufus L. Edmisten
Attorney General RLE.

QUESTIONS: (1) May the General Assembly appoint non-legislators to State boards and commissions which exercise a part of the administrative or executive sovereign power of the State?

(2) May the General Assembly delegate that authority to the Speaker of the House and President of the Senate?

ANSWERS: (1) Yes.

(2) There is no definitive answer to this question. It appears, however, that such a delegation of authority would not be unconstitutional.

INTRODUCTION

In the case of State ex rel. Wallace v Bone,[1] our Supreme Court held that the Separation of Powers provision of our Constitution[2] is to be strictly followed. The Bone decision is far-reaching. It prohibits members of the General Assembly, regardless of how or by whom appointed, from serving on any State Board or commission which exercises a part of the administrative or executive sovereign power of the State. This interpretation of the Separation of Powers provision was reiterated in the advisory opinion

1 ___ NC ___, 286 SE 2d 79 (1982).

2 N. C. Const., Art. I, §6.

handed down by the Supreme Court on February 16, 1982.[3] In the advisory opinion the Court expressed its opinion that legislation creating the Joint Legislative Committee to Review Federal Block Grant Funds[4] and vesting in the Joint Legislative Commission on Governmental Operations authority over budget line item transfers[5] was unconstitutional. The Court's opinion rested upon its belief that the legislation violated the Separation of Powers provision[6], the Governor's constitutional budget provision[7], and constituted an unconstitutional delegation of legislative power.[8]

The Bone decision and Advisory Opinion do not address the question of the General Assembly's power to appoint persons who are not legislators to State boards and commissions. This memorandum will explore this authority.

Constitutional Appointment Provisions Prior to 1875

Since North Carolina became a state in 1776, three Constitutions have been adopted. The first Constitution was adopted in 1776 and remained in effect until the second Constitution was adopted in 1868. Our present Constitution was adopted in 1970.

Under the Constitution of 1776, the General Assembly possessed the general appointing power. It elected the Governor, the Council of State and other executive branch officers, military officers,

[3] In re Advisory Opinion, ___NC___, ___SE 2d___ (February 16, 1982).

[4] Part XIV, Ch. 1127, 1981 S.L. These provisions are codified as G.S. §§120-84.1 through 84.5 (1981 Cumulative Supplement to 1981 Replacement Volume 3B of the General Statutes).

[5] §82,Ch. 1127, 1981 S.L. This provision is codified as G.S. §143-23(b) (1981) Cumulative Supplement to 1978 Replacement Volume 3C of the General Statutes).

[6] See, footnote 2 for citation.

[7] N. C. Const., Art. III, §5(3).

[8] N. C. Const., Art. II, §1.

judges, etc. The only appointive power granted to the Governor was to fill vacancies when the General Assembly was not in session.[9] By amendment in 1835, the Governor became a popularly elected official.

During the Reconstruction Period after the Civil War, the federal Reconstruction Acts were imposed on the South. One of the Acts declared that no legal state governments existed in the South and placed the states under federal military control. In order to gain readmission to the Union, each southern state was required to draw up a new constitution and have Congress approve it. Also the state had to ratify the Fourteenth Amendment to the United States Constitution.[10]

The Constitutional Convention of 1868 drew up the "new" Constitution. The delegates to the Convention were overwhelmingly members of the Republican Party whom the Conservative Party (former Democrats and Whigs) branded as carpetbaggers and scalawags because they came south with the victorious Union army (carpetbaggers) or were native North Carolinian Union sympathizers (scalawags).[11]

The Constitution made major changes in the political structure of the State. Prior to 1868, the General Assembly was the pre-eminent governmental branch. The Constitution of 1868 attempted to redistribute the political power more evenly among the three branches of government. One of the major changes shifted the appointment power

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[9] Nichols v. McKee, infra, at pages 431-432. This case will be analyzed in depth later in this memo.

[10] Zuber, "North Carolina During Reconstruction" (Published by the Division of Archives and History of the Department of Cultural Resources, 1975 Edition).

[11] Id., at pages 12-18.

from the General Assembly to the Governor. This was clearly set forth by Chief Justice Pearson in the case of The People ex rel. Welker v. Bledsoe,[12] as follows:

> ...The framers of our old Constitution in 1776, had an extreme jealousy of the executive, and favored the legislative branch of the government. The colony was at war for its independence, and the governors had sided with the crown. This accounts for the fact that the power of appointment (except to fill vacancies until the meeting of the Legislature) is taken from the Governor and conferred upon the General Assembly. The election of the Governor and his council, and of his generals and field officers, is given to the General Assembly, as well as the election of the judges and other public officers and the appointment of Justices of the Peace.
>
> But the Governor was Captain General of all of the military force of the State, and for fear, although stripped of the appointing power, and to be elected by the Legislature the Governor might endanger the liberties of the people, his eligibility to office is restricted to three years in six.
>
> By amendments to the Constitution 1836, the distribution of powers is left as before, save that the election of the Governor is taken from the General Assembly and given to the people, and the term of office is fixed at two years.
>
> By the present Constitution a very important change is made. The result of a recurrence to fundamental principles, i.e., the election of the Governor, Judges and other chief public officers, is taken from the General Assembly and given to the people, and the residuary appointing power is vested in the Governor with advice and consent of a majority of the Senators-elect, and the General Assembly as a body have nothing to do with it. 68 N.C. 457, at 460-461.

The provision added to the Constitution of 1868 which made the important change in the appointment provision read as follows:

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[12] 68 N.C. 457 (1873). This case will be analyzed in depth later in this memorandum.

> The Governor shall nominate, and by and with the advice and consent of the majority of the Senators elect, appoint all officers whose offices are established by this Constitution, or which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly. (N.C. Const., art III, §10)

The Conservative Party fiercely resisted the changes made by the 1868 Constitution but was unable to prevent the adoption of the Constitution. The Republicans controlled the legislature from 1868 to 1870. The Conservatives regained control of the General Assembly in the election of 1870. Among the first acts of the newly constituted General Assembly was the impeachment of Governor Holden, the governor put in power by the Union army and kept in power by Republican Party victory in 1868. The Conservative Party set about regaining the power of the General Assembly, which it controlled.

Governor Holden's impeachment trial ended on March 22, 1871. It resulted in his removal from office. On April 6, 1871, the General Assembly passed an act giving the President of the Senate and the Speaker of the House the power to appoint all proxies and directors in all corporations in which the State had an interest. The General Assembly expressly revoked the Governor's power to make these appointments. This set the stage for State ex rel. Clark v. Stanley,[13] the first test of the General Assembly's exercise of power (in the appointment context) after the demise of the Republican Party.

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[13] 66 N.C. 60 (1873).

During the Republican controlled legislative era, there was widespread corruption. One of the main criticisms of the legislature was the legislature's mismanagement of State funds and the manner in which the railroads secured money from the taxpayers with the approval of the legislature.[14] Apparently, the legislature sought to solve this problem by replacing the Governor's directors on the Atlantic and North Carolina Railroad Company with directors appointed by the General Assembly (through the Speaker of the House and President of the Senate.)

The General Assembly's appointees commenced a quo warranto proceeding to oust the Governor's appointees. The legislative appointees lost at the trial level and appealed to the Supreme Court. The Supreme Court upheld the lower court and held that the legislation empowering the General Assembly to appoint the directors violated the appointment provision of the Constitution of 1868. In reaching its decision, the Court propounded an interesting hypothetical question,the answer to which the Court stated the fallacy of the legislative appointees argument. It reads as follcws:

> Again, suppose an act:
> "Whereas, experience has proved that the Governor has made an ill use of the power of appointment, it is enacted: There shall be two fit persons to be styled 'appointors general,' whose duty it shall be to appoint all public officers and to fill all vacancies.
>
> "Sec. 2. It is further enacted: The President of the Senate and the Speaker of the House of Representatives shall be the appointors general."
>
> This act is clearly unconstitutional, for in the first place, in order to create this new office, it takes from the Governor a duty, or function, vested

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[14] Zuber article, at pages 19-24. See footnote 10 for citation.

> in him by the Constitution; and in the second place the General Assembly fills the office by its own appointment, contrary to the express veto of that instrument.
>
> This is the case under consideration. True, it is on a larger scale and covers more ground; but although differing in degree, it is the same in principle. A new office is created; it is not so in name, but is in effect the office of "appointors for officers in all corporations in which the State is a stockholder," and in order to create the office a duty, or function, of his office is taken from the Executive, and the appointment of these "appointors for corporations" is made by the General Assembly. 66 N.C. 60, at 65-66.[15]

The following year, the Supreme Court fleshed out its interpretation of the appointments provision of the 1868 Constitution in two additional cases. In People ex rel. Nichols v. McKee,[16] the Board of Trustees of the N. C. Institution of the Deaf and Dumb and the Blind had been appointed by the General Assembly pursuant to a statute enacted on January 21, 1871. On March 1, 1872, the Governor appointed his own trustees. The Governor's trustees demanded that the General Assembly's trustees step aside. When this demand was refused, the Governor's trustees filed a quo warranto action to oust the legislature's appointees. The Governor's trustees prevailed at the trial court level and in the Supreme Court. The essence of the Supreme Court's analysis is captured in the following excerpts:

> The first question is, to which of the departments

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[15] In addition to holding the legislature's attempted exercise of the appointment power unconstitutional, the hypothetical apparently had an impact of the perceived power to delegate appointive powers to the Speaker of the House and President of the Senate. All of the subsequent case law on the appointments provision deals with the General Assembly's attempted exercise of such power as a body.

[16] 68 N.C. 429 (1873).

has the Constitution granted the power of appointment to office?... 68 N.C. 429, at 431.

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Under the first Constitution for the State, the Legislature was the general appointing power. It elected the Governor, his Council and other Executive officers, and the officers of the Military, the Judges of the Courts, Justices of the Peace, etc. The Governor had no appointing power, except to fill vacancies when the Legislature was not in session. Under the present Constitution there is an entire change. The people have reserved to themselves the election of almost all the officers in the State. There are still some of the officers, which, for convenience, are otherwise appointed or elected, or chosen, as the case may be, and we proceed now to enquire to which of the departments the power is given:

1. We will first consider, what express grant of appointing power is made to the Legislature.

"Art. II, sec. 20. The House of Representatives shall choose their own speaker and other officers.

Sec. 22. The Senate shall choose its other officers, and also a speaker pro tempore in the absence of the Lieutenant Governor, or when he shall exercise the office of Governor."

The foregoing are all the grants of power of appointment to the Legislature under Article II, which is the legislative article. And it will be observed, that even these are not grants to the Legislature as a body, but only to each branch to choose its own officers. Under Article III, which is the Executive article, sec. 10, "The Governor shall nominate and by and with the advice and consent of the Senate, appoint all officers, etc., and no such officer shall be appointed or elected by the General Assembly."

Except the foregoing, there is no other express grant of appointing power to the Legislature, and the section last quoted is only the power of one branch to confirm or reject the nominations of the Governor, with an express prohibition to the General Assembly as a body in regard to all officers. So, it is plain that there is not only no express grant of power to the legislative department to appoint to office; but there is no express prohibition.

2. In the second place we will consider what express grant of appointing power is made to the Executive Department.

Art. III, sec. 10. "The Governor shall nominate, and

by and with the advice and consent of a majority of the Senators elect appoint all officers whose offices are established by this Constitution, or, which shall be created by law, and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly."

That section, read without any verbal criticism, would seem to make the Governor the general appointing power, and to exclude the Legislature altogether. 68 N.C. 492, at 431-433.

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From the foregoing it is plain that the general appointing power is given to the Governor, with the concurrence of the Senate; and that the power to fill vacancies, not otherwise provided for, is given to the Governor alone, and that, whether the Legislature is in session or not, and without calling the Senate. 68 N.C. 429, at 433.

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Reading the whole Constitution, and without any hypercriticism, it is plain, that such officers as are elected by the people at the polls, and most of them are so elected, are to be appointed by the Governor, the Senate concurring, except the immediate officers of the Supreme Court; and that all vacancies are to be filled by the Governor alone, except such as are otherwise specifically provided for. And the Legislature has no more right to appoint the Directors of the Asylums than the Governor has to appoint the clerks of the Legislature. 69 N.C. 429, at 434.

Our conclusion is, that the Legislature has no power to elect or appoint any officer in the State, except its own officers. Nor has it the power to provide for the appointment, or election, of any officer, whose office now exists, or which may hereafter be created; so as to take the appointment away from the Governor and Senate, or other appointing power, or the election away from the people. Nor can the constitutional rights of the Governor or the people be evaded by letting the offices to contractors. 68 N.C. 429, at 438.

The Supreme Court's interpretation of the appointment's provision of the 1868 Constitution left no room for doubt that the

Governor possessed the appointment power and that the General Assembly had none. In reaching this conclusion, the Court went through an intellectual exercise which indicated that the legislative appointment power prior to 1868 was vested in the General Assembly as a body and was not previously delegated to its principal officers. Justice Reade speaking for the Court, stated:

> The Constitution secures to the people the election of almost all the officers in the State. For such as they did not choose to elect, or it was not convenient for them to elect, the most convenient other mode was prescribed, to wit: nomination by the Governor. Elections were taken away from the General Assembly, because it is a large body with two branches and is very expensive. That was one of the evils; there may have been others. Would not the evil exist in electing officers thereafter to be created, as well as officers named in the Constitution? Doubtless. And must we not construe the provision with reference to the evil? Put the election of half a dozen Directors, for a half dozen Institutions each, in the General Assembly, and circumstances would often occur which would make the expense and inconvenience enormous. But then it is said, that the election need not be by the Legislature itself, but that it may be otherwise provided for by law. But it is answered, why should it be supposed that it was the purpose of the Constitution to allow the Legislature to appoint other modes for filling offices than the mode prescribed in the Constitution? If the mode prescribed in the Constitution was not the best, why was it prescribed? If it was the best, why allow it to be altered? And especially why leave the mode at sea so as to engender conflicts between the Departments? 68 N.C. 429, at 436.

The thrust of Justice Reade's analysis is that the appointments power was taken away, at least in part, by the Constitution of 1868 because it was inconvenient and unwieldly to have the General Assembly,

as a body, appointing the public officers of the State.[17]

In a companion case to McKee, the Supreme Court upheld the validity of the Governor's appointees to the Board of Directors of the Penitentiary in People ex rel. Welker v. Bledsoe.[18] The General Assembly's appointees to the board were made pursuant to a statute enacted on April 1, 1871. On March 1, 1872, the Governor made his appointments to the Board. The Governor's appointees demanded that the General Assembly's appointees step aside. After this demand was refused, the Governor's trustees also prevailed at the trial court level and in the Supreme Court. Although commencing the opinion with the statement that "[t]his case is governed by Clark v. Stanley, 66 N.C. 59," the Court fully analyzed the issue. The Court compared the "old" 1776 Constitution with the "new" 1868 Constitution (see quoted text on page four of this memo) and stated the following:

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[17] There is very little case law regarding the legislative branch's constitutional authority to delegate its appointment power to its presiding officers. The Supreme Judicial Court has opined that such delegations are unconstitutional delegations of authority and violate the separation of powers doctrine. In re Opinion of the Justices, 302 Mass. 605, 19 N.E. 2d 807 (1939); In re Opinion of the Justices, 303 Mass. 615, 21 N.E. 2d 551 (1939); In re Opinion of the Justices, 365 Mass. 639, 309 N.E. 2d 476 (1974). The Supreme Court of Utah held such delegations to violate the separation of powers doctrine on the theory that appointment power is executive in nature. Rampton v. Barlow, 23 Utah 2d 383, 464 P.2d 378 (1970). However, our Supreme Court has held the appointment powers not to be an executive power and rejected a similar separation of powers argument in Cunningham v. Sprinkle, infra. The only court which appears at first blush to not find constitutional infirmity is the Supreme Court of Arizona. In Lockwood v. Jordan, it rejected a separation of powers argument. However, the statutory appointment power delegated to the speaker of the house and president of the senate was subject to the advice and consent of a majority of the Arizona House and Senate. The ultimate power of appointment resided with the legislature as a whole.

[18] 68 N. C. 457 (1873).

...Creating an office is an act of legislation. Filling an office is an executive act. This is a fundamental principle. 68 N.C. 457, at 460.

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The idea that the Constitution leaves it in the power of the legislative branch of the government to encroach upon the functions of the Governor, by providing from time to time other modes of appointment or election, and especially the mode of appointing or electing by the General Assembly itself, could only have suggested itself to a mind accustomed to look at the subject from the "standpoint" of the old Constitution, under which the General Assembly had the power of appointment as well as of legislation; but such an idea cannot be entertained by a Court whose duty it is to look at the subject from the "standpoint" of the new Constitution, and to divest itself of the habits of thought and association belonging to the past.....

We have seen that the power to appoint all officers whose appointments are not otherwise provided for by the Constitution is vested in the Governor by express affirmative words. But to make assurance doubly sure, there is also an express prohibition against the exercise of this power by the General Assembly, "and no such officer shall be appointed or elected by the General Assembly," that is no one to fill an office established by this Constitution or an office which shall be created by law. Take it in any point of view, the appointment of the defendants by the General Assembly is not warranted by the Constitution, and they unlawfully hold and exercise the office of the Directors of the State's prisons.

...Providing funds, making regulations and creating the necessary offices for the management of the institution, are acts of legislation; but filling these offices by competent men, is a different matter--that is an executive function. The affirmative words of Art. III, sec. 10, by which the power of appointment is vested in the Governor, and also the negative words by which the General Assembly is prohibited from its exercise, shows the meaning of the Constitution to be a division of power in respect to the Penitentiary, as in respect to the other public institutions and offices, so as to put the responsibility of creating the necessary offices upon one branch of the government, and the responsibility of properly filling such offices upon another. 68 N.C. 457, at 463-464.

The Supreme Court decisions of State ex rel. Clark v. Stanley, People ex rel. Nichols v. McKee, and People ex rel. Welker v. Bledsoe, thwarted the General Assembly's efforts to secure control of the machinery of State government. Because these decisions were based upon interpretations of the Constitution, the Conservatives controlling the General Assembly set about to amend the Constitution in order to change the undesired results of these three cases. The appointments provision was only one of a number of changes that the Conservatives sought to make. In any event, the stage was set for the Constitutional Convention of 1875.

Constitutional Convention of 1875

The Conservative Party leaders wanted to undo some of the changes which they perceived as having been forced upon the State by the Republicans in the Constitutional Convention of 1868. The Republicans were equally determined not to allow the changes. The election of delegates to the Convention was hard fought. Both parties ended up with fifty-eight delegates apiece. There were also three independent delegates.[19]

One of the changes made to the Constitution was the amendment of the appointments provision. It was changed to read as follows:

> The Governor shall nominate, and by and with the advise and consent of a majority of the Senators elect, appoint all officers whose offices are established by this Constitution, and whose appointments are not otherwise provided for. (N.C. Const., Art. III, §10).

[19] Zuber article, at pages 48-50. (See footnote 10 for citation.)

The change wrought by the 1875 amendment apparently ended the conflict between the Governor and General Assembly. The next case which called for interpretation of this amendment occurred twenty-four years later. During this period, which lasted until the election of 1894, the Conservative (whose name changed back to the Democratic) Party controlled both the executive and legislative branches.

Between the period of 1876 to 1894, the Democratic Party had control of the political life of the State. The Democratic Party adopted a policy of stimulating railroad, industrial, mercantile and banking development by unrestricted private enterprise protected and aided by State government.[20] The Democratic party became the guardian and ally of big business and the railroads. The Republican Party had little impact on the operation of State government.

Rising opposition came from farmers. Farmers were in a period of economic hardship which became acute in the 1890's. The main cause of their economic distress were low prices, scarcity of money, and high credit. Farmers believed that they were suffering while the business interests flourished. For this reason, the farmers organized politically. The Populist Party emerged. In the election of 1892, the Democrats easily defeated the Republicans and Populists. The Democratic Party refused to conciliate the Populists and ostracized them. As a consequence, the Populist and Republican Parties banded together (creating a "fusion" party)

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[20] Lefler and Newsome, The History of a Southern State: North Carolina, (The University of North Carolina Press, 1973), at page 542; See, generally, Chapters 38-40 for a history of North Carolina during the period from 1877-1920.

and gained control of the General Assembly in 1894. In 1896, Republican D. L. Russel was elected Governor on the "fusion" ticket. The Democrats regained control of the General Assembly in 1898. This set the stage for the next constitutional conflict over the power of appointment.

The eruption of the conflict between the executive and legislative branches made its way into the courts once again. In the case of Cunningham v. Sprinkle[21], members of the Board of Agriculture appointed by the Governor refused to admit members appointed by election of the General Assembly. The legislative appointments to the board were authorized by statute. The General Assembly's appointees commenced a mandamus action to compel the Governor's appointees to admit them to membership on the board as required by statute.

The Governor's appointees argued that the Board of Agriculture was a constitutional office to which the General Assembly had no power of appointment. The Governor's appointees also argued that the power of appointment was an executive function which the General Assembly could not exercise without violating the Separation of Powers provision of our Constitution. The trial court held that the General Assembly's appointees were properly appointed. The Supreme Court affirmed.

The Supreme Court opinion stated, "We feel compelled to say that the members of the Board of Agriculture are not constitutional officers; and that being a legislative creation, they are equally within the power of legislative appointment."[22]

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[21] 124 N.C. 638, 33 S.E. 138 (1899). J-15

[22] 124 N.C. 638, at 641. The Court said it based its decision on its holdings in State Prison v. Day, 124 N.C. 362, 32 S.E. 748 (1899) and State ex rel. Cherry v. Burns, 124 N.C. 761, 33 S.E. 136 (1899).

The Court rejected the Governor's appointees' separation of powers argument because "[n]ow the election of officers is not an executive, legislative or judicial power, but only a mode of filling the offices created by law, whether they belong to one department or the other... It is thus clear that the power of appointment was not regarded as exclusively an executive prerogative."[23] This is a clear reversal of interpretation that the appointment power was executive as held in People ex rel. Welker v. Bledsoe, supra.

The Supreme Court made it clear that this new interpretation of the appointments provision resulted from the 1875 amendment in State ex rel. Cherry v. Burns.[24] On March 8, 1897, Burns was appointed Keeper of the Capitol by the Board of Public Buildings which was appointed by the Governor. His term was to last through the year 1900. On February 23, 1899, the General Assembly by statute took the appointment power from the executive branch and conferred this power on itself. In joint session, the General Assembly elected Cherry Keeper of the Capitol. Cherry asked Burns to step aside. Burns refused, and Cherry initiated the quo warranto proceeding to oust Burns from office.

Burns argued, inter alia, that his was a constitutional office the appointment to which belonged to the Governor and his board. The Supreme Court rejected the contention that the office of Keeper of the Capitol was a constitutional office. After

[23] 124 N.C. 638, at 642-643.

[24] 124 N.C. 761, 33 S.E. 136 (1899).

determining that this office was a legislative creation, the Court rejected Burns' appointments provision argument, stating:

> Welker v. Bledsoe, supra, and that line of cases in the 68 N.C., were all under the Constitution of 1868, and are not of the same authority now as they were under that Constitution. If the present Constitution was the same as that of 1868, there would be no difficulty in deciding this case for the defendant; but not upon the ground that it is a constitutional office, but because the Legislature would be prohibited from filling the office whether it was a constitutional office or not. These cases are to be viewed in the light of the amended Constitution of 1875. The amendments in the Constitution of 1875 leaves out that clause which prohibits the Legislature from filling any office, and also that clause "or which shall be created by law." These were important provisions, and must have been striken out of the Constitution of 1868 for a purpose. It is said it was done in consequence of the decision in Welker v. Bledsoe, supra; Nichols v. McKee, 68 N.C., 429 and that line of decisions. If this is so (and we think it probably is) it affords us some aid in construing the Constitution of 1875, and leads us to the opinion that the Legislature may fill this office. This view seems to be sustained by University v. McIver, 72 N.C., 76; Ewart v. Jones, 116 N.C., 570; Wood v. Bellamy, 120 N.C., 212, and State Prison v. Day, ante, 362.

In State Prison of North Carolina v. Day,[25] the Supreme Court held that the General Assembly could abolish an office and substitute in its place a different office to be filled by legislative appointees. However, the Court held that the legislature could not merely transfer to others the duties of a public office as a subterfuge to oust a public officer from office. This decision was based upon the theory that an office holder had a property interest in his office of which he could not be denied

[25]See footnote 22 for citation.

unless the office in fact was abolished. This holding was expressly overruled by the Supreme Court in Mial v. Ellington.[26] However, in Day, the Court stated that, "...it is clear that the Convention of 1875 intended to alter the Constitution as interpreted in McKee v. Nichols, supra, on that [power of appointment] point, and to confer upon the General Assembly the power to fill offices created by statute." 124 N.C. 362, at 367. It is also of note that the Supreme Court spoke in terms of the power of appointment as being possessed collectively by the legislature.

The last case which interprets the appointments provision, as amended in 1875, is State ex rel. Salisbury v. Croom.[27] On November 8, 1912, Governor William W. Kitchin (a Democrat) appointed R. H. Salisbury to fill a vacancy in the office of director of the Central State Hospital in Raleigh. He was appointed to fill the unexpired term of his predecessor which ran until 1917. However,

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[26] 134 N. C. 131, 46 S.E. 961 (1903). The Supreme Court in Mial v. Ellington also stated that, "[t]he Legislature, having been entrusted with the power of either electing or providing for the election of officers of legislative creation, must, as representatives of the people, be entrusted to make such changes in tenure, duties and emoluments of such offices as in its judgment the public interest demands. This power having been vested in that department of the government, it is our duty to obey and enforce the law as the 'State's collected will.'" 134 N.C. at 161-162. This implies that the power of appointments was viewed as a power belonging to the General Assembly as a body.

[27] 167 N.C. 223, 83 S.E. 354 (1914).

Salisbury's name was never sent to the Senate for confirmation. In March of 1913, Governor Locke Craig (also a Democrat) appointed A. B. Croom to fill the position[28], and Croom's appointment was confirmed by the Senate. The board of directors excluded Salisbury from further participation in running the hospital. Croom assumed the office of director and Salisbury commenced a quo warranto action contesting Croom's appointment. The decision in the case turned on the constitutional provisions regarding the interim appointment of persons to fill vacancies in public offices. The trial judge decided that Croom was entitled to the office because the constitutional Senate confirmation requirement gave him a permanent appointment which defeated Salisbury's interim appointment. The Supreme Court affirmed the judgment. In reaching its decision the Supreme Court reviewed the history of the power of appointments provision as follows:

> The Constitution of 1868, Article III, sec. 10, made provision that the Governor, by and with the advice and consent of a majority of the Senators-elect, appoint all officers whose offices are established by the Constitution or which shall be created by law and whose appointments are not otherwise provided for, and no such officer shall be appointed or elected by the General Assembly.
>
> Construing this and cognate sections of the Constitution in reference to vacancies, etc., it was held in various decisions that the term,"unless otherwise provided for," meant unless otherwise provided for by the Constitution itself, and that, except in specified and restricted instances, the Legislature had no power to appoint to office or to fill vacancies therein. Nichols v. McKee, 68 N.C., 429; Welker v. Bledsoe, 68 N.C., 457; Clark v. Stanly, 66 N.C., 59. This interpretation

[28]Kitchin (a liberal) and Craig (a conservative) had been rivals for the Democratic gubernatorial nomination in 1908.

> and consequent method of appointment of office and filling vacancies therein not being satisfactory to the dominant sentiment in the State, this article and section of the Constitution, as it then existed, and others of kindred nature, were altered by the Convention of 1875, and it was then established and now remains as follows (Art. III, sec. 10): "The Governor shall nominate and, by and with the advice and consent of a majority of the Senators-elect, appoint all officers whose offices are established by this Constitution and whose appointments are not otherwise provided for." It will thus be noted that the inhibition on the legislative power to appoint to office is removed and the inherent power of the Governor to appoint is restricted to constitutional offices and where the Constitution itself so provides. Accordingly, it has since been the accepted view that, in all offices created by statute, including these directorates and others of like nature, the power of appointment, either original or to fill vacancies, is subject to legislative provision as expressed in a valid enactment. Cherry v. Burns, 124 N.C., 761; Cunningham v. Sprinkle, 124 N.C., 638.

This Supreme Court opinion is the last case wherein the appellate courts of North Carolina have addressed the appointments provision in our Constitution. After the Democratic victories in 1900, which included passage of a "suffrage" amendment,[29] the backs of the State Republican and Populist Parties were broken. The Democrats controlled the executive and legislative branches until the election of 1972. During this period there was no constitutional confrontation between the Governor and General Assembly concerning the appointments provision.

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[29] Included in the "suffrage" amendments were literacy test requirements [N. C. Const. art. VI, §4 of the 1868 Constitution; N.C. Const., art. VI, §4 of the 1970 Constitution] which had the effect of eliminating the black vote upon which the Republican Party had theretofore relied for a great deal of its voting strength. See, Lefler and Newsome book at page 562. (Complete citation is located at footnote 20.)

The 1970 Constitution

On November 3, 1970, the voters adopted the present Constitution. It took effect on July 1, 1971. Among the changes incorporated in the present Constitution is a revision of the appointments provision, which now reads as follows:

> The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for. [N. C. Const., art. III, §5 (8)]

Although the language of this provision differs slightly from the 1875 amendment, the substance of the current provision is the same.[30] The previously decided cases which chronicled the history of the struggle over appointment powers are applicable to our current appointments provision.

Conclusions

The history of the general power of appointment provisions in our constitutional past indicates that this State initially gave the general appointment power of public officers to the General Assembly by virtue of the Constitution of 1776. This power was basically retained by the General Assembly until the Reconstruction Period after the Civil War. The Constitution of 1868

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[30] See, "Report of the North Carolina State Constitution Study Commission" (1968) at page 31. The Study Commission stated in its commentary on Article III of the proposed constitution that "We are recommending several changes that affect the executive branch of state government and especially the Governor, but these are of sufficient moment that they take the form of separate amendments. Article III of the proposed constitution, while reorganized and abbreviated by the omission of repetitive, legislative-type, and executed provisions, contains few substantive changes of note." Id. The power of appointments provisions was not singled out in the Commission's list of substantive changes to Article III.

shifted the general power of appointment to the Governor. This shift was reversed by the Constitutional Convention of 1875. Since 1875, our Supreme Court has held that the general appointment provision grants the Governor the power to appoint non-constitutional officers to the extent that the General Assembly authorizes by statute. If the General Assembly has not statutorily provided for gubernatorial appointments, the Governor can appoint non-constitutional officers with the advice and consent of the Senate.

The Separation of Powers provision of our Constitution is not contravened by the General Assembly exercising legislative power of appointment of executive branch boards and commissions created by the legislature. The appointments provisions set forth the separate constitutional functions of the executive and legislative branches of State government in the appointment process.

The final point which must be made relates to the General Assembly's constitutional authority to delegate the appointive power to its principal officers--the Speaker of the House and President of the Senate. Because our Courts have not addressed this issue, it is difficult to base a firm legal conclusion on the issue of whether such delegations of appointment powers from the General Assembly to the Speaker of the House and President of the Senate are constitutional.

The outcome of any possible litigation which conceivably could arise relating to this issue is speculative at best. A court analyzing this question may look to see how the General Assembly utilizes its appointive powers. As the decision in State ex rel. Wallace v. Bone, supra, indicates, our courts are very sensitive to the checks and balances built into our Constitution so that one branch of government does not gain control over another.

In sum, there is no definitive answer on the question of whether the General Assembly can delegate its appointment power to the President of the Senate and the Speaker of the House. At this point, the most that can be said is that such delegations of appointive authority do not appear to be unconstitutional.

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MEMORANDUM

TO: Members, Joint Committee on Separation of Powers

FROM: Gerry Cohen, Director
Legislative Drafting

DATE: March 16, 1982

SUBJECT: Advisory Budget Commission

The question posed for discussion is: If the Supreme Court rules that the Advisory Budget Commission's participation in the administration of the budget is an unconstitutional violation of the separation of powers concept, would the Governor be able to act alone in administering the budget?

The answer to the question would be: The Governor could act alone in all those administrative areas that now require the approval of the Advisory Budget Commission (ABC). However, the involvement of the ABC in the development of the budget would be undiminished.

Additionally, we believe that the General Assembly could require that the Governor submit certain changes for the non-binding advice of the Advisory Budget Commission.

It is important to note that no court has yet invalidated the powers of the Advisory Budget Commission under the Executive Budget Act. However, it is fairly clear that, given the proper case, the court would do so. It might thus be wise to abide by the advice of the Attorney General that the role of the ABC be advisory.

Before considering specific provisions of the Executive Budget Act , it might be helpful to consider certain basic concepts of constitutional law concerning how a court determines a statute is unconstitutional and what the impact of such a decision might be.

(1) A court will only consider the challenge to a statute as presented by the parties.

(2) A court will seek to invalidate as little of a statute as is necessary to eliminate the constitutionally repugnant language.

(3) When language in a statute is ruled unconstitutional, it is considered, generally, void ab initio, which means from its original passage.

(4) Ordinarily, when a statute is declared unconstitutional, all acts taken pursuant to that statute are deemed to be void and of no consequence.

(5) When a statute is determined to be unconstitutional, the law reverts, as of the decision, to the law that existed before the passage of the void statute.

(6) A court will always attempt to interpret a statute so as to render it valid.

These are the basic tenets of constitutional law and construction applicable to the question which serves as the basis of this discussion which will go on to consider specific provisions of the Executive Budget Act after a brief consideration of the likely posture in which the court will render its decisions.

The court will never rule of the constitutionality of a statute on itw own. Some party or parties with proper standing will have to challenge the constitutionality of the statute. It is clear that the Governor could challenge the infringement of his rights to administer the budget under the Constitution.

To take an example of one section of the law, two sentences in G.S. 143-25 would likely be challenged. Those containing the words "...and by and with the advice and consent of a majority of the Advisory Budget Commission..." would likely fall to a challenge as to constitutionality. The Supreme Court has indicated a probability, in their advisory opinion, that these involve an unlawful violation of separation of powers. Since a court will invalidate only so much of a statute as is repugnant to the Constitution, it is reasonable to assume that the words "and consent of a majority" will be deleted by the Court. That would allow the Governor to act only after consulting with the ABC but would not permit the ABC to directly prohibit any allocations or reductions of funds. Other statutes which require simply the approval of the Governor and ABC would probably be construed to require just approval of the Governor.

Several other sections of the Executive Budget Act might be subject to attack on constitutional grounds. The sections governing the budgets for the State Auditor, State Treasurer, and Administrative Office of the Courts and indicating that they would be "subject only to such control as may be exercised by the Advisory Budget Commission" (G.S. 143-2) appear to be in violation of the Governor's constitutional right to prepare, recommend, and administer the budget as found in Section 5 of Article III.

Nothing in any of the opinions of the Supreme Court have limited the oversight powers of the ABC or the Genera Assembly. The Governor may always be limited in his administration of the budget by carefully considered and prepared limitations which could be placed in the budget bills.

In the interim between now and June, careful consideration can be given to the future role of the ABC in budget preparation and oversight, and in enacting special provisions which will require the executive to follow the intent of the legislature without interfering with the actual administration of the budget. Final decisions on administering the budget as enacted by the General Assembly will be in the hands of the Governor.

STATE OF NORTH CAROLINA
DEPARTMENT OF JUSTICE
RALEIGH 27602

RUFUS L. EDMISTEN
ATTORNEY GENERAL

17 March 1982

The Honorable Liston B. Ramsey
Speaker, North Carolina House
of Representatives
Legislative Building
Raleigh, North Carolina 27611

Dear Speaker Ramsey:

By letter of February 19, 1982 addressed to each Legislator, I advised that Legislators resign from 41 named boards and commissions. You asked that I reconsider my advice as to the following four:

(1) The Education Commission of the States;
(2) The Southern Growth Policies Board;
(3) The Governor's Advocacy Council on Children and Youth; and
(4) The Child and Family Services Interagency Committee.

I continue to feel that Legislators should resign from all of these 41 boards, including the four that you asked that I reconsider. I continue to feel this way because each requires the exercise of executive or administrative sovereign powers; and each requires much more than purely advisory action.

The Education Commission of the States

The duties and powers of the Education Commission of the States are set forth in Article III of N.C.G.S. 115C-104. In particular, N.C.G.S. 115C-104(6), (7), and (8)provide:

"(6) The commission may borrow, accept or contract for the services of personnel from any party jurisdiction, the United States, or any subdivision or agency of the aforementioned governments, or from any agency

of two or more of the party jurisdictions or their subdivisions.

(7) The commission may accept for any of its purposes and functions under this Compact any and all donations, and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any state, the United States, or any other governmental agency, or from any person, firm, association, foundation, or corporation, and may receive, utilize and dispose of the same. Any donation or grant accepted by the commission pursuant to this paragraph or services borrowed pursuant to paragraph (6) of this article shall be reported in the annual report of the commission. Such report shall include the nature, amount and conditions, if any, of the donation, grant, or services borrowed, and the identity of the donor or lender.

(8) The commission may establish and maintain such facilities as may be necessary for the transaction of its business. The commission may acquire, hold, and convey real and personal property and any interest therein."

It is clear from these three enumerated sections alone that the Commission acts in much more than an advisory capacity, and to the contrary, may enter into contracts for employment, may accept donations, grants of money, equipment, and supplies, and may acquire, hold and convey real and personal property. Such functions are clearly executive and administrative in nature, and, therefore Legislators may not continue to sit on this Commission.

The Southern Growth Policies Board

The powers and duties of the Southern Growth Policies Board is set forth in N.C.G.S. 143-493 and 143-494. Among

those powers and duties which are executive and administrative in nature, and certainly go beyond being purely advisory, are the power to make or commission studies, investigations and recommendations with respect to seven enumerated items set forth in N.C.G.S. 143-493. Moreover, as provided for in N.C.G.S. 143-494, the Board has the authority to make contracts with public or private agencies or private persons or entities for the undertaking of investigation or research which the Board requires. It is clear, therefore, that the Southern Growth Policies Board is empowered to exercise administrative and executive functions and does much more than act in a purely advisory capacity.

The Governor's Advocacy Council on Children and Youth

The powers and duties of the Governor's Advocacy Council on Children and Youth are set forth in N.C.G.S. 143B-414. Although I recognize that an argument could be made that the Council functions primarily as an advisory body, it appears that the Council goes beyond acting purely in an advisory capacity and in fact does perform administrative and executive functions since it provides information to the public and state and local and private agencies serving children and youth concerning the activities and foundings of the Council and in acting as an advocate for children and youth within the State and local governments. I admit, however, that this is a close one.

The Child and Family Services Interagency Committee

The powers and duties of this Committee are set forth in N.C.G.S. 143B-426.4. Although much of what the Committee does could be considered advisory in nature, the Committee clearly exercises administrative and executive functions in communicating with federal agencies dealing with family and children services in policy and coordinating efforts with the federal and state agencies and in developing procedures and guidelines to improve services to families and children.

Should you wish to discuss this with me further, please let me know and I will be happy to meet with you or members of your staff at your pleasure.

Very truly yours,

RUFUS L. EDMISTEN
Attorney General

RLE:js

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*(11 Jan 1982)

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MEMORANDUM

TO: Liston Ramsey
Speaker of the House

FROM: Gerry Cohen, Director
Legislative Drafting Division

SUBJECT: Separation of Powers

You have asked me to look at the Executive Budget Act (Article 1 of Chapter 143 of the General Statutes) and the two 1981 budget bills, Senate 29 (Chapter 859, July 8, 1981), and House Bill 1392 (Chapter 112), October 10, 1981), to see if there are any constitutional problems with assigning budget responsibilities to the Advisory Budget Commission, the Joint Legislative Commission on Governmental Operations, or the Joint Legislative Committee to Review Federal Block Grant Funds.

Article 1, Section 6 of the Constitution of North Carolina states that, "The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

This provision on its own, however, does not necessarily invalidate legislative participation in budget preparation and execution, since these from a historical sense have been in a gray area, partly legislative and partly executive.

Indeed, as history shows, (See The Advisory Budget Commission, Clyde L. Ball, October 1980, and The Advisory Budget Commission--Not as Simple as ABC, N. C. Center for Public Policy Research, Inc., March, 1980), the Governor's participation in budget preparation and execution dates only from 1919 legislation

of the General Assembly, and in its present form from the Executive Budget Act of 1919.

Prior to 1919, budget preparation was a haphazard process, coordinated occasionally, with legislative responsibility, with budget execution equally unrestrained, with ocassional intervention by the Treasurer.

Thus, from 1919 until the present day, budget preparation and execution was by law the function of the Governor and Advisory Budget Commission.

The problem with the current structure is that the 1969 session of the General Assembly enacted a new State Constitution, which was ratified by the voters in 1970.

That Constitution includes as Section 5(3) of Article III the following language:

"The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor."

This simple provision received little attention by the study commission that recommended the new Constitution to the 1969 session. A committee stated that "The Commission also approved the proposal that the Governor be empowered by the Constitution to formulate and administer the State budget." (Minutes of Committee on Structive, Organization, and Powers of State Government, October 11, 1968).

The full Commission noted that the provision was to give constitutional status to the Governor's power which had previously been regulated by statute.

Now that the budget preparation and administration power has been constitutionally made an executive power, it would appear that separation of powers would nullify many statutes providing for legislative participation in budget preparation and administration.

At your request, I am listing below various powers of the Advisory Budget Commission, Joint Legislative Committee to Review Federal Block Grant Funds, and Joint Legislative Commission on Governmental Operations which I believe could be challenged successfully in a lawsuit based on the 1971 Constitutional amendment.

There is one other important constitutional issue, which is that even if one assumed that a power was legislative, would it be permissible to delegate that power to a committee.

Section 1 of Article II of the Constitution states that "The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives." Powers of budget enactment are powers held by the legislature through the process of enacting bills. The lawmaking power cannot be delegated to a committee, while other powers such as investigation or executive oversight can be delegated.

As the Institute of Government noted in 1975 in commenting on the 1971 Constitutional amendment stating the budget process, "That provision may be construed to give the Governor exclusive responsibility and authority for preparing the proposed budget for legislative consideration and for executing the budget once it has been enacted by the General Assembly. (The North Carolina Executive Budget Act Topically Arranged, p. iii, 1975.)

ADVISORY BUDGET COMMISSION

The following powers of the Advisory Budget Commission are called into question:

(1) Preparation of budgets for State Auditor, State Treasurer, and Administrative Office of the Courts. G.S. 143-4 gives the A.B.C. sole authority over budget preparation for those agencies. This clearly conflicts with the constitutional provision.

(2) Budget execution for those agencies. G.S. 143-2 makes the State Auditor, State Treasurer, and the A.O.C. exempt from fiscal control by the Governor and instead places them under the fiscal control of the A.B.C.

(3) Budget Document. G.S. 143-11 states that if the Governor and A.B.C. agree on the budget, "...he shall prepare their report in the form of a proposed budget....". Although there are provisions for the Governor to present his own budget in case of a disagreement, the fact that the A.B.C. and Governor's budgets are so tied together might give the courts some pause. While the General Assembly is perfectly within its power to set up an A.B.C., there is question about the extent of its power to interfere with the Governor's budget preparation.

(4) Under G.S. 143-25, quarterly allotments must be approved by the Governor and A.B.C. This seems a substantial variance from the constitutional requirement that the Governor administer the budget.

(5) Under G.S. 143-25, the A.B.C. must concur in reduction of maintenance appropriations in case of a deficit.

(6) The A.B.C. in conjunction with the Governor may change the scope of a capital improvements project.

(7) The Governor and A.B.C. may authorize a new capital project under G.S. 143-18.1.

(8) The A.B.C. must approve variances of more than 10 percent in the D.O.T. budget under G.S. 136-44.2.

(9) Under G.S. 136-44.37, the Advisory Budget Commission must approve State funding for federal rail revitalization project.

(10) A department must have A.B.C. approval to apply for C. and E. funds for liability insurance under G.S. 58-194.1.

(11) The A.B.C. must approve interest transfers on pooled unemployment funds to the State Treasurer's Budget under G.S. 147-86.1(d).

(12) The A.B.C. can allocate Housing Finance Agency funds to the State Treasurer for Administrative expenses under G.S. 122A-8.1.

(13) The A.B.C. must approve supplemental funding for Highway Patrol radio systems under G.S. 20-196.

(14) Expenditures from the equipment reserve fund from sale of surplus property must be approved by the A.B.C. under G.S. 143-49(4).

(15) Certain grants of the Agency for Public Telecommunications must be approved by the A.B.C. under G.S. 143B-426.11(7).

(16) Under G.S. 146-30 funds from timber sales can be used if approved by the A.B.C., and funds from sale of park lands are under a similar restriction.

(17) Under G.S. 58-241.11, the budget of the Burial Association Administration must be approved by the A.B.C.

(18) Certain exemptions from purchasing requirements must be approved by the A.B.C. under G.S. 143-56.

(19) Under G.S. 143-215.73 certain transfers relating to water resources projects must be approved by the A.B.C.

(20) Under G.S. 116-11(9) certain category iii funds may be reallocated with the University with A.B.C. approval.

(21) U.N.C. funds may be transferred from one institution to another with A.B.C. approval under G.S. 116-11(9)c.

(22) The A.B.C. must approve special budgeting procedures for N. C. Memorial Hospital under G.S. 116-37(e).

(23) Under numerous provisions of the General Statutes, salaries of officials are set or approved by the A.B.C.

(24) The A.B.C. adopts many rules dealing with Purchase and Contract under Article 3 of Chapter 143 of the General Statutes.

JOINT LEGISLATIVE COMMITTEE TO REVIEW FEDERAL BLOCK GRANT FUNDS

G.S. 120-84.5 states that certain actions concerning block grant funds cannot be taken without approval of the Committee or the General Assembly if it is in session. There is no problem with requiring approval of the entire General Assembly through passage of a bill, since the General Assembly can control appropriation of Federal Funds.

But committee actions required by law such as distribution formulas, transfer of funds, encumbrance of funds, and approval of departmental rules are all items that even if the General Assembly could regulate in a bill (such as limiting transfers to a certain percentage), it is in my opinion powerless to delegate to a committee. The power of appropriating federal funds is legislative, as the Pennsylvania Supreme Court said in the case of Shapp v. Sloan, 391A 2d 595(1978). Thus the legislature can refuse to accept the funds, or attach conditions or stipulations to their expenditure. But absent such restrictions, such grants may be handled by the Governor in his executive power to administer the budget, and are not subject to legislative control by committee.

JOINT LEGISLATIVE COMMISSION ON GOVERNMENTAL OPERATIONS

(1) Under G.S. 136-44.2, enacted by Chapter 859, Session Laws of 1981 (The July budget bill), no federally eligible construction project may be funded entirely with State funds unless the Commission has approved the project or has failed to

object within 60 days. While a statute can certainly require submission of a project to a committee prior to action, there is some question in my mind about whether giving the committee power to reject the project constitutes an unlawful delegation of legislative authority to the committee, as well as treading on the power to administer the budget. Again, my reservation is that given the black and white language of the Constitutional provision, the General Assembly may be able to write whatever stipulations into the budget it desires, but after enactment, it can no longer be part of the budget process.

(2) Under G.S. 143-23(b), enacted by Chapter 1127, Session Laws of 1981 (the October Budget Bill), all transfers out of salary line items and all other transfers in excess of 10 percent of a program or object line item must be approved by the Commission.

The same problem as outlined above occurs with this power. It clearly affects the administration of the budget, as well as delegating legislative power to a legislative commission.

SPECIAL PROVISIONS

In addition to the statutory powers granted to the Advisory Budget Commission, the Joint Legislative Committee to Review Federal Block Grant Funds, and the Joint Legislative Commission on Government Operations, the following special provisions in the July budget bill (Ch. 859), and the October budget bill (Ch. 1127) might be questionable.

(1) Ch. 859, Sec. 5. The A.B.C. must approve certain highway fund transfers between accounts.

(2) Ch. 859, Sec. 13.6. The A.B.C. must approve certain shift premium pay.

(3) Ch. 859, Sec. 13.8. The A.B.C. must approve certain fee changes by the Department of Labor.

(4) Ch. 859, Sec. 13.12 through 13.19. A special legislative committee is authorized to set employee hospital and medical benefits.

(5) Ch. 859, Sec. 14. Changes in basis of payment in the Medicaid program must be approved by the A.B.C. In addition, Medicaid Income Eligibility Standards may be changed with the approval of the A.B.C. Furthermore, the A.B.C. could approve certain Medicaid cutbacks prior to the convening of the October session.

(6) Ch. 859, Sec. 17. Standards for Migrant Health Eye Care Eligibility require A.B.C. approval for changes.

(7) Ch. 859, Sec. 13.4. Proceeds from sale of land at John Umstead Hospital can be spent only in a plan which requires A.B.C. approval.

(8) Ch. 859, Sec. 35.2. Staff members of the State Board of Community Colleges have their salaries set with A.B.C. approval.

(9) Ch. 859, Sec. 47.1. The Administrative Office of the Courts had much of its budget supervision transferred from the Governor to the A.B.C.

(10) Ch. 859, Sec. 48. A schedule of transfer of control of certain motor vehicles requires A.B.C. approval.

(11) Ch. 859, Sec. 49. Rules on operation, maintenance, and repair of State motor vehicles must be approved by the A.B.C.

(12) Ch. 859, Sec. 68. D.O.T. consulting contracts must be approved by the A.B.C.

(13) Ch. 1127, Sec. 22. Certain Medicaid changes must be approved by the A.B.C. Prepaid health care for Medicaid Recipients must also be approved by the A.B.C.

(14) Ch. 1127, Sec. 23(g). The Joint Legislative Committee on Governmental Operations must approve certain uses of Willie M. funds. Under subsection (i), expenditure plans also require similar approval.

Despite my observations in this memo about the powers of the General Assembly viz a viz the Governor, I do not believe the constitutional provision in any way restricts the General Assembly from establishing an Advisory Budget Commission to participate in the budget process and report to the General Assembly. Likewise, it is perfectly permissible to require the Governor to report certain administrative actions to committees or commissions in the Legislative Branch prior to their effectiveness.

Of course, there has been no court test of the limits of the Governor's power under the 1970 Constitution to propose and administer the budget, and statutes that are listed above are, of course, constitutional until a court or other appropriate agency rules they are not. But serious constitutional issues do exist.

APPENDIX N

MEMBERSHIP OF SUBCOMMITTEES

SUBCOMMITTEE 1

Representative James F. Morgan, Chairman
Representative Robert Hunter
Representative Martin Lancaster
Senator Julian Allsbrook

SUBCOMMITTEE 2

Representative George Miller, Jr., Chairman
Representative William T. Watkins
Representative Dennis Wicker
Senator Kenneth C. Royall, Jr.

SUBCOMMITTEE 3

Senator Henson P. Barnes, Chairman
Senator W. Craig Lawing
Representative Parks Helms
Representative Martin Nesbitt

SUBCOMMITTEE 4

Senator Robert S. Swain, Chairman
Representative Al Adams
Representative Margaret Tennille
Representative Richard Wright

HOUSE DRH11263-LB

Short Title: Separation of Powers Act. (Public)

Referred to:

A BILL TO BE ENTITLED

AN ACT TO MAKE OMNIBUS AMENDMENTS TO THE GENERAL STATUTES TO CARRY OUT THE RECOMMENDATIONS OF THE LEGISLATIVE RESEARCH COMMISSION'S COMMITTEE ON SEPARATION OF POWERS.

The General Assembly of North Carolina enacts:

Section 1. This act may be cited as the Separation of Powers Act of 1982.

An outline of the provisions of the act follows this section. The outline shows the heading "-----CONTENTS/INDEX----" and it lists by general category the descriptive captions for the various sections and groups of sections that make up the act.

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(This outline is designed for reference only, and it in no way limits, defines, or prescribes the scope or application of the text of this act.)

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PART 3.-----BOARD OF TRANSPORTATION

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PART 1.-----GENERAL PROVISIONS ON APPOINTMENTS

Sec. 2. Chapter 120 of the General Statutes is amended by adding a new Article to read:

"ARTICLE 16.

"Legislative Appointments to Boards and Commissions.

"§ 120-121. Legislative appointments.--(a) In any case where the General Assembly is called upon by law to appoint a member to any board or commission, that appointment shall be made by enactment of a bill.

(b) A bill may make more than one appointment.

(c) The bill shall state the name of the person being appointed, the board or commission to which the appointment is being made, the effective date of the appointment, the date of expiration of the term, the county of residence of the appointee,

and whether the appointment is made upon the recommendation of the Speaker of the House of Representatives or the President of the Senate.

"§ 120-122. Vacancies in legislative appointments.--When a vacancy occurs, other than by expiration of term, in any office subject to appointment by the General Assembly upon the recommendation of the Speaker of the House of Representatives or upon the recommendation of the President of the Senate, and the vacancy occurs either: (i) after election of the General Assembly but before convening of the regular session; (ii) when the General Assembly has adjourned to a date certain, which date is more than 10 days after the date of adjournment; or (iii) after sine die adjournment of the regular session, then the Governor may appoint a person to serve until the expiration of the term or until the General Assembly fills the vacancy, whichever occurs first. The General Assembly may fill the vacancy in accordance with G.S. 120-121 during a regular or extra session. Before making an appointment, the Governor shall consult the officer who recommended the original appointment to the General Assembly (the Speaker of the House of Representatives or the President of the Senate), and ask for a written recommendation. The Governor may not appoint a person other than the person so recommended. Any positions subject to appointment by the 1981 General Assembly but not filled prior to sine die adjournment of the 1981 Session may be filled by the Governor under this section as if it were a vacancy occurring after the General Assembly had made an appointment.

"§ 120-123. Service by members of the General Assembly on certain boards and commissions.--No member of the General Assembly may serve on any of the following boards or commissions:

(1) The Board of Agriculture, as established by G.S. 106-2.

(2) The Art Museum Building Commission, as established by G.S. 143B-59.

(3) The Apprenticeship Council, as established by G.S. 94-2.

(4) The Board of Public Telecommunications Commissioners, as established by G.S. 143B-426.9.

(5) The Board of Transportation, as established by G.S. 143B-350.

(6) The Board of Trustees Teachers' and State Employees' Retirement System, as established by G.S. 135-6.

(7) The Coastal Resources Commission, as established by G.S. 113A-104.

(8) The Environmental Management Commission, as established by G.S. 143B-283.

(9) The State Fire Commission, as established by G.S. 143B-481.

(10) The Public Officers and Employees Liability Insurance Commission, as established by G.S. 143B-422.

(11) The North Carolina Land Conservancy Corporation, as established by G.S. 113A-137.

(12) The North Carolina Capital Building Authority, as established by G.S. 129-40.

(13) The North Carolina Criminal Justice Education and Training Standards Commission, as established by G.S. 17C-3.

(14) The North Carolina Housing Finance Agency Board of Directors, as established by G.S. 122A-4.

(15) The North Carolina Seafood Industrial Park Authority, as established by G.S. 113-315.25.

(16) The Committee for Review of Applications for Incentive Pay for State Employees, as established by G.S. 126-64.

(17) The Board of Trustees of the North Carolina School of Science and Mathematics, as established by G.S. 115C-223.

(18) The North Carolina Board of Science and Technology, as established by G.S. 143B-441.

(19) The State Farm Operations Commission, as established by G.S. 106-26.13.

(20) The Board of Commissioners of the Law Enforcement Officers' Benefit and Retirement Fund, as established by G.S. 143-166.

(21) The Board of Trustees of The University of North Carolina Center for Public Television, as established by G.S. 116-37.

(22) The Commission for Mental Health, Mental Retardation and Substance Abuse Services, as established by G.S. 143B-148.

(23) The Governor's Waste Management Board, as established by G.S. 143B-216.12.

(24) The North Carolina Alcoholism Research Authority, as established by G.S. 122-120.

(25) The North Carolina Ports Railway Commission, as established by G.S. 143B-469.

(26) The North Carolina State Ports authority, as established by G.S. 143B-452.

(27) The Property Tax Commission, as established by G.S. 143B-223.

(28) The Social Services Commission, as established by G.S. 143B-154.

(29) The North Carolina State Commission of Indian Affairs, as established by G.S. 143B-407.

(30) The Wildlife Resources Commission, as established by G.S. 143-240.

(31) The Council on the Status of Women, as established by G.S. 143B-294.

(32) The Board of Trustees of North Carolina Museum of Art, established by G.S. 140-5.13."

Sec. 3. G.S. 147-12 is amended by adding a new subdivision to read:

"(3a) The Governor may make appointments to fill vacancies in offices subject to appointment by the General Assembly as provided in G.S. 120-122."

Sec. 4. G.S. 147-12 is amended by adding a new subdivision to read:

"(3b) Whenever a statute calls for the Governor to appoint one person from each congressional district to a board or commission, and at the time of enactment of that statute, the gubernatorial appointments do not cover all of the congressional districts, then the Governor, in filling vacancies on that board or commission as they occur, shall make appointments to satisfy that requirement, but shall not be required to remove any person from office to satisfy the requirement."

Sec. 5. G.S. 143B-13 is amended by adding a new subsection to read:

"(f) Whenever a statute requires that the Governor appoint at least one person from each congressional district to a board or commission, and due to congressional redistricting, two or more members of the board or commission shall reside in the same congressional district, then such members shall continue to serve as members of the board or commission for a period equal to the remainder of their unexpired terms, provided that upon the expiration of said term or terms the Governor shall fill such vacancy or vacancies in such a manner as to insure that as expeditiously as possible there is one member of the board or commission who is a resident of each congressional district in the State."

PART 2.-----BOARD OF PUBLIC TELECOMMUNICATIONS COMMISSIONERS

Sec. 6. G.S. 143B-426.9(3) and (4) are rewritten to read:

"(3) Two members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121;

(4) Two members appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121;".

Sec. 7. The fourth paragraph of G.S. 143B-426.9 beginning with the words "The terms of the members of the North Carolina" is rewritten to read:

"The initial members appointed to the Board by the General

Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years."

Sec. 8. The eighth paragraph of G.S. 143B-426.9 is rewritten to read:

"Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies shall be filled in the same manner as the original appointment."

PART 3.-----BOARD OF TRANSPORTATION

Sec. 9. G.S. 143B-350(d) is rewritten to read:

"(d) The Board of Transportation shall have two members appointed by the General Assembly. One of these members shall be appointed upon the recommendation of the Speaker of the House of Representatives, and one shall be appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

Sec. 10. The last two sentences in G.S. 143B-350(e) are rewritten to read:

"Board members shall receive per diem and necessary travel and subsistence expenses in accordance with G.S. 138-5 and G.S. 138-6, as appropriate."

PART 4.-----BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM

Sec. 11. G.S. 135-6(b)(4) is rewritten to read:

"(4) Two members appointed by the General Assembly, one appointed upon the recommendation of the Speaker of the House of Representatives, and one appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Neither of these members may be an active or retired teacher or State employee or an employee of a unit of local government. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

PART 5.-----CHILD AND FAMILY SERVICES INTERAGENCY COMMITTEE

Sec. 12. G.S. 143B-426.4(7) is amended by inserting the word "advisory" between the words "other" and "duties".

PART 6.-----GOVERNOR'S ADVOCACY COUNCIL ON CHILDREN AND YOUTH

Sec. 13. G.S. 143B-414(8) is rewritten to read:

"(8) To perform other advisory functions assigned by the Secretary of Administration or a legislative committee."

Sec. 14. G.S. 143B-415 is amended by adding immediately after the first paragraph the following new language:

"Of the members appointed by the Governor, at least one shall come from each congressional district in acccordance with G.S. 147-12(3b)."

PART 7.-----GOVERNOR'S CRIME COMMISSION

Sec. 15. G.S. 143B-479 is amended by:

(1) Deleting the word "develop" in (a)(2) and inserting the word "recommend" in lieu thereof;

(2) Deleting the words "To assist and participate with the" in (a)(3) and inserting the words "To advise" in lieu thereof;

(3) Deleting (a)(7) and (a)(9a) and renumbering the succeeding subdivisions accordingly;

(4) Deleting the word "set" in (a)(8) and inserting the word "recommend" in lieu thereof;

(5) Deleting the word "make" in (a)(9) and inserting the words "recommend recipients of" in lieu thereof; and

(6) Deleting all of subsection (b) except the last sentence of the second paragraph.

Sec. 16. G.S. 143B-480.1 and G.S. 143B-480.2 are amended by deleting the words "Governor's Crime Commission" each time they appear in these statutes and inserting the word "Secretary" in lieu thereof.

Sec. 17. G.S. 143B-476(a) is amended by adding the following sentence to read:

"These powers and duties include:

(1) accepting gifts, bequests, devises, grants, matching funds and other considerations from private or governmental sources for use in promoting the work of the Governor's Crime Commission;

(2) making grants for use in pursuing the objectives of the Governor's Crime Commission;

(3) adopting rules as may be required by the federal

government for federal grants-in-aid for criminal justice purposes;

(4) ascertaining the State's duties concerning grants to the State by the Law Enforcement Assistance Administration of the United States Department of Justice, and developing and administering a plan to ensure that the State fulfills its duties; and

(5) administering the Assistance Program for Victims of Rape and Sex Offenses."

PART 8.-----ECONOMIC DEVELOPMENT BOARD

Sec. 18. The first two paragraphs of G.S. 143B-434(a) are rewritten to read:

"There is created within the Department of Commerce an Economic Development Board. The Board shall advise the Secretary of Commerce on:

(1) the formulation of a program for the economic development of the State of North Carolina; and

(2) the formulation of a budget and the hiring of the head of each division of the Department of Commerce concerned with the expansion of the travel and tourism industry.

The Secretary shall prepare the budget of the Department and shall hire the heads of the above-mentioned divisions who shall serve at his pleasure. The Board shall meet at least monthly at the call of its chairman or the Secretary. Each month the Secretary shall report to the Board on the program and progress of this State's economic development.

The Economic Development Board shall consist of 25 members.

The Secretary of Commerce, the President of the Senate or his appointee, and the Speaker of the House of Representatives or his appointee, shall be members of the Board. The Governor shall appoint 22 members of the Board. Of his appointees, the Governor shall appoint at least one member residing in each congressional district of the State."

PART 9.-----ENVIRONMENTAL MANAGEMENT COMMISSION

Sec. 19. G.S. 143B-283(d) is rewritten to read as follows:

"(d) In addition to the members designated by subsection (a), the General Assembly shall appoint four members, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of initial appointees by the General Assembly shall expire on June 30, 1983. Thereafter, these members shall serve two-year terms."

Sec. 20. The Legislative Research Commission is authorized to study fully the membership, powers and duties of the Environmental Management Commission and to make recommendations, which will better protect, preserve and enhance the water and air resources of the State, to the 1983 Session of the General Assembly.

PART 10.-----STATE FIRE COMMISSION

Sec. 21. G.S. 143B-481 is amended in the first sentence by deleting the words: "one member of the House of

Representatives appointed by the Speaker of the House, one member of the Senate appointed by the President of the Senate" and inserting at the end of the first sentence the following:

"The General Assembly shall appoint two members, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122."

Sec. 22. G.S. 143B-481 is further amended by rewriting the fourth paragraph as it appears in the 1981 Cumulative Supplement to Volume 3C of the General Statutes to read:

"The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. Thereafter, these appointees shall serve two-year terms."

PART 11.-----GOVERNOR'S ADVOCACY COUNCIL FOR PERSONS WITH DISABILITIES

Sec. 23. Subdivisions (1), (2), and (5) of G.S. 143B-403.1 are rewritten to read:

"(1) To advise the Secretary of Administration who shall provide for a statewide program of protection and advocacy in accordance with Section 113 of Public Law 94-103, Developmental Disabilities Services and Facilities Construction Act, as amended;

(2) To advise the Secretary of Administration who shall pursue legal, administrative, or other appropriate remedies to insure the protection of the rights of all developmentally, mentally,

physically, emotionally and otherwise disabled persons who are receiving treatment, services, or habilitation from any State, local, or area program;

(5) To advise the Secretary of Administration who shall contract with public agencies or private nonprofit corporations to fulfill any of the functions and duties provided for in subdivisions (2) and (6) and government-funded programs."

Sec. 23.1. G.S. 143B-403.2 is amended by adding the following new language at the end of the first sentence:

"The Governor shall appoint at least one person from each congressional district in accordance with G.S. 147-12(3b)."

PART 12.-----PUBLIC OFFICERS AND EMPLOYEES LIABILITY INSURANCE COMMISSION

Sec. 24. G.S. 143B-422 is amended in the first paragraph by deleting the following words from the second sentence: "the Lieutenant Governor shall appoint one member who shall be a member of the North Carolina Senate; the Speaker of the House of Representatives shall appoint one member who shall be a member of the North Carolina House of Representatives" and inserting in its place: "and the General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983."

Sec. 25. G.S. 143B-422 is further amended in the first paragraph by deleting the two sentences reading: "The member appointed by the Lieutenant Governor shall be appointed to a term of four years. The member appointed by the Speaker of the House shall be appointed to a term of two years.", and inserting in lieu thereof "Beginning July 1, 1983, the appointment made by the General Assembly upon the recommendation of the Speaker shall be for two years, and the appointment made by the General Assembly upon the recommendation of the President of the Senate shall be for four years."

Sec. 26. The next to the last sentence of the first paragraph of G.S. 143B-422 is amended by deleting "If", and inserting in lieu thereof "Except as provided in this section, if".

Sec. 27. G.S. 143B-423 is amended by deleting the third sentence.

PART 13.-----NORTH CAROLINA LAND CONSERVANCY CORPORATION

Sec. 28. G.S. 113A-137 is amended by deleting the third sentence of the first paragraph and inserting the following:

"The General Assembly shall appoint four trustees of the Corporation, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees of the General Assembly shall expire on June 30, 1983. The terms of subsequent

appointees of the General Assembly shall be two years."

PART 14.-----CAPITAL BUILDING AUTHORITY

Sec. 29. G.S. 129-40 is amended:

(1) in the first sentence by deleting "a member of the Senate to be appointed by the Lieutenant Governor; a member of the House of Representatives to be appointed by the Speaker of the House" and inserting in its place "the General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate"; and

(2) by adding at the end of the section:

"Appointments by the General Assembly shall be made in accordance with GS. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. Subsequent appointees by the General Assembly shall serve two-year terms."

Sec. 30. The Legislative Research Commission is authorized to study fully the membership and powers of the Capital Building Authority and to make recommendations it deems advisable to the 1983 Session of the General Assembly."

PART 15.-----NORTH CAROLINA CRIMINAL JUSTICE EDUCATION AND TRAINING STANDARDS COMMISSION

Sec. 31. G.S. 17C-3(a) is amended:

(1) in the second sentence by deleting "26 members" and inserting in lieu thereof "25 members"; and

(2) by deleting from subdivision (5) the language:

"One trial court judge selected by the Chief Justice of the North Carolina Supreme Court, one Senator selected by the Lieutenant Governor, one member of the House of Representatives selected by the Speaker of the House; the" and inserting in its place "The"; and

(3) by adding at the end of subdivision (5):

"The General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-122. The terms of the initial appointees by the General Assembly shall expire on June 30, 1983. Subsequent appointees by the General Assembly shall serve two-year terms."

Sec. 32. G.S. 17C-5(a) is rewritten to read:

"(a) The Commission shall elect, on July 1 of each year, its chairman. An ex officio member of the Commission may not serve as its chairman."

PART 16.-----NORTH CAROLINA HOUSING FINANCE AGENCY

Sec. 33. The first thirteen sentences of G.S. 122A-4 are deleted and the following inserted in lieu thereof:

"(a) There is hereby created a body politic and corporate to be known as 'North Carolina Housing Finance Agency' which shall be constituted a public agency and an instrumentality of the State for the performance of essential public functions.

(b) The agency shall be governed by a board of directors composed of 13 members. The directors of the agency shall be residents of the State and shall not hold other public office.

(c) The General Assembly shall appoint eight directors, four upon the recommendation of the Speaker of the House of Representatives (at least one of whom shall have had experience with a mortgage-servicing institution and one of whom shall be experienced as a licensed real estate broker), and four upon the recommendation of the President of the Senate (at least one of whom shall be experienced with a savings and loan institution and one of whom shall be experienced in home building). Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. Notwithstanding any other provision of law, the terms of the four noncategorical appointments by the General Assembly shall expire on June 30, 1983. Subsequent noncategorical appointments shall be for terms of two years each. The terms of the initial categorical appointees by the General Assembly upon the recommendation of the Speaker shall expire on June 30, 1983; the terms of subsequent appointees shall be two years. The term of one of the initial catagorical appointees by the General Assembly upon the recommendation of the President of the Senate shall expire on June 30, 1983, and the other on June 30, 1985; the terms of subsequent appointees shall be four years.

(d) The Governor shall appoint four of the directors of the agency; one of such appointees shall be experienced in community planning, one shall be experienced in subsidized housing management, one shall be experienced as a specialist in public housing policy, and one shall be experienced in the manufactured

housing industry. The four appointees of the Governor shall be appointed for staggered four-year terms, two being appointed initially for three years and two for four years, and shall continue in office until their successors are duly appointed and qualified. Any person appointed to fill a vacancy shall serve only for the unexpired term.

(e) Any member of the board of directors shall be eligible for reappointment. The 12 members of the board shall then elect a thirteenth member to the board by simple majority vote. Each member of the board of directors may be removed by the Governor for misfeasance, malfeasance or neglect of duty after reasonable notice and a public hearing, unless the same are in writing expressly waived. Each member of the board of directors before entering upon his duties shall take an oath of office to administer the duties of his office faithfully and impartially, and a record of such oath shall be filed in the office of the Secretary of State."

Sec. 34. G.S. 122A-16 is amended by adding a new sentence at the end to read:

"The Agency shall on January 1 and July 1 of each year submit a written report of its activities to the Joint Legislative Commission on Governmental Operations."

Sec. 35. The Joint Legislative Commission on Governmental Operations is authorized to study the membership, powers and duties of the North Carolina Housing Finance Agency and to make recommendations it deems advisable to the 1983 Session of the General Assembly.

PART 17.-----NORTH CAROLINA SEAFOOD INDUSTRIAL PARK AUTHORITY

Sec. 36. G.S. 113-315.25 is amended by deleting subsection (c) and by rewriting subsection (d) to read:

(d) The General Assembly shall appoint two persons, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122. The terms of the initial appointees by the General assembly shall expire on June 30, 1983. The terms of subsequent appointees by the General Assembly shall be two years."

Sec. 37. G.S. 113-315.25(g) is amended by deleting the last two sentences and inserting the following in lieu thereof:

"The members of the Authority shall not be entitled to compensation for their services, but shall receive per diem and necessary travel and subsistence expense in accordance with G.S. 138-5 and G.S. 138-6."

Sec. 38. The Legislative Research Commission is authorized to study the powers and duties of the North Carolina Seafood Industrial Park Authority and to make recommendations to the 1983 Session of the General Assembly to assist the Authority in the task of promoting, developing, constructing, equipping, maintaining, and operating the seafood industrial parks within the State.

PART 18.-----COMMITTEE FOR REVIEW OF APPLICATIONS FOR INCENTIVE PAY FOR STATE EMPLOYEES

Sec. 39. The last sentence of G.S. 126-64 is rewritten to read:

"In addition, the Governor shall appoint one person who has experience in administering incentive pay as used in industry, and the General Assembly shall appoint two persons who have experience in administering incentive pay as used in industry. Of the two members appointed by the General Assembly, one shall be appointed upon the recommendation of the Speaker of the House of Representatives, and one shall be appointed upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Members appointed by the General Assembly shall serve until the Committee expires on July 1, 1984. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

PART 19.-----NORTH CAROLINA SCHOOL OF SCIENCE AND MATHEMATICS

Sec. 40. G.S. 115C-223(a)(3) and (4) are rewritten to read:

"(3) Two members, one of whom shall be a superintendent of a local school administrative unit, appointed by the General Assembly upon the recommendation of the President of the Senate in accordance with G.S. 120-121.

(4) Two members, one of whom shall be a principal of a local school administrative unit, appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121."

Sec. 41. The first sentence of G.S. 115C-233(b) is rewritten to read:

"The initial members appointed by the General Assembly upon the recommendation of the President of the Senate shall serve for terms expiring June 30, 1983; their successors shall serve for four-year terms beginning July 1 of 1983 and each fourth year thereafter. The initial members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years."

Sec. 42. The last sentence of G.S. 115C-223(b) is amended by deleting the words "Lieutenant Governor and Speaker of the House" and inserting in lieu thereof the words "General Assembly".

Sec. 43. G.S. 115C-223(c) is amended by inserting between the words "in" and "appointive" the phrase "appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies in".

PART 20.-----NORTH CAROLINA BOARD OF SCIENCE AND TECHNOLOGY

Sec. 44. The first paragraph of G.S. 143B-441 is amended by rewriting the second sentence to read:

"Two members shall be appointed by the General Assembly, one shall be appointed upon the recommendation of the President of the Senate, and one shall be appointed upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121."

Sec. 45. The first two sentences of the second paragraph of G.S. 143B-441 are rewritten to read:

"The initial members appointed to the Board by the General Assembly shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

Sec. 46. The fifth paragraph of G.S. 143B-441 is amended by deleting the second sentence.

PART 21.-----STATE FARM OPERATIONS COMMISSION

Sec. 47. G.S. 106-26.13 is rewritten to read:

"§ 106-26.13. Recreation of State Farm Operations Commission.--There is hereby recreated a State Farm Operations Commission within the Department of Agriculture. The Commission shall consist of two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121, and the following ex officio members or their designees: a member of the Board of Agriculture appointed by the Commissioner of Agriculture; the Dean of the School of Agriculture and Life Sciences of North Carolina State University; the Dean of the School of Forest Resources of North Carolina State University; the Secretary of Human Resources; and the Secretary of Correction. The two members appointed by the General Assembly shall be farmers whose principal residence is on a farm, whose principal occupation is farming or farm operations, and whose principal source of income is from farming or farm operations. The initial members

appointed to the Commission by the General Assembly shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

PART 22.-----BOARD OF COMMISSIONERS OF THE LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND

Sec. 48. G.S. 143-166(b)(5) is rewritten to read:

"(5) Two members to be appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121. Neither member appointed by the General Assembly may be an active or retired law enforcement officer. The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

PART 23.-----BOARD OF TRUSTEES OF THE NORTH CAROLINA MUSEUM OF ART

Sec. 49. G.S. 140-5.13(b) is amended by:

(1) Rewriting subdivision (1) to read:

"(1) The Governor shall appoint eleven members, one from each congressional district in the State in accordance with G.S. 147-12(3b);";

(2) Deleting the word "four" in subdivisions (2), (3) and (4) and inserting the word "three" in lieu thereof;

(3) Rewriting subdivision (5) to read:

"(5) The General Assembly shall appoint two members, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121.";

(4) Deleting subdivision (6); and

(5) Deleting the words "President of the Senate or the Speaker of the House", "President of the Senate and the Speaker of the House of Representatives", and "President of the Senate or of the Speaker of the House" from the last three sentences of the subsection and inserting the words "General Assembly" in each place in lieu thereof.

Sec. 50. G.S. 140-5.13(c) is amended by deleting the words "Every vacancy" and inserting in lieu thereof the phrase "Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. All other vacancies".

Sec. 51. G.S. 140-5.13(d) is amended by:

(1) Deleting the words "legislative members" and inserting in lieu thereof the words "legislative appointees";

(2) Rewriting subdivision (6) to read: "(6) The initial appointments by the General Assembly shall serve until June 30, 1983. Subsequent appointments shall be for two-year terms commencing July 1, 1983, and biennially thereafter";

(3) Deleting subdivision (7).

Sec. 52. The second sentence of G.S. 140-5.13(j) is deleted.

Sec. 53. The reduction of one each in appointees by the North Carolina Art Society, Incorporated, the North Carolina Museum of Art Foundation, Incorporated, and the Board of Trustees of the North Carolina Museum of Art shall be accomplished at the expiration of the terms of members expiring June 30, 1983. The Governor shall make three additional appointments effective that date to serve six-year terms.

PART 24.-----UNIVERSITY OF NORTH CAROLINA CENTER FOR PUBLIC TELEVISION

Sec. 54. G.S. 116-37.1(b)(1) is amended by:

(1) deleting the phrase "one Senator appointed by the President of the Senate; one member of the House of Representatives appointed by the Speaker of the House" and inserting in lieu thereof the phrase "two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121"; and

(2) Inserting a new sentence between the second and third sentences of the subdivision to read:

"The initial members appointed to the Board of Trustees by the General Assembly shall serve for terms expiring June 30, 1983, and notwithstanding anything else in this section, their successors shall be appointed in 1983 and biennially thereafter for two-year terms."

Sec. 55. G.S. 116-37.1(b)(5) is amended by deleting the words "Any vacancy which occurs" and inserting in lieu thereof the following: "Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Other vacancies occurring".

PART 25.-----COMMISSION FOR MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE SERVICES

Sec. 55.1. G.S. 143B-148(a) is amended by:

(1) Rewriting subdivision (1) to read:

"(1) Four of whom shall be appointed by the General Assembly, two upon the recommendation of the Speaker of the House of Representatives, and two upon the recommendation of the President of the Senate in accordance with G.S. 120-121. These members shall have concern for the problems of mental illness, mental retardation, alcohol and drug abuse. The initial members appointed to the Commission by the General Assembly shall serve for terms expiring June 30, 1983. Thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

(2) Rewriting the first sentence of subdivision (2) to read:

"Twenty-one of whom shall be appointed by the Governor, one from each congressional district in the State in accordance with G.S. 147-12(3b), and 10 at-large members."

Sec. 56. G.S. 143B-148(b) is amended by deleting the last sentence of the subsection.

Sec. 57. G.S. 143B-148(c) is rewritten to read:

"(c) Commission members shall receive per diem, travel and subsistence allowances in accordance with G.S. 138-5 and G.S. 138-6, as appropriate."

PART 26.-----GOVERNOR'S WASTE MANAGEMENT BOARD

Sec. 58. G.S. 143B-216.12(a)(3) is rewritten to read:

"(3) Two members appointed by the General Assembly, one upon the recommendation of the Speaker of the House of Representatives, and one upon the recommendation of the President of the Senate in accordance with G.S. 120-121."

Sec. 59. G.S. 143B-216.12(b) is amended by rewriting the last sentence to read:

"The initial members appointed by the General Assembly shall serve for terms expiring June 30, 1983; thereafter, their successors shall serve for two-year terms beginning July 1 of odd-numbered years."

Sec. 60. G.S. 143B-216.12(e) is amended by adding a new sentence at the end to read:

"Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122."

Sec. 61. G.S. 143B-216.12(f) is rewritten to read:

"Any member of the Board, except legislative appointees, may be removed by the Governor for misfeasance, malfeasance, or nonfeasance. Members appointed by the General Assembly may be removed for these reasons only by the General Assembly."

Sec. 62. G.S. 143B-216.12(g) is amended by deleting the second sentence.

PART 27.-----MUNICIPAL BOARD OF CONTROL

Sec. 63. Article 1A of Chapter 160A of the General Statutes is repealed.

Sec. 64. This Part does not affect the validity of any corporate charter issued by the Municipal Board of Control prior to the effective date of this Part.

Sec. 65. This Part shall become effective October 1, 1982, except that an order incorporating a city which is entered prior to October 1, 1982, but subject to a referendum to be held under G.S. 160A-9.3 between October 1, 1982, and January 1, 1983, shall be valid notwithstanding the abolition of the Municipal Board of Control.

PART 28.-----NORTH CAROLINA CAPITAL PLANNING COMMISSION

Sec. 66. G.S. 143B-373 is amended as follows:

(1) Subsection (1)d. is amended by deleting the word "select", and inserting in lieu thereof "recommend to the Governor".

(2) Subsection (1)e. is amended by deleting "name", and inserting in lieu thereof "recommend to the Governor the name for".

(3) Subsection (1) is amended by deleting "the City of Raleigh and its environs" in each of the four places it appears and inserting in lieu thereof "Wake County".

(4) Subsection (1)d. is amended by adding immediately before the semicolon ", except for buildings occupied by the General Assembly".

(5) Subsection (1)e. is amended by inserting

immediately after the word "Hospital", the words ", the General Assembly".

Sec. 67. G.S. 120-32 is amended by adding a new subsection to read:

"(10) To select the locations for buildings occupied by the General Assembly, and to name any building occupied by the General Assembly."

Sec. 68. G.S. 147-12 is amended by adding a new subsection to read:

"(12) To name and locate State government buildings, monuments, memorials, and improvements, as provided by G.S. 143B-373(1)."

PART 29.-----NORTH CAROLINA PORTS AUTHORITY

Sec. 69. G.S. 143B-452 is amended by rewriting the last sentence of the first paragraph to read:

"The Governor shall appoint seven members to the Authority, and the General Assembly shall appoint two members of the Authority. Effective July 1, 1983, the Authority shall consist of seven persons appointed by the Governor, and four persons appointed by the General Assembly."

Sec. 70. The first paragraph of G.S. 143B-452 is amended by adding the following new language immediately after the second sentence:

"Effective July 1, 1983, it shall be governed by a board composed of 11 members and hereby designated as the authority."

Sec. 71. The third and fourth paragraphs of G.S. 143B-452 are repealed, and the following substituted in lieu thereof:

"The General Assembly shall appoint two persons to serve terms expiring June 30, 1983. The General Assembly shall appoint four persons to serve terms beginning July 1, 1983, to serve until June 30, 1985, and successors shall serve for two-year terms. Of the two appointments to be made in 1982, one shall be made upon the recommendation of the Speaker, and one shall be made upon the recommendation of the President of the Senate. Of the four appointments made in 1983 and biennially thereafter, two shall be made upon the recommendation of the President of the Senate, and two shall be made upon the recommendation of the Speaker. Appointments by the General Assembly shall be made in accordance with G.S. 120-121, and vacancies in those appointments shall be filled in accordance with G.S. 120-122."

PART 30.-----PROPERTY TAX COMMISSION

Sec. 72. The first paragraph of G.S. 143B-223 is amended by deleting "one each appointed by the Lieutenant Governor and the Speaker of the House", and inserting in lieu thereof "two appointed by the General Assembly".

Sec. 73. G.S. 143B-223 is amended by deleting the last two sentences of the first paragraph and inserting the following in lieu thereof:

"Of the two appointments made by the General Assembly, one shall be made upon the recommendation of the Speaker, and one shall be upon recommendation of the President of the Senate. The initial appointments of the General Assembly shall be for terms to expire on June 30, 1983, and the appointment of their successors shall be for terms of two years for the person

appointed by the General Assembly upon the recommendation of the Speaker and four years for the person appointed by the General Assembly upon the recommendation of the President of the Senate. Appointments by the General Assembly shall be in accordance with G.S. 120-121 and vacancies shall be filled in accordance with G.S. 120-122."

PART 31.-----COMMISSION OF INDIAN AFFAIRS

Sec. 74. G.S. 143B-407(a) is amended by deleting "the Speaker of the House of Representatives (or a person designated by the Speaker), the Lieutenant Governor (or a person designated by the Lieutenant Governor)", and inserting in lieu thereof "two persons appointed by the General Assembly".

Sec. 75. G.S. 143B-407(a) is further amended by adding the following new language at the end:

"Of the two appointments made by the General Assembly, one shall be made upon the recommendation of the Speaker, and one shall be made upon recommendation of the President of the Senate. Appointments by the General Assembly shall be made in accordance with G.S. 120-121 and vacancies shall be filled in accordance with G.S. 120-122."

Sec. 76. G.S. 143B-407(b) is further amended by adding the following new language at the end:

"The initial appointments by the General Assembly shall expire on June 30, 1983. Thereafter, successors shall serve for terms of two years."

PART 32.-----SOCIAL SERVICES COMMISSION

Sec. 77. The fourth paragraph of G.S. 143B-154 is repealed.

Sec. 78. Chapter 143B of the General Statutes is amended by adding a new section to read:

"§ 143B-153. Legislative enactment required.--Notwithstanding any provision of this Part or of Chapter 108A of the General Statutes, the setting of rates or fees for social services for services provided under this Part or that Chapter, or the setting of eligibility standards or the designation of services to be provided, if granted by this Part or that Chapter to the Social Services Commission, instead shall be done only by enactment of laws enacted by the General Assembly. This section applies only to the exercise of powers by the Social Services Commission. The Social Services Commission may adopt interim rules or regulations in those areas during any time the General Assembly is not in session or has recessed for more than 10 days, such rules or regulations to expire on the first day of July following their effective date, unless earlier modified, amended, enacted, or repealed by the General Assembly. The Social Services Commission shall report by May 1 of each year on any rules or regulations adopted under this section. This section is effective July 1, 1983."

PART 33.-----WILDLIFE RESOURCES COMMISSION

Sec. 79. G.S. 143-240 is amended by deleting the second and third sentences of the eleventh paragraph and inserting the following in lieu thereof:

"The General Assembly shall appoint two members of the

Commission, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President of the Senate, in accordance with G.S. 120-121."

Sec. 80. G.S. 143-241 is amended in the last paragraph by deleting the last sentence and inserting the following in lieu thereof:

"Initial members of the Commission appointed by the General Assembly shall serve until June 30, 1983, and subsequent appointees shall serve for a two-year term beginning July 1, 1983, and biennially thereafter."

Sec. 81. G.S. 143-242 is amended by rewriting the second sentence to read:

"Appointments to fill vacancies of those members of the Commission appointed by the General Assembly shall be made under G.S. 120-122."

PART 34.-----NORTH CAROLINA BOARD OF PHYSICAL THERAPY EXAMINERS

Sec. 82. G.S. 90-270.25 is amended by deleting the fifth and sixth sentences from its text.

Sec. 83. Appointments made under the previous G.S. 90-270.25 are valid until the expiration of the term, or death, resignation or removal of the appointee, but no new appointment may be made which would increase the membership of the Board to more than eight.

PART 35.-----FURTHER STUDY AUTHORIZED

Sec. 84. The Legislative Research Commission is authorized to continue its study of the separation of powers between the three branches of State government and to report its

findings and recommendations to the 1983 Session of the General Assembly.

PART 36.-----EFFECTIVE DATE

Sec. 85. Except as provided elsewhere in this act, this act is effective upon ratification.

APPENDIX P

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1981

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SENATE DRS11644-LB

Short Title: Ports Authority Bond Approval. (Public)

Sponsors:

Referred to:

A BILL TO BE ENTITLED

AN ACT TO IMPLEMENT THE RECOMMENDATIONS OF THE LEGISLATIVE RESEARCH COMMISSION'S COMMITTEE ON SEPARATION OF POWERS BY PROVIDING THAT BONDS ISSUED BY THE STATE PORTS AUTHORITY BE APPROVED BY THE GOVERNOR AFTER RECEIVING THE ADVICE OF THE ADVISORY BUDGET COMMISSION.

The General Assembly of North Carolina enacts:

Section 1. G.S. 143B-456(b) is amended by deleting "Advisory Budget Commission", and inserting in lieu thereof the words "Governor, after receiving the advice of the Advisory Budget Commission".

Sec. 2. G.S. 143B-454(9) is amended by deleting "Advisory Budget Commission", and inserting in lieu thereof "Governor, after receiving the advice of the Advisory Budget Commission".

Sec. 3. This act is effective upon ratification.