

FLORIDA FEATURE: THE DIRECTION AND SUPERVISION BY ELECTED OFFICIALS OF FLORIDA EXECUTIVE BRANCH AGENCIES AND ADMINISTRATIVE RULEMAKING: 1968-2012

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Text

[*333]

Introduction

In *Whiley v. Scott*, a majority of the Florida Supreme Court opined the governor lacked the authority to direct the suspension of administrative rulemaking by agencies whose appointed senior administrators served at his pleasure.¹ The majority concluded: (1) the legislature could place executive [*334] branch agencies under the complete control of at-will gubernatorial appointees, and (2) neither the supreme executive power constitutionally vested in the governor, nor the authority to remove at-will appointees, authorized him to direct these agency heads without further statutory authority.² Finding "the power to remove is not analogous to the power to control,"³ the Court invited the Florida Legislature to clarify the law. Promptly accepting the invitation, the legislature passed a bill confirming: (1) all appointed agency heads remained subordinate to the direction and supervision of the governor

¹ [Whiley v. Scott, 79 So. 3d 702 \(Fla. 2011\)](#).

² [Id. at 715](#).

³ *Id.*

(or other appointing authority, such as the cabinet), and (2) as a procedural statute, the Florida Administrative Procedure Act ⁴ operated within the structure of constitutional executive power. ⁵

This Article argues the legislature relied on the full text of the constitutional executive article when reorganizing the executive branch after adoption of the 1968 Florida Constitution, and examines the subsequent control over agency rulemaking exercised by numerous governors. The implementation of the 1968 Constitution left undisturbed the governor's basic authority over at-will appointees, contrary to the conclusions of a subsequent attorney general opinion, AGO 81-49. That opinion was not cited for thirty years and would have remained a theoretical outlier but for the reliance and approval of the Whiley majority. ⁶

I. Executive Branch Authority Over Appointed Subordinates in Florida: The Historical Context

Those drafting the 1838 Florida Constitution understood that the scope of the executive power included the authority necessary to direct and supervise those subordinate officials appointed by the chief executive, an [*335] understanding informed by the national experience with the U.S. Constitution ⁷ and shared by the framers of other state constitutions. ⁸ The executive power vested by the Florida Constitution was only restrained in its exercise by

⁴ Fla. Stat. Ch. 120 (2013).

⁵ 2012 Fla. Laws 116.

⁶ [Whiley v. Scott, 79 So. 3d at 714.](#)

⁷ The framers of the federal document understood the chief executive had sole discretion and authority to remove appointed subordinates unless otherwise expressly constrained directly by the U.S. Constitution or by valid exercise of power granted to one of the other branches. This point was developed extensively in the Congress of 1789 during the debate on the bill creating the Department of Foreign Affairs. James Madison, representing Virginia, argued the power of removing appointed officers was inherent in the constitutional design for the executive branch because, if the subordinate officers were not responsible to the President, the President could not fulfill the duties of that office to the nation. The power of removal and the consequent authority of oversight by, and accountability to, the President thus prevented the possibility that the appointed officers could usurp the executive power. See 1 Annals of Cong. 479-80 (1789) (Joseph Gales ed., 1834), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=2> 41 (statement of Rep. James Madison); see generally *U.S. Const. art. II, § 3* ("He shall take care that the laws be faithfully executed, and shall commission all the officers of the United States."). The provenance summary of the Archives Library Information Center (ALIC) of the National Archives lists the full title as The Debates and Proceedings in the Congress of the United States with an Appendix Containing Important State Papers and Public Documents, and all the Laws of a Public Nature, with Copious Index 1st Congress to 18th Congress, 1st session ... March 3, 1789-May 27, 1824; Compiled from Authentic Sources, and describes the 42 volume series as "the first attempt to record the daily proceedings in both houses of Congress. This reprint edition is probably as faithful a report of the debates and proceedings as could be compiled after such a lapse of time." Available at <http://www.archives.gov/research/alic/reference/admin-history/congressional-debates.html#annals>. During the debate, John Vining, representing Delaware, pointed out the President was held responsible for the faithful execution of the laws, "but take away his controlling power, and upon what principle do you require his responsibility?" 1 Annals of Cong. at 532. In a later dispute with the U.S. Senate about his removal of the Treasury Secretary in 1833, President Andrew Jackson drew support from this House debate and expressed a similar understanding. See Andrew Jackson, President of the United States, Removal of the Public Deposits (Sept. 18, 1833), in *The Statesmanship of Andrew Jackson, As Told in His Writings and Speeches* 261, 280-81 (Francis Newton Thorpe ed., 1909) [hereinafter Jackson, Removal], available at http://books.google.com/books?id=WL52AAAAMAAJ&pg=PA517&dq=Andrew+Jackson+writings&hl=en&ei=vjSfTo7cBInu0gGkzqSJCQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CDEQ6AEwAA#v=onepage&q&f=false; Andrew Jackson, President of the United States, Protest on the Expunging Resolution (Apr. 15, 1834) [hereinafter Jackson, Protest], in *The Statesmanship of Andrew Jackson, As Told in His Writings and Speeches* 325, 342, 347 (Francis Newton Thorpe ed., 1909) [hereinafter Jackson, Protest]. Jackson maintained that the President derived the power to remove subordinate executive appointees from the grant of executive power in Article II of the U.S. Constitution - the same power under which those appointees remained subject to the President's supervision and control. See Jackson, Removal, *supra* at 280-81; Jackson, Protest, *supra* at 342, 347. See also Saikrishna Prakash, *Removal and Tenure in Office*, [92 Va. L. Rev. 1779, 1820-32 \(2006\)](#) (a comprehensive analysis of the historical context and development of the President's executive power to remove subordinate officials).

⁸ See comparison of state constitutions *infra* note 22.

express limitations, including allocating some functions to one or more officers outside the governor's control. Where the Constitution did not expressly limit the appointment or removal of executive branch subordinates, the appointing constitutional officer retained full authority to direct and supervise their actions in performance of their delegated duties. This principle was informed by the historical development of the constitutional [*336] article on the executive, retained throughout the various versions of the Constitution, and reinforced by the language of the new Florida Constitution adopted in 1968.

From statehood to 2011, Florida's governors fulfilled their duties by understanding an appointee who "served at the pleasure"⁹ meant the appointing official had the continuing ability to direct and supervise the actions of that appointee while the subordinate remained attentive to the superior's policy directions. The clear intent of the Florida Constitution was for elected constitutional officers to exercise continuing oversight and responsibility for executive departments. The 1968 Constitution simplified and organized the text for better clarity while retaining traditional methods of restricting the exercise of executive power: separating functions between several constitutionally created offices,¹⁰ placing certain decisions with a collective cabinet,¹¹ maintaining direct accountability to the people instead of a single official by requiring separate election of specific officers,¹² providing senatorial advice and consent before exercising certain powers,¹³ and limiting the scope of executive action by express language or by authorizing the legislature to do so by statute.¹⁴ Yet, where the Constitution was silent, or the legislature did not exercise its permitted authority, the power and responsibility vested in the governor provided sufficient authority necessary to ensure proper execution of the laws.¹⁵

The reorganization of the executive branch, following ratification of the 1968 Constitution, and the refinements to the mandatory processes followed by administrative agencies when executing statutorily imposed duties, showed not so much a legislative primacy to create and direct the functions of administrative agencies, but rather demonstrated the balance maintained when legislatively derived policy was placed for implementation within the constitutional executive. While reorganizing the executive branch in 1969 was a new undertaking for the legislature, Florida had much experience with the operation of government under the supervision and responsibility of elected constitutional officers.

[*337]

II. The Supreme Executive Power

Each executive article in every version of the Florida Constitution opens with substantially the same phrase.¹⁶ Every version of the constitution also made the governor responsible for ensuring the faithful execution of the laws,

⁹ The express phrase "serving at the pleasure" was first adopted in 1968 in Fla. Const. art. IV, § 6.

¹⁰ Fla. Const. art. IV, §§1, 4, 8, 9.

¹¹ Id. § 4(a).

¹² Id. § 5.

¹³ Id. §§6(a), 7(b), 9.

¹⁴ Id. §§1(b)-(f), 4(a)-(d), 4(f), 4(g), 6, 8(c), 9, 11, 12.

¹⁵ Id. § 1(a).

¹⁶ Compare Fla. Const. of 1865, art. III, § 1 (readopting the language of the Constitutions of 1845 and 1861 for the new version repealing the Ordinance of Secession after the Civil War, but this version never fully took effect), and Fla. Const. of 1861, art. III, § 1 (readopting the language of the Constitution of 1845 for the new version incorporating the Ordinance of Secession at the start of the Civil War), and Fla. Const. of 1845, art. III, § 1 ("The Supreme Executive Power shall be vested in a Chief Magistrate, who shall be styled the Governor of the State of Florida.") (sometimes called the Constitution of 1838 for the year in which it was drafted), with Fla. Const. art. IV, § 1(a) ("The supreme executive power shall be vested in a governor."), and Fla. Const. of 1885, art. IV, § 1 (readopting the language of the Constitution of 1868), Fla. Const. of 1868, art. V, § 1 ("The supreme executive power of the State shall be vested in a Chief Magistrate, who shall be styled the Governor of Florida.").

¹⁷ which is the primary purpose for the power vested in the executive branch. The Florida Supreme Court has ruled the "exercise of this power and the performance of this duty are clearly essential to the orderly conduct of government and the execution of the laws of this State." ¹⁸ Both of these constitutional clauses are self-executing; no implementing legislation is necessary because each clause sufficiently establishes the authority and responsibility as intended by the people. ¹⁹

The U.S. Constitution vested the executive power in the President without need for further characterization because the federal executive essentially was unitary. ²⁰ When apportioning the judicial power in Article III, the Constitution used "supreme" to denote the hierarchical relationship between the Supreme Court and the lower federal courts to be created by Congress. ²¹ In contrast, many state constitutions adopted between 1787 and 1838 vested the "supreme executive power" in the governor because these [*338] instruments also created other executive branch officers with authority and accountability separate from the governor. ²² "Supreme," in the context of vested constitutional authority, thus described the hierarchical relationship among the executive officers with the governor having the final responsibility and accountability for all such authority not apportioned elsewhere.

Continual use of the same phrases, in the same contexts, for the same purposes, in successive versions of the Constitution is interpreted as deliberately retaining the same meaning and construction of the language as attributed under the previous version of the Constitution. ²³ By restating the historical language vesting supreme

¹⁷ See Fla. Const. art. IV, § 1(a); Fla. Const. of 1885, art. IV, § 6; Fla. Const. of 1868, art. V, § 6; Fla. Const. of 1865, art. III, § 11; Fla. Const. of 1861, art. III, § 10; Fla. Const. of 1838, art. III, § 10.

¹⁸ *Finch v. Fitzpatrick*, 254 So. 2d 203, 204 (Fla. 1971).

¹⁹ See *Florida Dep't of Education v. Glasser*, 622 So. 2d 944, 947 (Fla. 1993); *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960); cf. *Maloney v. Kirk*, 212 So. 2d 609, 612 (Fla. 1968) (Roberts, J., concurring) ("When the Constitution has dealt with a subject in such manner as to clearly indicate that it was the intent of the authors that the coverage be complete, the legislature is, by implication, denied the power to take from or to add to the constitutional provisions.").

²⁰ See *U.S. Const. art. II, § 1, cl. 1*. As concluded by one commentator, "executive power," as understood during the drafting, ratification, and implementation of the U.S. Constitution, meant the power to execute the laws. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 806 (2003). The constitutional vesting of that power in the President included the full authority to supervise, direct, and control all subordinate executive officers because these exercised a portion of the lawful execution power. *Id.* at 819-20.

²¹ See U.S. Const. art. III, § 1, cl. 1.

²² Cf. Ala. Const. of 1819, art. IV, § 1, 23, available at http://www.legislature.state.al.us/misc/history/constitutions/1819/1819_4.html; Ind. Const. of 1816, art. IV, § 1, 21, 24, available at <http://www.in.gov/history/2879.htm>; Ark. Const. of 1836, art. V, § 1, 14, available at http://www.modern-constitutions.de/nbu.php?page_id=02a1b5a86ff139471c0b1c57f23ac196&show_doc=US-AR-1836-01-30-en&viewmode=pages&position=9; Iowa Const. of 1846, art. 5, § 1, available at http://books.google.com/books?id=vjiOAAAAYAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false; Ky. Const. of 1792, art. II, § 1, 14, 16, 17, available at http://www.modern-constitutions.de/nbu.php?page_id=02a1b5a86ff139471c0b1c57f23ac196&show_doc=US-KY-1792-04-19-en&viewmode=thumbview; La. Const. of 1812, art. III, § 1, 9, 19, available at <http://www.louisianadigitalibrary.org/cdm4/document.php?CISOROOT=/lapur&CISOPTR=25275&CISOSHOW=15852>; Me. Const. art. V, pt. 1, § 1, 8, pt. 3, § 1, in *The Debates, Resolutions, and Other Proceedings of the Convention of Delegates* 5, 16-18 (1820), available at <http://archive.org/stream/debatesresolutio00mainrich#page/n7/mode/2up>; Mich. Const. of 1835, art. V, § 1, art. VII, § 1, 3, available at <http://www.legislature.mi.gov/documents/historical/miconstituti> on 1835.htm; Miss. Const. of 1817, art. IV, § 1, available at <http://mshistory.k12.ms.us/articles/98/index.php?s=extra&id=267>; Mo. Const. of 1820, art. IV, § 1, 12, 22, available at <http://cliio.missouristate.edu/FTMiller/LocalHistory/Docs/MOConst1820.htm>; Ohio Const. of 1803, art. II, § 1, 16, available at <http://www.ohiohistorycentral.org/entry.php?rec=1858>; Pa. Const. of 1790, art. II, § 1, XV, available at <http://www.duq.edu/academics/schools/law/pa-constitution/texts-of-the-constitution/1790>; Tenn. Const. of 1796, art. II, § 1, available at <http://www.tngenweb.org/law/constitution1796.html>. While the Iowa Constitution was composed and adopted after the drafting of the Florida Constitution in 1838-1839, the text provides a bookend to this territorial period because both states were admitted to the Union in 1845-1846 under the practice of the Missouri Compromise.

executive power in the governor, the people in 1968 adopted the interpretation and application of this phrase as continuing the hierarchical structure of executive authority divided and limited in the Florida Constitution. By reaffirming the historical duty of the governor as solely responsible for ensuring the faithful execution of the laws, the people continued the interpretation attributing sufficient authority within the vested executive power to enable complete fulfillment of this responsibility. ²⁴

[*339] The phrase "supreme executive power" has not been expressly defined by court decisions in Florida, but the construction given to similar phrases by other states is instructive. The New Hampshire Constitution vests the executive power of the state in a "supreme executive magistrate, who shall be styled the Governor of the State of New Hampshire." ²⁵ The New Hampshire Supreme Court found the phrase is not mere verbiage but provided "such power as will secure an efficient execution of the laws." ²⁶ The Alabama Constitution vests supreme executive power in a governor using language substantially similar to Florida's, ²⁷ and the Alabama Supreme Court interpreted the phrase as providing such power as necessary for the governor to perform all duties, including the faithful execution of the laws, as the constitution requires of the state's highest executive authority. ²⁸ Similar to Florida's application of the phrase, these interpretations are consistent with the historical understanding of the express responsibility invariably accompanying the vesting of executive power.

By adopting the 1968 Constitution, the people of Florida vested in the governor the supreme executive power as that authority had been understood, interpreted, and applied in the state since 1845. The governor was made fully responsible to ensure the faithful execution of the laws, equally construed from statehood to incorporate so much of the executive power as necessary to fulfill that duty. In this existing constitutional context, the legislature subsequently reorganized the executive branch.

III. Reorganizing the Executive Branch

A. Historical Precedent for Statutory Offices and Delegation of Powers

Long before its 1969 reorganization of the executive branch, the Florida Legislature wrestled with delegating authority to offices created by statute. An 1897 act created a board of legal examiners, the members of which were to be appointed by the Florida Supreme Court for terms exceeding four years. ²⁹ Within two months of the enactment, an applicant petitioned for admission to the bar under the prior procedure established by rules of the **[*340]** Supreme Court, but was refused based on the trial court ruling the statute preempted the process for admitting attorneys. ³⁰ Seeking a writ of mandamus compelling the trial judge to consider the application under the

²³ See [Gray, 125 So. 2d at 856](#); [Advisory Op. to the Governor, 96 So. 2d 541, 546 \(Fla. 1957\)](#); [State ex rel. West v. Butler, 69 So. 771, 780 \(Fla. 1915\)](#).

²⁴ See [Sun Ins. Co. v. Clay, 133 So. 2d 735 \(Fla. 1961\)](#) ("It is a fundamental principle of constitutional law that each department of government, whether federal or state, has, without any express grant, the inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." (citations omitted) (internal quotation marks omitted)).

²⁵ N.H. Const. art. 41.

²⁶ [Op. of the Justices, 27 A.3d 859, 866-867 \(2011\)](#).

²⁷ Ala. Const. of 1901, art. V, § 113 ("The supreme executive power of this state shall be vested in a chief magistrate, who shall be styled "The Governor of the State of Alabama.").

²⁸ [Riley v. Cornerstone Cmty. Outreach, Inc., 57 So. 3d 704, 719-20 \(Ala. 2010\)](#) (quoting [State ex rel. Stubbs v. Dawson, 86 Kan. 180, 187-88 \(1911\)](#)).

²⁹ 1897 Fla. Laws 73; invalidated by [State ex rel. Clyatt v. Hocker, 22 So. 721, 722 \(Fla. 1897\)](#).

prior procedure, the applicant argued the statute was unconstitutional both by usurping an exclusively judicial function and by creating terms of office exceeding four years.³¹ The Court agreed the legislation provided both a selection process for board members and terms of office not authorized by the constitution, found the act unconstitutional, and granted the requested relief.³² In resolving the case, the Court first cited numerous authorities and defined the meaning of a public "office" and "officer":

A person, in the service of the government, who derives his position from a duly and legally authorized election or appointment, whose duties are continuous in their nature, and defined by rules prescribed by government, and not by contract, consisting of the exercise of important public powers, trusts, or duties, as a part of the regular administration of the government, the place and the duties remaining, though the incumbent dies or is changed, ... is a public officer ... ; every "office," in the constitutional meaning of the term, implying an authority to exercise some portion of the sovereign power, either in making, executing, or administering the laws.³³

The case is notable for its examination of the nature of government office and that an officer, as opposed to a mere employee, is entrusted with part of the sovereign power of the state.³⁴ Where the Florida Constitution spoke to the creation and administration of an official position, the constitutional requisites controlled the implementation of that office by statute.³⁵

The legislature also had previously dealt with the separation of powers and with delegating authority to make rules or policies implementing a statute. The Florida Supreme Court held a law authorizing the state railroad commissioners to set rates was not an impermissible delegation of authority because the exercise of discretion properly circumscribed by statute was not exclusively a legislative function.³⁶ Considering a successor railroad commissioner statute, the Florida Supreme Court later articulated the **[*341]** distinction between powers exclusive to one of the three branches of government and those amenable to delegation:

The governmental powers that are divided into the legislative, executive, and judicial departments, and the exercise of which is forbidden to persons not properly belonging to the particular department, are those so defined by the Constitution, or such as are inherent or so recognized by immemorial governmental usage, and which involve the exercise of primary and independent will, discretion, and judgment, subject not to the control of another department, but only to the limitations imposed by the state and federal Constitutions. The powers of all the departments are exercised by their proper officials through or by the aid of administrative officers. The Constitution provides for and authorizes the Legislature to provide for administrative officers who lawfully perform functions and duties and exercise more or less authority under the direction of officers who have real governmental powers, and who may properly belong to different departments of the government. This clearly indicates that all official duties, authority, and functions prescribed or contemplated by law are not necessarily governmental powers within the meaning of the constitutional provisions separating the powers of government into departments. The purpose of the

³⁰ [State ex rel. Clyatt, 22 So. at 721-24.](#)

³¹ [Id. at 722.](#)

³² [Id. at 723.](#) At that time, the Constitution of 1885 required that state officers either be elected by the people or be appointed by the governor for terms exceeding no more than the four years. Fla. Const. of 1885, art. XVI, § 7.

³³ [State ex rel. Clyatt, 22 So. at 723](#) (internal quotation marks omitted).

³⁴ [Id. at 723.](#)

³⁵ See [State ex rel. Landis v. Bird, 163 So. 248 \(Fla. 1935\)](#); [Advisory Op. to the Governor, 113 So. 913 \(Fla. 1927\)](#); [Advisory Op. to Governor \(Broward\), 39 So. 63 \(Fla. 1905\)](#).

³⁶ [McWhorter v. Pensacola & Atlantic R.R. Co., 5 So. 129, 137 \(Fla. 1888\)](#).

Constitution is to secure efficient government by the harmonious co-operation of the separate, independent departments.³⁷

The Court ruled the legislature could adopt a statute authorizing designated officials, subject to specified limits, to adopt rules and regulations necessary for the complete operation and enforcement of the statute, and such authority was not exclusively legislative.³⁸

B. Guidance from the 1968 Constitution

After 1968, executive branch reorganization was informed by the newly adopted Article IV, Section 6 of the Florida Constitution, in addition to the full text of restructured Article IV, its historical interpretation and application of its preserved text, and the traditional separation of powers. The constitution continued to apply a strict, but not absolute, separation of powers allowing delegations of authority to administrative agencies under specific directions and requirements for implementation.³⁹ The Constitution expressly **[*342]** prevented one branch (or a member thereof) from exercising the entire power of another branch,⁴⁰ a prohibition to be applied practically.⁴¹

The text of the new Article IV, Section 6, created three main principles for reorganizing the executive branch. First, all functions of the executive branch could be allotted among no more than twenty-five departments, excluding those expressly authorized or provided for elsewhere in the Constitution.⁴² Second, unless the Constitution provided otherwise, the legislature was required to place, by law, the administration of each department under the direct supervision of a specific official.⁴³ The third principle restricted in part the governor's power to appoint or remove subordinate officers. The legislature was authorized, but not required, to limit the power to appoint or remove subordinates by making such action subject to confirmation by the Senate or the approval of three

³⁷ [State v. Atlantic Coast Line R.R. Co., 47 So. 969, 974 \(Fla. 1908\)](#) (emphasis added).

³⁸ [Id. at 976.](#)

³⁹ Fla. Const. art. II, § 3, art. III, § 1, art. IV, § 1, art. V, § 1; see also [State v. Johnson, 345 So. 2d 1069, 1071 \(Fla. 1977\)](#) ("Separation of powers does not mean that every governmental activity be classified as belonging exclusively to a single branch of government.").

⁴⁰ [Canney v. Bd. of Pub. Instruction of Alachua Cty., 278 So. 2d 260, 262 \(Fla. 1973\).](#)

⁴¹ See Peter D. Webster, Sylvia H. Walbolt, & Christine R. Davis, *Statutory Construction in Florida: In Search of a Principled Approach*, 9 Fla. Coastal L. Rev. 435, 496-97 (2008).

⁴² Fla. Const. art. IV, § 6. By stating "shall be allotted" without additional express direction, further action would be required to fulfill this purpose of the Constitution. The allocation of executive functions required legislative action to create the requisite legal authority in the new departments because only the legislature has sole authority to originate and pass laws. *Id.* art. III, §§6, 7. In contrast, the Florida Constitution vests power directly in the executive where the assignment of the ascribed power is not contingent on legislative action. For example, the vesting of supreme executive power in the governor is not done "by law" but is accomplished completely by the constitutional text: "(t)he supreme executive power shall be vested in a governor... ." *Id.* art. IV, § 1(a).

⁴³ The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor... ." Fla. Const. art. IV, § 6. For example, the governor is also made the head of the Executive Office of the Governor. [Fla. Stat. § 14.201](#) (2013). A Cabinet Officer, the Chief Financial Officer, is made the head of the Department of Financial Services. *Id.* § 20.121(1). The Governor and Cabinet by statute serve as the head of the Department of Law Enforcement. *Id.* § 20.201. The majority of administrative agency heads are appointed by and serve at the pleasure of the governor, such as the Department of Business and Professional Regulation, *id.* § 20.165(1), Department of Children and Families, *id.* § 20.19(2)(a), Department of Environmental Protection, *id.* § 20.255(1), and Department of Corrections, *id.* § 20.315(3).

members of the cabinet. ⁴⁴ However, members of boards authorized to grant and revoke licenses for regulated occupations could be appointed only for fixed terms, removable only for cause. ⁴⁵

This new section of the Constitution provided the framework for legislation necessary to restructure the existing surfeit of administrative agencies, boards, and commissions into a limited number of entities, the **[*343]** management for which specific officers could be held publicly accountable. ⁴⁶ Missing was any express language permitting legislated limitations on the authority of elected officials to supervise and direct the activities of executive agencies or their appointed subordinates; this reflected the intentional omission by the framers of the 1968 Constitution of language permitting the legislature to restrict the general authority of executive branch officials to supervise and direct agency policies. ⁴⁷ Not expressly authorized to create executive branch agencies able to act independently from the constitutional officers, the legislature was limited to allotting executive branch functions among agencies, the administration of which would be placed under the supervision of specified officers.

C. The 1969 Government Organization Act

The Florida Legislature reorganized the executive branch into the same general structure as currently employed. ⁴⁸ The act summarized the legislative view of the respective roles of the branches of government:

The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws. ⁴⁹

Consolidation of executive functions into the limited number of administrative departments allowed by the 1968 Constitution was to be **[*344]** "consistent with executive capacity to administer effectively at all levels" in order "to achieve maximum efficiency and effectiveness as intended by s. 6, Art. IV of the State Constitution." ⁵⁰ As part of standardizing the structure of agency administration, the statute defined a number of terms. "Department" was made the principal administrative unit of the executive branch; "head of department" was the individual or board "in charge" of a department; a "secretary" was the head of a department not named in the constitution; and "agency"

⁴⁴ Fla. Const. art. IV, § 6(a).

⁴⁵ Id. § 6(b).

⁴⁶ During the debates in 1966 of the Commission created by the legislature to study and recommend revisions to the Constitution of 1885, Commissioner Joseph C. Jacobs noted at the time the number of existing agencies, boards, etc. was not even fully known; he estimated the total to range between 136 to 156 different entities. Fla. Comm. on Florida Constitution Revision, edited transcript of debate, vol. 28 at 570-71, 589 (1966) (available at Fla. Dep't of State, Fla. State Library, Tallahassee, Fla.) (statement of Joseph C. Jacobs).

⁴⁷ In 1967, the legislature was called into special session for the purpose of constitutional revision. On August 30, 1967, the Florida House of Representatives adopted amendment 700 to the proposed House draft, deleting a provision in the proposed article on the executive branch which would have provided the governor and cabinet would only exercise those powers as provided by law. The Florida Senate later concurred. The legislature therefore expressly considered and rejected legislative control of the authority exercised by elected constitutional officers over the executive branch. See proposed Amendment 700 to HJR 3-XXX (67) (8/30/1967), available at Fla. Dep't of State, Fla. State Archives, Tallahassee, Fla., Record Group 001006, Series 727, Carton 2, Folder 7.

⁴⁸ Governmental Reorganization Act of 1969, ch. 69-106, Laws of Florida, 1969 Fla. Laws 106 (codified as [Fla. Stat. § 20.02-.605](#) (2013)).

⁴⁹ This remains the language in the present statute. See [Fla. Stat. § 20.02\(1\)](#) (2013).

⁵⁰ Id. § 20.02(2), amended by Act effective May 25, 1994, ch. 94-235, § 1, Laws of Florida, 1994 Fla. Laws 235 (altering certain elements without changing the cited substance).

was a fluid term, depending on the context, that could be an "official, officer, commission ... department ... bureau ... or another unit or entity of government." ⁵¹

Under this statutory organizational structure, some departments were placed expressly under the direct supervision of an elected constitutional officer, ⁵² while most statutorily created departments were placed under the direct supervision of a secretary, appointed by the governor with the consent of the Senate, but serving at the pleasure of the governor. ⁵³ The legislature chose not to so restrict the governor's power to remove appointees. ⁵⁴

In organizing the executive branch, the legislature understood the 1968 Constitution did not authorize the creation of administrative power in any subordinate appointees who were not subject to supervision by an elected official. A clear reading of the phrase "serving at the pleasure" ⁵⁵ shows the governor had the power to terminate such an appointee's service whenever that office holder no longer comported with the governor's expectations. Similar to an at-will employee, the appointee's tenure in office and continued compensation could be ended by the governor at any time. ⁵⁶ Because of the hierarchical nature of the vested supreme executive power, the governor directly supervised all agencies unless the direct supervision of an agency [*345] was placed expressly with another official. ⁵⁷ Even then, the exercise of authority by officers subordinate to the governor remained subject to gubernatorial direction, supervision, and approval. ⁵⁸

D. Executive Authority and Administrative Rulemaking

Five years after reorganizing the structure of the executive branch, the legislature comprehensively revised the way administrative agencies did business. The 1974 revision of the Administrative Procedure Act (APA) ⁵⁹ completely changed the processes all statutorily created executive branch agencies were required to follow to enforce the substantive laws for which they are responsible, including determining applications for licenses, ⁶⁰ imposing sanctions for statutory violations, ⁶¹ responding to requests for interpretations of these statutes, ⁶² and adopting

⁵¹ [Fla. Stat. § 20.03](#).

⁵² For example, the current statute places the Department of Financial Services under the Chief Financial Officer. Id. § 20.121(1).

⁵³ See id. § 20.165(1) (the Dep't of Bus. and Prof'l Regulation).

⁵⁴ See generally Fla. Const. art. IV, § 6(a) ("When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office." (emphasis added)). The governor is required to appoint a number of department secretaries with the consent of the Senate but no such consultation is required to remove these appointees. See *supra* statutes cited note 43.

⁵⁵ Fla. Const. art. IV, § 6.

⁵⁶ See [Fla. Stat. § 20.03\(13\)](#) ("'To serve at the pleasure' means the appointee serves in the office until removed by the appointing authority. Consistent with the allotment of executive authority under ss. 1 and 6, Art. IV of the State Constitution, an appointee serving at the pleasure of the appointing authority generally remains subject to the direction and supervision of the appointing authority.").

⁵⁷ See Fla. Const. art. IV, § 6; see also Fla. Stat. Ch. 20 (2013).

⁵⁸ See [Jones v. Chiles, 638 So. 2d 48, 50 \(Fla. 1994\)](#).

⁵⁹ See generally Act effective 1974, ch. 74-310, Laws of Florida, 1974 Fla. Laws 310 (codified in Fla. Stat. ch. 120 (2013)).

⁶⁰ See [Fla. Stat. § 120.60](#) (2013).

⁶¹ Id. §§120.569, 120.57. A party subject to potential enforcement or disciplinary action by an agency is entitled to seek an administrative hearing. Id.

general public policies implementing specific statutes.⁶³ Coordinating with the definitions and structuring of administrative agencies in Chapter 20 of the Florida Statutes, the APA provides procedural safeguards all agencies⁶⁴ must follow before making binding decisions affecting substantial interests of any party, such as adopting a rule or order or denying a petition to adopt a rule or render an order.⁶⁵ The APA does not apply to executive branch officers exercising constitutional, as opposed to statutory, authority.⁶⁶

The APA imposes requirements for the hearings each agency must make available to any party who will be affected substantially by a particular action the agency proposes to take, and provides access to judicial review of all final decisions made by an agency.⁶⁷ Three separate methods are provided for an administrative agency to issue a binding determination of the law placed under its jurisdiction. First is a final order rendered against specific parties after the opportunity for a hearing on notice; these are limited **[*346]** to the facts of the case and the parties named.⁶⁸ The second form is a declaratory statement, in which the agency grants a petition and renders an opinion on the applicability of a statute, rule, or order of the agency to the specific set of circumstances presented by a substantially interested party.⁶⁹ The third is rulemaking.⁷⁰

A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency, as well as certain types of forms.⁷¹ A legislative function delegated by general law,⁷² rulemaking is the creation, development, establishment, or adoption of a rule.⁷³ In 1996, the legislature clarified the statute and delineated the two factors required for valid rulemaking.⁷⁴ First, to adopt a rule, an agency must have an express grant of authority to implement a specific law by rulemaking.⁷⁵ The grant of rulemaking authority itself need not be detailed.⁷⁶ Second, the agency must implement a specific

⁶² Id. § 120.565. An agency may be requested to consider and issue a formal opinion, called a "declaratory statement," interpreting a statute under its jurisdiction. Id.

⁶³ Id. § 120.52(16) (defines such general policies as "rules.").

⁶⁴ Id. § 120.52(1) (defines "Agency.").

⁶⁵ Id. § 120.52(2) (defines this as taking "agency action.").

⁶⁶ See id. § 120.52(1).

⁶⁷ See id. §§120.569, 120.57, 120.68.

⁶⁸ Id. §§120.569(2)(l), 120.57.

⁶⁹ Id. § 120.565.

⁷⁰ Id. § 120.54.

⁷¹ Id. § 120.52(16); see also [Fla. Dep't of Fin. Servs. v. Capital Collateral Reg'l Counsel-Middle Region, 969 So. 2d 527, 530 \(Fla. 1st DCA 2007\)](#).

⁷² See Fla. Const. art. III, § 1; see also [Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 \(Fla. 1st DCA 2000\)](#); [Dep't of Revenue v. Novoa, 745 So. 2d 378, 380 \(Fla. 1st DCA 1999\)](#).

⁷³ See [Fla. Stat. § 120.52\(17\)](#).

⁷⁴ See generally Act effective Oct. 1, 1996, ch. 96-159, § 9, Laws of Florida, 1996 Fla. Laws 159.

⁷⁵ See [Fla. Stat. §§120.52\(8\), 120.536\(1\)](#).

⁷⁶ See [Save the Manatee Club, Inc., 773 So. 2d at 599](#).

statute through rulemaking, which statute in turn must provide specific standards and guidelines sufficient to preclude the agency from exercising unbridled discretion in creating policy or applying the law.⁷⁷

With certain constitutional exceptions limited to exclusive responsibilities, most of which pertain to internal administration, executive officers and administrative agencies do not have inherent rulemaking authority.⁷⁸ Unless otherwise provided by law, all agencies with delegated rulemaking authority must follow the process and procedure set out in the APA.⁷⁹ The substantive legal authority for an agency's action is contained in other statutes; the APA ensures uniform procedures⁸⁰ to protect the rights of the public when dealing with an agency, including the exercise of delegated [*347] rulemaking. The APA does not specify any process for internal policy formulations before statutory rulemaking is commenced.⁸¹ With the exception of a general mandate to commence rulemaking within 180 days from the effective date of a new law requiring the promulgation of rules,⁸² the APA does not control the initial process an agency follows to consider, review, reflect, research, or otherwise choose among alternative approaches to formulate a rule implementing law.⁸³ In this conceptual phase, elected officers, politically accountable to the people, could (and do) participate in the policy direction and development by agencies leading to the articulation of policy to be implemented by rulemaking.

Only after a decision is made to initiate rulemaking must the APA process and procedure be followed.⁸⁴ Unless the proposal is to repeal an existing rule, the agency must publish a notice of rule development and may schedule workshops to allow public input.⁸⁵ The agency head may delegate responsibilities for rule development to a subordinate.⁸⁶ For purposes of compliance with the APA, an "agency head" is defined as a "person or collegial body in a department or other governmental unit statutorily responsible for final agency action."⁸⁷ The definition is broader than that for a department head in Chapter 20,⁸⁸ denoting the applicability of certain procedural requirements in the APA to a broader field of executive branch officers.

Once an internal decision is made, and the agency head approves the specific proposed rule, the agency must publish notice of the proposed rule and the complete text of the proposal.⁸⁹ After completing public hearings (if requested),⁹⁰ resolving changes requested by the Joint Administrative Procedures Committee,⁹¹ providing a

⁷⁷ [Fla. Stat. § 120.536\(1\)](#); see also [Askew v. Cross Key Waterways](#), 372 So. 2d 913, 925 (Fla. 1979); [Sloban v. Fla. Bd. of Pharmacy](#), 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); [Bd. of Tr. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.](#), 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

⁷⁸ See [Fla. Stat. § 120.54\(1\)\(e\)](#).

⁷⁹ See *id.* § 120.54 (2013).

⁸⁰ See *id.* § 120.515 (2013).

⁸¹ See [Adam Smith Enterprises, Inc. v. Dept. of Envtl. Reg.](#), 553 So. 2d 1260, 1265, n. 4 (Fla. 1st DCA 1990).

⁸² See [Fla. Stat. § 120.54\(1\)\(b\)](#) (2013).

⁸³ See [Whiley v. Scott](#), 79 So. 3d 702, 721 (Fla. 2011) (Polston, J., dissenting); see also [Adam Smith Enterprises, Inc.](#), 553 So. 2d at 1265, n. 4.

⁸⁴ [Fla. Stat. § 120.54](#) (2013).

⁸⁵ *Id.* § 120.54(2).

⁸⁶ *Id.* § 120.54(1)(k).

⁸⁷ *Id.* § 120.52(3).

⁸⁸ *Id.* § 20.03(4).

⁸⁹ *Id.* § 120.54(3)(a)(1).

statement of estimated regulatory costs (to those providing proposed lower cost alternatives to the rule and to the public)⁹² or the entry of a final order on a petition challenging the proposed **[*348]** rule,⁹³ and with the approval of the agency head, the rule is filed for adoption with the Florida Department of State.⁹⁴ The rule then goes into effect 20 days after adoption, unless a later date is specified in the notice of rulemaking, a different date is required by another statute, or when ratified by the legislature.⁹⁵

The APA imposes procedural requirements for agencies to exercise statutorily derived authority and duties, including delegated rulemaking authority. The authority for these actions is not provided in the APA but in the various substantive statutes jurisdiction over which the legislature places in different administrative departments.⁹⁶ The legislature may allot a particular program to a department but make the senior administrator answerable directly to the governor, outside the chain of command of the departmental secretary.⁹⁷ The legislature expressly limits the direction and control exerted by administrative superiors when that is its intention. For example, the statutes authorizing rulemaking by various licensing boards restrict oversight of that authority by the agency in which the boards are housed. The Florida Department of Business and Professional Regulation (DBPR) is expressly authorized to challenge rules proposed by the various licensing boards assigned for its administration, but that authority does not extend to directing or controlling board rulemaking.⁹⁸ The State Surgeon General similarly is expressly limited to challenging rules of the boards under the Florida Department of Health (DOH).⁹⁹ In expressly limiting the rulemaking roles of these two agencies, the legislature understood the import of the language used.¹⁰⁰ However, when rulemaking power is delegated to a statutory office without such express insulation from superiors, the more reasonable interpretation is that the legislature did not purposely separate the exercise of rulemaking authority from the ordinary administrative supervision and direction of the executive overseeing the office.

[*349] The allocation of executive branch functions to departments placed under the direct administration of specified officers was based on Article IV, Section 6, but accomplished in the context of the entire Article IV, including Section 1(a) and the incorporated traditional interpretation and application of executive power by the Florida Constitution. The APA, as a mandatory procedural framework, holds the executive branch agencies publicly accountable for exercising statutorily derived authority but does not, indeed cannot, alter the substantive relationship between elected constitutional officers and their appointed subordinates.

IV. The Direction and Supervision by Florida Governors of Policy Implementation and Rulemaking by Appointed Agency Heads

⁹⁰ Id. § 120.54(3)(c).

⁹¹ Id. §§120.54(3)(d), 120.545(3)(a).

⁹² Id. § 120.541.

⁹³ Id. § 120.56.

⁹⁴ Id. § 120.54(3)(e).

⁹⁵ Id. § 120.54(3)(e)(6).

⁹⁶ See, e.g., id. § 487.011 (placing the substantive authority to license and regulate the application and use of pesticides in Florida in the Department of Agriculture and Consumer Services. The Department must follow the procedures in the APA when taking certain actions).

⁹⁷ See generally [Agency for Health Care Admin. v. Associated Indus. of Fla., Inc., 678 So. 2d 1239 \(Fla. 1996\)](#).

⁹⁸ See [Fla. Stat. § 455.211](#).

⁹⁹ Id. § 456.012. Compare id. § 472,006(5) with id. § 472.008(1) (showing the authority of the Department of Agriculture and Consumer Services to control the rulemaking of the Board of Professional Surveyors and Mappers).

¹⁰⁰ See [Cason v. Dept. of Mgmt. Servs., 944 So. 2d 306, 315 \(Fla. 2006\)](#).

Since the adoption of the 1968 Constitution, the subsequent reorganization of the state's executive branch, and the passage of the comprehensive APA, Florida governors have used executive orders to direct and supervise the policies implemented by their appointed agency heads. These orders were not framed as "suggestions" but were delivered with the supervisory verve and authority of the Office of Governor. These directions included how gubernatorial appointees would exercise statutorily created rulemaking authority.

By 1981, Governor Bob Graham was concerned about the working relationship between the Department of Professional Regulation and the various licensing boards placed under its administration, particularly the interaction between the boards and department staff and the efficient use of agency resources.¹⁰¹ By executive order he created the Governor's Management Review Committee, charging the members to assist the department to develop and adopt practices for enhanced program effectiveness.¹⁰² The order specified those operational topics to be the subject of the Committee's review and policy development.¹⁰³ Neither the department nor its appointed Secretary had a choice: the order created the Committee, gave it a specific charge, and directed the department to participate in the review.¹⁰⁴

In the same year, Governor Graham ordered the appointed secretaries of the Departments of Commerce, Environmental Regulation, Health and Rehabilitative Services, Transportation, Veterans and Community Affairs, **[*350]** and the director of the governor's own Office of Planning and Budgeting, to take specific action to implement the governor's preferred policies about managing Florida's coastline resources and environment.¹⁰⁵ These officials were ordered to give high priority to acquiring coastal properties consistent with the public's need for safety and economic welfare, and were informed this policy should be a basis for developing future acquisition programs.¹⁰⁶ The governor further required these officials to direct state funds and federal grants only to those coastal development projects accommodating growth, meeting a need for necessary economic development, or where the danger to the public from natural hazards was minimal.¹⁰⁷ Once again, by executive order the governor had described policy preferences and directed appointed subordinate agency heads to take specific action to implement those preferences.

In 1989, Governor Bob Martinez issued an executive order directing both the Department of Environmental Regulation and the Department of Health and Rehabilitative Services to follow a specific policy approach in developing rules pertaining to bio-hazardous waste.¹⁰⁸ The order further directed the environmental agency to adopt its specific rule no later than April 1, 1989.¹⁰⁹

In 1995, Governor Lawton Chiles, by executive order, directed all agencies "under the supervision of the Governor" to review their specific rules and submit them for further review by the Governor's Office of Planning and Budget.¹¹⁰ This order also directed all such agencies immediately to begin repealing all rules defined in the order as obsolete.¹¹¹ This was followed by his executive order directing all agencies to implement the earlier order by

¹⁰¹ See Fla. Exec. Order No. 81-74 (1981).

¹⁰² Id. at § 1.

¹⁰³ Id.

¹⁰⁴ Id. at §§2-3.

¹⁰⁵ Fla. Exec. Order No. 81-105 (1981). Interestingly, this executive order was issued on September 4, 1981, after the July 8, 1981, issuance of Attorney General Opinion 81-49, discussed *infra* Part VI.

¹⁰⁶ Id. at § 1.

¹⁰⁷ Id. at § 2.

¹⁰⁸ Fla. Exec. Order No. 89-1 (1989).

¹⁰⁹ Id. at § 1.

¹¹⁰ Fla. Exec. Order No. 95-74 (1995).

commencing the repeal of rules and also requiring the agency heads to begin to "overhaul, amend, or repeal" those rules identified in the earlier reviews reported by their respective agencies.¹¹² Governor Chiles further created the "Rule of Flexibility," ordering all agencies to apply the following principle when engaging in rulemaking: "this agency will make decisions in a manner that reasonably implements or interprets the [*351] policies established by the controlling legislation so that the results reached shall be fair, objective, and defensible without achieving legalistic, ridiculous conclusions."¹¹³

In 2007, Governor Charlie Crist issued an executive order entitled "Establishing Immediate Actions to Reduce Greenhouse Gas Emissions within Florida."¹¹⁴ He ordered the Secretary of the Department of Environmental Protection¹¹⁵ to develop rules setting maximum allowable emission standards for electric utilities and establishing statewide diesel engine idle reduction standards.¹¹⁶ He also directed the Secretary of the Department of Community Affairs to initiate rulemaking to adopt specific Florida Energy Conservation Standards required to increase the efficiency of certain consumer appliances by fifteen percent from current standards and ordered such standards to be implemented by July 1, 2009.¹¹⁷

Each of these executive orders demonstrates a common understanding: the governor has authority as the chief executive to direct and supervise non-elected appointees serving at the governor's pleasure in the administration of their respective agencies. The legislature exercised its constitutional authority to organize the executive branch by placing the administration of most statutorily created departments under appointees serving at the pleasure of the governor. The adoption of the APA established procedures for executive agencies to follow in exercising delegated legislative functions. The Constitution did not authorize the legislature to create any additional executive power. Accordingly, the legislature could not, and did not, create a class of non-elected officials exercising executive power independent from any direction or supervision by an elected officer. Consequently, the adoption of the APA neither altered the structure of the executive branch nor constrained the governor or other elected officers in the exercise of their constitutionally derived authority.

V. Zeitgeist of the Florida Legislature 2010-2012

Historically, while remaining attentive to agency rulemaking, the Florida Legislature was not always active in oversight. The revision and expansion of the APA in 1974 not only implemented standard procedures but also signaled the legislature's expectation for agencies to be held more [*352] accountable for their actions due to increased public participation and legislative supervision.¹¹⁸ This expectation was not fully realized, in part because of judicial decisions interpreting the law as allowing administrative agencies significant discretion in exercising their delegated authorities, particularly in the area of rulemaking.¹¹⁹ The legislature first began to correct this trend in 1991 by compelling all agency policies meeting the statutory definition of a rule to be adopted according to the required APA procedure; agencies had no discretion in the matter.¹²⁰ Further study and

¹¹¹ Id. at § 1.

¹¹² Fla. Exec. Order No. 95-256, §§1, 3 (1995).

¹¹³ Id. at § 4.

¹¹⁴ Fla. Exec. Order No. 2007-127 (2007).

¹¹⁵ See 1993 Fla. Laws 213§§3, 8 (creating the reorganized successor to the Florida Department of Environmental Regulation).

¹¹⁶ Fla. Exec. Order No. 2007-127, § 1.

¹¹⁷ Id. at § 2.

¹¹⁸ See 1974 Fla. Laws 310.

¹¹⁹ See [Dep't of Prof'l Regulation, Board of Med. Exam'r v. Durrani, 455 So. 2d 515 \(Fla. 1st DCA 1984\)](#); [McDonald v. Dep't of Banking and Finance, 346 So. 2d 569 \(Fla. 1st DCA 1977\)](#).

legislation by both the Florida House and Senate, especially to ensure agency rules were based directly on statutory authority, culminated in a 1996 APA reform bill substantially constraining agency rulemaking practices.¹²¹ In 1999, after a court decision finding continuing agency discretion where the rule regulated "a matter directly within the class of powers and duties identified in the statute to be implemented,"¹²² the legislature further limited agency rulemaking by expressly removing this loophole.¹²³

The 2010 session marked a renewed sense of legislative purpose to actively engage the administrative agencies in their delegated rulemaking and regulatory functions. The legislature passed House Bill 1565, revising the thresholds for when an agency was required to prepare a statement of estimated regulatory costs (SERC)¹²⁴ and creating a new condition precedent before certain rules could take effect: if the SERC showed the proposed rule would have certain adverse impacts or increase regulatory costs, creating an **[*353]** economic effect exceeding one million dollars within five years from the rule's implementation, the rule must be ratified legislatively before becoming legally effective.¹²⁵ Vetoed by the governor on May 28, 2010, the bill became law when the successor legislature overrode the veto on November 16, 2010.¹²⁶ Acting on submissions for ratification under the amended statute,¹²⁷ the legislature carefully enacted language that only authorized the proposed rule to go into effect without adopting the text as a statute.¹²⁸

The following year, the legislature continued its active role overseeing and controlling agency rulemaking by mandating economic reviews of all rules extant on November 16, 2010, requiring all agencies annually to report rulemaking and revisions planned for the following year, and implementing a survey seeking public input about agency rules or other regulations, particularly those adversely affecting economic activity and job creation in the state.¹²⁹ Every agency with delegated rulemaking authority was required to evaluate the economic impact of each

¹²⁰ See Act effective April 27, 1991, ch. 91-30, Laws of Florida, 1991 Fla. Laws 30 (codified at Fla. Stat. § 120.535). See also Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, [19 Fla. St. U. L. Rev. 437-455 \(1991\)](#).

¹²¹ 1996 Fla. Laws 159 §§8, 9 (repealing Fla. Stat. § 120.535 and replacing with [Fla. Stat. § 120.536](#), expressly restricting agency rulemaking by requiring both a grant of rulemaking authority and a specific law to be implemented by the proposed rule).

¹²² ***St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 80 (Fla. 1st DCA 1998)**.

¹²³ Act effective June 18, 1999, ch. 99-379, § 1, Laws of Florida, 1999 Fla. Laws 379 (amending [Fla. Stat. § 120.536](#) (2013)).

¹²⁴ See House Bill 1565, ch. 2010-279, Laws of Florida, 2010 Fla. Laws 279. Prior to the statutory changes in 2010, Florida law required agencies to estimate the economic impact of each proposed rule that affected small business by preparing a SERC. See, e.g., [Fla. Stat. § 120.54\(3\)\(b\)1](#) (2010). A SERC was also required when a person substantially affected by a proposed rule provided the agency with a written alternative that accomplished the same purpose but for a lower regulatory cost. See, e.g., [Fla. Stat. § 120.541\(1\)\(b\)](#) (2010). HB 1565 revised these criteria to mandate preparation of a SERC when the proposed rule adversely affected small business or was projected to directly or indirectly increase regulatory costs by more than \$ 200,000 in the aggregate within the first year the rule was implemented. See, e.g., [Fla. Stat. § 120.541\(1\)\(b\)](#) (2013).

¹²⁵ Ch. 2010-279, 2010 Fla. Laws 279 (codified as [Fla. Stat. § 120.541\(3\)](#) (2013)).

¹²⁶ Larry Sellers, *The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of "Million Dollar Rules,"* 85 Fla. B.J., May 2011, at 5, 37.

¹²⁷ See [Fla. Stat. § 120.541\(3\)](#) (2010) (codified as amended at [Fla. Stat. § 120.541\(3\)](#) (2013)).

¹²⁸ See Eric H. Miller, *HB 7253 & HB 993: The Legislature's Policy of Economic Review and the 2011 Amendments to the APA*, 32 Admin. Law Sec. Newsl. (Fla. B. Ass'n, Tallahassee, FL), June 2011, at 1.

¹²⁹ House Bills 993 and 7239 passed and enrolled as 2011 Fla. Laws 225. In addition to amending existing sections of the APA, the law created [Fla. Stat. § 120.745](#) (2011) (mandating economic reviews) and [Fla. Stat. § 120.7455](#) (2011) (implementing public survey).

current rule that existed when the legislature adopted the ratification requirement in November 2010, projecting that impact for a five-year period beginning July 1, 2011.¹³⁰ After a period of publication and opportunity for public comment, each agency would complete a detailed compliance economic review for each qualifying rule (with some requirements differing from those applicable to a standard SERC) and report those results to the legislature.¹³¹

By 2012, legislative oversight became more direct. A review of the Florida Administrative Code found a number of rules were still in effect despite the repeal of their underlying statutes or the outright abolition of the adopting agency.¹³² A separate review disclosed a number of statutory rulemaking authorizations to agencies were rarely or never used.¹³³ The legislature nullified (repealed) 270 separate rules and provided criteria and a summary process for the Department of State to evaluate and repeal rules for **[*354]** which there no longer was any statutory authority or an actual agency to perform the repeal.¹³⁴ A second bill repealed over fifty unnecessary statutory authorizations of agency rulemaking and provided criteria to identify and remove unneeded rulemaking statutes as part of the legislature's annual statutory revision process.¹³⁵

This heightened legislative oversight was, in part, a reaction to the severe national economic recession, afflicting Florida with an unduly sluggish recovery and an unemployment rate exceeding the national average.¹³⁶ Agency rules lacking factual support for the economic burdens they imposed were seen as unnecessarily impeding prospects for economic recovery.¹³⁷ As described above, this initial motivation matured into greater attention to holding executive branch officials accountable for how they exercised delegated rulemaking authority.

The concern of the legislature throughout this period was for administrative agencies to adhere more strictly to the scope of authority expressly created in statute and not to usurp the legislative responsibility to create public policy. Notably absent from the several revisions of the rulemaking process was any stated concern about continued gubernatorial direction, supervision, and oversight of appointed agency heads in the exercise of rulemaking authority.¹³⁸

VI. Attorney General Opinion 81-49: Theoretical Outlier

Despite this context of settled understanding about the constitutional authority of the governor to direct and supervise those appointed agency heads serving at the governor's pleasure, a single opinion from the Office of the Florida Attorney General in 1981 reached a counterintuitive conclusion. The opinion examined the interaction of the new language in Article IV, Section 6 with Florida's historical approach to executive power.¹³⁹ This **[*355]** opinion

¹³⁰ [Fla. Stat. § 120.745\(2\)](#) (2013).

¹³¹ *Id.* § 120.754(3)-(5), (9); see also Miller, *supra* note 128.

¹³² 2012 Fla. Laws 31 §§8-14.

¹³³ 2012 Fla. Laws 116 §§11-57.

¹³⁴ See ch. 2012-31, Laws of Florida, 2012 Fla. Laws 31.

¹³⁵ See ch. 2012-116, Laws of Florida, 2012 Fla. Laws 116. See also Eric H. Miller, *Once More Unto the Breach: The Legislature Turns Again to Improving Regulatory Oversight*, 34 *Admin. Law Sec. Newsl.* (Fla. B. Ass'n, Tallahassee, FL) Aug. 2012, at 1.

¹³⁶ See Fla. Legislative Budget Comm'n, *State of Florida Long-Range Financial Outlook: Fiscal Year 2011-12 through 2013-14*, 35-39 (Fall 2010), available at http://edr.state.fl.us/Content/long-range-finacial-outlook/3-Year-Plan_Fall-2010_1112-1314.pdf.

¹³⁷ Fla. Exec. Order No. 2011-01 (2011).

¹³⁸ See, e.g., 2012 Fla. Laws 116; 2011 Fla. Laws 225.

¹³⁹ See generally 81-49 Fla. Op. Att'y. Gen. (1981). In Florida, official opinions of the attorney general do not set precedent but are considered generally persuasive. "Although an opinion of the Attorney General is not binding on a court, it is entitled to

deviated from the settled principles of executive direction and supervision of appointed subordinates incorporated in all prior applications of the constitutional text by finding the governor lacked express statutory authority to direct or control agency rulemaking.

On July 8, 1981, the attorney general responded to an inquiry from Governor Graham and the Secretary of the Department of Environmental Regulation concerning whether the governor, or the governor and cabinet, could order various agencies to comply with specific directions and policies concerning implementation of the Florida Coastal Management Program. ¹⁴⁰ Concentrating almost exclusively on the express constitutional duty of the governor to ensure the faithful execution of the laws, the author of the opinion interpreted this clause as a general duty not conferring by implication any specific power the governor otherwise did not possess, and any such implication was contrary to the language of new Article IV, Section 6. ¹⁴¹

In that author's view, the governor, or the governor and cabinet, could direct policy implementation for the Florida Coastal Management Program only as to those agencies the legislature placed under their direct, respective administrations. ¹⁴² The opinion interpreted Article IV, Section 6 as authorizing the legislature to apportion the executive power of government. ¹⁴³ The author presumed the legislative adoption of Chapter 20 of the Florida Statutes, placing the administration of certain executive branch departments directly under their appointed agency heads, excluded the governor from directing or supervising the formulation or implementation of policy by these departments save through removing these appointees. ¹⁴⁴

On this basis, Opinion 81-49 concluded:

The plain and ordinary meaning of the language of s. 6, Art. IV, is that the power of administration and direct supervision over the 25 executive departments shall only be exercised by either the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, as determined by the Legislature, unless the constitution provides otherwise. Accordingly, I am constrained to conclude that the issue of whom may **[*356]** exercise the power of administration and direct supervision over a particular state agency is left to the wisdom of the Legislature, unless such has been pre-empted by the Constitution.

...

Because the Governor is not the head of any executive department (except the executive office of the Governor) I am of the opinion that the Governor may not by executive order give binding directions to any of the state executive departments created in ch. 20, F.S. ¹⁴⁵

careful consideration and generally should be regarded as highly persuasive." [Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459 \(Fla. 2005\)](#) (citing [State v. Family Bank of Hallandale, 623 So.2d 474, 478 \(Fla.1993\)](#)).

¹⁴⁰ See 81-49 Fla. Op. Att'y. Gen. 1-2 (1981). The inquiry, and the attorney general's response, preceded Fla. Exec. Order No. 81-108 (1981), in which the governor ordered the secretary and appointed heads of four other agencies, as well as the governor's own Office of Planning and Budgeting, to follow and implement the governor's specific policy preferences concerning coastal management. See supra Part IV.

¹⁴¹ 81-49 Fla. Op. Att'y. Gen. 2.

¹⁴² Id. at 3.

¹⁴³ Id.

¹⁴⁴ Id.

¹⁴⁵ Id. at 2-3 (emphasis added).

The opinion correctly recited some basic rules of constitutional interpretation: each provision of the constitution must be given effect in any interpretation,¹⁴⁶ the words used must be given their plain and ordinary meaning unless a different interpretation is apparent from the context,¹⁴⁷ and where the constitution expressly prescribes a particular method for the exercise of a specific power, the exercise of such power by other means is excluded.¹⁴⁸ But the artificially constrained scope of analysis shows the opinion neither applied these principles of interpretation nor construed together all parts of Article IV in order to give each its fullest application.

The opinion's author restricted the analysis to the governor's duty to ensure faithful execution of the laws in Article IV, Section 1(a), characterized merely as a general duty, and to the language in Article IV, Section 6 authorizing legislative restructuring of the executive branch functions. The opinion treated the phrase "or an officer or board appointed by and serving at the pleasure of the governor"¹⁴⁹ as a dispositive disjunctive, presuming this authorized the legislature to divest the governor's authority to direct and supervise the implementation of policy by appointed subordinates, a divestiture merely implied by the authority to place the administration of a department under the direction of a gubernatorial appointee.¹⁵⁰ The author failed to apply the full constitutional context developed by reading Article IV together with those sections confirming the extent of the separation of powers¹⁵¹ and failed to articulate the vesting of executive power within a **[*357]** hierarchical structure of responsibility.¹⁵² This overly narrow construction led to a seemingly plausible conclusion¹⁵³: by authorizing the legislature to place executive departments under at-will gubernatorial appointees, the constitution also divested the governor of any authority save the power of removal. Such a conclusion neither construes together all relevant constitutional clauses nor gives proper and full effect to each word; it is inapposite to a proper, integrated reading of the text.

As previously stated, the Constitution expressly provides for the functions of the executive branch to be allotted among not more than twenty-five departments the direct administration of which may be placed with one of the constitutionally denominated officials.¹⁵⁴ This language does not expressly empower any appointee to act without regard to the direction and supervision of the governor or the appointing authority. The purpose of Article IV, Section 6 was the coherent organization of the executive branch structure, not the authorization of the legislature to create autonomous subordinate appointees empowered to act independently from the appointing authority, thereby supplanting the constitutional power vested by the people in their elected officials. By failing to interpret Article IV, Section 6, not only under all provisions creating Florida's strict, but not absolute, separation of powers, but in the full context of all terms used in Article IV, the conclusion of Opinion 81-49 was wrong because it did not give effect to the intent and will of the people in adopting Article IV. This was clearly understood by Governor Graham when he

¹⁴⁶ See Advisory Op. to the Governor - 1996 Amend. 5 (Everglades), [706 So. 2d 278, 281 \(Fla. 1997\)](#); In re Advisory Op. to Governor Request of June 29, 1979, [374 So. 2d 959 \(Fla. 1979\)](#).

¹⁴⁷ See [Benjamin v. Tandem Healthcare, Inc., 998 So. 2d 566, 570 \(Fla. 2008\)](#); see also [City of St. Petersburg, v. Briley, Wild & Assoc., Inc., 239 So. 2d 817, 822 \(Fla. 1970\)](#).

¹⁴⁸ See [S & J Transp., Inc. v. Gordon, 176 So. 2d 69 \(Fla. 1965\)](#).

¹⁴⁹ 81-49 Fla. Op. Att'y Gen. 2.

¹⁵⁰ Id. at 3.

¹⁵¹ Fla. Const. art. II, § 3, art. III, § 1, art. V, § 1 (1968).

¹⁵² The hierarchical structure of responsibility dictates that the governor has final accountability and authority over the executive branch absent express provisions otherwise. See *supra* Part II.

¹⁵³ There is always a well-known solution to every human problem - neat, plausible, and wrong." H. L. Mencken, *Prejudices: Second Series* 158 (Alfred A. Knopf, Inc. 1920).

¹⁵⁴ Fla. Const. art. IV, § 6 (emphasis added).

subsequently issued Executive Order 81-108 on September 4, 1981, expressly directing specific appointed agency heads in the implementation and development of future policies for the Florida Coastal Management Act. ¹⁵⁵

Conclusion

Those holding the office of Florida Governor after 1968 understood the historical, precedential, and constitutional context for properly directing and supervising their respective appointees. During the same period, the legislature periodically revisited the administrative process for rulemaking to ensure agencies hewed only to the authority expressly delegated in statute, but raised no concern about the control exerted by the governor over the **[*358]** implementation of statutory policy by subordinate appointees serving at the governor's pleasure. ¹⁵⁶ Contradicting the conclusion asserted by Opinion 81-49 of the attorney general, Florida governors clearly understood their at-will appointees remained subject to gubernatorial direction and supervision of their official duties absent express language to the contrary either in the constitution or enacted into statute.

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¹⁵⁵ See Act effective June 15, 1978, ch. 78-287, Laws of Florida, 1978 Fla. Laws 287.

¹⁵⁶ See, e.g., [Fla. Stat. §§20.02\(3\), 20.03\(13\), 20.04, 20.05, 120.515, 120.52\(3\)](#) (2013); 2012 Fla. Laws 116; Fla. Laws 225; 2010 Fla. Laws 279; 1999 Fla. Laws 379; 1996 Fla. Laws 159; 1974 Fla. Laws 310. Of special note are the 26 legislative findings in Ch. 2012-116, Laws of Florida, 2012 Fla. Laws 116, which recite the legislature's intent in clarifying the accountability of subordinate at-will appointees to their appointing officers, such as the subordination and accountability to the governor of the secretary of the Department of Environmental Protection. See also [Fla. Stat. § 20.255](#) (2013).