St. Thomas Law Review

Volume 31
Issue 2 *Spring 2019*

Article 3

2019

Are Administrative Law Judges Officers of the State: Constitutional Considerations in the Selection and Tenure of Administrative Law

Eric H. Miller

ARE ADMINISTRATIVE LAW JUDGES OFFICERS OF THE STATE?

CONSTITUTIONAL CONSIDERATIONS IN THE SELECTION AND TENURE OF ADMINISTRATIVE LAW JUDGES

ERIC H. MILLER[1]

One of the hallmarks of the Florida Administrative Procedure Act is the creation of a pool of hearing officers independent from any agency or the direct control of any political figure. Since its substantial revision in 1974, the statute has always provided for the selection and hiring of administrative law judges ("ALJ") by the Director of the Division of Administrative Hearings.

ALJs hear almost every type of case, from licensure denials to environmental permitting challenges. In most cases, the ALJ weighs the evidence and legal arguments before recommending findings of fact, conclusions of law, and proposed final disposition to the agency referring the case. However, ALJs also have statutory authority to enter final, binding orders in challenges to agency rulemaking. Entering a final, binding order, subject only to judicial appeal, is an exercise of the state's sovereign power and authority. Under longstanding Florida constitutional decisions, only an "officer," not a public employee, may be delegated part of the sovereign power.

This Article first examines Florida law on the nature of offices, and officers, including the constitutional requirements for appointment or election and tenure. The analysis then turns to whether ALJs are officers or employees and, if they are officers, whether the present system of their employment should be reconsidered. This issue is timely, for in the 2017-2018 legislative sessions the Florida House of Representatives passed bills

1. Eric H. Miller, B.A. (Florida State University 1978), M.A. (Florida State University 2012), J.D. (Florida State University 1984). Admitted to The Florida Bar (1984) and to the U.S. District Courts for the Northern (1991), Middle (1985) and Southern (1991) Districts of Florida. Board Certified by The Florida Bar in State & Federal Government and Administrative Practice (2008). A member of The Florida Bar since 1984, Mr. Miller practiced privately and in government agencies in administrative, bankruptcy, civil, commercial, and constitutional law. Currently, he serves as Policy Chief of the Local Federal & Veterans Affairs Subcommittee of the Florida House. Mr. Miller has published several articles on Florida administrative law as well as the historical development of debtor protection laws.

requiring ALJs to be appointed to four-year terms by the Governor and Cabinet from candidates nominated by an independent commission.

INTRODUCTION

In 1974, the Florida Legislature comprehensively revised the Administrative Procedure Act ("APA"),[2] carving out a national leadership role in state administrative law that continues to this day. A lynchpin of these changes was the creation of a central pool of administrative law judges ("ALJs," originally called hearing officers)[3] outside the influence of any one agency. ALJs are housed in the autonomous Division of Administrative Hearings ("DOAH").[4] The director of DOAH, also serving as the chief administrative law judge, is appointed by the Administration Commission[5] upon the approval of the Florida Senate and acts as DOAH's agency head.[6] Categorized as career service employees,[7] ALJs are hired by DOAH, acting through the director, for no fixed terms.[8]

ALJs are authorized to render final orders in proceedings challenging whether an agency rule is an invalid exercise of delegated legislative authority.[9] Under this authority, each ALJ, not the chief judge on behalf of DOAH, renders a final order. Because a final order binds the parties unless reversed on appeal, this dispositive action is an exercise of the State's sovereign power. Under long-standing Florida precedent, when the Legislature creates a permanent position for a public purpose, and allocates to it a portion of the sovereign power to be exercised by the incumbent for a public purpose, that position is an "office" and those assigned to the position are "officers." Unless otherwise provided in the Florida

2. *See* Adminstrative Procedure Act, Fla. Laws ch. 74-310 (amended 1974).
3. *See* Administrative Procedure Act — General Amendments, 1996 Fla. Sess. Law Serv. 2. "Administrative Law Judge" was substituted for "hearing officer" throughout ch. 120, Fla. Stat., in 1996.
4. *See* FLA. STAT. § 120.65(1).
5. *See* FLA. STAT. § 14.202 (2018). Comprised of the governor and cabinet.
6. *See* FLA. STAT. § 120.65(1).
7. *See* FLA. STAT. §§ 110.205(1), 110.205(2)(r), 110.205(2)(w) (2018).
8. *See* FLA. STAT. § 120.65(4) (2018).
9. *See* FLA. STAT. § 120.56(1)(e) (2018).

Constitution, those selected to be officers typically are appointed by the governor,[10] either solely or with the confirmation of the Senate or approval of three members of the cabinet,[11] for terms of no more than four years.[12] State officers are distinguished from employees because they fill a continuing position having the responsibility to exercise a sovereign function for the public good. These principles raise questions about whether ALJs are officers of the state and, concomitantly, whether their manner of selection and employment are consistent with the Constitution.

During the past two legislative sessions, the Florida House of Representatives has considered and passed bills addressing these questions. Each bill would have revised the manner of selecting ALJs by requiring a special nominating panel to submit candidates to the governor and cabinet for final selection and appointment. The bills also would have limited the appointments of ALJs and the chief judge to terms of four years, requiring reappointment for continued service.[13] This Article examines the historical precedents for Florida's long-standing policy of what makes an official an "officer" and the implications of that policy on the selection and tenure of administrative law judges.

A. WHO ARE OFFICERS OF THE STATE?

Florida historically has drawn a distinction between those employed by the government merely to perform certain tasks and those selected to fill offices responsible for exercising specific governmental powers. As noted in an article examining the constitutional prohibition against dual office holding:

> Most of the questions involving article II, section 5(a) of the current Florida Constitution have concerned what constitutes an "office." The constitution does not define the term, and the legislature has not sought to define the term to clarify the parameters of the constitutional provision. In the absence of such clarification, the courts and the Attorney General's Office have referred to several early Florida Supreme Court decisions generally considering what constitutes an "office" as opposed to an "employment."[14]

---

10. *See* Jones v. Chiles, 638 So. 2d 48, 50 (Fla. 1994); *see also* FLA. CONST. art. IV, §§1(a), 1(f).

11. *See* FLA. CONST. art. IV, § 6(a) (2018).

12. *See* FLA. CONST. art. III, § 13 (2018).

13. *See* H.B. 941, 120th Cong., Reg. Sess. (Fla. 2018); *see also* H.B 1225, 119th Cong., Reg. Sess. (Fla. 2017).

14. Robert A. Butterworth & Joslyn Wilson, *One is Enough – Florida's Constitutional Dual Office Holding Prohibition,* 29 STETSON L. REV. 307, 309 (Fall, 1999).

1. The Early Cases

In 1870, the governor sought an advisory opinion from the Florida Supreme Court on issues pertaining to the payment of county officer expenses. The second question requested the Court clarify those who were county officers under the Constitution. The Court advised the "character, as State or county or municipal officers, is not determined by the manner in which such offices are filled."[15] The opinion concluded that a county officer was someone who served in an office typically created with specific duties for the operation of county government but which was also limited to the territory of the county.[16]

In a subsequent opinion ruling the statutory grant of authority to act as a harbor pilot in Florida was in the nature of a franchise and not a state office, the Court found:

> Were it in our view... that the functions and powers performed by pilots were such as necessarily constituted them officers, then, and even though they were only creatures of legislative action, still they must have been either elected by the people or appointed by the Governor, (Constitution, Sec. 27, Art. IV.,) and the appointment by the board of Commissioners of Pilotage...would be without any foundation in law, because in direct conflict with this limitation of the Constitution.[17]

2. The Seminal Case: *State ex rel. Clyatt v. Hocker*

State ex rel. Clyatt v. Hocker[18] is the primary Florida authority defining the terms "office" and "officer" under the Florida Constitution. The case arose because Clyatt wanted to practice law in Florida. Prior to June 5, 1897, this was done under rules of the Supreme Court by petitioning the chief judge of the judicial circuit in which the hopeful lawyer resided.[19] On June 5 of that year, an act went into effect that created a State Board of Legal Examiners, consisting of five members appointed by

15. In re Executive Communication, 13 Fla. 687, 689 (1870).
16. *See id.* at 691–92.
17. State ex rel. Att'y Gen. v. Jones, 16 Fla. 306, 309–10 (1878).
18. State ex rel. Clyatt v. Hocker, 22 So. 721 (Fla. 1897).
19. *See id.* at 721. According to the summary in the case, an applicant filed a petition showing the minimum requirements of being at least twenty-one years old and of good moral character. The Chief Judge could examine the qualifications of the applicant or designate two members of the bar within the circuit to conduct the examination and make a recommendation. The Chief Judge then would approve or deny the petition for a license to practice law. Ah, the halcyon days of yesteryear.

the Supreme Court to serve five-year terms.[20] The terms of the initial board members were staggered so that a successor member would be appointed each year.[21] The board would be responsible for examining the qualifications of all applicants for admission to the bar, to grant or deny each application, to issue licenses to practice law, and to collect a fee of no more than five dollars from each applicant to defray the board's expenses.[22]

Clyatt filed his petition on July 9, 1897, but was denied by Chief Judge Hocker of the Fifth Circuit because the new law conferred exclusive jurisdiction to approve applicants to the bar on the legislatively created state board. Clyatt then petitioned the Florida Supreme Court for a writ of mandamus against Judge Hocker, arguing the new law was unconstitutional on three grounds.[23] First, by providing for the Supreme Court to appoint the board members instead of requiring their election or gubernatorial appointment, the act violated the following provision of the Florida Constitution: "The Legislature shall provide for the election by the people or appointment by the Governor of all State and county officers not otherwise provided for by this Constitution, and fix by law their duties and compensation."[24] Second, the five-year terms of the board members violated the constitutional prohibition against creating any office with a term of more than four years.[25] Third, admitting lawyers to the practice of law in the state courts inherently is a judicial function and the legislative delegation of that authority to the Board of Legal Examiners violated the separation of powers.[26]

The Supreme Court found the case presented two central questions. First, what is an "office" under the Florida Constitution. Second, whether the position of a member on the State Board of Legal Examiners was an office requiring a term of no more than four years.[27] The Court reviewed a number of authorities to identify the characteristics of an office and, by extension, those who are officers under the Constitution. This review began by citing the words of Chief Justice John Marshall:[28]

> An office is defined to be a 'public charge or employment,' and [the one] who performs the duties of the office, is an officer. [If employed

20. *See* 1897 Fla. Laws 721.
21. *See* 1897 Fla. Laws 721.
22. *See* 1897 Fla. Laws 721–22.
23. *See Clyatt*, 22 So. at 722.
24. FLA. CONST. art. III § 27 (1885).
25. FLA. CONST. art. XVI, § 7, (1885).
26. FLA. CONST. art. II (1885).
27. *Clyatt*, 22 So. at 722.
28. *See id.*

> on the part of the United States, (the person) is an officer of the United States.] Although an office is 'an employment,' it does not follow that every employment is an office. [One] may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government . . . to perform, who enters on the duties appertaining to [that] station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties form an officer.[29]

Drawing from an advisory opinion of the Maine Supreme Court, the Court noted the characteristics of an office included the

> *delegation of a portion of the sovereign power to, and possession of it by, the person filling the office* . . . The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another. Still it is a legal power, which may be rightfully exercised; *and in its effects it will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state.*[30]

Additional facets of an office included the conferring of durable and continuing governmental authority for a public purpose.[31] Finally, the Court quoted with approval the following summary:

> The term "office" implies a delegation of a portion of the sovereign power to, and possession of it by, the person filling the office; a public office being an agency for the state, and the person whose duty it is to perform the agency being a public officer. The term embraces the idea of tenure, duration, emolument, and duties, and has respect to a permanent public trust to be exercised in behalf of government, and not to a merely transient, occasional, or incidental employment. 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.[32]

---

29. *Id.* (citing to *U.S. v. Maurice*, 2 Brock. 96, 102–03 (Marshall, C.J., sitting in the Cir. Ct. for the District of Virginia and North Carolina, Virginia Term, May 1823)).

30. *Clyatt*, 22 So. at 722 (emphasis added).

31. *See id.*

32. *Id.* at 723 (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES

The Court found the members of the state board indeed were state officers because they were delegated an important exercise of government power (to regulate the admission of attorneys to practice law). Their duties were continuous and remained to be performed when the individual board members left their positions, there was a fixed tenure of office and fixed periods when successors would be appointed. The offices and officers were created by governmental authority to discharge legal duties as part of the state's sovereign power for the public good, and their jurisdiction extended throughout the state.[33] The key factor was the delegation of a portion of the state's sovereign power, which came to be known as the "sovereign power principle."[34]

Because the members of the board of legal examiners were state officers, the Court ruled the act creating the board was unconstitutional on two grounds. By requiring the Supreme Court to appoint the members, the act violated the requirement that all officers either be elected or appointed by the governor unless the Constitution provided otherwise. The act also violated the constitutional prohibition against creating an office with a term exceeding four years. Based on answering the two central questions, the Court found the act unconstitutional and declined to address whether it violated the separation of powers. Chief Judge Hocker's motion to quash the alternative writ was denied and mandamus issued.[35]

Twenty-two years later, in *State ex rel. Holloway v. Sheats*,[36] the Court emphasized the sovereign power principle, and the authority of the office holder to exercise that power, as the most important distinction between an "office" and mere "employment:"

> The term "office" implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office, while an 'employment' does not comprehend a delegation of any part of the sovereign authority. The term 'office' embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract. An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a

AND OFFICERS, §§ 1–9, at 1–7 (Callaghan & Co. 1890)).

33. *See id.*

34. Robbin v. Brewer, 236 So. 2d 448, 451 (Fla. Dist. Ct. App. 1970) ("Thus, although there have been other tests to distinguish as to whether a position is an office or employment, the most frequently used is the one alluded to in the *State ex rel. Clyatt v. Hocker* case, . . . and this test has through the years been known as 'the sovereign power principle.'").

35. *See Clyatt*, 22 So. at 722, 724.

36. State ex rel. Holloway v. Sheats, 83 So. 508 (Fla. 1919).

> governmental nature; and this constitutes, perhaps, the most decisive difference between an employment and an office, and between an employé and an officer.[37]

The petitioner in *Holloway* was appointed by the governor as a rural school inspector despite not being nominated for the position by the State Superintendent of Public Instruction, as required by then-current law.[38] When the superintendent refused to requisition payment for his salary and travel expenses, Holloway petitioned to compel such requisition by mandamus. The superintendent opposed the writ on the grounds the position was not an office but a mere employment and petitioner was not hired in compliance with the law. The Court found petitioner's duties were performed under the supervision and direction of the State Superintendent and the position lacked any delegation of sovereign authority. There was no definite term of office. Finding petitioner was an employee who was not properly hired to the position, the Court did not grant the writ.

A 1927 law created the Dade County Ocean Front Protective Commission,[39] specifically named four individual members to the Commission (two representing the County, two the City of Miami Beach) and provided a majority of these would select a fifth member to act as commission chair. The members had no fixed term of service but held their positions until all work was completed. In an action seeking to validate certain bonds to be issued by the commission, the circuit court found the act unconstitutional and denied validation. On appeal, the Supreme Court found the commission had been allocated certain sovereign government powers and the exercise of such powers made the commissioners officers.

The Court ruled only duly constituted officers could exercise the powers of the commission, but the law violated the Constitution by failing to provide fixed terms or proper appointment of the commissioners. Accordingly, the Court affirmed the ruling of the lower court.[40]

> In 1953, the governor requested the Supreme Court clarify the governor's constitutional authority and duties under a 1951 act creating a Hotel & Restaurant Commissioner to be employed at will by the governor and cabinet. The act purported to repeal then-existing ch. 509, Fla. Stat., under which the governor appointed a Hotel

37. *Id.* at 509.
38. *See Holloway*, 83 So. at 508; *see also* 1913 Fla. Laws 143.
39. *See* 1927 Fla. Laws 2818–19.
40. *See* Dade County v. State, 116 So. 72 (Fla. 1928).

Commissioner to serve four year terms.[41] Quoting extensively from *Clyatt*, the Court found the position of Hotel & Restaurant Commissioner created by the act was an office because the "duties fixed and prescribed by law provide the supreme test in such cases."[42] As the new position was an office, the act violated the constitution by constraining the governor and cabinet only to hiring a new commissioner as an employee with no fixed term. The Court observed the Legislature could not "curtail the appointive power of the Governor" as provided in the Constitution and could not create a statutory office with a term exceeding four years.[43] Accordingly, the Court found the act unconstitutional.[44]

3. Reliance on the Sovereign Power Principle under the 1968 Florida Constitution

The principal factors identified in *Clyatt*, particularly the delegation and exercise of a portion of the sovereign power, continue to distinguish an office from mere employment. The Florida Supreme Court applied *Clyatt* in resolving whether a member of a school board was an officer for purposes of the constitutional prohibition against special laws pertaining to the election, jurisdiction, or duties of officers.[45] Finding the application of the constitution was not limited to "constitutional officers," the Court reiterated with approval the *Clyatt* definition of "office"[46] and found the legislation at issue violated the constitutional prohibition.[47]

In *Johnson v. Johansen*,[48] the First District Court of Appeal relied on *Clyatt* for the basic definition of "officer"[49] in determining the position of president of the Jacksonville City Council was not an office for purposes of the governor's constitutional authority to remove county officers.[50] The issue arose when the sitting city council president, also a council member, appealed a circuit court order in which the court refused to enjoin council proceedings to remove that member from the presidency. The First District Court of Appeal determined the council president was the presiding officer

41. *See* 1951 Fla. Laws 1177–78.
42. *In re* Advisory Op. to the Governor, 63 So. 2d 321, 325 (Fla. 1953).
43. *Id.* at 326.
44. *See id.* at 327.
45. *See* FLA. CONST. art. III, § 11(a)(1).
46. Kane v. Robbins, 556 So. 2d 1381, 1382 (Fla. 1989).
47. *See id.* at 1384.
48. Johnson v. Johansen, 338 So. 2d 1300 (Fla. Dist. Ct. App. 1976).
49. *See id.* at 1302.
50. *See* FLA. CONST. art. IV, § 7(a).

of a legislative body which solely determined which of its members should occupy that position.[51]

Reversing a decision of the Division of Unemployment Compensation finding county poll workers were employees, not independent contractors, the Third District Court of Appeal in 2000 cited *Clyatt* and quoted *Holloway* to define "office." The court ruled the poll workers were controlled in their functions and activities by the state statute creating the position, not by the county as an employer.[52]

In a series of opinions primarily about the constitutional prohibition against dual office holding,[53] the Attorney General has relied repeatedly on the definition of "office" in *Clyatt* and *Holloway*:

> While the constitution does not define the term "office," the courts have stated that the term "implies a delegation of a portion of the sovereign power . . . and embraces the idea of tenure, duration, and duties in exercising some portion of the sovereign power, conferred or defined by law and not by contract."[54]

Florida commentators continue to rely on the sovereign power principle. In their 1999 article, Butterworth and Wilson acknowledge the continued application of *Clyatt* and *Holloway* to define whether a particular position is an "office" for purposes of the constitutional prohibition against dual office holding.[55] Writing fifteen years later, van Assenderp and Scarpone relied on the *Clyatt* and *Holloway* definition of office and also defined "state sovereignty:"

> Sovereignty refers to the supreme political authority of an independent state or, in other words, a state's "authority and . . . right to govern itself." In the United States, the fifty individual states have retained all of their common law sovereign powers, save those that were

51. *See Johnson*, 338 So. 2d at 1303.

52. Miami-Dade Cty. v. State Dep't of Labor & Emp't Sec., 749 So. 2d 574, 577 (Fla. Dist. Ct. App. 2000).

53. *See* FLA. CONST. art. II, § 5(a).

54. Cty. Comm'n Ex Officio Designation Bd. of Adjustment, Op. Att'y. Gen. Fla. 94–66 (1994); *cf.* Creation of State or Cty. Offices, Op. Att'y. Gen. Fla. 84–21 (1984), Dual Office, Civil Serv. Bd. and Pension Fund, 90–45 (1990), City Comm'n Appointments, 91–48 (1991), Firefighters/Dual Officeholding, 93–39 (1993), Cty. Comm'n Ex Officio Designation Bd. of Adjustment, 94–66 (1994), Dual Officeholding, Alt. Educ. Inst., 96–95 (1996), Dual Office-Holding, Cmty. All. Members, 2000–72 (2000), Dual Office-Holding, Reg'l Transp. Auth., 2013–02 (2013), Dual Office-Holding–Historic Pres. Bd., 2016–15 (2016).

55. *See* Robert A. Butterworth & Joslyn Wilson, *One is Enough – Florida's Constitutional Dual Office Holding Prohibition*, 29 STETSON L. REV. 307, 309–310 (1999).

relinquished to the federal government. In Florida, state officers are imbued with a portion of state sovereignty.[56]

4. The Sovereign Power Principle in Other Jurisdictions

Delegation of a portion of the sovereign power remains integral to defining a public office and the public officers exercising such authority. The Supreme Court of Nebraska relied on its earlier application of *Clyatt* to find that the members of county boards of mental health were officers, based on the public power allocated to their positions.[57] In a 2007 opinion citing *Clyatt*, the Office of Legal Counsel in the U.S. Department of Justice stated the two primary characteristics of a federal office requiring appointment by the President: "(1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and (2) it is 'continuing.'"[58]

5. Factors Establishing an Office

In *Clyatt* and *Holloway*, the Florida Supreme Court identified the following factors establishing a position as a governmental office as opposed to governmental employment:

- The position is created by governmental authority.
- A portion of the sovereign power is delegated to the position.
- The delegation of power creates certain duties which are continuous.
- The holder of the position is responsible to exercise the delegated power for a public purpose, whether the making, executing, or administering the law.
- The position is permanent and its delegated power must be exercised regardless of the holder's identity.
- The person selected to the position holds it for a specific duration.

56. H. Kenza van Assenderp & Kayla M. Scarpone, *Florida Article and Survey: Telli v. Broward County–A Misunderstanding of County Home Rule and an Abridging of the Status of the Constitution's County Officers Who are Not the Charter's County Officers,* 39 NOVA L. REV. 1, 13–14 (2014).

57. *See* Zimmerman v. Douglas Cty. Hosp., 563 N.W.2d 349, 352 (Neb. 1997) (citing with approval Sullivan v. Hajny, 315 N.W.2d 443 (Neb. 1982)).

58. Officers of the U.S. Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 73–74 (2007).

B. CONSTITUTIONAL REQUIREMENTS FOR CREATING AN OFFICE

The Florida Constitution creates certain offices and specifies both the manner in which they are filled and the lengths of their terms. For example, the Legislature is divided into two chambers, House and Senate, all the members of which are elected but the representatives in the House serve terms of only two years while senators generally serve four years.[59] The Legislature is authorized to set by law the powers, duties, compensation, and manner of payment of state and county officers[60] and may create such public offices as deemed necessary, subject to some constitutional constraints. State and county officers must swear or affirm the oath specified in the Constitution.[61] Certain officers are required to be elected,[62] but all others are to be appointed.

1. Appointment of State Officers Under the 1968 Constitution

When *Clyatt* and *Holloway* were decided, unless otherwise provided by the Florida Constitution state officers were required to be appointed only by the governor.[63] Although similar provisions appeared in prior versions of the Constitution,[64] Article III, § 27 of the 1885 Constitution was not carried over to the current version. However, its substance was reorganized into different sections of the 1968 Constitution, preserving the basic intent for state officers to be elected or appointed by the governor solely or under certain conditions.

As noted above, the Legislature has full authority to determine by law the powers, duties, compensation, and method of payment for each officer.[65] The Constitution expressly requires the election of specified officers and the appointment of others.[66] The Legislature may designate

59. FLA. CONST. art. III, § 1, 15.

60. FLA. CONST. art. II, § 5(c).

61. FLA. CONST. art. II, § 5(b).

62. *See* FLA. CONST. art. III, § 15. For example, senators and representatives: the governor, lieutenant governor, and cabinet; *see also* FLA. CONST. art. IV, § 5(a). Judges of the circuit and country courts, state attorneys, and public defenders; FLA CONST. art. V, § 10(b), 17, 18. County commissioners, sheriffs, clerks of the circuit court, tax, collectors, tax collectors, property appraisers, and supervisors of elections; FLA. CONST. art. VIII, § 1(c), 1(d). The five individual county officers may be selected, other than by election, if so provided in a county charter or special act approved by the voters, district school board members, and Superintendent of Schools (unless provision is made for the school board to employ the superintendent).

63. FLA. CONST. art. III, § 27 (1885).

64. *See* FLA. CONST. art. VI, § 19 (1838); *see also* FLA. CONST. art. III, § 27 (1868).

65. *See* FLA. CONST. art. II, § 5(c).

66. *See* FLA. CONST. art. IV, § 9. For example, the members of the Fish and Wildlife

certain statutory offices to be filled by appointment subject to confirmation by the Senate or the approval of three members of the cabinet.[67]

The framers of the 1968 Constitution intended the appointment of officers not otherwise provided in the Constitution would be made by the governor. The governor is authorized and required to fill by appointment any vacancy in a state or county office.[68] A vacancy in office occurs when the office is created; when the incumbent dies, is removed, resigns, succeeds to another office, is absent without explanation for sixty consecutive days, or fails to maintain residence required for the office; or when the person elected or appointed fails to qualify for the office within thirty days from the commencement of the term.[69] Finally, the Constitution places the supreme executive power in the governor, a hierarchal term ensuring the governor is responsible for exercising that executive power vested by the people through the Constitution that is not otherwise allocated within the divided executive branch.[70] As the Florida Supreme Court has observed:

> As the chief executive officer in whom the supreme executive power is vested, the Governor has direct supervision over all executive departments unless the legislature places that supervision in the hands of one of the following other executive officers: 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... Inherent in that direct supervisory authority is the power to appoint executive officers to public office.[71]

Unless the Constitution provides a different method for selecting a person to occupy a state office, or the Legislature requires election or appointment subject to Senate confirmation or cabinet approval, the governor is required to appoint state officers.[72]

Conservation Commission are required to be appointed by the governor and confirmed by the Senate; *see also* FLA. CONST. art. V, § 11(a). Supreme Court justices and judges of the district courts of appeal are appointed by the governor.

67. *See* FLA. CONST. art. IV, § 6(a). Requiring the approval of three cabinet members appears to be a holdover from the days of a six member cabinet; *see also* FLA. CONST. art. IV, § 4(a). As the current cabinet is composed only of the Chief Financial Officer, the Attorney General, and the Commissioner of Agriculture, appointment subject to cabinet approval would require a unanimous vote.

68. FLA. CONST. art. IV, § 1(f).

69. *See* FLA. CONST. art. X, § 3; *see also* FLA. STAT. § 114.01 (2018).

70. *See* Eric H. Miller, *The Direction and Supervision by Elected Officials of Florida Executive Branch Agencies and Administrative Rulemaking: 1968–2012*, 12 AVE MARIA L. REV. 333, 337–39 (2014).

71. Jones v. Chiles, 638 So. 2d 48, 50 (Fla. 1994).

72. *See* Op. Att'y. Gen. Fla. 84–21 (1984).

2. Required Term of Office

The Florida Constitution provides specific terms of office for certain officials and authorizes others to serve terms exceeding four years if provided by law.[73] Unless authorized otherwise in the Constitution, no office may be created the term of which exceeds four years.[74] The appointment of those officers responsible for administering executive branch departments and who serve at the pleasure of the governor is an exception to the four-year term requirement. Under the 1885 Constitution, an officer could not serve at the pleasure of the governor.[75] The executive branch article revision in the 1968 Constitution authorized general laws placing the direct supervision of administrative departments under the governor, other specified elected officials, "or an officer or board appointed by and serving at the pleasure of the governor . . . ."[76] An early decision under the new constitution by the Florida Supreme Court found this new text created an exception to the strict four year term requirement, allowing

73. *See* FLA. CONST. art. IX, § 3 (authorizing longer terms for appointive boards dealing with education).

74. *See* FLA. CONST. art. III, § 13; *see also* Op. Att'y. Gen. Fla. 77–134 (1977). Discussing a line of cases under the 1885 Constitution where the courts "implied" the four-year limitation to offices, which either exceeded the four-year requirement or failed altogether to specify a term. The Attorney General then discusses *State ex rel. Investment Corp. v. Harrison*, 247 So. 2d 713 (Fla. 1971), where the Supreme Court found the addition of "except as provided herein" to § 13 in the 1968 Constitution foreclosed the prior practice of "implying" a four-year term, making § 13 now more strict in application.

75. *See* State ex rel. Investment Corp. v. Harrison, 247 So. 2d 713, 715 (Fla. 1971); *see also In re* Advisory Opinion of the Governor, *Term of Appointments for Governor*, 306 So. 2d 509, 511 (Fla. 1975).

76. *See* FLA. CONST. art. IV § 6.

> Executive departments.—All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. 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, except:
> (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.
> (b) Boards authorized to grant and revoke licenses to engage in regulated occupations shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause.

Id.

the Legislature to create offices without a specified term provided the appointees served at the pleasure of the governor.[77]

The Supreme Court subsequently expanded on the scope of this constitutional exception to the four-year term requirement. After his reelection in 1974, Governor Reubin Askew requested an advisory opinion[78] seeking the Court's guidance on whether he had to reappoint all the officials then serving at his pleasure. The Court responded that certain appointments would require reappointment but those appointed solely by the governor, and serving at the governor's sole pleasure, would not unless otherwise required by statute.[79] Where the governor's appointment required the confirmation or advice and consent of the Senate, the Court noted the general statute requiring the term of office for such appointees ran concurrently with the term of the governor and required their reappointment or replacement.[80] For appointees, such as the executive director of the Florida Department of Law Enforcement ("FDLE"), where the specific statute required appointment by the governor and three members of the cabinet[81] subject to Senate confirmation and provided the appointee served at the pleasure of the governor and cabinet, reappointment would not be necessary.[82] However, those serving at the governor's pleasure and whose appointments did not require Senate confirmation could continue to serve without formal reappointment.[83]

C. THE CREATION OF DOAH AND THE ROLE OF ADMINISTRATIVE LAW JUDGES

The 1974 Act[84] created DOAH as a new entity within the existing Department of Administration. DOAH would be headed by a director appointed by the Administration Commission[85] and confirmed by the

77. *See Harrison*, 247 So. 2d at 714–715.

78. *See* FLA. CONST. art. IV, § 1(c).

79. *In re* Advisory Opinion of the Governor, *Term of Appointment for Governor*, 306 So. 2d at 511–513.

80. *See Harrison*, 247 So. 2d at 512; *see also* FLA. STAT. § 114.04 (2018). Although amended subsequently, the statute still provides for such reappointment.

81. *See* FLA. CONST. art. IV, § 6(a).

82. *See* FLA STAT. § 20.201(1) (2018).

83. *See Harrison*, 247 So. 2d at 513.

84. 1974 Fla. Laws 952–74.

85. *See* FLA. STAT. § 20.31(2) (1973). The Administration Commission was composed of the governor and cabinet (six members at that time) with the Governor designated as the Chair, and for any initiative to pass the commission required the affirmative vote of the Governor and at least three other members.

Senate. In turn, DOAH (acting through its director) would employ hearing officers to conduct required hearings.[86] In challenges seeking a determination whether a rule was an invalid exercise of delegated legislative authority,[87] the individual hearing officers were authorized to render final orders declaring whether all or part of a rule was invalid, subject only to judicial review.[88] As stated in the 1974 Act, the legislative intent was to: [M]ake uniform the rule-making and adjudicative procedures used by the administrative agencies of this state.[89]

In her 1986 article on access to administrative proceedings,[90] Professor Dore found the legislative history of the 1974 changes creating the rule challenge hearing procedural statutes, including allocating final order authority to the hearing officers, provided scant detail. The version of the revised APA passed in the House and the version originally filed in the Senate did not provide for administrative challenges to the validity of a proposed agency rule. The proposed rule challenge process, including the allocation of final order power to the hearing officers, arose in the Senate committee substitute for the bill by the Committee on Rules and Calendar.[91] The Senate committee substitute included the allocation of final order authority to the hearing officer, "[t]he hearing officer may declare the proposed rule wholly or partly invalid."[92]

The conference committee reconciliation of the House and Senate versions retained the proposed rule challenge process, specifying the grounds of such challenges and requiring a showing that the challenger was substantially affected by the rule. This conformed the process to challenge proposed rules to the process provided to challenge existing rules.[93] During Senate floor debate on the Senate version, Sen. Dempsey Barron[94] remarked:

86. *See* 1974 Fla. Laws 952–74 (creating FLA. STAT. § 120.65 (2018).

87. *See* FLA. STAT § 120.56(2) (2017). The new statute also contemplated hearing challenges as to whether a rule was an exercise of invalidly delegated legislative authority, a provision no longer stated in the law. Presumably, this is because challenging whether a delegation of legislative authority itself is valid actually questions whether the Legislature acted beyond the limitations placed in the Florida Constitution, and ALJs cannot adjudicate the constitutionality of a law or statute. *See also* Myers v. Hawkins, 362 So. 2d 926, 927 (Fla. 1978).

88. *See* FLA. STAT. § 120.56(2)(b) (2017).

89. *See* Ch. 74-310, Fla. Laws §3(1).

90. *See* Patricia A. Dore, *Access to Administrative Proceedings*, 13 FLA. ST. U. L. REV. 965, 1010–12 (1986).

91. *See id.*, at 1010–11.

92. *Id.*, at 1011.

93. *See id.*, at 1011–12.

94. *See* Mark Silva, *Legandary Senator Dies*, ORLANDO SENTINEL (July 8, 2001),

> [W]here a member of the public is aggrieved by a proposed rule within the twenty-one [sic] days that they have to become aggrieved, *they may immediately go to the hearing officer* and say, we contend that this proposed rule is outside of the authority of the agency that made it, and thereby *avoid it ever becoming a rule.*[95]
>
> . . .
>
> Now, under the Senate bill that you have before you, you see that when a rule is made and the public is aggrieved, either at the time it is made or at some subsequent time, that you may go directly to the independent hearing officer, and *his decision is final unless appealed to the District Court of Appeals* [sic] in Tallahassee.[96]

Professor Dore noted the ability of a party to challenge a proposed rule before an independent hearing officer with the authority to declare the proposed rule invalid appeared to be unique to Florida.[97] She briefly described the procedural choices before the Legislature and the final intent to allocate binding final order authority in rule challenges in the individual hearing officers.

> The validity challenge to proposed rules provision is essentially an intrabranch dispute resolution mechanism. That is, whenever a qualified member of the public believes an executive branch agency has exceeded its statutory authority, that person may have the matter resolved by a specially created and insulated executive branch agency: the DOAH. The legislature could have vested this authority in the attorney general, or in the Governor, or in the Governor and Cabinet, either sua sponte or on motion of a person substantially affected. That decision could have been made final and not subject to judicial review. The legislature could have chosen to vest this authority in the circuit courts or in the district courts of appeal. . . . What the legislature chose to do instead was to create, within the executive branch, a pool of independent hearing officers *and to invest in them the authority to determine*, subject to judicial review, whether other executive branch agencies' rules were within the authority delegated by the legislature.[98]

That final order authority remains substantially unchanged.[99]

---

http://articles.orlandosentinel.com/2001-07-08/news/0107080152_1_barron-legislature-tallahassee (explaining that Sen. Barron was from Panama City and at the time Sen. Barron was Chair of the Senate Committee on Rules and Calendar and principal advocate for the changes to the rule challenge process).

95. *See* Dore, *supra* note 90, at 1012 (emphasis added).
96. *Id.*, at 1014 (emphasis added).
97. *Id.*, at 1012.
98. *Id.*, at 1017 (emphasis added).
99. *See* FLA. STAT. § 120.56(1)(e) (2017).

D. A FEDERAL INTERLUDE

The delegation of legislative authority, legislative creation of DOAH and the office of ALJ, and the exercise of the appointive power in Florida are controlled exclusively by the Florida Constitution absent a violation of the United States Constitution or federal law. Federal cases construing the President's authority under the Appointments Clause of the Constitution[100] may be instructive but are not controlling on whether the Florida Constitution requires that certain positions be filled by executive appointment. Nevertheless, in its decision determining that certain federal ALJs were public officers requiring proper constitutional appointment,[101] the U.S. Supreme Court relied on factors similar to those historically articulated by Florida and examined in this Article.

At issue in *Lucia v. Securities and Exchange Commission* was whether the ALJs within the Securities and Exchange Commission ("SEC" or "Commission") were "Officers of the United States," distinct from mere employees, for purposes of the Appointments Clause. Under the Appointments Clause officers of the United States must be appointed by the President, the head of a department, or a court of law.[102] The case thus turned on whether the position of ALJ in the SEC was an "office" and the occupant an "officer" for purposes of the Appointments Clause. The case began when the SEC brought an administrative complaint against the petitioner and his investment company, which allegations the petitioner opposed. The Commission itself may preside in such actions but usually delegates that function to one of five ALJs within the agency.[103] Each ALJ is selected and hired by SEC staff members, not the Commission or the President.[104]

After the full administrative evidentiary hearing, including a remand from the SEC to the ALJ for further fact finding, the petitioner argued on appeal to the SEC that the administrative proceeding was invalid because the ALJ was not properly appointed under the Constitution. The SEC, then the Court of Appeals for the D.C. Circuit, rejected this argument and

100. *See* U.S. CONST. art. II, § 2, cl. 2.

101. *See* Lucia v. SEC, 138 S. Ct. 2044 (2018).

102. *See id.* at 2051, n.3. The Appointments Clause provides for appointment by the President with the advice and consent of the Senate, but authorizes Congress to provide by law for appointment of "inferior Officers" (*sic*) by the President alone, the department heads, or courts of law. As noted by the Court, the distinction between "principal" and "inferior" officers was not at issue in the case.

103. *See* 15 U.S.C. § 78d-1(a) (2018).

104. *See Lucia*, 138 S. Ct. at 2049.

concluded the ALJs were mere employees who could not "'exercise significant authority independent of [its own] supervision.'"[105] The Circuit Court decision directly conflicted with a holding from the Court of Appeals for the Tenth Circuit[106] and petitioner sought certiorari review in the Supreme Court.[107] In reversing the D.C. Circuit's decision the Supreme Court ruled the scope of authority and power allocated to and exercised by the SEC ALJs rendered them officers requiring constitutional appointment, analogous to the holding in *Freytag v. Commissioner*[108] finding special trial judges of the United States Tax Court are officers for purposes of appointment.

The majority opinion by Justice Kagan first examined the ALJ's scope of power and authority. An ALJ designated to preside over an administrative proceeding brought by the SEC has extensive powers to conduct and control the hearing.[109] The Court noted a number of these powers: "supervising discovery; issuing, revoking, or modifying subpoenas; deciding motions; ruling on the admissibility of evidence; administering oaths; hearing and examining witnesses; generally '[r]egulating the course of' the proceeding and the 'conduct of the parties and their counsel;' and imposing sanctions for '[c]ontemptuous conduct' or violations of procedural requirements." The Court also noted the ALJ's authority in the SEC's final decision of an administrative case. The ALJ issues an initial decision containing findings of fact and conclusions of law together with the final disposition, including appropriate sanctions.[110] The SEC may review the initial decision or may issue an order that the decision is final as the action of the Commission.[111]

The Court examined its pertinent precedents for the factors establishing an "office." An 1879 decision stressed "ideas of tenure [and] duration" in requiring that an Officer of the United States occupy a

105. *Lucia*, 138 S. Ct. at 2050. *See* Raymond J. Lucia Cos., v. SEC, 832 F.3d 277 (D.C. Cir. 2016).

106. *See* Bandimere v. S.E.C., 844 F.3d 1168 (10th Cir. 2016).

107. *See Lucia*, 138 S. Ct. at 2050–51. Interestingly, because the Federal Government defended the SEC decision before the Circuit Court but changed its position in responding to the petition for certiorari, now advocating that the ALJs indeed were officers under the Appointments Clause, in granting the petition the Supreme Court appointed an *amicus curiae* to defend the judgment.

108. *See* Freytag v. Commissioner, 501 U.S. 868, 881 (1991).

109. *See* 17 C.F.R. § 201.111 (2019). This SEC Rule of Practice expressly states it supplements but does not limit the powers of a hearing officer under 5 U.S.C. §§ 556, 557 (of the federal Administrative Procedure Act)

110. *See* 17 C.F.R. § 201.360(a) (2019).

111. *See* 17 C.F.R. § 201.360(d) (2019); *see also* 15 U.S.C. § 78d-1(c) (2018).

continuing position established by law and that the duties of the position "must be continuing and permanent."[112] A later case set out an additional factor that an officer must "exercise significant authority pursuant to the laws of the United States."[113] In *Freytag*, the Court applied the following factors to find the special trial judges in fact were officers:

- The position of special trial judge was a continuing office established by law.
- The law also set the duties, salary, and method of selection of special trial judges.
- Those chosen as special trial judges provided ongoing, as opposed to temporary, service.
- A special trial judge exercised significant authority, exercising considerable discretion in presiding over adversarial proceedings, including taking testimony, ruling on evidence, conducting trials, enforcing compliance with discovery, and entering final decisions in minor matters.[114]

Applying the factors from *Freytag*, the Court found an SEC ALJ:

- Occupied a continuing office established by law that also created the duties, salary, and means of selection;
- The position was a career appointment, not temporary;
- Similar to the special trial judges of the Tax Court, an SEC ALJ had "significant discretion" to ensure fair and orderly adversarial hearings, including 1) receiving evidence, examining witnesses, and taking pre-hearing depositions, 2) conducting trials, administering oaths, ruling on motions and on 3) the admissibility of evidence, and 4) enforcing compliance with discovery orders.
- Finally, SEC ALJs were authorized to issue proposed findings, legal conclusions, and remedies, which became final if the Commission chose not to review, resulting in a final order being issued as the order of Commission.[115]

112. United States v. Germaine, 99 U.S. 508, 511–52 (1879); *see Lucia* 138 S. Ct. at 2051.

113. *Buckley v. Valeo*, 424 U.S. 1, 126, n.162. In *Buckley*, the Court said: "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of (Article II)." *See also Lucia*, 138 S. Ct. at 2051.

114. *See Freytag*, 501 U.S. at 881–82.

115. *See Lucia*, 138 S. Ct. at 2053–54.

Based on these factors, the Court found the SEC ALJs are "Officers of the United States" for purposes of the Appointments Clause. Because the ALJ in that case was not appointed either by the President or the Commission, the administrative proceeding was not conducted properly. Following other precedent,[116] the Court reversed the decision of the Circuit Court and remanded the matter for the SEC to conduct a new hearing before a different ALJ (who was appointed properly).[117]

In his concurring opinion, Justice Thomas noted the common understanding of the term "officer" contemporaneous with the drafting and adoption of the United States Constitution encompassed all federal officials "with responsibility for an ongoing statutory duty," regardless how important or significant that duty.[118] Finding "(t)he ordinary meaning of 'officer' was anyone who performed a continuous public duty,"[119] Justice Thomas cited Chief Justice John Marshall's opinion in *United States v. Maurice*.[120]

On July 10, 2018, the President issued an "Executive Order Excepting Administrative Law Judges from the Competitive Service."[121] The Executive Order amended 5 C.F.R. §§ 6.2, 6.3(b), 6.4, 6.8, removing all ALJ positions appointed under 5 U.S.C. § 3105 from the category requiring competitive examination and hiring requirements and placing them under the exempted service. While not dispositive about the nature of public officers and the exercise of executive appointment power under the Florida Constitution, *Lucia v. Securities and Exchange Commission* shows the federal courts will use similar factors to determine whether a particular position is an "office" requiring exercise of constitutional appointment power. As in Florida, an individual not occupying a governmental office is an employee.

E. ARE ADMINISTRATIVE LAW JUDGES PUBLIC OFFICERS?

Applying the *Clyatt* and *Holloway* factors to the position of Administrative Law Judge shows:

- The position is created by governmental authority. The

116. *See* Ryder v. United States, 515 U.S. 177 (1995).
117. *See Lucia*, 138 S. Ct. at 2055–56.
118. *Lucia*, 138 S. Ct. at 2056 (J. Thomas, joined by J. Gorsuch, concurring).
119. *Lucia*, 138 S. Ct. at 2057 (J. Thomas concurring).
120. *See* United States v. Maurice, 26 F. Cas. 1211, 1214; *see also supra* note 28 and accompanying text.
121. Exec. Order No. 13843, 83 Fed. Reg. 32,755 (July 10, 2018).

position of ALJ is created by the Legislature for implementation of important components of the APA.

- A portion of the sovereign power is delegated to the position. The position of ALJ is allocated the authority to render final orders in proceedings challenging whether a proposed or existing agency rule is an invalid exercise of delegated legislative authority. These final orders are binding on the agency and on the general public if not reversed on appeal because they constitute final agency action by the ALJ.[122]
- The delegation of power creates certain duties which are continuous, the position is permanent, and its delegated power must be exercised regardless of the holder's identity. The position of ALJ is a permanent statutory position with continuous duties that must be exercised as required by statute regardless of an incumbent's identity.
- The holder of the position is responsible to exercise the delegated power for a public purpose, whether the making, executing, or administering the law. Each incumbent ALJ, regardless of their identity, is responsible to exercise the delegated power for a public purpose.[123]
- The person selected to the position holds it for a specific duration. Currently, ALJs occupy their positions for no specific duration.

F. POINT - COUNTERPOINT

This analysis raises a number of thoughtful questions:

- Most obviously, forty-three years have elapsed since the modern APA went into effect and there appears to be no instance in which a party before DOAH claimed that an ALJ could not decide a rule challenge because the ALJ was not properly appointed to an office with a fixed term. Is this a solution in search of a problem?

That is a fair point. However, if the system adopted to provide neutral adjudicators for disputes with governmental agencies has inherent flaws, the public is served better by resolving those issues through thoughtfully

122. *See* FLA. STAT. §§ 120.52(7), 120.56(1)(e).
123. *See Clyatt*, 39 Fla. 477, 487, ; *see also Holloway*, 78 Fla. 583, 588.

considered and developed policy rather than reacting *ad hoc* to a negative judicial decision at some future time.

- Does not a correct reading of the APA show it creates ALJs as employees and not "officers?" There is no fixed number of ALJs, no requirement that a vacated position be filled, and rule challenges apparently comprise only a small percentage of their work.

Under *Clyatt* and its progeny, the sovereign power principle determines whether a position is an "office," not statutory labels or the volume of a particular type of work. Note that the Florida Constitution requires a circuit court in each judicial circuit to exercise full judicial authority but provides no fixed number of circuit judges.[124] Indeed, just as with ALJs, there is no requirement that a circuit court judgeship must be filled if the occupant vacates that position (although the Legislature must meet certain conditions, including a two-thirds (2/3) vote in each chamber, to reduce the number of judges in the event of a vacancy). Even though there is no requirement that each judicial position must remain extant and filled, there is no argument that circuit court judges are "officers" under the Constitution.

- *Clyatt* and its significant progeny were decided under the old Constitution and rely on provisions that were not carried forward into the 1968 document. Are they relevant to an administrative process that simply did not exist when they were decided?

Continual use of the same term or phrase, in the same context, for the same purpose, in successive versions of the Constitution, means the framers deliberately retained the judicial constructions of that term unless a different intent is expressed.[125] Use of the word "office" in the 1968 Constitution carried the same meaning, and the same interpretations, as found by the courts under the 1885 Constitution. In this context, the Supreme Court previously decided an "office," and hence an "officer," depended upon the nature of the authority and the exercise of sovereignty by the occupants of the position, regardless of the frequency or extent of the power used.

124. *See* FLA. CONST. art. V, § 5.

125. *See* Fla. Dep't. of Revenue v. City of Gainesville, 918 So. 2d 250, 263–64 (Fla. 2005); *see also* Gray v. Bryant, 125 So. 2d 846, 856 (Fla. 1960); Swartz v. State, 316 So. 2d 618, 621 (Fla. 1st DCA 1975).

The controlling law on this issue is not archaic simply because the Supreme Court settled these points under the previous constitution. Florida developed principles of administrative decision-making well before the 1968 Constitution,[126] including adopting the first version of the APA in 1961.[127] The 1968 Constitution neither obviated the case law controlling administrative decision-making nor resolved the problems of affording the public timely notice of pending decisions, providing entry points to proceedings, or affording access to agency rules. Those issues continued for six years after the adoption of the Constitution, and two years after the electorate approved the extensive revisions to Article V on the Judiciary, until the adoption of the present APA in 1974.

- Under the Constitution, many executive branch departments are headed by individuals appointed to serve at the pleasure of the governor, not for a specific term of office. Most departments in turn are subdivided into divisions, and divisions into bureaus, each headed by a division director or bureau chief.[128] These individuals daily make decisions applying the law that become final agency action. Because they execute and administer the law, aren't they also officers?

As discussed in the section on Required Term of Office, department heads appointed by, and serving at the pleasure of, the governor are defined as officers in the Constitution. The provision for serving at the pleasure of the governor is an exception to the four year term requirement of Article III, §13, of the Constitution. Division directors and bureau chiefs act on behalf of the agency head, who retains full authority to exercise the agency's powers, including rulemaking.[129] In contrast, by statute, the governor and cabinet (as the Administration Commission) appoint the chief judge/director of DOAH subject to Senate confirmation but the chief judge does not serve at their pleasure.[130] Under *State ex rel. Investment Corp. v. Harrison*, 247 So. 2d 713, (Fla. 1971), and *In re Advisory Opinion of the Governor, Term of Appointments for Governor*, 306 So. 2d 509, (Fla. 1975), the wording of the statute would appear to remove the position of chief judge from the exception in Article IV, §6, of the Florida Constitution.

126. *See* State v. Atlantic Coast Line R. Co., 56 Fla. 617, 637 (1908).
127. *See* FLA. STAT. § 120.
128. *See* FLA. STAT. § 20.04(3).
129. *See* FLA. STAT. § 20.05(1).
130. *See* FLA. STAT. § 120.65(1).

CONCLUSION

The Florida Supreme Court repeatedly has reiterated and applied the sovereign power principle as the main test of whether a position is a public office or mere employment. The present statutory system entrusts sole discretion for the hiring and removal of ALJs to the chief administrative law judge and their employment is for unfixed terms. Whether the powers, duties, and continuing nature of the position make ALJs "officers" for the purpose of selection and tenure, requiring compliance with the constitutional requirements for public officers, is an issue for future public policy determination.