

WHILEY V. SCOTT: MISINTERPRETING FLORIDA’S HISTORICAL SCOPE OF CONSTITUTIONAL EXECUTIVE POWER

*Eric Miller**

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“*[T]here is always a well-known solution to every human problem—neat, plausible, and wrong.*”¹

I. INTRODUCTION

The Florida Supreme Court breathed new life into H. L. Mencken’s axiom with its decision in *Whiley v. Scott*.² Upon taking office in 2011, Governor Rick Scott ordered agencies under his direction to suspend administrative rulemaking pending further review by his office.³ A food stamp recipient bypassed the trial and intermediate Florida appellate courts by filing an original action in the Florida Supreme Court, in the form of a petition for writ of *quo warranto*, arguing the governor had no authority to order such a suspension.⁴ A majority of the court opined that the governor lacked authority to direct his at-will appointees to suspend administrative rulemaking.⁵ Over the vigorous dissents of the Chief Justice and another member of the court, the majority concluded: (1) the legislature could place administrative 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 the governor to direct these agency heads without further statutory authority.⁶

The majority found the exercise of administrative rulemaking authority by subordinate agency heads—appointed by and serving at the pleasure of the governor—was not subject to the governor’s direction or supervision

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¹ H.L. Mencken, *Prejudices: Second Series*, 158 (New York: Alfred A. Knopf 1920).

² 79 So. 3d 702 (Fla. 2011).

³ Fla. Exec. Order No. 2011-01 (Jan. 4, 2011).

⁴ Petition for Writ of Quo Warranto, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC11-592).

⁵ *Whiley v. Scott*, 79 So. 3d 702, at 705 (Fla. 2011).

⁶ *Id.* at 715.

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because the legislature had not empowered such oversight.⁷ Narrowly viewing the agency's rulemaking as controlled exclusively by the legislature, the majority ignored the full extent of constitutionally vested executive power, failed to follow the court's own principles of constitutional interpretation, and relied instead on the questionable reasoning in a dormant attorney general's opinion.⁸ The decision effectively recognized a "fourth branch of government"—agency heads appointed by and serving at the pleasure of the governor, but immune from gubernatorial direction and supervision.⁹ Finding "the power to remove is not analogous to the power to control," the court invited the legislature to clarify the law.¹⁰

Accepting the invitation, the legislature passed Chapter 2012-116, Laws of Florida.¹¹ The law confirmed: (a) all but one of the governor's actions conformed with existing law; (b) all appointed agency heads remained subordinate to the direction and supervision of the governor (or other appointing authority, such as the cabinet); and (c) as a procedural statute, the Florida Administrative Procedure Act¹² operates within the structure of constitutional executive power.¹³ Twenty-six legislative findings grounded the law on Florida's historical understanding and application of the constitutional executive power since Florida's founding.¹⁴ Quoting *The Federalist*, tracing the development of the executive article in each succeeding version of the Florida Constitution, and citing the historical record on the framing of the present document, the legislature approved the *Whiley* dissenters' analysis as properly articulating both the Constitution and the legislative intent for the statutory structure of the executive branch.¹⁵

Proper analysis of the majority's opinion and the subsequent legislative response¹⁶ requires an understanding of the constitutional context of executive power in Florida and the implementation of executive authority under the 1968 Florida Constitution. This article examines the issues and arguments before the court, the majority and dissenting opinions, and the principles of constitutional interpretation from which the majority strayed based largely on an isolated attorney general opinion. The article discusses the decision's consequences, questioning both the efficacy of proceeding in

⁷ *Id.* at 716–717.

⁸ FLA. OFF. OF THE ATT'Y GEN., AGO 81-49, EXECUTIVE ORDER AS BINDING ORDER (1981) (hereinafter "AGO 81-49").

⁹ *See Whiley*, 79 So. 3d at 713–714.

¹⁰ *Id.* at 715, 717.

¹¹ *See* 2012 Fla. Laws 116.

¹² FLA. STAT. § 120 (2012).

¹³ 2012 Fla. Laws 116, §§ 1, 2.

¹⁴ 2012 Fla. Laws 116, § 1.

¹⁵ 2012 Fla. Laws 116, § 1(26)(b).

¹⁶ *See, e.g.*, 2012 Fla. Laws 116.

quo warranto and whether the opinion has any precedential effect because the writ itself was withheld. Finally, the article analyzes how the subsequent legislation reaffirmed the Florida executive branch's historical, constitutionally vested executive power. By contrasting the restricted construction adopted by the majority with a proper interpretation of the Florida Constitution, the article shows the majority's opinion is neat and plausible, but wrong.

A. Historical Context of Constitutional Executive Power in Florida

Analyzing the court's competing rationales first requires understanding the historical context and development of the Florida Constitution, as well as the implementation of executive authority by the Florida Legislature and succeeding governors.¹⁷

Florida's first Constitution was based on fifty years' experience of both national and state executive power.¹⁸ In 1789, the United States Congress concluded that the constitutional grant of executive power to the President implied the inherent authority to direct, control, and remove those officers appointed to serve at the President's pleasure.¹⁹ The vesting and limiting of executive power in contemporary and subsequent state constitutions followed a similar pattern: the plenary executive authority was placed in the executive branch, subject to express limitations, and the chief magistrate (usually denominated "governor") was responsible for exercising the full executive power, except as otherwise clearly provided.²⁰ Because state constitutions often limited executive power by allocating specific functions to other officers, the authority vested in the governor was called the "supreme executive power."²¹ This distinguished the governor's responsibilities from specific, separately-allocated powers to ensure the complete exercise of the full executive power.²² Similar to its use in constitutional articles vesting judicial power by creating more than one court, the word "supreme" connoted a hierarchy of responsibility within the executive branch.²³

Every version of the Florida Constitution used the same phrasing in the

¹⁷ See Eric H. Miller, *The Historical Development of Executive Branch Oversight and Control in Florida: 1838–1968*, 13 AVE MARIA L. REV. 371 (2015) (hereinafter "Historical Development"); 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 (2014) (hereinafter "Direction and Supervision").

¹⁸ Miller, *Historical Development*, *supra* note 17, at 394.

¹⁹ *Id.* at 387–88.

²⁰ *Id.* at 390–94.

²¹ *Id.*

²² *Id.* at 390, 394.

²³ *Id.* at 397.

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executive article to describe the power and authority of the governor.²⁴ Numerous amendments to the various executive articles neither constrained the executive authority over at-will gubernatorial appointees nor impliedly authorized such officers to act independently from the governor's control.²⁵ The framers revised the executive article in the 1968 Constitution, particularly those provisions concerning executive branch reorganization, only after expressly rejecting legislative control over the direction and supervision of subordinate appointees by constitutional officers.²⁶

The 1968 constitutional revisions impacted the structure of Florida's modern executive branch. Substantively, the legislature restructured the executive agencies by placing most under the authority of an appointee serving at the pleasure of the governor.²⁷ Procedurally, the legislature created the Florida Administrative Procedure Act ("APA")²⁸ to provide the uniform processes all administrative agencies must follow when performing their statutory duties.²⁹ Numerous governors showed a common interpretation of their constitutional authority, particularly over the implementation of general policy through agency rulemaking, by directing and supervising the form, content, and goals of rules adopted by administrative agencies.³⁰ While monitoring and periodically revising the requirements for rulemaking, the legislature never raised a concern about the direction and control of appointed agency heads by the various governors.³¹

This legislative inaction made an anomalous 1981 attorney general opinion all the more curious.³² Ignoring the historical context of executive power in Florida, and failing to read properly the pertinent sections of the executive article,³³ the attorney general opinion concluded that the governor could not direct and supervise agency rulemaking because the legislature only authorized the exercise of rulemaking power by the at-will, subordinate appointees, rather than the governor.³⁴ The subsequent conduct of both the legislature and the various governors showed a settled understanding of the Constitution directly opposite to this conclusion, and the opinion remained

²⁴ Miller, *Historical Development*, *supra* note 17, at 377–78.

²⁵ *Id.* at 397–405.

²⁶ *Id.* at 412–14.

²⁷ See 1969 Fla. Laws 106.

²⁸ FLA. STAT. § 120 (2012).

²⁹ FLA. STAT. § 120.515 (2012).

³⁰ Miller, *Direction and Supervision*, *supra* note 17, at 349–52.

³¹ See, e.g., 1996 Fla. Laws 159; 1999 Fla. Laws 379; 2010 Fla. Laws 279; 2011 Fla. Laws 225; 2016 Fla. Laws 116.

³² FLA. OFF. OF THE ATT'Y GEN., AGO 81-49, EXECUTIVE ORDER AS BINDING ORDER (1981) (hereinafter "AGO 81-49"); see Miller, *Direction and Supervision*, *supra* note 17, at 354–57.

³³ FLA. CONST. art. IV, §§ 1(a), 6 (1968).

³⁴ AGO 81-49.

dormant for thirty years.³⁵

It would return.

II. PROLOGUE TO *QUO WARRANTO*

Rosalie Whiley filed a petition for writ of *quo warranto* in the Florida Supreme Court, requesting a ruling that newly-elected Governor Rick Scott had no power to suspend, direct, supervise, or otherwise interfere with agency rulemaking.³⁶ This issue was already part of pending, actively-contested litigation predating the new governor's election in November 2010.³⁷ The following discussion shows the development of the issues in the *Etienne* case and their relevance to the Whiley petition.

A. *Etienne v. DCF*

Eva Etienne sought continued benefits under the Supplemental Nutrition Assistance Program (“SNAP”)³⁸ by applying for renewal online.³⁹ The existing online form⁴⁰ did not permit an application using minimum personal information. Etienne challenged the applicable administrative rule as an invalid exercise of the Department of Children and Family Services’ (DCF) delegated rulemaking authority.⁴¹ DCF requested a continuance of the final hearing to initiate rulemaking revising the online form. Although Etienne’s counsel objected to any delay, arguing the challenge process better

³⁵ Amicus Brief of the Attorney General in Support of Respondent at 16–17, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC11-592).

³⁶ Petition for Writ of Quo Warranto, *supra* note 4.

³⁷ See *Etienne v. Dep’t of Children and Family Servs.*, Case nos. 10-005141RP, 10-009516RP, 10-010105RP (Florida Division of Administrative Hearings 2010), <http://www.doah.state.fl.us/ALJ/searchDOAH> (last visited Nov. 9, 2018). The information about the *Etienne* litigation is drawn from the three cases filed with the Florida Division of Administrative Hearings (“DOAH”), each styled *Etienne v. Dep’t of Children and Family Servs.*, later consolidated into one proceeding under Case No. 10-005141RP.

³⁸ See, e.g. 7 U.S.C. § 2213 (2010). SNAP is funded through the U.S. Dept. of Agriculture and controlled primarily by USDA regulations. In Florida, SNAP is administered through the Florida Dept. of Children and Family Services.

³⁹ See Petition to Determine Invalidity of Access Rule 65A-1.400(1)(d), *Etienne v. Dep’t of Children and Family Servs.*, No. 10-005141RP (Florida Division of Administrative Hearings 2010), <http://www.doah.state.fl.us/ALJ/searchDOAH> (last visited Nov. 29, 2018).

⁴⁰ ACCESS Online Application System, CF-ES Form 2353, Mar 08 (promulgated under authority of Florida Administrative Procedure Rule 65A-1.400(1)(d)).

⁴¹ Petition to Determine Invalidity of Access Rule 65A-1.400(1)(d), *Etienne v. Dep’t of Children and Family Servs.*, No. 10-005141RP (July 9, 2010). Florida law provides several opportunities for those substantially affected by agency rule to challenge whether the agency exceeded the authority delegated by the legislature. Proposed rules may be challenged under FLA. STAT. § 120.56(2)-(3) (2018). “Invalid exercise of delegated legislative authority” is expressly defined by FLA. STAT. § 120.52(8) (2018), with particular reference to agency rulemaking.

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protected Etienne's rights,⁴² the Administrative Law Judge ("ALJ") continued the hearing.⁴³ On September 10, 2010, DCF reported rulemaking progress, having published the notice of proposed Rule 65A-1.205(1), and requested a further continuance.⁴⁴ Etienne objected because the parties fundamentally disagreed about the interpretation of key terms in the applicable federal regulations,⁴⁵ but the ALJ continued the final hearing.⁴⁶

Etienne separately challenged DCF's ACCESS CF-ES Form 2353, and that matter was consolidated with the original case.⁴⁷ After the parties filed competing motions for a summary final order,⁴⁸ Etienne filed a third petition challenging the published revisions to proposed Rule 65A-1.205(1), which was consolidated with the existing proceeding.⁴⁹ The ALJ scheduled the final evidentiary hearing for March 2011,⁵⁰ before hearing oral argument on the motions for summary final order on December 22, 2010. The consolidated cases were still pending when Governor Scott took office on January 4, 2011.⁵¹

B. Executive Order 11-01

Within an hour of taking office, Governor Scott issued "Executive Order Number 11-01 (Suspending Rulemaking and Establishing the Office

⁴² See FLA. STAT. §§ 120.56(1)(c), (1)(d) (2018). Administrative challenges to rules have strict statutory deadlines. In 2010, a petition complying with the statute was required to be assigned to an Administrative Law Judge ("ALJ") within 10 days of being filed with DOAH; the final evidentiary hearing was then required to be held within 30 days unless the ALJ granted a continuance agreed by the parties or for good cause shown. FLA. STAT. § 120.56(1)(c) (2010). The ALJ's final order was required to be rendered within 30 days from the hearing. FLA. STAT. § 120.56(1)(d) (2010). The present statutes require the same.

⁴³ Order Granting Continuance and Canceling Hearing, Etienne v. Dep't of Children and Family Servs., No. 10-005141RP (Aug. 2, 2010).

⁴⁴ Respondent's First Status Report, Etienne v. Dep't of Children and Family Servs., No. 10-005141RP (Sept. 10, 2010).

⁴⁵ Response of Petitioner, Etienne v. Dep't of Children and Family Servs. No. 10-005141RP (Sept. 16, 2010).

⁴⁶ Order Continuing Abeyance, Etienne v. Dep't of Children and Family Servs. No. 10-005141RP (Sept. 24, 2010).

⁴⁷ Petition to Determine Invalidity of Proposed rule 65A-1.400(1)(d), *supra* note 41. See also Order of Consolidation, Etienne v. Dep't of Children and Family Servs., Nos. 10-5141RX & 10-9516RP (Oct. 14, 2010). ACCESS CF-ES Form 2353, dated September 2010, was published in Rule 65A-1.400 and incorporated by reference in proposed Rule 65A-1.205(1).

⁴⁸ FLA. STAT. § 120.57(1)(h) (2011). Analogous to a motion for summary final judgment in federal or state court.

⁴⁹ Order Granting Motion for Consolidation and Continuance, Etienne v. Dep't of Children and Family Servs., Nos. 10-5141RX, 10-9516RP, 10-10105RP (Dec. 9, 2010).

⁵⁰ Order Re-Scheduling Hearing, Etienne v. Dep't of Children and Family Servs., Nos. 10-5141RX, 10-9516RP, 10-10105RP (Dec. 9, 2010).

⁵¹ See, e.g., Respondent's Motion for Continuance, Etienne v. Dep't of Children and Family Servs., Nos. 10-5141RX, 10-9516RP, 10-10105RP (Jan. 7, 2011).

of Fiscal Accountability and Regulatory Reform)” (“EO 11-01”).⁵² The order cited several principles as its foundation, including the governor’s responsibilities for planning and budget and ensuring faithful compliance with the laws.⁵³ EO 11-01 also stated “the administration of each state agency, unless otherwise provided in the Constitution, shall be placed by law under the direct supervision of the Governor” This inaccurately rendered the principle that the governor has constitutional authority to direct and supervise executive branch departments headed by his or her at-will appointees.⁵⁴

The purpose of EO 11-01 was to ensure all agencies performed their duties, including regulatory actions and rulemaking, efficiently and effectively, with the least adverse economic impact on regulated entities or the general public. In the order, the governor designated a section in the Executive Office of the Governor (“EOG”)⁵⁵ as the Office of Fiscal Accountability and Regulatory Reform (“OFARR”), to implement this purpose.⁵⁶ Among other responsibilities, the order charged OFARR with: (1) reviewing proposed or existing agency rules for compliance with the governor’s policy initiatives; (2) requiring agencies to assess the cost, benefit, risk, and effect on employment of each proposed rule; (3) identifying waste, fraud, or mismanagement in agency programs and recommending solutions; and (4) coordinating with other governmental accountability offices to identify rules disproportionately impacting small businesses.⁵⁷ The order required agencies “under the direction of the Governor” to designate a liaison to meet several responsibilities, including preparing annual regulatory plans to identify rules for amendment or repeal, and statutory mandates adversely impacting private businesses.⁵⁸

EO 11-01 required agencies under the governor’s direction to suspend pending rulemaking and submit all prospective rules for review and approval by the governor’s office.⁵⁹ The key was whether the agency was a

⁵² See Fla. Exec. Order No. 2011-01 (Jan. 4, 2011).

⁵³ FLA. CONST. art. IV, § 1(a). The clause stating this authority was not part of the original language adopted in 1968 but was amended into the text as part of Revision Number 1 submitted by the Taxation and Budget Reform Commission and approved by the voters on November 3, 1992.

⁵⁴ *Id.* at §§ 1(a), 6.

⁵⁵ FLA. STAT. § 14.201 (1979). This is an administrative unit of the executive branch for which the governor is denominated expressly as the agency head.

⁵⁶ Fla. Exec. Order No. 2011-01, § 3.

⁵⁷ *Id.*

⁵⁸ *Id.* at § 5.

⁵⁹ *Id.* at §§ 1, 4. The order also imposed a 90-day period during which agencies had to obtain OFARR approval before executing contracts exceeding \$1 million in value. *Id.* at § 6. Agencies not under the governor’s direction were requested to participate in the suspension and review processes established by the Order. *Id.* at § 2.

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“Governor’s agency” subject to his direction and supervision; the order drew a distinction from those agencies clearly placed under another constitutional entity. The use of this distinction is understandable based on the history and tradition of the constitutional offices and statutory precedent. When creating the Citizen’s Assistance Office within the EOG in 1979, the legislature authorized it to “[i]nvestigate . . . any administrative action of any state agency, the administration of which *is under the direct supervision of the Governor . . .*”⁶⁰ The Office of Suicide Prevention, administratively housed in DCF, receives information and support from “[a]gencies *under the control of the Governor* or the Governor and Cabinet . . .”⁶¹ Finally, the Chief Inspector General is responsible “for promoting accountability, integrity, and efficiency in the agencies *under the jurisdiction of the Governor.*”⁶² Each statute, while worded differently, conveys the same concept—the legislature recognizes the governor’s authority over a number of administrative agencies beyond the EOG.

EO 11-01 clearly conflicted with statutory law on one point: the governor ordered the secretary of state not to publish rulemaking notices unless directed by OFARR.⁶³ A major concern of the APA’s comprehensive 1974 revision was providing timely public notice of agency action and meetings of public bodies at which dispositive action may or would be taken. As of January 2011, the APA required the Department of State to publish weekly information pertaining to agency actions online and in print, including notices of public hearings, public meetings, rule development, filing of proposed rules, adoption of rules, and summaries of rule objections filed by the legislative Joint Administrative Procedures Committee.⁶⁴ As the statute allowed neither the governor nor the secretary of state⁶⁵ to prevent such publication, failure to publish could have subjected the department and the secretary to legal action.

C. Impact of EO 11-01 on the Etienne Litigation

In *Etienne* the ALJ’s ruling on the motions for summary final order was still pending on January 7, 2011, when DCF asserted two grounds to continue

⁶⁰ FLA. STAT. § 14.26(2)(a) (2011) (emphasis added).

⁶¹ FLA. STAT. § 14.2019(4) (2011) (emphasis added).

⁶² FLA. STAT. § 14.32(1) (2011) (emphasis added).

⁶³ This is inconsistent with FLA. STAT. §§ 120.55(1)(b), (2) (2011). The order could have been executed in compliance with law through OFARR approving the mandatory weekly publication.

⁶⁴ In the 2012 Session the legislature revised the publication requirement. The electronic format is now mandatory, and the publication is called the Florida Administrative Register. 2012 Fla. Laws 63, § 2; *see also* FLA. STAT. § 120.55 (2018).

⁶⁵ *See* FLA. STAT. § 20.10(1) (2011). The Secretary of State is the head of the Department of State.

the final hearing scheduled for March. First, the deadline for filing proposed changes to the disputed form by the USDA was March 23, and DCF would be required to implement the resulting decision. DCF argued waiting for final guidance from the USDA was reasonable, and there was no need for a final order prior to that time.⁶⁶ Second, EO 11-01 suspended current rulemaking, and any changes to the form required by the USDA would also require OFARR approval before the revised form could be adopted.⁶⁷

Etienne opposed a continuance on several grounds. She argued the anticipated USDA review and comment were not relevant to and could not moot the pending challenge, which would stand or fall on its own merits.⁶⁸ She alleged DCF's repeated statements of intent to commence rulemaking at some unspecified future time were not in themselves good cause for a continuance.⁶⁹ Further, EO 11-01 had no bearing on the consolidated cases because DCF demonstrated no attempt to comply with the "seemingly innocuous restriction" of requesting OFARR approval to commence rulemaking.⁷⁰ Finally, Etienne argued the governor had no power to suspend rulemaking under the APA, and EO 11-01 violated the constitutional separation of powers by encroaching on the legislative authority exercised by adopting the APA.⁷¹

On January 24, 2011, the ALJ abated the proceedings solely by concluding that EO 11-01 suspended rulemaking.⁷² The ALJ postponed further action in the matter until OFARR reviewed the proposed form and DCF could proceed with rulemaking.⁷³ A subsequent order on April 20, 2011, clearly stated the sole basis for the original abatement was to accommodate the OFARR review.⁷⁴ Etienne appealed this non-final order, raising, among other points, her argument that EO 11-01 unconstitutionally suspended certain agency rulemaking, and requested the appellate court lift

⁶⁶ Respondent's Motion for Continuance, *Etienne v. Dep't of Children and Family Servs.*, *supra* note 51.

⁶⁷ *Id.*

⁶⁸ Petitioner's Response to Respondent's Motion for Continuance at 2–3, *Etienne v. Dep't of Children and Family Servs.*, Nos. 10-5141RX, 10-9516RP, 10-10105RP (Jan. 12, 2011).

⁶⁹ *Id.* at 4.

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 5–6.

⁷² Order Canceling Hearing and Placing Cases in Abeyance, *Etienne v. Dep't of Children and Family Servs.*, Nos. 10-5141RX, 10-9516RP, 10-10105RP (Jan. 24, 2011). The ALJ did note the USDA preliminary review found the proposed revised form still did not comply with federal regulations.

⁷³ *Id.*

⁷⁴ Order Continuing Case in Abeyance and Requiring Status Report, *Etienne v. Dep't of Children and Family Servs.*, Nos. 10-5141RX, 10-9516RP, 10-10105RP (Apr. 20, 2011).

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the abatement.⁷⁵ DCF completed the OFARR review process and notified the ALJ that the conditions of the abatement were met.⁷⁶ The ALJ noted the abatement could not be lifted while the interlocutory appeal on that issue was pending,⁷⁷ and the appellate court temporarily relinquished jurisdiction so the ALJ could act.⁷⁸ Ultimately, all three cases were dismissed as moot once DCF ceased using the challenged form.⁷⁹

III. THE ISSUES: PRESENTATION, ARGUMENT, AND ANALYSIS

A. Point: *Whiley and Amici*

Like Etienne, Whiley received food purchase assistance through SNAP, and she periodically was required to recertify her need for continuing benefits.⁸⁰ Whiley preferred to use the available online application.⁸¹ She alleged the online form required more than minimum information to initiate the process, in violation of USDA policy,⁸² similarly being argued in the *Etienne* litigation. Rather than join the pending administrative challenges to the very same rulemaking or bring one of the actions available to try the facts fully and obtain direct relief for the alleged violation of her rights,⁸³ Whiley petitioned the Florida Supreme Court to issue a writ of *quo warranto* against the governor.⁸⁴

⁷⁵ Administrative Petition to Review Non-Final Agency Action, *Etienne v. Dep't of Children and Family Servs.*, No. 3D11-461 (Feb. 23, 2011).

⁷⁶ Notice that Condition of Order Cancelling Hearing and Placing Cases in Abeyance has been Met and Motion for a Status Conference, *Etienne v. Dep't of Children and Family Servs.*, Nos. 10-5141RX, 10-9516RP, 10-10105RP (Apr. 13, 2011).

⁷⁷ Order Continuing Case in Abeyance and Requiring Status Report, *supra* note 74.

⁷⁸ Order Granting Temporary Relinquishment on Court's Own Motion, No. 3D11-461 (May 10, 2011). The ALJ lifted the abatement by order dated May 25, 2011.

⁷⁹ Final Order of Dismissal, *Etienne v. Dep't of Children and Family Servs.*, Nos. 10-5141RX, 10-9516RP, 10-10105RP (July 21, 2011).

⁸⁰ 65A FLA. ADMIN. CODE R. 1.205(2) (2010).

⁸¹ Affidavit of Rosalie Whiley incorporated into Appendix to Petition for Writ of Quo Warranto, *Whiley v. Scott*, No. SC11-592 (March 28, 2011).

⁸² Petition for Writ of Quo Warranto, *supra* note 4, at 6.

⁸³ For example, Whiley could have alleged the actions of DCF violated her rights as secured by the federal laws governing SNAP and brought an action for declaratory and injunctive relief under 42 U.S.C. § 1983 in U.S. District Court. 28 U.S.C. § 1331 (2010). Alternatively, she could have brought such an action in the applicable Florida Circuit Court, as Florida Circuit Courts have all original jurisdiction not otherwise vested by law in the local county courts. FLA. CONST. art. V, § 5(b); FLA. STAT. § 26.021. Finally, she could have sought declaratory and injunctive relief under FLA. STAT. § 86.011.

⁸⁴ Petition for Writ of Quo Warranto, *supra* note 4. The Florida Supreme Court has developed the use of proceedings in *quo warranto* to test not only whether an individual properly occupies a public office, but also whether an officer or agency exercised a proper right or power. *See Florida House of Representatives v. Crist*, 999 So. 2d 601 (Fla. 2008); *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989).

The petition alleged that EO 11-01 improperly suspended administrative rulemaking because the governor had no such authority.⁸⁵ Expanding on the point asserted in *Etienne*, counsel for Whiley conflated narrow readings of two constitutional principles to argue the governor had no authority to direct, supervise, or control at-will appointed agency heads in the conduct of administrative rulemaking.⁸⁶ First, the petition correctly stated rulemaking is a legislative function and may be delegated to executive branch agencies (hence, to the officials of such agencies) only under specific restrictions and guidelines.⁸⁷ However, Whiley went beyond the concept of a strict separation of powers in the Florida Constitution by arguing all actions pertaining to agency rulemaking, from initial conception to final adoption, were solely controlled by the legislature as an exclusively legislative power.⁸⁸ She argued the governor had only such power to direct, supervise, or control executive branch agencies and their exercise of delegated rulemaking authority as was prescribed by statute, and that the legislature made rulemaking the exclusive prerogative of the agency heads. Because they were required to exercise this authority independently, the governor could not order any suspension of rulemaking.⁸⁹

Whiley's theory hinged on the constitutional phrase "or an officer or board appointed by and serving at the pleasure of the governor"⁹⁰ The word "or" at the beginning of the constitutional clause could be read as a conjunctive, grammatically completing the list of officials from which the legislature could choose one alternative to directly administer a particular agency. This reading is consistent with Florida's historical understanding and application of executive power, with prior precedent of the Supreme Court, and with the text of the Florida Constitution. However, citing AGO 81-49, Whiley applied a disjunctive reading and argued the Constitution authorized the legislature to apportion all executive branch power over a particular agency function to one of the denominated officials, excluding any gubernatorial authority over the agency (with the exception of removing those appointees serving at the governor's pleasure).⁹¹ This novel interpretation meant the legislature was authorized to create a category of state officials who: (1) were appointed by the governor, not elected by the people; (2) served at the pleasure of the governor; (3) had the power to control the functions of their respective agencies without gubernatorial

⁸⁵ Petition for Writ of Quo Warranto, *supra* note 4, at 3.

⁸⁶ *Id.* at 1–2, 15–16.

⁸⁷ *Id.* at 17.

⁸⁸ *Id.* at 12.

⁸⁹ *Id.* at 11–12.

⁹⁰ FLA. CONST. art. IV, § 6.

⁹¹ Petition for Writ of Quo Warranto, *supra* note 4, at 11, 15–16.

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direction or supervision; and thus (4) were not amenable to gubernatorial direction to follow a particular policy when implementing the laws within the jurisdiction of their particular agencies. By implication, Whiley posited the legislature statutorily allotted certain executive branch functions beyond the direction, supervision, or control of the governor and every elected officer. The governor's authority to remove an at-will appointee therefore was irrelevant to the supervision and control of a program placed under such an agency head. Whiley acknowledged that Article IV, section 1(a), vested supreme executive power in the governor but dismissed its relevance by arguing this section conferred neither the power to suspend the operation of a statute nor the authority of direct control over agency rulemaking, absent an express grant from the legislature.⁹² Essentially, Whiley argued that in delegating rulemaking authority the legislature co-opted the assigned official to the exclusion of the executive power vested in the governor.

The petition included some collateral issues. She alleged the designation of OFARR in EO 11-01 created a new state agency to which the governor transferred the rulemaking authority statutorily vested in the agency heads.⁹³ A plain reading of the order showed the governor acted under his authority to designate an operational function within the EOG and to delegate the oversight necessary to supervise and control certain administrative agency functions. Whiley's argument was spurious. The name of the office was thus irrelevant insofar as it denoted those employees of EOG tasked with duties in support of the governor's exercise of an oversight function.⁹⁴

Whiley also argued that requiring OFARR approval, before "governor-directed" agencies could proceed with rulemaking, effectively transferred the ultimate decision to propose and adopt rules to OFARR.⁹⁵ She contended this violated the separation of powers and deprived the public of the procedural safeguards in the APA.⁹⁶ This issue is interesting because she began by correctly stating part of EO 11-01 improperly attempted to abrogate the statute by ordering a suspension of all rulemaking publication, but then speculated the APA would be flagrantly violated if administrative agencies complied with the order.⁹⁷ Whiley failed to show EO 11-01 actually compelled or encouraged any agency to violate the APA.⁹⁸ She could only

⁹² *Id.* at 11–12.

⁹³ *Id.* at 2–5, 16, 18, 21.

⁹⁴ Just as easily, the Governor could have called this office "Bob" without any change in its assigned function.

⁹⁵ Petition for Writ of Quo Warranto, *supra* note 4, at 21–24.

⁹⁶ *Id.* at 14–18.

⁹⁷ *Id.* at 26.

⁹⁸ The exception previously noted affected publication of notices in the Florida Administrative Weekly, a statutory requirement that could have been satisfied by timely

show where agencies relied on EO 11-01 as justifying their own suspensions of rulemaking.⁹⁹

This argument demonstrated the irreconcilable paradox in Whiley's position. If the speculative violations of the APA could occur only because agencies *chose* to comply with EO 11-01, the governor had no inherent authority to order any suspension and the agencies were free to *choose* to proceed with the statutory requirements of the APA. Thus, the petition was not well-taken because the proper remedy was against the DCF officials who declined to conduct timely rulemaking.¹⁰⁰ However, if the governor's directive bound agencies headed by at-will gubernatorial appointees, whether issued as a formal executive order or communicated less formally, the petition in *quo warranto* was not well-taken because the governor acted according to a valid power. The proper remedy then would be an action in circuit court challenging the suspension.¹⁰¹

After various *amici* filed briefs and the governor filed his response, Whiley's amended reply attempted to reinforce her major argument through an inverted interpretation of the Florida Constitution. She asserted the governor's powers were limited to those expressly "spelled out in the Constitution or statutes," and, despite the express vesting of executive power in Article IV, section 1(a), the governor's power over state agencies was "limited to whatever the Constitution and the statutes grant him."¹⁰² This construction directly conflicted with the clear language and intent of Article IV, section 1(a), vesting the people's executive power in the governor, subject to express limitations, rather than the inverse—a grant only of specifically expressed powers. Whiley's appeal to history—"the Governor has taken extraordinary action beyond that of any previous governor and an extraordinary writ is necessary"¹⁰³—even if allowed as rhetorical license, cannot substantiate such hyperbole when considered in light of Florida's historical implementation of executive power.¹⁰⁴

The court granted leave to file briefs as *amicus curiae* to three entities supporting Whiley.¹⁰⁵ Reiterating her primary points, each *amicus*

OFARR action.

⁹⁹ Petition for Writ of Quo Warranto, *supra* note 4, at 27–28.

¹⁰⁰ See, e.g., FLA. STAT. § 120.54(1)(a) (requiring an agency to adopt a rule "as soon as feasible and practicable."); see also FLA. STAT. § 120.54(3)(a) (expressly requiring the agency head to approve providing the statutory notice of rulemaking.).

¹⁰¹ See *Martinez v. Martinez*, 545 So. 2d 1338, 1339 (Fla. 1989). Other issues raised in the original petition were derivative or duplicative of the main arguments considered by the court.

¹⁰² Petitioner's Amended Reply, at 4, 15, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC11-592).

¹⁰³ *Id.* at 30.

¹⁰⁴ Miller, *Direction and Supervision*, *supra* note 17, at 349–351.

¹⁰⁵ Brief for Florida Audubon Society as Amicus Curiae Supporting Petitioner, *Whiley v.*

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advocated the analysis of AGO 81-49 and argued the placing of administrative departments under appointed agency heads, pursuant to Article IV, section 6, precluded the governor from exercising any supervision or control over the rulemaking functions of those agencies.¹⁰⁶ Each *amicus* argued EO 11-01 was an attempt to usurp the rulemaking authority delegated by the legislature, violating the separation of powers doctrine.¹⁰⁷

The Florida Audubon Society argued the governor's supreme executive power did not inherently include the authority to control all executive agencies, because Article IV, section 1(a), expressly authorized the governor to "require information in writing from all executive or administrative state, county or municipal officers upon any subject relating to the duties of their respective offices."¹⁰⁸ If the governor had inherent constitutional power to direct executive branch officers, Florida Audubon posited there would have been no need to spell out this particular power.¹⁰⁹ Therefore, the vested executive power did not imply any additional authority over executive agencies beyond that specified in the Constitution or established by statute.¹¹⁰ This argument fails on a clear reading of the entire text of Article IV, section 1(a).

The Constitution authorizes the governor to require written information from all officers and entities of the executive branch, including separately elected officers such as the Commissioner of Agriculture, separate constitutional entities such as the Fish and Wildlife Conservation Commission, and executives of county or municipal governments.¹¹¹ Because the Constitution places these officers and entities outside the governor's general authority, such express exception to this alternate allocation of executive power was necessary for the governor to *require* all

Scott, 79 So. 3d 702 (Fla. 2011) (No. SC11-592); Brief for Disability Rights Florida as Amicus Curiae Supporting Petitioner, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC11-592); Brief for Academy of Florida Elder Law Attorneys and the Elder Law Section of the Florida Bar as Amicus Curiae Supporting Petitioner, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC11-592).

¹⁰⁶ Brief for Florida Audubon Society as Amicus Curiae Supporting Petitioner, *supra* note 105, at 6; Brief for Disability Rights Florida as Amicus Curiae Supporting Petitioner, *supra* note 105, at 4-5; Brief for Academy of Florida Elder Law Attorneys and the Elder Law Section of the Florida Bar as Amicus Curiae Supporting Petitioner, *supra* note 105, at 3-4.

¹⁰⁷ Brief for Florida Audubon Society as Amicus Curiae Supporting Petitioner, *supra* note 105, at 10; Brief for Disability Rights Florida as Amicus Curiae Supporting Petitioner, *supra* note 105, at 3-5; Brief for Academy of Florida Elder Law Attorneys and the Elder Law Section of the Florida Bar as Amicus Curiae Supporting Petitioner, *supra* note 105, at 2-3.

¹⁰⁸ Brief for Florida Audubon Society as Amicus Curiae Supporting Petitioner, *supra* note 105, at 6-7.

¹⁰⁹ *Id.* at 6.

¹¹⁰ *Id.* at 6-7.

¹¹¹ See FLA. CONST. art. IV, §§ 4(d), 9; FLA. CONST. art. VIII, §§ 1, 2.

such officers to provide written information. Granting the governor authority over other officers does not imply a lack of inherent authority over the governor's own at-will subordinate appointees.

Another *amicus* argued policy considerations, some outside the scope of a *quo warranto* petition.¹¹² Disability Rights Florida argued the governor should not be “allowed” to “exercise ultimate discretion” over rulemaking because that would presume a subject matter expertise he did not possess.¹¹³ The flaw in this argument is that Article IV sets no criteria or qualifications for individuals chosen to head agencies or serve on licensing boards. Where particular expertise is necessary, both the Constitution and statutes expressly state the required qualifications.¹¹⁴

B. Counterpoint: The Governor and The Attorney General

1. Executive Order 11-72

The governor filed a formal response to the petition on May 12, 2011, but the actual response began more than a month before with the promulgation of Executive Order 11-72 (“EO 11-72”),¹¹⁵ expressly superseding EO 11-01. The preamble of EO 11-72 incorporated many of the policy statements set out in EO 11-01, recited OFARR's achievements, and reiterated key provisions of Article IV, sections 1(a) and 6.¹¹⁶ EO 11-72 differed by eliminating the suspension of both agency rulemaking and publication by the Department of State.¹¹⁷ The order confirmed the utility of OFARR and continued its delegation of authority to review and approve prospective rules, without renewing its earlier duties to investigate agency

¹¹² Brief for Disability Rights Florida as Amicus Curiae Supporting Petitioner, *supra* note 105, at 7–8.

¹¹³ *Id.* at 8.

¹¹⁴ The attorney general must meet the same basic constitutional requirements for office as the governor and other cabinet members but also must be a licensed attorney in Florida for the 5 years preceding election to office. FLA. CONST. art. IV, § 6. When necessary, the legislature expressly states the specific qualifications to head certain agencies, such as the director of the Office of Insurance Regulation. FLA. STAT. § 20.121(3)(d) (2018).

¹¹⁵ See Fla. Exec. Order No. 2011-72 (April 8, 2011).

¹¹⁶ FLA. CONST. art. IV, §§ 1(a), 6.

¹¹⁷ As noted in the discussion of EO 11-01, part of that order would have required the Secretary of State to violate the clear requirements of FLA. STAT. § 120.55 (2010). The Department of State in fact published the Florida Administrative Weekly on January 7, 2011. Due to the timing of publication requirements, that publication was already in process when EO 11-01 was issued and could not be “suspended.” The department complied with the order and did not publish an issue on January 14, 2011. Publication resumed on January 21, 2011, apparently because the department had an opportunity to confer with the governor's office and clarify the statute's mandate on weekly publication. See *Florida Administrative Code and Florida Administrative Register*, FLA. DEPT. OF STATE (last visited Nov. 27, 2018), <https://www.flrules.org/bigDoc/Default.asp?Year=2011>.

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fraud and mismanagement.¹¹⁸ The order continued to call for a comprehensive review of all existing rules and to repeal those that were duplicative, unnecessary, or obsolete.¹¹⁹

Because the governor issued EO 11-72 after Whiley filed her petition, the order's preamble stated the "administering, planning, and budgeting for the State is inextricably intertwined with the agency rulemaking process," anticipating the court's central focus on the role of gubernatorial oversight of agency rulemaking.¹²⁰ This finding foreshadowed the governor's central argument before the court: to give full effect to the plain language in Article IV, the governor has broad authority to meet his responsibilities, and this authority inherently resides in the comprehensive, plenary executive power vested by the people.¹²¹ Unless a facet of executive authority is expressly placed by the Constitution in another official or entity, the full executive power remains with the governor pursuant to Article IV, section 1(a). Under this interpretation, Article IV, section 6, authorizes the legislature to organize the executive branch in a standardized fashion for *management purposes*, removing the overarching *organizational* authority from the governor and cabinet. However, the section does not authorize the legislature to apportion executive *power* in any manner that dilutes the authority expressly vested in the constitutional executive officers.

2. The Governor's Response to the Petition

Counsel for the governor faced a classic dilemma in crafting the response. On one hand, the historical understanding and implementation of executive branch power in Florida, as well as other states and the federal government, clearly refuted Whiley's argument that the governor lacked authority over appointed at-will agency heads, other than the power of removal.¹²² There was no basis for the case and apparently no advantage for the governor to acquiesce and participate in the proceeding. In fact, addressing the merits of the petition could arguably be deemed as seeking an advisory opinion from the Supreme Court about the governor's constitutional powers.¹²³ On the other hand, not participating and opposing the petition risked the court issuing a writ on arguably invalid grounds, even though the court had neither asserted personal jurisdiction over the

¹¹⁸ Fla. Exec. Order No. 2011-72, *supra* note 115, at § 3.

¹¹⁹ *Id.* at § 6.

¹²⁰ *Id.* at § 2.

¹²¹ Response to Petition for Writ of Quo Warranto, at 35, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC11-592).

¹²² *Id.* at 35–50.

¹²³ FLA. CONST. art. IV, § 1(c) ("The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties.").

governor¹²⁴ nor possessed the means to enforce any resulting order. Ignoring such a writ could precipitate a public opinion maelstrom fueled by incendiary media commentary, since the decision would likely be issued in the summer, a traditionally slow news time in Florida save for the occasional tropical cyclonic event. Choosing to respond, the governor raised the proper and valid historical, precedential, and constitutional grounds to dismiss the petition but also overextended some of those very points.¹²⁵

The response argued three overarching themes. First, relief through *quo warranto* was not appropriate because Whiley had legal remedies readily available if there was a true violation of the APA.¹²⁶ Many of her arguments or those by her *amici* were based on hypothetical transgressions of the APA, not actual facts.¹²⁷ Their arguments about OFARR only amounted to policy challenges for which the APA itself provided ample avenues for relief, far from showing a constitutional crisis precipitated by EO 11-01.¹²⁸ Second, challenging OFARR as the vehicle through which the governor implemented a program of administrative oversight, did not raise a separation of powers issue because the exercise of *intra*-branch authority did not create an *inter*-branch conflict.¹²⁹ Each valid legislative delegation of rulemaking authority necessarily required the executive branch to exercise some discretion in adopting rules.¹³⁰ Properly exercising such discretion incorporated the fact that appointed agency heads were not autonomous but deferred to the guidance and policies of the governor. Third, whether by executive order or informal communication, the constitutional powers vested and duties imposed under Article IV provided ample authority for gubernatorial oversight of certain executive departments, as demonstrated by Florida's long history of gubernatorial direction of agencies and rulemaking.¹³¹

Arguing that debatable policy choices are no basis for an exercise of *quo warranto* jurisdiction, the governor characterized the petition as nothing

¹²⁴ See Order-Response/Reply Requested (Spec. Issue), *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC11-592). Rather than issue a summons or other attempt to compel the appearance of the governor, on April 4, 2011, the Supreme Court issued a request for the governor to respond to the petition and briefs of *amicus* by April 25, 2011.

¹²⁵ Response to Petition for Writ of Quo Warranto, *supra* note 121.

¹²⁶ *Id.* at 24–25.

¹²⁷ *Id.* at 12–14; Brief for Florida Audubon Society as Amicus Curiae Supporting Petitioner, *supra* note 105, at 2, 11–13; Brief for Disability Rights Florida as Amicus Curiae Supporting Petitioner, *supra* note 105, at 8–12; Brief for Academy of Florida Elder Law Attorneys and the Elder Law Section of the Florida Bar as Amicus Curiae Supporting Petitioner, *supra* note 105, at 4–6.

¹²⁸ Response to Petition for Writ of Quo Warranto, *supra* note 121, at 28–29.

¹²⁹ *Id.* at 27.

¹³⁰ *Id.* at 26.

¹³¹ *Id.* at 30–46.

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more than a mere collection of alleged violations of the APA for which the Act itself provided complete process and remedies.¹³² In fact, the APA does not even apply to executive orders issued pursuant to the governor's constitutional authority.¹³³ However, this argument left open the question of how to resolve issues of legislative authority under Article IV, section 6. The remedies available under the APA could not address whether a statute, which placed a department under the direct administration of a non-elected agency head appointed by and serving at the pleasure of the governor, made that bureaucrat constitutionally autonomous from any gubernatorial direction and supervision until removed from office. Questions about the governor's constitutional power are outside the scope of the APA and cannot be adjudicated in an administrative challenge.¹³⁴ Conversely, a declaratory judgment action filed in the appropriate Florida Circuit Court could appropriately challenge any rulemaking done pursuant to allegedly unauthorized gubernatorial direction or an act taken in contravention of such direction.¹³⁵

On the merits, the governor stated the creation of OFARR within the EOG did not violate the separation of powers doctrine because OFARR was not a new administrative agency.¹³⁶ Derived solely from the governor's authority over his own staff, OFARR exercised no power expressly allotted by the Constitution or delegated by statute.¹³⁷ OFARR's review and approval of certain rulemaking decisions did not improperly revise the APA, but was instead a structured internal process chosen by the governor to supervise those agencies headed by appointees serving at his pleasure.¹³⁸ OFARR's supervision of agency rulemaking was derived only from the governor's existing authority.¹³⁹ This "intra-branch authority" to direct agency heads in their duties—including administrative rulemaking—in turn was rooted in the governor's power to remove certain agency heads at will. The "power to remove is the power to control."¹⁴⁰

Each agency authorized to implement substantive law through

¹³² *Id.* at 25.

¹³³ *See* FLA. STAT. § 120.52(1) (2016).

¹³⁴ *Myers v. Hawkins*, 362 So. 2d 926, 928 (Fla. 1978).

¹³⁵ FLA. STAT. § 86.011 (2016). The clear advantages of such a proceeding include not only the ability to develop a complete factual record but also opportunity for advocates to fully develop the legal arguments before the trial court, with further refinement in the Florida intermediate appellate courts. Such refinement of the arguments and the record would better assist the Supreme Court in resolving any remaining issues requiring its attention.

¹³⁶ Response to Petition for Writ of Quo Warranto, *supra* note 121, at 6, 31.

¹³⁷ *Id.* at 6–8, 30–32.

¹³⁸ *Id.* at 32–33, 50–56.

¹³⁹ *Id.* at 21–23.

¹⁴⁰ *Id.* at 33.

rulemaking must comply with the express limitations and guidance in the governing statute, using the process required by the APA.¹⁴¹ Within these statutory parameters, the agency makes a number of policy choices before rulemaking is complete, from initial internal decisions about the wording of the proposed rule through deciding whether to revise the text before final adoption. Some rulemaking tasks must be done only by each agency head,¹⁴² but this procedural requirement does not alter the relationship between the governor and the agency head. Contrary to Whiley's contention, at-will appointees are not autonomous from gubernatorial control. With the sole power to remove appointed agency heads serving at his pleasure, the governor has the authority and responsibility to direct these appointees about the policy choices that would result in retention or removal.¹⁴³ By ignoring this principle, Whiley and supportive *amici* effectively read Article IV, section 1(a) out of the Constitution.

The governor argued that Whiley's own rationale proved the petition should be denied, noting that if his order actually controlled the exercise of rulemaking authority by at-will appointed agency heads, the case was moot, and the court could not issue the writ because the governor exercised a valid constitutional power.¹⁴⁴ However, assuming *arguendo* the agency heads were autonomous, the petition was also moot because the agency heads could choose to ignore the order and avoid the adverse impacts speculated by Whiley.¹⁴⁵ If agency heads voluntarily choose to comply with the executive order and submit rulemaking decisions to the OFARR process, any violations of the APA flowed from that choice, making the agency heads the proper parties in any challenge.¹⁴⁶

Additionally, arguing against the merits of the petition, the governor referred to the numerous executive orders by prior Florida governors expressly directing and controlling agency rulemaking, as evidence of the historical understanding of the authority vested through the express language of Article IV, section 1.¹⁴⁷ In conjunction with the other terms in section

¹⁴¹ FLA. STAT. § 120.536(1) (2018).

¹⁴² See FLA. STAT. § 120.54(1)(k) (2018). For example, the agency head must approve the notice of proposed rule required by FLA. STAT. § 120.54(3)(a)1.

¹⁴³ Response to Petition for Writ of Quo Warranto, *supra* note 121, at 32 n. 13, 58.

¹⁴⁴ *Id.* at 30–32.

¹⁴⁵ The governor's argument tacitly acknowledged that an executive order does not have the force of law, unlike a properly enacted bill which the governor approves. See FLA. CONST. art. III, §§ 6–8. The legislature by statute has authorized certain declarations of the governor as having the force of law. See, e.g., FLA. STAT. § 14.021 (2018) (promulgation and enforcement of rules and regulations during a lawfully declared emergency); § 501.160(2) (2018) (selling essential commodities for an unconscionable price during a declared state of emergency, or “price gouging”).

¹⁴⁶ Response to Petition for Writ of Quo Warranto, *supra* note 121, at 32 n.13.

¹⁴⁷ *Id.* at 41–46.

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1(a), the duty to ensure faithful execution of the laws implied a broad scope for the executive power because the court's own precedents found proper performance of this duty was essential to the orderly conduct of government.¹⁴⁸ The governor asserted this interpretation aligned with the positions of the federal government and the majority of states.¹⁴⁹ Pointing to the statute that created the Chief Inspector General's duties in the EOG, the governor's argument noted the legislature recognized the authority of the governor over those executive branch agencies for which direct administration was placed in an at-will appointee.¹⁵⁰ Finally, the governor pointed out the inconsistency of Whiley and the *amici* urging their position to preserve public reliance on agency head "expertise" in formulating agency rules—an expertise the governor did not have—while concurrently arguing against any executive branch discretion in implementing delegated rulemaking.¹⁵¹ As the governor established earlier in his response, only exercising the discretion inherent in delegated rulemaking authority demonstrates this "expertise."¹⁵²

The governor's argument correctly applied the historical interpretation of executive power vested by the Florida Constitution. Reaching as far back as Hamilton's observation on the necessity for vigor in the executive branch,¹⁵³ and Madison's summation about the centrality of "appointing, overseeing, and controlling those who execute the laws,"¹⁵⁴ the governor's response argued the historical separation of powers in American constitutionalism continued to inform interpretations about the nature and extent of executive power.¹⁵⁵ The governor argued that the longstanding practices of chief executives over time became part of the structure of government and a meaningful interpretation of the vested executive power.¹⁵⁶ Building on this premise, the governor read the provisions of Article IV, sections 1 and 6 together. The governor applied the court's precedents on constitutional interpretation to establish the clear and orderly authority for directing and supervising the exercise of delegated rulemaking

¹⁴⁸ *Id.* at 38–39 (citing *In re Advisory Opinion to the Governor*, 290 So. 2d 473, 475 (Fla. 1974); *Finch v. Fitzpatrick*, 254 So. 2d 203, 204 (Fla. 1971)).

¹⁴⁹ *Id.* at 46, 49.

¹⁵⁰ FLA. STAT. § 14.32(2)(d), (i) (2011) (authorizing the Chief Inspector General both to examine records of "any agency the administration of which is under the direct supervision of the Governor," and to act as liaison and monitor of inspectors general "in the agencies under the Governor's jurisdiction.").

¹⁵¹ Response to Petition for Writ of Quo Warranto, *supra* note 121, at 64.

¹⁵² *Id.* at 64.

¹⁵³ *Id.* at 65 (quoting from THE FEDERALIST No. 70 (Alexander Hamilton)).

¹⁵⁴ *Id.* at 37 (quoting 1 ANNALS OF CONGRESS 481 (1789)).

¹⁵⁵ *Id.* at 53–54.

¹⁵⁶ *Id.* at 46 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

authority by at-will appointees.¹⁵⁷ Thus, the governor answered the petition by demonstrating the power he had in the first place.¹⁵⁸

The court declined to dismiss the petition on jurisdictional grounds or in the interest of judicial prudence. Even so, the governor could have obviated any further discussion about deferring to agency expertise by noting the sparing use of express qualifications for officials in both the Constitution and statute. The Constitution clearly states when “special expertise” is a prerequisite to take office,¹⁵⁹ and the legislature expressly limits certain agency heads to particular qualifications.¹⁶⁰ As most offices do not require particular expertise or training in a field prior to an official’s election or appointment, Whiley and her *amici*’s reliance on this point was misplaced and of little relevance.

3. The Attorney General’s Amicus Curiae Brief Supporting the Governor

The Attorney General’s *amicus* brief focused on the state’s substantial interest in preserving the proper authority over executive branch agencies, vested in elected officers who are directly accountable to the voters, refuting Whiley’s theory of independently-operating agency heads.¹⁶¹ The Attorney General argued the unique facts underlying AGO 81-49 rendered its rationale unpersuasive in this case.¹⁶² AGO 81-49 failed to address the constitutional vesting of supreme executive power in the governor in the context of the governor’s responsibility to supervise executive branch agencies.¹⁶³ Further, subsequent developments in the Constitution and the law made this opinion irrelevant.¹⁶⁴

The *amicus* brief complemented the governor’s argument—the powers vested and duties imposed in Article IV, section 1, establish the broad scope of the executive power to control administrative agencies headed by at-will

¹⁵⁷ Response to Petition for Writ of Quo Warranto, *supra* note 121, at 32–41.

¹⁵⁸ *Id.*

¹⁵⁹ FLA. CONST. art. IV, § 5(b) (providing that the Attorney General must be a member of the Florida Bar for at least 5 years preceding election to office, but suggesting there is no similar requirement for skill or training imposed on the Governor, Chief Financial Officer, or Commissioner of Agriculture.).

¹⁶⁰ See FLA. STAT. § 20.43(2)(a) (2018) (stating that the State Surgeon General must be a licensed doctor with “advanced training or extensive experience” in public health administration); see also FLA. STAT. § 20.23(1)(b) (2018) (specific education and experience relevant to transportation systems is required for the Secretary of the Department of Transportation).

¹⁶¹ Amicus Brief of the Attorney General in Support of Respondent, *supra* note 35, at 1.

¹⁶² *Id.* at 15.

¹⁶³ *Id.* at 16.

¹⁶⁴ *Id.* at 17.

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gubernatorial appointees.¹⁶⁵ An interpretation finding that these appointees exercise authority, independent from any direction of the governor, fails to comport with the constitutional principles establishing political accountability in the governor for the actions of administrative agencies.¹⁶⁶ Such an interpretation implies a diffusion of executive power beyond the limitations expressly stated in the Constitution, precluding the ability of the voters to hold *anyone* accountable for agency action.¹⁶⁷ Because the governor was acting under proper constitutional authority, absent a clear violation of law, separation of powers principles called for judicial deference, and the court was urged to refrain from reviewing and second-guessing the governor's use of OFARR to implement his policies regarding agency rulemaking.¹⁶⁸

Interestingly, the Attorney General flatly stated reliance on AGO 81-49 was "unwarranted," and argued three points, all but receding from the previously-dormant opinion.¹⁶⁹ First, the facts of the opinion were inapposite to the pending petition. The Attorney General's un rebutted summary of those facts showed that the governor in 1981 sought to exercise complete control over every aspect of agency compliance, implementation, and enforcement of the Coastal Management Program, effectively co-opting the entire rulemaking function.¹⁷⁰ In contrast, EO 11-01 imposed a clearly restrained supervision of rulemaking done by gubernatorial appointees;¹⁷¹ there was no usurpation of the requirements in the APA. Second, in 1992, the people increased the scope of the governor's authority over state agencies by amending article IV, section 1(a), to add the final clause: "[t]he governor shall be the chief administrative officer of the state responsible for the planning and budgeting for the state . . .," creating a different constitutional context that effectively distinguished AGO 81-49.¹⁷² Third, statutory changes subsequent to AGO 81-49 further limited any relevance of the opinion.¹⁷³ In short, the Attorney General argued AGO 81-49 was an anachronism with no current utility.¹⁷⁴

¹⁶⁵ *Id.* at 4–8; see Response to Petition for Writ of Quo Warranto, *supra* note 121, at 35–36, 38–41.

¹⁶⁶ Amicus Brief of the Attorney General, *supra* note 35, at 5.

¹⁶⁷ *Id.* at 6.

¹⁶⁸ *Id.* at 10–11.

¹⁶⁹ *Id.* at 15–17.

¹⁷⁰ *Id.* at 15.

¹⁷¹ *Id.* at 15–16.

¹⁷² Amicus Brief of the Attorney General, *supra* note 35, at 16–17.

¹⁷³ *Id.* at 16–17. See FLA. STAT. § 20.051 (2018), created by 1994 Fla. Laws 235 § 5.

¹⁷⁴ Amicus Brief of the Attorney General, *supra* note 35, at 17.

IV. THE MAJORITY OPINION AND THE DISSENTS

Five Justices¹⁷⁵ concurred in a per curiam opinion granting the petition but withholding the requested writ.¹⁷⁶ The majority viewed the case as a question on the respective authorities of the governor and the legislature concerning agency rulemaking proceedings:

Our precise task in this case is to decide whether the Governor has overstepped his constitutional authority by issuing executive orders which contain certain limitations and suspensions upon agencies relating to their delegated legislative rulemaking authority and the requirements related thereto.¹⁷⁷

The majority concluded the governor lacked authority to issue EO 11-01 and its successor, EO 11-72, on separation of powers grounds:

“[T]o the extent each suspends and terminates rulemaking by precluding notice publication and other compliance with Chapter 120 absent prior approval from OFARR—contrary to the Administrative Procedure Act—the orders) infringe upon the very process of rulemaking and encroach upon the Legislature’s delegation of its rulemaking power as set forth in the Florida Statutes.”¹⁷⁸

The majority emphasized two concepts urged by Whiley. First, the suspension of pending rulemaking by EO 11-01 and creation of the OFARR review process altered the rulemaking procedure of the APA, violating the constitutional separation of powers.¹⁷⁹ Second, the governor could only control rulemaking where the legislature placed the direct administration of an agency under his authority.¹⁸⁰ Essentially, the majority interpreted both orders as unauthorized, binding statutory amendments. Further, the majority creatively read article IV, section 6, as allowing the legislature to create a category of subordinate executive branch officials, composed of appointed agency heads serving at the pleasure of the governor.¹⁸¹ Under the majority’s decision, these appointed agency heads apparently are empowered to exercise the authority of their respective agencies independently and without

¹⁷⁵ Whiley v. Scott, 79 So. 3d 702 (Fla. 2011) (per curiam). Justices Barbara J. Pariente, R. Fred Lewis, Peggy A. Quince, Jorge Labarga, and James E.C. Perry joined this opinion. See Whiley v. Scott, 79 So. 3d 702, 717 (Fla. 2011).

¹⁷⁶ Whiley, 79 So. 3d at 702 (Polston, J., dissenting) (stating that by reaching a conclusion but declining to issue any relief, the majority’s decision appeared to be more in the nature of an advisory opinion under FLA. CONST. art. IV, § 1(c)); see also *id.* at 726. The Constitution gives the court discretion whether to issue the writ, and the court adopted a similar outcome in Fla. House of Representatives v. Crist, 999 So. 2d 601, 616 (Fla. 2008).

¹⁷⁷ *Id.* at 708.

¹⁷⁸ *Id.* at 713 (emphasis in original).

¹⁷⁹ *Id.* at 705.

¹⁸⁰ *Id.* at 715–716.

¹⁸¹ See FLA. CONST. art. IV, § 6.

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any direction or supervision by the governor.¹⁸²

The dissenting justices refuted the majority's presumptions based on the actual language in the Florida Constitution, the statutes, and the governor's orders.¹⁸³ Chief Justice Canady emphasized the traditional reading of the Constitution and observed that Florida law imposes no restriction on the authority of the governor to supervise and direct policy choices made by subordinate executive branch officials regarding rulemaking:

[T]he majority . . . [imposes] unprecedented and unwarranted restrictions on the Governor's constitutional authority to supervise subordinate executive branch officers The majority's decision does not take seriously [the] reality that the rulemaking process involves certain discretionary policy choices by executive branch officers Nor does the majority come to terms with the absence from Florida law of any restriction on the authority of the Governor to supervise and control such policy choices made by subordinate executive branch officials with respect to rulemaking The Governor's right to exercise such supervision and control flows from the 'supreme executive power' . . . together with the Governor's power . . . to appoint executive department heads who serve at the Governor's pleasure Given the constitutional structure establishing the power and responsibilities of the Governor, it is unjustified to conclude . . . that by assigning rulemaking power to agency heads, the Legislature implicitly divested the Governor of his supervisory power with respect to executive officials who serve at his pleasure.¹⁸⁴

Justice Polston agreed that "nothing in the APA prohibits the Governor from performing executive oversight to ensure that the rulemaking process at his agencies results in effective and efficient rules that accord with Florida law."¹⁸⁵ He questioned the efficacy of proceeding in *quo warranto* since the original order was superseded, and only hypothetical allegations about the substance and effect of EO 11-72 remained.¹⁸⁶ He particularly examined the APA rulemaking procedure and the changes allegedly wrought by the governor's orders. Observing that rulemaking under the APA is a complex but flexible process allowing for agency discretion and providing public participation, he concluded the governor could implement EO 11-72 without

¹⁸² *Whiley*, 79 So. 3d at 714–15.

¹⁸³ *Id.* at 717–26 (Fla. 2011).

¹⁸⁴ *Id.* at 717–18 (Canady, C.J., dissenting).

¹⁸⁵ *Id.* at 724 (Polston, J., dissenting).

¹⁸⁶ *Id.* at 718 (Polston, J., dissenting).

violating the law.¹⁸⁷ The governor did not attempt to suspend statutory time limits for rulemaking; contrary to the assertions of Whiley and her *amici*, and the conclusions of the majority, “[a]ll agencies remain subject to the APA’s time limits, and the Governor remains constitutionally responsible for ensuring that Florida’s laws, including the APA’s time limits, are faithfully executed by the agencies under his supervision.”¹⁸⁸

V. WHILEY V. SCOTT: AN ANALYSIS

The dissenting Justices were correct. By presuming a violation of the APA, accepting as true Whiley’s unsubstantiated suppositions, and considering only parts of the Florida Constitution without the full context supplied by article IV, the majority neatly circumscribed their analysis. This narrow frame made the rationale of AGO 81-49 appear plausible, leading the majority to conclude that the governor could neither suspend rulemaking within agencies nor direct the rulemaking policies of at-will appointed agency heads because the legislature never created such positive authority.¹⁸⁹ Based on Florida’s historical understanding and implementation of constitutional executive power, the court’s own precedents, and the full text of the Constitution, the majority was wrong.

A. *The Majority Erroneously Presumed Some Abrogation or Violation of the APA*

Since Florida’s admission into the Union in 1845, every version of the Florida Constitution required the strict separation of powers between the three branches.¹⁹⁰ “Strict” in the sense that no branch may delegate the whole of its power for any purpose to another branch, nor may a branch presume to exercise a power clearly belonging to another. This separation, however, is not absolute, and permits the legislature to delegate rulemaking to executive branch agencies.¹⁹¹ The separation of powers is applied practically, allowing each branch to check and balance the others by zealously guarding its own authority, preventing any one branch from exercising complete sovereign power, and simultaneously forcing all branches to act in concert to operate a workable government. Through this doctrine, Florida fulfills the basic understanding of the U.S. Constitution:

¹⁸⁷ *Id.* at 725 (Polston, J., dissenting).

¹⁸⁸ *Whiley*, 79 So. 3d at 725.

¹⁸⁹ *Id.* at 715–17.

¹⁹⁰ See FLA. CONST. art. II, § 2 (1838); FLA. CONST. art. III (1868); FLA. CONST. art. II (1885); FLA. CONST. art. II, § 3 (1968).

¹⁹¹ *Bush v. Schiavo*, 885 So. 2d 321, 332 (Fla. 2004); *State v. Atlantic Coast Line R. Co.*, 47 So. 969 (Fla. 1908). See also *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1979); *Sloban v. Fla. Bd. of Pharm.*, 982 So. 2d 26 (Fla. Dist. Ct. App. 2008).

The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.¹⁹²

In Florida, the separation of powers is not absolute because not every governmental activity belongs exclusively to a single branch: “[t]here has been no complete and definite designation by a paramount authority of all the particular powers that appertain to each of the several departments.”¹⁹³ Perhaps there can be no absolute and complete separation of all the powers of a practical government.”¹⁹⁴ Because the Florida Constitution vests, then limits, the entire power allocated to each branch, the text does not express the exact parameters, scope, or details of each constituent authority comprising such vested power.¹⁹⁵ The power is absolute where no limitation is expressed.¹⁹⁶

The actual issue in *Whiley* was not whether the governor encroached on the wholly, non-delegable legislative power to enact law. Rather, the issue was whether under proper delegations of rulemaking authority already made by the legislature, the governor had constitutional authority to supervise the *execution* of rulemaking by at-will, appointed executive branch subordinates.¹⁹⁷ Rulemaking is a legislative function, delegable only with sufficient guidelines and strictures to prevent the executive branch from exercising unbridled discretion to make binding public policy or law.¹⁹⁸ The majority referred to these principles in their analysis:

Rulemaking is a derivative of lawmaking Accordingly, ‘[w]hen an agency promulgates a rule having the force of law, it acts in place of the legislature’ Moreover, the Legislature has delegated specific responsibilities to agency heads, such as the

¹⁹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹⁹³ *State v. Johnson*, 345 So. 2d 1069, 1071 (Fla. 1977).

¹⁹⁴ *State v. Atlantic Coast L. R. Co.*, 47 So. 969, 975 (Fla. 1908).

¹⁹⁵ *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011); *Graham v. Haridopolos*, 75 So. 3d 315, 318–19 (Fla. 2011); *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977); *Corcoran v. Geffen*, 250 So. 3d 779, 783–84 (Fla. Dist. Ct. App. 2018).

¹⁹⁶ *State ex rel. Kennedy v. Lee*, 274 So. 2d 881, 882 (Fla. 1973), *State ex rel. West v. Butler*, 69 So. 771, 777 (Fla. 1915).

¹⁹⁷ *Whiley v. Scott*, 79 So. 3d 702, 717–18 (Fla. 2011) (Canady, C.J. dissenting).

¹⁹⁸ See *Sloban v. Fla. Bd. of Pharm.*, 982 So. 2d 26, 29–30 (Fla. 2008); *Bd. of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass’n*, 794 So. 2d 696, 704 (Fla. 2001); *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 2000).

authority to determine whether to go forward with proposing, amending, repealing, or adopting rules Accordingly, the Legislature may specifically delegate, to some extent, its rulemaking authority to the executive branch ‘to permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions.’¹⁹⁹

The majority concluded the suspension of rulemaking by EO 11-01, applicable to those agencies headed by at-will gubernatorial appointees, violated the APA.²⁰⁰ In reaching this conclusion, the majority determined that the order made legally-binding changes to the rulemaking statutes, an interpretation supported neither by facts in the record nor the order itself. If the governor expressly attempted to unilaterally alter the statute, all seven justices likely would have joined a single, succinct opinion upholding the court’s established precedent. Under such circumstances, the court may have easily found the governor had no authority to enter a binding order modifying the law.²⁰¹

Whether EO 11-72 actually superseded and replaced EO 11-01 was insignificant to the majority.²⁰² EO 11-72 continued to require that specific agencies obtain OFARR review and approval prior to publishing any rulemaking notice mandated by the APA.²⁰³

The majority concluded the directives in EO 11-01 and EO 11-72²⁰⁴ effectively altered the statute, usurping legislative power.²⁰⁵ As noted by Justice Polston in his dissent, the APA is silent on the process applicable to formulating policy prior to initiating statutory rulemaking, especially how, when, where, and with whom an agency conducts such initial creation.²⁰⁶ The court agreed with the governor’s argument that the governor may consult with agencies headed by his or her at-will appointees during this period of formulation.²⁰⁷ Here, the only potential conflict between EO 11-

¹⁹⁹ *Whiley*, 79 So. 3d at 710–11.

²⁰⁰ *Id.* at 713.

²⁰¹ *See, e.g.*, Fla. House of Representatives v. Crist, 999 So. 2d 601, 616 (Fla. 2008).

²⁰² *Whiley*, 79 So. 3d at 719 (Polston, J., dissenting) (explaining that EO 11-72 by its own terms “superseded” the earlier order, which overrode EO 11-01 and mooted any challenge to it). Fla. Executive Order No. 2011-72, § 8 (Apr. 8, 2011) clearly states the order supersedes EO 11-01. The phrasing used by the majority opinion seems to indicate that some retained vitality in EO 11-01 was necessary for the case to continue.

²⁰³ Fla. Exec. Order No. 2011-72, *supra* note 115, § 1.

²⁰⁴ Fla. Exec. Order No. 2011-01, *supra* note 52, § 1; Fla. Exec. Order No. 2011-72, *supra* note 115, § 1.

²⁰⁵ *Whiley*, 79 So. 3d at 713.

²⁰⁶ *Id.* at 721 (Polston, J., dissenting); *see also* Adam Smith Enters. v. State Dept. of Env’tl. Regulation, 553 So. 2d 1260, 1265 n. 4 (Fla. Dist. Ct. App. 1990).

²⁰⁷ *Whiley*, 79 So. 3d at 715–16; *see also* Oral Argument at 46:35, 57:15, 1:12:29–1:13:02, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC 11-592).

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01 and the APA was the direction for the Secretary of State not to publish rulemaking notices without prior OFARR approval. Since the governor cannot order anyone to act illegally without violating his or her own constitutional duty to ensure faithful execution of the laws, that portion of EO 11-01 was void *ab initio*, unless OFARR “directed” weekly publication as required at that time.

The terms of both orders, the text of the APA, and the lack of any sufficient facts on the record demonstrated the orders created no actual, enforceable suspension of rulemaking in derogation of law. Nonetheless, the court accepted Whiley’s errant view that agencies may hold and exercise rulemaking authority independent from the direction or supervision of the governor or any other elected constitutional officer.²⁰⁸ EO 11-01 suspended prospective and pending rulemaking until the governor’s delegate could review and approve the agency proposals.²⁰⁹ Moreover, EO 11-72 required agencies under the direction of the governor to obtain OFARR approval before commencing rulemaking and before publishing any rulemaking notice as required by law.²¹⁰ Neither order changed the APA requirements for rulemaking, particularly with respect to the time limits for agencies to act, rights of public access and petition, hearing rights, or any other provision mandated by law to provide the public access and input. The orders only affected communications between the governor and at-will gubernatorial appointees and imposed no binding requirements on the state as a whole or any citizen.

The only issue was Whiley’s policy objection to the OFARR process for reviewing pending or proposed rules—there was no violation of the APA. Both orders left intact the legal remedies to compel compliance by state officers with statutory rulemaking requirements. By choosing an internal review process requiring consideration by his staff, the governor merely created additional time pressure on his office because the full requirements of the APA still applied. As noted by Justice Polston’s questioning at oral argument, if the orders changed the statutory rulemaking requirements, the governor would have exceeded his powers because he cannot change the law unilaterally. Thus, with the promulgation of EO 11-72, the governor remained within the scope of constitutional executive authority and did not encroach on the legislative power.

B. The Majority Improperly Interpreted Article IV

The majority relied on strained interpretations of the constitutional

²⁰⁸ See Petition for Writ of Quo Warranto, *supra* note 4, at 11–12; Petitioner’s Amended Reply, *supra* note 102, at 17–19, 34.

²⁰⁹ Fla. Exec. Order No. 2011-01, *supra* note 52, §§ 1, 4.

²¹⁰ Fla. Exec. Order No. 2011-72, *supra* note 115, § 1.

doctrines of separation of powers and the vesting of executive power, as well as of the APA. The opinion approved the rationale of AGO 81-49 and found the APA made an agency head responsible for that agency's rulemaking, exclusive of any supervision and direction by the governor and regardless of the nature of the appointment.²¹¹ The majority concluded the appointee was intended to exercise rulemaking authority independent of the governor's preferences, because the legislature placed an agency under the direct supervision of a non-elected at-will gubernatorial appointee, but did not expressly empower the governor to supervise or direct the actions of that official.²¹² The majority's analysis conflicted with interpretations and applications of article IV in the Florida Constitution by prior governors, and deviated from the court's previously articulated principles of constitutional interpretation.

1. Principles for Interpreting the Florida Constitution

In Florida jurisprudence, the primary purpose of constitutional construction is to discern and effectuate the intent and objective of the people.²¹³ Interpretation begins with the specific constitutional provision's text; if the language is clear, use of other interpretive means is unnecessary.²¹⁴ Every part of the Constitution must be construed together and given its full effect, particularly if there are multiple provisions on the same subject.²¹⁵ No word or part may be considered mere surplusage.²¹⁶ While interpretation relies on the plain and ordinary meaning of the words used in each provision, the construction adopted for one section must not oppose the clear intention of another.²¹⁷ If the language of a provision is unclear or subject to more than one reasonable meaning, a court must apply additional interpretive principles (the "rules of interpretation") to construe

²¹¹ *Whiley*, 79 So. 3d at 714–15.

²¹² *Id.* at 715–16.

²¹³ *Browning v. Fla. Hometown Democracy, Inc.*, 29 So. 3d 1053, 1063 (Fla. 2010); *Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n*, 838 So. 2d 492, 501 (Fla. 2003); *Metro. Dade County v. City of Miami*, 396 So. 2d 144, 146 (Fla. 1980); *St. Petersburg v. Briley, Wild & Associates, Inc.*, 239 So. 2d 817, 821–22 (Fla. 1970).

²¹⁴ *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d 566, 570 (Fla. 2008); *St. Petersburg v. Briley, Wild & Associates, Inc.*, 239 So. 2d 817, 821–22 (Fla. 1970); *State ex rel West v. Gray*, 74 So. 2d 114, 116 (Fla. 1954); *Gray v. Bryant*, 125 So. 2d 846, 862 (Fla. 1960) (Thornal, J., concurring) (“[i]t is unnecessary to apply rules of construction to arrive at the meaning of a constitutional provision when the language of the Constitution is clear and explicit.”).

²¹⁵ *Advisory Op. to the Governor*, 706 So. 2d 278, 281 (Fla. 1997); *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979); *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla. 1960).

²¹⁶ *Advisory Op. to the Governor*, 706 So. 2d at 281; *Plante*, 372 So. 2d at 936; *Gray*, 125 So. 2d at 852.

²¹⁷ *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d 566, 570 (Fla. 2008); *Advisory Op. to the Governor*, 706 So. 2d at 281; *Gray*, 125 So. 2d at 858.

the Constitution, consistent with the intent of the people in adopting the instrument.²¹⁸ The court stated, “[w]here the words admit of two senses, each of which is conformable to common usage, that sense is to be adopted which, without departing from the literal import of the words, best harmonizes with the nature and objects, the scope and design, of the instrument.”²¹⁹ While the rules of statutory interpretation generally apply, constitutional construction requires greater flexibility by emphasizing the principles of the provision as adopted by the people over strict adherence to the literal meaning of the chosen words.²²⁰ Finally, the Constitution may not be interpreted in a manner leading to an irrational or absurd result.²²¹

2. The Majority’s Alternate Interpretation of Article IV

The majority opinion created an alternate view of article IV, sections 1(a) and 6, that conflicted with previous interpretations and applications of the scope of executive power vested by the Florida Constitution. Established principles of interpretation should have compelled the majority to utilize the tools of construction to determine the full intent of the people in adopting sections 1(a) and 6. The governor relied on the constitutional text, the court’s prior decisions, and the actions of his predecessors to argue the historically-accepted interpretation of the vested executive power.²²² The governor has sufficient constitutional authority to direct and supervise his at-will appointed subordinates, including authority to direct the formulation and implementation of policy through the rulemaking of agencies directed by such appointees.²²³ The majority, however, adopted a contrary interpretation—the governor’s executive power did not extend to appointed agency heads because the APA purportedly placed the exercise of delegated rulemaking authority by these officers outside his control.²²⁴

This conclusion conflicted with the court’s prior interpretation of the interaction between article IV, sections 1(a) and 6, and the organization of the executive branch agencies under Florida Statutes, Chapter 20. In *Jones v. Chiles*, a compensation claims judge petitioned the court for a writ of mandamus ordering Governor Chiles to reappoint the judge for another four-

²¹⁸ *Briley, Wild & Associates, Inc.*, 239 So. 2d at 822; *State ex rel West*, 74 So. 2d at 116.

²¹⁹ *State ex rel West*, 74 So. 2d at 116 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 633 (5th ed., 1905)).

²²⁰ *Coastal Fla. Police Benevolent Ass’n v. Williams*, 838 So. 2d 543, 548 (Fla. 2003).

²²¹ *Agency for Health Care Admin. v. Associated Indus.* 678 So. 2d 1239, 1247 (Fla. 1996); *Plante*, 372 So. 2d at 936 (citing *City of Miami v. Romfh*, 63 So. 440 (1913)).

²²² Response to Petition for Writ of Quo Warranto, *supra* note 121, at 32–34, 38–44.

²²³ Response to Petition for Writ of Quo Warranto, *supra* note 121, at 26–27, 30–54.

²²⁴ *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011). See, FLA. STAT. §§ 120.54(3)(a)1, 120.54(3)(e)1 (2010).

year term.²²⁵ The relevant statute required a statewide nominating commission to consider the reappointment of all compensation claims judges prior to the expiration of their respective terms.²²⁶ If the commission recommended retention, the statute required the governor to reappoint the judge for another four-year term.²²⁷ If the commission declined retention, the governor could not reappoint the judge.²²⁸ Concerning the judge, the commission recommended retention but the governor refused reappointment.²²⁹ The judge argued reappointment was merely a ministerial task once the commission approved retention, and the governor had no discretion to refuse.²³⁰ The governor argued the statute violated the separation of powers by depriving him of his gubernatorial prerogative to appoint executive branch officers.²³¹

The Florida Supreme Court noted that these compensation claims judges served under a department of the executive branch headed by a secretary appointed by and serving at the pleasure of the governor.²³² After examining article IV, sections 1(a) and 6 as well as the statute, the court concluded that because the head of the agency was an at-will gubernatorial appointee, the direct authority to appoint compensation claims judges could be placed only in the governor or the department secretary.²³³ If placed with the Secretary, the exercise of that authority remained subject to the governor's constitutional power to direct and supervise the Secretary.²³⁴

In *Jones v. Chiles*, the Court expressly interpreted the consequences of denominating an at-will gubernatorial appointee as the head of an administrative entity and recognized that the secretary exercised the authority delegated by statute, subject to the continuing oversight and direction of the governor.²³⁵ In *Whiley*, the governor argued the holding from

²²⁵ *Jones v. Chiles*, 638 So. 2d 48 (Fla. 1994); see FLA. STAT. § 440.45 (2016) (the Office of the Judges of Compensation Claims is created by statute, not the Florida Constitution).

²²⁶ FLA. STAT. § 440.45 (1991).

²²⁷ *Jones*, 638 So. 2d at 48–49 (citing FLA. STAT. § 440.45 (1991)).

²²⁸ *Jones*, 638 So. 2d at 48–49 (citing FLA. STAT. § 440.45 (1991)). As noted by the court, during the pendency of the case, the legislature amended the statute to eliminate this power of the commission and place the power of reappointment solely in the Governor. See also *id.* at 52 n.3 (citing 1993 Fla. Laws 415).

²²⁹ *Id.* at 48–49.

²³⁰ *Id.* at 50.

²³¹ *Id.*

²³² *Jones*, 638 So. 2d at 50. At that time the Judges of Compensation Claims were under the Department of Labor and Employment Security. See FLA. STAT. § 20.171 (1991), which was repealed by 2002 Fla. Laws 194, § 69. The Office of the Judges of Compensation Claims previously was placed under the director of the Division of Administrative Hearings. See 2001 Fla. Laws 91.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ The APA definition of “agency head” in effect during 1991 was identical to the

Chiles for this very point.²³⁶ In contrast, Whiley’s counsel only referenced the case as an example of legislative encroachment into the executive power. Whiley did not comment on the court’s express construction in *Chiles* of article IV, sections 1(a) and 6, that effectively validated the governor’s authority to direct and supervise at-will agency head appointees.²³⁷ Interestingly, the *Whiley* majority did not even address *Jones v. Chiles* and its interpretation of article IV, sections 1(a) and 6. Instead, the majority constructed and applied a contrary and novel interpretation of the same constitutional language, ruling that the legislative designation of an at-will appointee as an agency head precluded the governor from directing or supervising that official’s exercise of delegated power.²³⁸ Contrast the majority rationale in *Whiley* discussing the impact of article IV, sections 1(a) and 6, on statutory delegations of authority to agency heads with the conclusion on that issue in *Jones v. Chiles*:

As the chief executive officer in whom the supreme executive power is vested, (FN1. *See* art. IV, § 1(a), Fla. Const.) 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. *See* art. IV, §§ 1(a), 6, Fla. Const. Inherent in that direct supervisory authority is the power to appoint executive officers to public office

Under section 20.171, the Department of Labor and Employment Security comes under the direct supervision of the Secretary of Labor and Employment Security, an officer who is appointed by and serves at the pleasure of the Governor. As such, only the Governor or the Secretary of Labor and Employment Security, subject to the Governor’s approval, would have the power to appoint judges of compensation claims.²³⁹

By not overruling *Jones v. Chiles*, the *Whiley* majority effectively created a second “reasonable” interpretation of article IV, sections 1(a) and 6, compelling use of the full tools of constitutional interpretation: “[t]o

statutory definition in place when the Governor promulgated EO 11-01. *Compare* FLA. STAT. § 120.52(3) (2011), *with* FLA. STAT. § 120.52(3) (1991) (the language in both sections is the same: “[a]gency head” means the person or collegial body in a department or other governmental unit statutorily responsible for final agency action.”).

²³⁶ *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011).

²³⁷ Petitioner’s Amended Reply to Respondent’s Response to Petition for Writ of Quo Warranto and Amicus Brief of the Attorney General at 5, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC 11-592).

²³⁸ *Whiley*, 79 So. 3d at 713–15.

²³⁹ *Jones*, 638 So. 2d at 50.

prevent an interpretation of this language which would lead to an unreasonable conclusion, or to one such as was not intended by the framers, we are privileged to look to the historical background of this particular provision.”²⁴⁰ Although the majority acknowledged the need for further interpretation by delving into the historical record of prior actions by Florida governors directing and supervising agency rulemaking, the constrained scope of this attempt failed to answer two key questions. First, what was the legislature’s intent in framing, and the people in adopting, article IV, sections 1(a) and 6, in the 1968 Constitution? Second, how should article IV, sections 1(a) and 6, be construed together to give full effect to each section?

3. Historical Guidance: Past Practices of Governors

How should the *Whiley* majority have considered the practices of prior governors in directing and supervising rulemaking by administrative agencies? Four different governors directed the rulemaking of agencies headed by at-will appointees to conform to express policy decisions.²⁴¹ Governor Scott argued these precedents demonstrated his predecessors’ historical understanding that the constitutional executive power authorized his continued direction and supervision of agencies headed by at-will gubernatorial appointees.²⁴² The majority dismissed the governor’s reliance by opining that Governor Chiles’ Executive Orders 95-74 and 95-256 were “clearly limited to review of agency rules,” a conclusion contrary to the actual text of these orders.²⁴³

EO 95-74, section 1, required each agency to review its rules thoroughly but then *directed* each agency “to proceed immediately to repeal obsolete rules” identified by such review.²⁴⁴ EO 95-256 reiterated the requirement for a thorough review and report of existing agency rules and mandated implementation of express policy pertaining to rulemaking.²⁴⁵ The order *directed* agencies “to take immediate steps to repeal rules, to carry out Executive Order 95-74.”²⁴⁶ The order further *directed* agencies to begin rulemaking proceedings to “overhaul, amend, or repeal” the rules identified for such treatment in their respective reports.²⁴⁷ The order created “The Rule

²⁴⁰ *St Petersburg v. Briley, Wild & Associates, Inc.*, 239 So. 2d 817, 822 (Fla. 1970).

²⁴¹ Miller, *Direction and Supervision*, *supra* note 17, at 349–51.

²⁴² Response to Petition for Writ of Quo Warranto, *supra* note 121, at 41–44.

²⁴³ *Whiley*, 79 So. 3d at 712.

²⁴⁴ Fla. Exec. Order No. 1995-74 (February 27, 1995); *see also* Stephen T. Maher, *The Death of Rules: How Politics is Suffocating Florida*, 8 ST. THOMAS L. REV. 313, 321–24 (1996).

²⁴⁵ Fla. Exec. Order No. 1995-256 (July 12, 1995); *see also* Maher, *supra* note 244, at 324–328.

²⁴⁶ *Id.* at § 1.

²⁴⁷ *Id.* at § 3.

of Flexibility”—Governor Chiles’ express statement of policy guiding agency decisions to implement or interpret controlling statutes by rule—and mandated the agencies conduct all rulemaking according to this principle.²⁴⁸ The order was “directed to the Governor’s agencies.”²⁴⁹

The *Whiley* majority thought the critical difference between the 1995 and 2011 orders was that, under the 1995 order, the agencies “remained free to engage in the proposal, amendment, and repeal of rules without approval from a member of the Executive Office of the Governor.”²⁵⁰ This distinction is without difference. In 1995, Governor Chiles *directly ordered* how each “Governor’s agency” (those headed by appointees serving at his pleasure) was to proceed with particular types of rulemaking and what overarching policy to apply.²⁵¹ In 2011, Governor Scott directed how similar agency heads were to approach particular rulemaking decisions.²⁵² In both cases, the governor supervised and directed specific rulemaking actions and activities. Governor Scott delegated the receipt, review, and notification function to a designee in his office, while Governor Chiles imposed just as significant restrictions on agency policy action, without requiring an intermediate step.²⁵³

Governors Graham, Martinez, and Crist directed similar unequivocal rulemaking mandates to administrative agencies.²⁵⁴ The common practice among these governors, with different political agendas and policy preferences, belies the majority’s espoused narrow view.

4. Historical Guidance: Crafting Article IV, Section 6

What was the intent of the legislature in framing, and the people in adopting, article IV, sections 1(a) and 6 as part of the 1968 Constitution? In a prior analysis of a constitutional provision requiring resort to extrinsic methods of construction to determine its reasonable meaning and the framers’ intent, the court studiously considered the textual development in the 1966 study commission and the legislature of 1967 thru 1968.²⁵⁵ The 1966 study commission expressly debated and partly rejected legislative control of the governor’s authority over the executive branch agencies

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.* at § 8.

²⁵⁰ *Whiley v. Scott*, 79 So. 3d 702, 713 (Fla. 2011).

²⁵¹ Fla. Exec. Order No. 1995-256, *supra* note 245, §§ 2, 3, 4.

²⁵² Fla. Exec. Order No. 2011-01, *supra* note 52, §§ 1, 4, 5; Fla. Exec. Order No. 2011-72, *supra* note 115, §§ 1, 6.

²⁵³ Fla. Exec. Order No. 1995-256, *supra* note 245, §§ 1, 4, 8.

²⁵⁴ *See* Fla. Exec. Order No. 1981-74 (July 2, 1981); Fla. Exec. Order No. 1981-105 (Sept. 4, 1981); Fla. Exec. Order No. 1989-01 (Jan. 5, 1989); Fla. Exec. Order No. 2007-127 (July 13, 2007). *See also*, Miller, *Direction and Supervision*, *supra* note 17, at 349–51.

²⁵⁵ *St. Petersburg v. Briley, Wild & Associates, Inc.*, 239 So. 2d 817, 822 (Fla. 1970).

resulting from the new reorganization.²⁵⁶ During its consideration and drafting of article IV, the legislature went further and struck all text providing for legislative control over the elected officials' authority to direct and supervise subordinate executive officials.²⁵⁷ This extensive consideration and rejection of legislative control conclusively shows the intent of the framers when drafting article IV, section 6, and of the people when they adopted the 1968 Constitution, which directly contravened the majority's conclusion. By authorizing the legislature to place agencies under the direct supervision of non-elected, at-will appointees, the people intended neither to authorize the apportionment of executive authority to subordinates independent from the governor nor divest the governor's authority and responsibility for their actions.

5. Integrated Construction of Article IV, Giving Each Section Full Effect

How should article IV, sections 1(a) and 6, be construed to give full effect to each section? The current Florida Constitution vests the executive power of the people, divided among particular officials, under limitations deemed necessary to preserve individual liberty, just as each executive article in every prior version of the Constitution.²⁵⁸ The majority failed to address the significance of readopting the same language used since 1845 to describe the governor's power and the necessity of understanding that language in its proper historical context. Nor did the majority consider the importance of the development of present article IV, section 6, in the 1966 study commission and in the legislature, which led to a section solely purposed with reorganizing the executive branch.²⁵⁹ After 1968, and until 2011, the three branches of Florida government applied the newly-adopted text in article IV, section 6 in a manner consistent with the historical interpretation of section 1(a).²⁶⁰

The majority misapplied a basic rule of construction by reading the text of article IV, section 6, as implying legislative authority to create appointed agency heads with the ability to exercise executive power independent from the governor.²⁶¹ This reading conflicted with the clear text of section 6 and the legislature's historical understanding of the constitutional authority to create and empower administrative departments. Interpreting the text as

²⁵⁶ Miller, *Historical Development*, *supra* note 17, at 407–10.

²⁵⁷ *Id.* at 410–13.

²⁵⁸ See FLA. CONST. art. III (1838); FLA. CONST. art. III (1861); FLA. CONST. art. V (1868) (*amended* 1871); FLA. CONST. art. IV (1885); FLA. CONST. art. IV (1968) (*amended* 1998).

²⁵⁹ Miller, *Historical Development*, *supra* note 17, at 410–15.

²⁶⁰ Miller, *Direction and Supervision*, *supra* note 17, at 341–43, 345–54.

²⁶¹ *Whiley v. Scott*, 79 So. 3d 702, 714 (Fla. 2011). See section IV.B.1, for the discussion of constitutional interpretive principles in section IV.B.1 of this article.

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implying some authority to create independently-acting, appointed agency heads also conflicts with the framers' use of express language to restrict the power vested in the governor. Those express constitutional provisions constraining the governor place certain portions of executive power under separate authorities. Accordingly, the legislature may affect the allocation of executive power only when expressly authorized in the Constitution. One example is the scope of authority for the Commissioner of Agriculture, who is elected directly by the people and has "supervision of all matters pertaining to agriculture," unless the legislature provides otherwise by law.²⁶² Article IV, section 6, authorizes the legislature to reorganize the executive branch and determine which official (or officials) would directly administer the operations of each department; it does not authorize the legislature to limit or expand a given official's scope of authority relative to the governor's vested powers.²⁶³

The majority's analysis failed to give full effect to the intent of the framers in proposing, and the people in adopting, article IV, section 6. In developing and proposing section 6, the legislature expressly considered *and rejected* the authority to enable those agency heads appointed by and serving at the pleasure of the governor to exercise their authority, without the governor's direction and supervision.²⁶⁴ As shown by the final text, the purpose of section 6 was to ensure that elected constitutional executives (principally the governor) retained authority and responsibility for supervising and controlling the actions of the executive departments.²⁶⁵ This purpose is discerned by construing together and giving effect to all provisions of article IV, beyond the majority's unduly-narrow reading limited to section 6.²⁶⁶

Reliance on AGO 81-49 disserved the majority's construction of article IV. The attorney general is authorized by statute to issue official opinions to a limited range of state executive officers, members of the legislature, and certain local officials.²⁶⁷ The courts carefully consider these opinions, which are regarded as highly persuasive when addressing the particular legal

²⁶² FLA. CONST. art. IV, § 4(d).

²⁶³ *Id.* at § 6 ("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").

²⁶⁴ Miller, *Historical Development*, *supra* note 17, at 410–413.

²⁶⁵ FLA. CONST. art. IV, § 6.

²⁶⁶ *See* Advisory Op. to the Governor, 706 So. 2d 278, 281 (Fla. 1997); *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979); *Gray v. Bryant*, 125 So. 2d 846, 852 (Fla. 1960).

²⁶⁷ FLA. STAT. § 16.01(3) (2018).

issue.²⁶⁸ State and local officers may rely on an opinion in performing their official duties, unless and until that opinion is superseded by a judicial decision.²⁶⁹ Above all, attorney general opinions are not binding on the courts, a point expressly noted by the *Whiley* majority.²⁷⁰ Unlike a contested case, the attorney general issues an opinion on the representation of facts presented in the petition, not by a weighing of evidence; nor does the attorney general have the benefit of a complete analysis of the legal issues by opposing advocates. Particularly, as in *Whiley*, where the attorney general expressly advocated against the continuing viability of AGO 81-49, opposition by the very office that issued the opinion should have made the court reluctant to apply its reasoning without establishing that this reasoning was reliable.²⁷¹ This is noteworthy because the conclusion of AGO 81-49 conflicted with the interpretation by the court in *Jones v. Chiles*.

AGO 81-49 misinterpreted the legislature's power to determine which officer should administer an agency as authority to dispossess the governor's ability to direct or supervise the actions of that agency.²⁷² The attorney general opinion discussed the duty of the governor to ensure faithful execution of the laws, but it did not analyze the interrelationship between vesting supreme executive power in section 1(a) and allotting direct supervision for an agency's daily actions under section 6.²⁷³ The conclusion of AGO 81-49 ignored the impact and consequences of article IV, section 1(a), by treating the vesting of "supreme executive power" as mere surplusage, and narrowly focusing only on section 6. Properly applying the rules of constitutional interpretation to the full text of article IV yields precisely the opposite result.

The majority fell into the same interpretive trap as the author of AGO 81-49. The *Whiley* dissenters, particularly Chief Justice Canady, stressed the significance of construing together the full text of articles IV, sections 1(a) and 6.²⁷⁴ The Chief Justice succinctly framed the interpretive principles and issues in the case. He articulated both the source of the governor's authority and that the governor acted within his constitutional power to direct agency rulemaking by at-will appointees.²⁷⁵ The majority's response was less than clarifying:

²⁶⁸ *State v. Family Bank of Hallandale*, 623 So. 2d 474, 478 (Fla. 1993); *Beverly v. Div. of Beverage of Dep't of Bus. Reg.*, 282 So. 2d 657, 660 (Fla. Dist. Ct. App. 1973).

²⁶⁹ *Family Bank of Hallandale*, 623 So. 2d at 478 (citing *State ex rel. Atl. Coast Line R. Co. v. State Bd. of Equalizers*, 94 So. 681 (1922)).

²⁷⁰ *Id.* at 478; *Beverly*, 282 So. 2d at 660; *Whiley v. Scott*, 79 So. 3d 702, 714 (Fla. 2011).

²⁷¹ Amicus Brief of the Attorney General, *supra* note 35, at 15–17.

²⁷² Miller, *Direction and Supervision*, *supra* note 17, at 354–57.

²⁷³ AGO 81-49, at 1–2. *See* FLA. CONST. art. IV, § 1(a).

²⁷⁴ *Whiley*, 79 So. 3d at 717–18 (Canady, C.J., dissenting).

²⁷⁵ *Id.*

With apparent disregard for the Court’s precedent, the dissents deem the Governor all-powerful as “the supreme executive power” by virtue of article IV, section 1(a) of the Florida Constitution The phrase “supreme executive power” is not so expansive, however, and to grant such a reading ignores the fundamental principle that our state constitution is a limitation upon, rather than a grant of, power Moreover, the dissents’ failure to address the provisions of the APA delegating to agency heads the authority to determine whether to go forward with proposing, amending, repealing, or adopting rules—i.e., sections 120.54(3)(a)(1) and 120.54(3)(e)(1), Florida Statutes (2010)—an authority that cannot be delegated by any entity other than the Legislature, demonstrates the absence of support for the position advanced.²⁷⁶

Three interpretive errors readily appear in this statement. First, the majority failed to give full meaning to all of the text in article IV, sections 1(a) and 6. Contrary to the plain language of article IV, the intent of its framers, and the history of Florida’s constitutional executive article, the majority treated the phrase “supreme executive power” as insubstantial surplusage and disregarded its proper use in the construction of section 6. Here, the majority apparently accepted Whiley’s assertions at face value and failed to take into account the governor’s repeated acknowledgement of the constitutional constraints on his authority as well as statutory requirements. No attempt was made by the majority to distinguish their reading of the term from the usage and understanding applied by the dissents or to explain why the phrase did not substantially affect the interpretation of section 6. Nothing in the dissenting opinions showed an obsequious application rendering the governor “all powerful;” indeed, both the Chief Justice and Justice Polston stressed the constitutional limitations of the governor’s authority.

Second, the majority failed to discern the proper use of “supreme executive power” as a hierarchical statement of the governor’s powers and duties. The majority did not broadly interpret the phrase to make the governor all-powerful (a point which the dissenters and the governor agreed). The majority then attempted to refute this fabricated argument by emphasizing that the Constitution is a limitation of power.²⁷⁷ The majority did not explain what power, precisely, is limited by vesting the “supreme executive power” in the governor. The full text of article IV limits the executive power, but the vesting of executive power identified as “supreme” shows that the people intended a hierarchical structure for the executive

²⁷⁶ *Id.* at 715 (internal citations omitted). The majority cites no precedent for this statement other than tangential references to cases stating the standard principle that the Florida Constitution is a document limiting, not granting, power.

²⁷⁷ *Id.*

branch—one where the governor has full authority and responsibility unless otherwise directed by the express terms of the article.²⁷⁸

Third, the majority construed statutory delegations of responsibility to agency heads for certain rulemaking procedural steps as impliedly limiting the governor’s constitutional executive power. Having fabricated and dismissed the argument that “supreme executive power” should be interpreted as making the governor all-powerful, the majority then criticized the dissenting justices for not discussing the impact of legislative actions such as the APA on the governor’s authority as limited by article IV, section 1(a).²⁷⁹ The majority concluded that the “supreme executive power” of the governor could be limited by the APA’s requirements for rulemaking, but failed to explain how the legislature could delegate rulemaking authority to the executive branch without making the *execution* of that authority subject to the vested constitutional executive power. The obvious problem with this analysis is that if the governor’s supervisory authority is rooted in the “limitation” of supreme executive power articulated in section 1(a), it is a *constitutional* power outside of the APA; thus, APA delegations to agency heads cannot restrict the executive power vested in the governor.²⁸⁰

Article IV, section 6, does not authorize the legislature to insulate administrative agencies from the supervisory powers of the governor, particularly when the agency head serves at the pleasure of the governor.²⁸¹ The Constitution expressly constrains the role of the legislature to *allocate* executive functions among a limited number of departments and to assign the *administration* of each agency to the *direct supervision* of a specifically-denominated official.²⁸² The legislature has no authority to create an unlimited number of officials independent from the governor or to create new forms of executive power. Reasonably harmonized, article IV, sections 1(a) and (6), clearly show that the intent of the framers and the people was not only to reorganize the executive branch agencies, but also to ensure subordination of all executive officers to those constitutional officers answerable to voters.

²⁷⁸ See, e.g., Miller, *Historical Development*, *supra* note 17.

²⁷⁹ *Whiley*, 79 So. 3d at 715.

²⁸⁰ FLA. STAT. § 120.52(1)(a) (2018) (“‘Agency’ means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution The Governor; each state officer and state department, and each departmental unit described in s. 20.04”).

²⁸¹ FLA. CONST. art. IV, § 6.

²⁸² *Id.* As stated in the text of FLA. CONST. art. IV, § 6, the legislature by law may allot executive functions among a limited number of departments and may provide whether a department is supervised directly by the governor, one or more of the other constitutional officers, or by one or more individuals appointed by and serving at the pleasure of the governor. The text provides that the governor’s appointing power may be limited by requiring senate confirmation or approval by three members of the cabinet.

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The majority discounted the impact of the governor's authority to remove appointed agency heads serving at his pleasure on whether article IV, sections 1(a) and 6, acted to provide the governor with continuing authority to direct and supervise administrative rulemaking by such officials.²⁸³ Because the APA does not expressly delegate authority to the governor to direct and supervise agency heads, the majority implied that the governor is excluded from any other role in agency rulemaking, a finding contrary to the scope of power vested and described in a full reading of sections 1(a) and (6). The majority conflated Florida Statutes, section 120.54(1)(k), with article IV, section 6, to imply that the legislature created at-will appointed agency heads empowered to act independently from the governor's direction and supervision. The majority dismissed the dissents' interpretation that the statute was designed simply to bar delegations *by the agency head* to agency subordinates so that agency rulemaking would proceed only with the knowledge, and accountability, of the agency head. But, the agency head's retention of official responsibility for rulemaking is exactly what the law required, and no more:

An agency head may delegate the authority to initiate rule development under subsection (2); however, rulemaking responsibilities of an agency head under subparagraph (3)(a)1., subparagraph (3)(e)1., or subparagraph (3)(e)6. may not be delegated or transferred.²⁸⁴

The ordinary and plain meaning of "delegate" is to entrust part of one's work, power, authority, or responsibility to be done by another, such as a subordinate.²⁸⁵ The "authority" under Florida Statutes, sections 120.54(3)(a)1 and 120.54(3)(e)1, is a check on rulemaking: the agency may not publish a notice of a proposed rule or file a rule for final adoption without the approval of the actual agency head. The wording and structure of Florida Statutes, section 120.54(1)(k), shows that the legislature clearly only intended that the agency head could not delegate these specific tasks; the statute cannot be extrapolated to bar the governor from directing and supervising his appointees. If the legislature intended such a reading, it certainly knew how to enact words preventing any third party from directing, supervising, influencing, or otherwise asserting authority over any agency head in exercising delegated rulemaking authority.

The majority's analytical error presumed that where the legislature assigns responsibility to an agency without expressly providing for gubernatorial supervision, the legislature disables the governor from

²⁸³ *Whiley*, 79 So. 3d at 715.

²⁸⁴ FLA. STAT. § 120.54(1)(k) (2018).

²⁸⁵ *Delegate*, OXFORD ONLINE DICTIONARY, <http://oxforddictionaries.com/definition/delegate> (last visited Dec. 19, 2018).

supervising the activity. The reality is precisely the opposite: if the legislature intends to remove a subordinate from direct accountability to that official's immediate superior, it does so through express legislation.²⁸⁶ In supervising agency heads, where the legislature may act but chooses not to do so, the governor retains presumptive authority to direct the actions of those serving at the governor's pleasure.

6. The Importance of Article IV, Section 1(a) as a Self-Executing Provision

The Florida Constitution itself vests the supreme executive power in the governor; the clause is self-executing, requiring no further action for its implementation or completion.²⁸⁷ This means the Constitution fully vested the governor with the supreme executive power before the legislature reorganized the executive branch and created Florida Statutes, Chapter 20. In construing article IV, sections 1(a) and 6, *in pari materia*, every statutory allocation of departmental administration to an at-will gubernatorial appointee remained subject to the supreme power vested *and existing* in the governor at the time the statute was enacted. The subsequent adoption of rulemaking procedures in the APA in 1974, including the definition of "agency head," was subject to both the vested authority of the governor and the existing allotment of administrative supervision.²⁸⁸ Because the framers of the Constitution expressly rejected legislative control over the scope of executive power to direct and supervise administrative agencies, and because the authority in article IV, section 6, is limited to allotting supervision of agency administration, the power already vested in the governor provided full authority to direct and supervise at-will appointed agency heads absent constitutionally-valid, express language.²⁸⁹

²⁸⁶ See *Agency for Health Care Admin. v. Associated Indus. of Fla.*, 678 So. 2d 1239, 1248 (Fla. 1996).

²⁸⁷ See *Fla. Dep't of Educ. v. Glasser*, 622 So. 2d 944, 947 (Fla. 1993) ("Had the framers of the 1968 Florida Constitution intended a self-executing grant of power, they could have chosen self-executing language. Our present constitution contains numerous examples of such phrases . . . 'The supreme executive power shall be vested in a governor.'" (quoting FLA. CONST. art. IV, § 1(a)); see also *Gray v. Bryant*, 125 So. 2d 846, 851 (Fla. 1960) ("The basic guide, or test, in determining whether a constitutional provision should be construed to be self-executing, or not self-executing, is whether or not the provision lays down a sufficient rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment. If the provision lays down a sufficient rule, it speaks for the entire people and is self-executing.") (citing *State ex rel. City of Fulton v. Smith*, 194 S.W.2d 302 (Mo. 1946); *City of Shawnee v. Williamson*, 338 P.2d 355 (Okla. 1959)). FLA. CONST. art. IV, § 1(a).

²⁸⁸ See FLA. CONST. art. IV, §§ 1(a), 6; FLA. STAT. §§ 20.02–05 (1973).

²⁸⁹ See Fla. Exec. Order No. 1995-256, § 4, *supra* note 245 (quoting in part FLA. CONST. art. IV, § 6); Miller, *Historical Development*, *supra* note 17, at 410–413.

7. No Absurd Result

No matter how novel the proposed analysis or esoteric the argument, properly interpreting the Florida Constitution requires a pragmatic approach: “[t]he Constitution is concerned with substance and not with form and *its framers did not intend to forbid a common-sense application of its provisions.*”²⁹⁰ An interpretation leading to an absurd result must be rejected if the provision may be interpreted differently to accomplish the intent of the people.²⁹¹ Courts must avoid interpretations leading to unreasonable or absurd consequences that the people did not intend.²⁹² Plainly defined, an interpretation is “absurd” if it is ridiculously unreasonable or lacks a rational or orderly relationship to human reality.²⁹³

The majority rejected the concept that the power to remove at-will gubernatorial appointees exemplified the authority to direct and supervise those officials in the exercise of delegated rulemaking authority.²⁹⁴ The justices inverted a line from the governor’s argument, declaring “the power to remove is not analogous to the power to control.”²⁹⁵ This interpretation is counterintuitive to the understanding of basic human nature that the federal and state executives, legislators, courts, and commentators articulate.²⁹⁶ The Congressional debates over executive power, and the recurring reservations about the impact on an independent judiciary of the legislative power of appropriation, point to a consensus conclusion diametrically opposed to that of the *Whiley* majority: the delegated power to direct the actions and control the exercise of governmental authority directly flows from the power to

²⁹⁰ See *State ex rel. West v. Gray*, 74 So. 2d 114, 118 (Fla. 1954) (approving *Meredith v. Kauffman*, 169 S.W.2d 37, 38 (Ky. 1943) (emphasis in original)).

²⁹¹ *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979) (citing *Miami v. Romfh*, 63 So. 440 (Fla. 1913)).

²⁹² *St. Petersburg v. Briley, Wild & Associates, Inc.*, 239 So. 2d 817, 822 (Fla. 1970) (citing *Florida Dry Cleaning & Laundry Bd. v. Everglades Laundry, Inc.*, 188 So. 380 (Fla. 1939)).

²⁹³ *Absurd*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/absurd> (last visited Dec. 19, 2018).

²⁹⁴ Construing both FLA. CONST. art. IV, §§ 1(a) and 6, the power to remove at-will employees arises under the broad mandate of authority to the governor in § 1(a).

²⁹⁵ *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011).

²⁹⁶ *State ex rel. Albritton v. Lee*, 183 So. 782, 790 (Fla. 1938) (Ellis, C.J., concurring) (quoting 1 J. KENT, COMMENTARIES ON AMERICAN LAW, 281 (O. Holmes ed., 12th ed. 1873) (“In his excellent work, Commentaries on American Law, which has been recognized since 1826 as containing a clear and correct elucidation of the fundamental principles of the American governmental system, Honorable James Kent expresses the thought in the following words: ‘It would be in vain to declare that the different departments of government should be kept separate and distinct, while the legislature possessed a discretionary control over the salaries of the executive and judicial officers. This would be to disregard the voice of experience and the operation of invariable principles of human conduct. A control over a man’s living is, in most cases, a control over his actions.’”); see also THE FEDERALIST NO. 70 (Alexander Hamilton).

remove such at will officers because of the control over subordinates' livelihood. The majority's conclusion runs counter to basic observations about human nature reflected and incorporated into the fabric of both the U.S. and Florida Constitutions.

8. The People's Intent

The U.S. Supreme Court noted that although the Constitution gives Congress the power to restrict presidential control of appointees, such power has its inherent limits: "(i)n its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."²⁹⁷ This observation succinctly summarizes the clear intent of the people in adopting the 1968 Florida Constitution: to provide the governor with full authority and responsibility for the exercise of executive power, excluding only that which is vested in other elected officials, subject to express constitutional limitations. Thus, the interpretation by the *Whiley* dissenters gives complete effect to the intent of the framers in drafting (and the people in adopting) article IV.

Each constitutional provision must be interpreted in light of the purpose to be accomplished "and the evils, if any, sought to be prevented or remedied."²⁹⁸ The court has repeatedly stated that its purpose is to fulfill, never frustrate, the will of the people.²⁹⁹ A practical test of constitutional interpretation is examining subsequent legislative determinations about the meaning of a provision; if the text is subject to more than one interpretation, the interpretation adopted by the legislature is given great deference by the courts.³⁰⁰ The legislature has enacted numerous laws that require full efficacy on a structured administrative chain of command in order to provide for the direction and supervision of subordinates through the agency head.³⁰¹ The agency head in turn is subject to the vested, inherent authority of the

²⁹⁷ *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 502 (2010) (relying on THE FEDERALIST NO. 51 (James Madison) and highlighting presidential control over appointees as a foundational principle from the beginning of the U.S. Constitution).

²⁹⁸ *State ex rel. West v. Gray*, 74 So. 2d 114, 115 (Fla. 1954).

²⁹⁹ *Id.*; *Browning v. Fla. Hometown Democracy, Inc.*, 29 So. 3d 1053, 1063 (Fla. 2010); *Benjamin v. Tandem Healthcare, Inc.*, 998 So. 2d 566, 570 (Fla. 2008); *Plante v. Smathers*, 372 So. 2d 933, 936 (Fla. 1979); *In re Advisory Op. to Governor Request*, 374 So. 2d 959, 964 (Fla. 1979).

³⁰⁰ *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1247 (Fla. 1996) (quoting *Greater Loretta Improvement Ass'n v. State ex rel. Boone*, 234 So. 2d 665, 669 (Fla. 1970)).

³⁰¹ For example, the general duties of all agency heads are outlined in FLA. STAT. § 20.05 (2018). The Department of Business and Professional Regulation and its several divisions are placed under a secretary appointed by and serving at the pleasure of the governor. FLA. STAT. § 20.165(1) (2018). One of these units is the Division of Alcoholic Beverages and Tobacco, administered by a subordinate official, the Division Director, and expressly authorized to appoint and train division personnel. FLA. STAT. § 561.11 (2018).

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governor to supervise administrative agencies. For example, when creating the Agency for Health Care Administration, the legislature placed the agency in a particular department but excluded that departmental secretary from any control over the agency.³⁰² Although the enabling statute required the agency director to report to the governor, the statute otherwise was silent as to the governor's role.³⁰³ The court found the legislature intended the agency to answer to the governor because the agency head was made an at-will gubernatorial appointee.³⁰⁴ Similarly, the Agency for Persons with Disabilities is housed administratively in the Department of Children and Family Services, but is not subject to the direction, supervision, or control of any function by that department.³⁰⁵ Rather, the director of the Agency for Persons with Disabilities serves as the agency head for all purposes.³⁰⁶ The First District Court of Appeal found no constitutional infirmity with this structure.³⁰⁷ The legislature understands that executive power requires a chain of command, which subjects subordinates to the direction and control of more senior personnel concerning agency rulemaking. This principle is even applicable to regulatory boards, where members are appointed for specific terms and cannot be removed except for cause.³⁰⁸

The following examples show how the legislature uses express statutory language to recognize the governor's authority to supervise and direct those agencies headed by appointees serving at the governor's pleasure. To "promote accountability, integrity, and efficiency in government . . ." the legislature established an Office of Inspector General in each agency.³⁰⁹ For agencies under the jurisdiction of the cabinet or governor and cabinet, that agency head is authorized to appoint or remove the agency inspector general.³¹⁰ Specifically, "(f)or state agencies under the jurisdiction of the Governor," the chief inspector general, who is appointed by and serving at the pleasure of the governor, appoints or removes agency inspector generals.³¹¹ Because the statute provides no additional language

³⁰² FLA. STAT. § 20.42 (1992).

³⁰³ *Agency for Health Care Admin.*, 678 So. 2d at 1247 (quoting FLA. STAT. § 20.42 (1991)).

³⁰⁴ *Id.* at 1248 (AHCA later was restructured as a separate department); *see* FLA. STAT. § 20.42(2) (2018) (showing the Secretary still is appointed by the Governor, confirmed by the Senate, and serves at the Governor's pleasure).

³⁰⁵ FLA. STAT. § 20.197 (2018).

³⁰⁶ *Id.* at § 20.197(1).

³⁰⁷ *J.M. v. Fla. Agency for Persons with Disabilities*, 938 So. 2d 535, 538 n. 4 (Fla. Dist. Ct. App. 2006).

³⁰⁸ FLA. CONST. art. IV, § 6(b).

³⁰⁹ FLA. STAT. § 20.055(2) (2018).

³¹⁰ *Id.* at § 20.055(3)(a)1, (3)(c).

³¹¹ FLA. STAT. § 14.32(1) (2018); *id.* at § 20.055(3) (emphasis added); FLA. STAT. § 20.055(3)(a)1, (3)(c) (2018).

“authorizing” the governor to “direct agencies,” the quoted clause is a legislative acknowledgement of the governor’s existing authority over agencies headed by at-will gubernatorial appointees. In turn, the statute creating and authorizing the chief inspector general refers to “*agencies under the jurisdiction of the Governor*.”³¹² The text and context of both statutes are not limited merely to the EOG or a department where the legislature expressly designates the governor as the agency head. Instead, the statutes clearly convey the legislative understanding that the governor has directory and supervisory authority over a number of agencies premised on the constitutionally vested executive power.

The legislature also uses express statutory language when insulating appointed officials from the governor’s direction and supervision. One example is the Division of Administrative Hearings (“DOAH”), created to conduct evidentiary hearings under the APA.³¹³ Housed in the Department of Management Services³¹⁴ for administrative purposes, DOAH is not “subject to the control, supervision, or direction by the Department of Management Services in any manner”³¹⁵ The same statute designates the director of DOAH as its agency head and requires, upon Senate confirmation, the director’s appointment by the Administration Commission.³¹⁶ This places the director outside the authority of the department secretary and the governor.

As shown by these examples, since 1969, shortly after article IV, section 6, was adopted as part of the 1968 Florida Constitution, the legislature repeatedly determined that the interaction of sections 1(a) and 6 empowered the governor to direct and supervise at-will appointed executive branch officials absent valid, express language in the Constitution or statute providing otherwise. The *Whiley* majority interpreted a lack of express authorization in the APA as a lack of authority in the governor.³¹⁷ As shown by reading all of article IV *in pari materia*, and by the foregoing statute examples, the opposite is the case. In instances where the legislature may act to limit the scope of the governor’s administrative authority but does not do so, the governor retains the authority to direct and supervise at-will appointees. The dissenters in *Whiley*, not the majority, correctly articulated

³¹² FLA. STAT. § 14.32(1) (2018) (emphasis added).

³¹³ See FLA. STAT. §§ 120.56(1)(c), 120.569(2)(a), 120.65(1) (2018). See also Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. STATE U. L. REV. 965, 1017 (1986).

³¹⁴ FLA. STAT. § 20.22(1) (2018) (stating that the head of the Department of Management Services is appointed by and serves at the pleasure of the Governor).

³¹⁵ FLA. STAT. § 120.65(1) (2018).

³¹⁶ FLA. STAT. § 14.202 (2018) (stating that the Administration Commission is comprised of the governor and cabinet, with the governor as chair of the commission).

³¹⁷ *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011).

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the same understanding of the constitutional provisions defined by the legislature, which is consistent with the interpretation and application of the executive power since the founding of the State.³¹⁸ As a result, the majority opinion strayed from an interpretation that has been articulated and applied for decades.

VI. CONSEQUENCES OF THE *WHILEY* DECISION

The *Whiley* majority rendered their decision by granting the petition for writ of *quo warranto* but withheld issuing the writ, noting:

We trust that any provision in Executive Order 11–72 suspending agency compliance with the APA, i.e., rulemaking, will not be enforced against an agency at this time, and until such time as the Florida Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor.³¹⁹

Fairly construing the majority’s adjuration with the plain text of EO 11-72, there was arguably no need for further action because the executive order did not suspend compliance with the APA. Although the court in prior cases followed a similar pattern of granting the petition, issuing an opinion, and withholding the writ, the effect of this decision appears to be as an advisory opinion since it does not provide an actual remedy.³²⁰ Justice Polston asserted as much in his dissent.³²¹ Nevertheless, the governor acquiesced to the majority by replacing EO 11-72 with Executive Order 11-211 (“EO 11-211”).³²² EO 11-211 required each agency headed by a gubernatorial appointee to submit rulemaking documentation to OFARR for review at least one week prior to submitting the documents for publication.³²³ The precatory findings of that order strongly disagreed with the majority opinion and its interpretation of the governor’s constitutionally-derived powers, but then concluded “the majority opinion in *Whiley* is to be afforded the deference due a judgment of the [Florida] Supreme Court.”³²⁴ This final observation is questionable because, there was no writ, mandate, nor “judgment” that was issued.³²⁵ Thus, the court left unclear as a matter of law whether the case was decided conclusively.

³¹⁸ *Id.* at 717–18, 723–26.

³¹⁹ *Id.* at 717.

³²⁰ See Florida House of Representatives v. Crist, 999 So. 2d 601, 616 (Fla. 2008).

³²¹ *Whiley*, 79 So. 3d at 726 (Polston, J., dissenting).

³²² Fla. Exec. Order No. 2011-21, *supra* note 328, at 1.

³²³ *Id.* at 7, § 2.

³²⁴ *Id.* at 5.

³²⁵ See Case Docket for SC11-592 at <http://onlinedocketssc.flcourts.org/DocketResults/CaseDocket?Searchtype=Case+Number&CaseYear=2011&CaseNumber=592> (last visited Nov. 27, 2018). The docket shows only a “disposition-granted” dated Aug. 16, 2011.

The Florida Legislature accepted the Supreme Court's invitation to amend the APA. Here, the legislature found that the governor's position in the case was consistent with the historical understanding and context, judicial precedent, and legislative application.³²⁶ As a result, the legislature amended both Florida Statutes, Chapter 20, and the APA, expressly conforming the law with the proper interpretation of applicable constitutional texts, and ensuring the governor's continuing authority to direct and supervise appointed agency heads serving at the governor's pleasure.

A. Executive Order 11-211

EO 11-211 superseded EO 11-72 but continued the governor's delegation of oversight and review functions to OFARR. Agencies headed by at-will gubernatorial appointees were required to provide OFARR with the text of all proposed new or amended rules, repeals, and all notices for publication.³²⁷ However, the agencies were no longer required to obtain OFARR approval to proceed with the APA rulemaking process.³²⁸ The order initially set out the governor's predicate findings; in particular, the distinction between the governor, as elected by and answerable to the people of the state, and the subordinate appointees who are not so accountable.³²⁹ Notably, EO 11-211 specifically and vigorously disputed the findings and rationale of the *Whiley* majority opinion by restating the interpretation of the governor's powers and duties vested under article IV.³³⁰ The order also acknowledged approval for the analysis and conclusions of the dissenting justices in the *Whiley* decision.³³¹ However, despite the court failing to issue a writ or other remedy, EO 11-211 concluded by treating the majority opinion as a valid judgment.³³²

B. The Inefficacy of Proceeding in Quo Warranto

Treating the majority opinion as a valid judgment is debatable. A petition for writ of *quo warranto* is an original proceeding testing a person's right to hold an office or exercise some right or privilege.³³³ The Florida Supreme Court has discretionary authority to issue the writ but its

³²⁶ 2012 Fla. Laws 116, §1.

³²⁷ Fla. Exec. Order No. 2011-211, *supra* note 328, at 7, § 2.

³²⁸ *See id.* at 5–7, §§ 1, 2.

³²⁹ *Id.* at 7, § 2.

³³⁰ *Id.* at 4–5.

³³¹ *Id.*

³³² *Id.* at 5.

³³³ Tracy Raffles Gunn, *Original Proceedings in Florida's Appellate Courts*, 32 STETSON L. REV. 347, 354 (2003).

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jurisdiction is limited to state officers or state agencies.³³⁴ Typically, exercising such a remedy as to subordinate state officers creates no enforcement problems; the executive power and the duty of the governor to ensure the faithful execution of the laws afford ample authority to carry out the court's writ. However, more significant constitutional issues arise when the court issues a writ in circumstances that command the governor to cease actions for which the court concludes there is no authority.

What if the governor politely declines to accede to the writ's prohibition? The Supreme Court arguably could not impose punishment for contempt when the governor acts in his or her official capacity. To do so would imply some superiority of the judicial branch over the executive, a presumption prohibited by the Florida Constitution. The court lacks authority to remove the duly-elected governor from office, even temporarily.³³⁵ Thus, issuing the writ to a governor who adamantly opposes the court's authority risks the appearance of interfering with the legitimate operation of the executive branch. Moreover, it would present problems of justiciability and would confirm the court's inability to enforce its own orders. In an earlier opinion dismissing a petition for writ of mandamus to compel the governor to issue a certificate of election for a congressional seat, Chief Justice Edwin M. Randall explained:

The proposition . . . is that the Judicial Department of the government may control the Executive in reference to an executive duty It has ever been considered by statesmen and jurists that where one has a power over another, in a public capacity, the one is the greater and the other the inferior power To employ the power of the courts in the business of managing the office of the Governor and directing him in the exercise of his duties, is to blot out the character given (that office) in the Constitution of 'Supreme Executive' and 'Chief Magistrate' of the State, and reduce him to the level of a secretary or county clerk If we have a case in which we cannot punish the disobedient, it results that we have no power to command . . . we produce no result except the exposure of our own impotence.³³⁶

Issuing an extraordinary writ to the governor presents different issues than imposing such a remedy on subordinate officers. Recognizing this discrepancy, the court has a history of granting such petitions and rendering such opinions.³³⁷ But, the court traditionally withholds the issuance of a writ to the governor by relying on the governor's willingness to accede to the

³³⁴ FLA. CONST. art. V, § 3(b)(8).

³³⁵ See FLA. CONST. art. III, § 17; FLA. CONST. art. IV, § 3; FLA. CONST. art. V, § 3.

³³⁶ State *ex rel.* Bisbee v. Drew, 17 Fla. 67–73 (1879).

³³⁷ See Fla. House of Representatives v. Crist, 999 So. 2d 601, 616 (Fla. 2008); *Ex parte Henderson*, 6 Fla. 279, 299 (Fla. 1855) (withholding issuing a writ of mandamus).

holding.³³⁸

The *Whiley* majority closed their opinion with “it is so ordered,” but it is difficult to understand the legal and precedential value of such a statement. While Florida has a full history and analysis of the use of extraordinary writs, particularly *quo warranto*, there are unanswered questions about the future impact of this case. The court’s jurisdiction is discretionary as to *issuing* writs of *quo warranto*; however, it is dubious whether such discretion extends to granting petitions and declaring an opinion without entering a final writ. If the old common law form of the writ provided the courts with broad latitude in an original jurisdiction proceeding, that scope is restricted by the jurisdictional limitations in the Florida Constitution. The original scope of the judicial power may have included authority to approve requests for extraordinary writs but withhold the actual issuance; however, by articulating the scope of the Supreme Court’s *quo warranto* jurisdiction in the Constitution, the people expressed their intent to constrain the court in issuing both writs of mandamus and writs of *quo warranto*.³³⁹ Jurisdiction does not go to the cause of action articulated in the petition; rather, it goes to issuing the writ. If the court grants the petition, the court found proper grounds to issue the writ and resolve the case. Arguably, if the court declines to issue the writ, it can be inferred that the court did not find proper grounds to issue one. In sum, the Constitution does not authorize the use of original extraordinary writ jurisdiction to issue binding advisory judgments, particularly when a full and complete legal remedy is available.³⁴⁰

Whiley had a full legal remedy available: an action for declaratory judgment and injunctive relief in the circuit court.³⁴¹ While declaratory judgment and injunctive relief may lack the intellectual allure and relative glamour of proceeding under the Supreme Court’s original jurisdiction, this standard form of action would have benefitted the court’s analysis and holding. All factual disputes, including the actual impact of the governor’s executive orders, would have been established in a complete record. Additionally, if the judgment demonstrated a significant miscarriage of constitutional authority and a need for prompt resolution, the District Court of Appeal could certify the decision for immediate Supreme Court review.³⁴² There would have been no need for the Supreme Court to ask whether the case should be referred to the circuit court for fact finding; the record for

³³⁸ *Crist*, 999 So. 2d at 299; *Ex parte Henderson*, 6 Fla. at 299 (withholding issuing a writ of mandamus).

³³⁹ FLA. CONST. art. V, § 3(b)(8) (1968).

³⁴⁰ *State ex rel. Gibbs v. Bloodworth*, 184 So. 1, 2 (Fla. 1938) (explaining the court will not issue a writ in *quo warranto* where there is an ample and sufficient remedy at law.); *see also State ex rel. Landis v. Duval County*, 141 So. 173, 176 (Fla. 1932).

³⁴¹ FLA. STAT. § 86.011 (2011).

³⁴² FLA. CONST. art. V, § 3(b)(4) (1968); FLA. R. APP. P. 9.030(a)(2)(B), 9.125.

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review would have been complete and the parties' legal arguments would have matured.³⁴³ Above all, the court would have had the advantage of the lower court's consideration of all the issues and articulation of the dispositive law.

It is doubtful that an opinion issued without a final writ or judgment has a binding effect, since the court's jurisdiction to render decisions about the scope and extent of the governor's constitutional powers is limited to advisory opinions requested by the governor. If *Whiley* is interpreted as an advisory opinion because the governor's substantial participation somehow constituted a "request," or simply because the court withheld the writ and any other remedy, the decision is not binding precedent.³⁴⁴

C. The Legislative Response to the Supreme Court's Request for Clarification

The Florida Legislature understood the *Whiley* holding to mean that the governor had no inherent constitutional authority to direct and supervise agency rulemaking outside of any express legislative delegation in the APA.³⁴⁵ The decision meant that agency heads who the governor appointed and those serving at his or her pleasure could exercise delegated rulemaking authority independent from any accountability to the governor except for the possibility of removal from office. The *Whiley* majority's view about how the statutes organized executive agencies and delegated rulemaking authority was one that misinterpreted the legislature's intent.³⁴⁶ The legislature adopted Florida Statutes, Chapter 20, to organize the functions of the executive branch.³⁴⁷ The legislature adopted the APA to standardize the proceedings necessary for administrative agencies to execute governmental authority provided by statute.³⁴⁸ The various express delegations of rulemaking authority in different statutes were made for agencies to implement substantive law within the controlling structure established by article IV of the Florida Constitution.³⁴⁹ Concerned about the implications

³⁴³ Scheduling Order, *Whiley v. Scott*, 79 So. 3d 702 (Fla. June 17, 2011) (No. SC 11-592) (granting Petitioner's Request for Expedited Oral Argument and scheduling oral argument for July 29, 2011).

³⁴⁴ *In re Advisory Op. to the Governor*, 509 So. 2d 292, 301 (Fla. 1987).

³⁴⁵ 2012 Fla. Laws 116, § 1(26).

³⁴⁶ FLA. STAT. § 120.54(5) (2018) (explaining the statute delegates authority to the Administration Commission to adopt the rules of procedure applicable to proceedings under the APA).

³⁴⁷ FLA. STAT. § 20.02 (2018).

³⁴⁸ FLA. STAT. §§ 120.54, 120.56, 120.565, 120.569 (2018).

³⁴⁹ *See, e.g.*, FLA. STAT. § 455.2035 (2018) (authorizing the Department of Business and Professional Regulation to adopt rules for licensure programs not placed under a statutory regulatory board); FLA. STAT. § 570.07(23) (2018) (authorizing the Department of Agriculture and Consumer Services to adopt rules implementing any of its statutory duties); FLA. STAT. §

for ongoing, effective governmental administration if the *Whiley* holding remained unabated, the legislature moved with alacrity to combat the foreseeable chaotic effect of the decision.

The *Whiley* decision came at a time of greater legislative attention to the implementation of delegated rulemaking authority, particularly the economic impact of existing and proposed rules.³⁵⁰ Responding to *Whiley*, similar bills were introduced in the House and Senate to clarify both agency administrative authority and the legislature's longstanding intent for the constitutional executives, especially the governor, to direct and supervise at-will appointees in exercising delegated authority.³⁵¹ Passed by both chambers, the final bill was signed into law on April 13, 2012 as 2012 Florida Laws 116.³⁵²

The legislature responded to the court's invitation for clarification by amending Florida Statutes, Chapters 20 and 120, expressly recognizing the authority of elected executive branch officers, particularly the governor, to direct and supervise those officials who they appoint and who serve at their pleasure.³⁵³ The first eight sections of the law reiterated the legislative intent

624.308(1) (2018) (authorizing both the Department of Financial Services and the Financial Services Commission to adopt rules implementing their respective statutes).

³⁵⁰ Miller, *Direction and Supervision*, *supra* note 17, at 351–354.

³⁵¹ The bill, a committee substitute for House Bill 7055 (CS/HB 7055) also included sections repealing unnecessary statutory delegations of rulemaking authority and establishing a continuing process to provide annual recommendations to repeal unnecessary delegations. The House bill, introduced by the House Rulemaking & Regulation Subcommittee, was carried through its committee stops and presented on the floor by Rep. Matt Gaetz (R-Ft. Walton Bch.). Senate Bill 1312 was introduced and sponsored principally by Sen. Don Gaetz (R-Niceville); this bill eventually was tabled by the Senate in favor of the House bill. Effective control of authority delegated by the legislature and a common-sense approach to government management appears to be more than just a theoretical concept in Florida; it is a family affair. Sen. Gaetz is the father of Rep. Gaetz, and the passage of CS/HB 7055 apparently is the first instance of a bill being carried in the separate chambers of the Florida Legislature simultaneously by sire and scion. *See* Press Release, Fla. Senate, State Agencies' Rule-Making Process To Be Restrained, Governor Approves Gaetz-Gaetz Bill (Apr. 13, 2012), <https://www.flsenate.gov/Media/PressReleases/Show/1974>; H.B. 7055, 2012 Leg. (Fla. 2012); S.B. 1312, 2012 Leg. (Fla. 2012) (last visited 12/2/2018).

³⁵² 2012 Fla. Laws 116.

³⁵³ FLA. STAT. §§ 20.02(3), 20.03(4), 20.03(5), 20.03(13), 20.05(1), 120.515, 120.52(3) (2012); *see also* 2012 Fla. Laws 116, §§ 4–8. Sections 4–8 of the law enacted specific amendments to Florida Statutes, Chapter 20, and the APA. Creating Florida Statutes, §20.02(3), and amending §20.03(4), the new law expressly stated the administration of an executive department placed under an officer or board appointed by and serving at the pleasure of the governor remains at all times under the governor's supervision and direction. The law expressly defined the term "to serve at the pleasure" by creating new Florida Statutes, §20.03(13), and reiterating that such an appointee "serving at the pleasure" remains subject to the direction and supervision of the appointing authority. Florida Statutes, section 20.05(1), was revised to expressly state that agency heads are subject to the constitutional allotment of power in the executive branch. To avoid any further misapprehension, section 3 of the law expressly stated the legislature's intent in making the revisions to Chapter 20 and the APA

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apparent in the existing statutes, recognizing the capacity for rational and pragmatic supervision of delegated rulemaking within the executive branch.³⁵⁴ The legislature began by providing detailed findings that explained the basis for the statutory amendments, and expressly affirmed that both EO 11-72 and EO 11-211 were consistent with state law and public policy.³⁵⁵

Twenty-six detailed findings clarified the legislature's interpretation of existing statutes as not granting at-will gubernatorial appointees any autonomous authority.³⁵⁶ The legislature acknowledged the governor's constitutional role as the chief executive officer of the state, in light of the historical understanding of executive power articulated by the framers of the U.S. Constitution, and as each version of the Florida Constitution allocated executive power.³⁵⁷ The legislature explained the foundation for the bill's clarification of statutory amendments, the relevant interpretation of the constitutional assignment of executive power, and the implications for statutory powers.³⁵⁸ The law confirmed the APA is only procedural in nature and is not intended to intrude into the constitutional authority of elected executive officers.³⁵⁹ The legislature clearly adopted a number of the predicate paragraphs included in EO 11-211, which shows the congruence of understanding between the legislative and executive branches in opposition to the *Whiley* majority. The legislature expressly disagreed with the majority's rationale by approving the dissenting opinions.³⁶⁰ The legislature emphasized the importance of holding appointed officials accountable to elected officers and approved the interim results of the governor's OFARR review process.³⁶¹ The legislative findings concluded that the decision in *Whiley* is accorded the deference due to an advisory opinion of the court because the court did not grant the requested relief.³⁶²

enumerated in the law: "The Legislature intends that the amendments made by this act to [Florida Statutes, §§20.02, 20.03, and 20.05], which apply to the organizational structure of the executive branch, and the creation of [Florida Statutes, 120.515], which applies to administrative procedure, are to clarify that the placement of an executive department under the direct administration of an officer or board appointed by and serving at the pleasure of the Governor does not implicitly limit or restrict the Governor's prerogative, legal authority, and constitutional responsibility to direct and supervise the execution of the law and the exercise of lawful discretion."

³⁵⁴ 2012 Fla. Laws 116, §§ 1–8.

³⁵⁵ *Id.* at §§ 1, 2.

³⁵⁶ *Id.* at § 1.

³⁵⁷ *Id.* at §§ 1(1)–(4).

³⁵⁸ *Id.* at §§ 1(5)–(11), (13)–(15), (17), (20)–(23).

³⁵⁹ *Id.* at § 1(16).

³⁶⁰ 2012 Fla. Laws 116, § 1(12), (26)(b).

³⁶¹ *Id.* at §§ 1(20)–(25).

³⁶² *Id.* at § 1(26)(d).

The legislature made two amendments to the APA: the first being a specific declaration of policy in a new statute section, which confirms the procedural nature of the APA and does not impair the authority of elected officers to direct and supervise their at-will appointees.³⁶³ This section addressed a significant issue argued in *Whiley* by expressly stating that an agency head's adherence to the direction and supervision of the appointing officer is not a delegation or transfer of statutory authority.³⁶⁴ For example, complying with the governor's policy directions is not a transfer of the rulemaking responsibilities exercisable by the agency head.

The second amendment emphasized the statutory definition of "agency head," reiterating the express language that the appointee remains subject to the direction and supervision of the appointing authority but also confirming that the actions of an agency head as authorized by statute are official acts.³⁶⁵ This latter clause prevents any argument that an otherwise-valid action is voidable if done without the permission of the appointing authority. These two amendments to the APA make clear that "direction and supervision" constitute proper influence over an agency head's exercise of statutory authority.

Contrary to the *Whiley* majority, the legislature found no violation of the constitutional separation of powers in EO 11-72.³⁶⁶ The Governor's letter to the Secretary of State transmitting the executed version of the act³⁶⁷ noted the concurrence of legislative and executive branch interpretations of the governor's article IV authority over at-will appointees.³⁶⁸ The letter also concluded that the statutory revisions in the new law were unnecessary under a correct interpretation of the Constitution.³⁶⁹ That may be true. But, what is equally true is that the statutory amendments do not conflict with such an interpretation, and the statutory clarifications clearly liberated the governor from any force of the *Whiley* opinion.

³⁶³ FLA. STAT. § 120.515 (2012); *see also id.* at §§ 3, 4, 7.

³⁶⁴ FLA. STAT. § 120.515 (2012).

³⁶⁵ FLA. STAT. § 120.52(3) (2012).

³⁶⁶ CS/HB 7055 (2012), signed by the Governor and enacted as 2012 Fla. Laws 116, § 2, showing that because EO 11-01 attempted to suspend certain publications by the secretary of state, in possible contravention to FLA. STAT. § 120.55 (2010), the order was not endorsed by the legislature. However, any legislative disapproval apparently dissipated when EO 11-72 superseded EO 11-01. Fla. Exec. Order No. 2011-72, § 8 (April 8, 2011).

³⁶⁷ Upon being approved and signed by the Governor, an act is deposited with the Department of State. FLA. STAT. § 15.07 (2018). The department assigns the actual chapter number to an act. FLA. STAT. § 15.155(1)(d) (2018).

³⁶⁸ Letter from Rick Scott, Governor of Florida, to Ken Detzner, Secretary of State (April 13, 2012), at 2, <https://www.flgov.com/wp-content/uploads/2012/04/4.13.12-HB-7055-Transmittal-Letter.pdf> (last visited Dec. 19, 2018).

³⁶⁹ *Id.*

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VII. CONCLUSION

Since 1787, framers of constitutions (including the Florida Constitution) allocated political power among the legislative, executive, and judicial branches based on the principle that such delegations vested in particular officers' bodies the *entirety* of the power so referenced. The Florida Constitution restrains governmental excess by dividing political power into three branches, creating further internal divisions within each branch, and expressly limiting the exercise of certain vested powers.³⁷⁰ The framers of most constitutions presumed the powers vested in each branch were not limited only to those expressly discussed in the constitutional text, but encompassed authority logically necessary for the particular branch to carry out its charge from the people. This implicitly entails all authority distinctively associated with that branch. The Florida Constitution vests the supreme executive power in the governor without detailing the principles, doctrines, or limitations of that authority in addition to those expressly stated elsewhere in the Constitution *because the framers commonly understood the scope and meaning of the terms employed*. Thus, the governor's vested authority embraces the entire scope of executive power and function not otherwise assigned to another officer or body.

The *Whiley* majority viewed rulemaking power as residing in the legislature at all times, never implicating any aspect of constitutional power, and always controlled exclusively by legislative action.³⁷¹ Such an absolutist interpretation is not warranted by the text of the Florida Constitution; if such interpretation was the case, then arguably the legislature could not delegate rulemaking to any executive branch official. The national history of understanding, controlling, and applying constitutional executive power, in addition to Florida case law, shows that the rulemaking power may be delegated to the executive branch with specific limits and controls necessary to execute the laws, rather than the unbridled making of public policy.³⁷² The operation of delegated rulemaking authority is within the governor's overarching constitutional responsibility to ensure the proper execution of the laws. Unless expressly and clearly limited by the Constitution, the governor retains full constitutional authority to direct and supervise the

³⁷⁰ See FLA. CONST. art. II, § 3, creates the basic separation of powers. FLA. CONST. art. III, § 1 divides the legislature into two chambers, and § 8 provides the governor's veto as a check on the legislative power. FLA. CONST. art. IV, §§ 1 and 4 divide the executive power between the Governor and three Cabinet members, § 6 provides limits on the Governor's power of appointment through Senate confirmation or Cabinet approval, and § 9 vests certain executive functions for fish and wildlife conservation in a separate commission. FLA. CONST. art. V, § 1, creates four separate levels of trial and appellate courts in Florida and constrains their respective jurisdictions.

³⁷¹ *Whiley v. Scott*, 79 So. 3d 702, 715–17 (Fla. 2011).

³⁷² See, e.g., FLA. STAT. §§ 120.52(8), 120.536(1) (2018).

actions of subordinate officials, including delegated rulemaking.

All versions of the Florida Constitution consistently vested the governor with the “supreme executive power” while contemporaneously creating other executive officers independent from the governor’s control. These independent officers are accountable only to the electorate. The use of the word “supreme” creates a hierarchical structure for exercising the executive power. Absent an express provision, the governor remains fully authorized and responsible for directing and supervising the executive branch’s functions implemented through administrative agencies.

By only narrowly focusing on certain language in article IV, section 6, and not giving a full and complete reading to section 1(a), the *Whiley* majority mistakenly decided the Governor could not direct his at-will appointees because the legislature did not expressly allow him to do so. The error in this conclusion is found in the question that logically should be answered next: if not subject to the governor’s supervision, then to whom are these unelected officials accountable? The *Whiley* majority, finding the agency had autonomy, did not articulate the accountability of such agency heads and thus failed to address the very real consequences of their decision.

The Florida Constitution does not authorize the creation of bureaucrats who are autonomous of any supervision. The clear intent of the people is for those ultimately responsible for the acts of the various branches of government to be answerable directly to the electorate. This is so even if the justices themselves periodically stand before the voters for merit retention.³⁷³ From this perspective, the requirements of article IV, section 6, are a particular expression of the governor’s supremacy. Under section 6, apart from elected constitutional officers and the members of certain licensing boards, the administrative head of any executive department *must* serve at the pleasure of the governor. The governor is ultimately responsible for every executive act that is not the direct responsibility of another elected constitutional officer.

Florida Statutes, section 20.02, states the legislature intended for the structure of the executive branch to be consistent with the “executive capacity to administer effectively at all levels.” Under long-standing interpretations and applications of executive power vested in the governor, the capacity to effectively administer all levels of the executive branch was assured by the governor’s authority to direct and supervise at-will gubernatorial appointees. Finding the governor cannot direct or supervise at-will appointees in the development of administrative policy is not consistent with the full language of the Constitution and section 20.02. Contrary to this legislative intent, the *Whiley* majority lessened that capacity

³⁷³ FLA. CONST. art. V, § 10(a).

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for effective administration. If every appointed agency head may pursue policy development and implementation without oversight from any elected official, and the elected official's only recourse to achieve consistent implementation of preferred policies is to summarily dismiss agency heads, then the potential for serial dismissals and disruptions of agency operations likely would produce *ineffective* administration. In this respect, the majority's rationale authorizes the legislature to create agencies autonomous from any executive control, which conflicts with the rationale and conclusion in *Jones v. Chiles*.

The legislature enacts policy and authorizes entities to *administer* the programs created, but this allocation cannot avoid the constitutional determination that all executive action must be accountable to elected officials under the Constitution. The execution of a statutory program must operate within the constitutional allocation of executive powers. This does not lessen the power of the legislature but represents the intent of all framers of all variants of the Florida Constitution: the substantive power to execute the laws enacted by the legislature is vested in the executive. The executive branch has no substantive authority to create public policy. Likewise, the legislative branch has no substantive authority to execute the laws but must direct their administration to the coordinate branch.

The delegation of rulemaking authority is an efficacious tool designed for the constrained implementation of law, but that delegation to an executive branch department must comport with the balance struck in the Florida Constitution. The Constitution places these agencies within the executive branch. While expressly providing for control of the executive branch by the governor exercising the supreme executive power, the Constitution only supports, not creates, the legislature's delegation of rulemaking authority. Statutes that articulate the scope of authority and duties of the chief inspector general demonstrate the legislature's understanding and intent that certain agencies are still subject to the governor's constitutional authority, even if the governor is not the denominated agency head. Although this understanding is not expressly stated in every statute, the historical record proves the generally-held assumption that the governor, as chief executive, is responsible for and has authority over executive branch agencies unless the Constitution or statute provides otherwise. The mere fact that the administration of an executive department was placed directly under an officer appointed by and serving at the pleasure of the governor did not change the governor's authority over that agency.

Whiley's argument was inherently flawed. For example, she and her supporting *amici* argued that a policy initially formulated by internal agency considerations, before rulemaking even began, was somehow equal in status to a statutorily-defined rule and thus merited the full panoply of APA process

if the governor participated in the initial stages. By misusing the word “rule,” Whiley set up an ephemeral straw man, and invited the court to find some legislative policy dictating the manner in which the governor may communicate with agency heads about formulating policy *prior to taking any action* to establish that policy as a rule.³⁷⁴ One *amicus* illogically argued that “(p)reventing agencies from even initiating rule development cuts the public out of an important step in shaping the language of the proposed rule.”³⁷⁵ The APA requires rule development before new rulemaking and requires rulemaking before there is an enforceable rule.³⁷⁶ As the APA sets no time limit for initiating rule development, save certain requirements under Florida Statutes, section 120.54(1)(b), there is no timeline for internal policy formulation. For the sake of argument, if the governor effectively shut down all rulemaking by prohibiting rule development, there would be no rule meriting public input. Only if agencies were ordered to violate the law and not provide any entry point for public comment would there be a detriment to the public interest. In such a case, judicial intervention through injunctive or other relief is available. Hyperbole is not a substitute for cogent analysis.

This shows the sophistry of the majority opinion. If the majority truly believed that agency heads were not subject to the governor’s direction and supervision concerning rulemaking, they should have denied the petition. No violation of the APA was shown and Whiley’s full and proper remedy, if any, was against those agency heads purportedly failing to exercise their exclusive rulemaking power. Her counsel never stated how the governor could enforce either executive order and thereby violate the APA. Whiley clearly had sufficient available legal remedies other than seeking an extraordinary writ from the Supreme Court; these included bringing actions against the actual agency heads, whom she argued had the sole legal power to direct agency rulemaking.³⁷⁷ Whiley repeatedly stressed that the legislature stated the requirements for rulemaking in the APA and that only the statutory process controlled.³⁷⁸ The Governor agreed because, in reality, that point was never at issue. In adopting the time requirements for compliance with the rulemaking procedures, the legislature provided neither direction for the internal processes exercised by the executive branch nor structure for the development of options subject to the discretion of an agency head. In the end, there is no alternative to complying with the APA

³⁷⁴ A real straw man at least is tangible to the point of requiring actual straw.

³⁷⁵ Brief for Florida Audubon Society as Amicus Curiae Supporting Petitioner, *supra* note 105, at 14.

³⁷⁶ FLA. STAT. § 120.54 (2018).

³⁷⁷ See discussion of possible actions, *supra* note 83.

³⁷⁸ See Petition for Writ of Quo Warranto, *supra* note 4, at 12, 14–18, 21–24, 30; Petitioner’s Amended Reply, *supra* note 102, at 13, 15, 17–19.

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assurances of notice and an opportunity to be heard after the statutory rulemaking process is initiated.³⁷⁹ Indeed, Whiley's counsel failed to point to any factual, legitimate, or actually threatened breach of the APA in the governor's orders.³⁸⁰ The moot point of prohibiting statutorily required publication by the Department of State was never more than a minor part of Whiley's argument. Her true complaint was a policy disagreement with the governor.

Regardless of the arguments, the court was responsible for the decision. Treating the phrase "supreme executive power" in section 1(a) as a merely textual embellishment, the majority took an absolutist view that implementing a legislatively delegated power excluded any role for constitutionally vested, supervisory executive power. In doing so, the majority confined itself to a neatly circumscribed but flawed analysis. So constrained, the majority endorsed the conclusions in AGO 81-49 as fully consistent with their reasoning, overlooking the failure of that earlier discussion to construe together all relevant clauses of article IV to give each their full meaning and fulfill the intent of the people in adopting the 1968 Constitution.

The majority's analysis is significantly flawed because it fails to clarify two consequences of their decision. The first is practical: if agency heads appointed by and serving at the pleasure of the governor are independent from gubernatorial direction and supervision in the exercise of agency rulemaking authority, then to whom are they accountable? If the majority meant to recognize a "fourth branch of government" composed of unelected bureaucrats, there is little support for this proposition in the Constitution's text. The Constitution's language shows the people intended for those

³⁷⁹ See, e.g., FLA. STAT. §§ 120.50, 120.52(8)(a), 120.54(1), 120.56, 120.74 (2018). One concludes the Florida Legislature is far more concerned with the function of implementing and executing the statutes over the form of internal executive branch decision making.

³⁸⁰ Oral Argument at 1:08:48, *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011) (No. SC 11-592), <http://wfsu.org/gavel2gavel/viewcase.php?eid=212>. Justice Peggy Ann Quince clearly asked "[w]hat is the additional step?" and Whiley's counsel could only respond with speculation that OFARR could stop rulemaking initiated by citizen petition. This argument showed a fundamental misunderstanding of both the APA and the governor's orders. The APA gives anyone with the requisite interest the right to request an agency to begin formulating policy implementing statute by initiating the formal rulemaking process. See FLA. STAT. § 120.54(7) (2018). The law *requires* the agency to make one of three final decisions on that petition within 30 days. The agency's decision does not meet the statutory definition of a rule because it is not a statement of general applicability. See FLA. STAT. § 120.52(16). Therefore, the decision whether to grant a petition to initiate rulemaking *was not a matter for review* by OFARR under EO 11-01 or its replacement, 11-72. However, because the decision to grant or deny a petition to initiate rulemaking affects the requesting party's substantive interests, the APA authorized a challenge to the agency's decision with the full panoply of procedural process rights afforded in Florida Statutes, sections 120.569 and 120.57, including judicial review of the resulting final order under Florida Statutes, section 120.68. Counsel's hypothetical was not only wrong but irrelevant.

exercising governmental authority to be accountable to the electorate, either directly or through their subordination to those directly-elected officials. Since the majority interpreted article IV, section 6, as authorizing the creation of independent appointed agency heads, a reading not previously presumed by the other two branches, the holding also should have clarified how the APA provided for holding these officials accountable.

The second consequence is the potential for administrative chaos. One possible result of finding an independent “fourth branch of government” is the immediate replacement of all appointed agency heads with every change in governor. A new governor, having no assurances that the present agency heads would feel bound to concur with or implement the new governor’s preferred policies, should be expected to remove all agency heads immediately upon taking office and replace them with the governor’s preferred interim appointees until the Senate could act. This type of upheaval every four to eight years would impede policy implementation more than the internal executive review processes initiated by new governors. Such uncertainty increases the risks of delay in addressing the needs of those vulnerable populations ostensibly of concern to Whiley and her peers.

Understanding the flaws in Whiley’s arguments or the lapses in analysis applied by the majority does not answer the core question of why the majority adopted their position in the face of the cogent and correct arguments by the governor and dissenting opinions. Ascribing motives other than seeking to interpret and apply the text of the Constitution is not supported by the opinion or the court record and would be merely speculative. Yet, the majority must have had some reason to exercise the court’s unbridled discretion and entertain the petition in *quo warranto*. Perhaps Justice Jackson’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*³⁸¹ provides some insight:

The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power’s validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.³⁸²

The majority opinion hinged on a presumption that “the power to remove is not the power to control.”³⁸³ This conclusion conflicts with the

³⁸¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring in result).

³⁸² *Id.*

³⁸³ *Whiley v. Scott*, 79 So. 3d 702, 715 (Fla. 2011).

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understanding of executive power held by the nation's founders, with the application of that power by federal and state executive branch officers at the time the Florida Constitution of 1838 was developed, and with basic human nature. The majority's conclusion could be read as frustrating the intent of the people. By vesting the supreme executive power in the governor, the people of Florida expressly intended a hierarchical exercise of the executive power. If not expressly delegated by the Constitution, the authority and responsibility to direct and supervise at-will appointees remains in the governor so that no unelected subordinate exercises governmental power without oversight by one who is ultimately held accountable by the electorate.

The *Whiley* majority sought to address what appeared to be a human problem—which in actuality was mere hyperbole—by applying a neatly circumscribed constitutional analysis—which excluded full and proper interpretation of all the applicable text—leading to a plausible conclusion, that fails upon full and proper constitutional construction and reasonable statutory interpretation. As argued by the Governor and expressly stated by the legislature, the majority's conclusion that the Governor lacked constitutional authority to direct and supervise his appointees was wrong.