IN THE SUPREME COURT OF FLORIDA 67,433

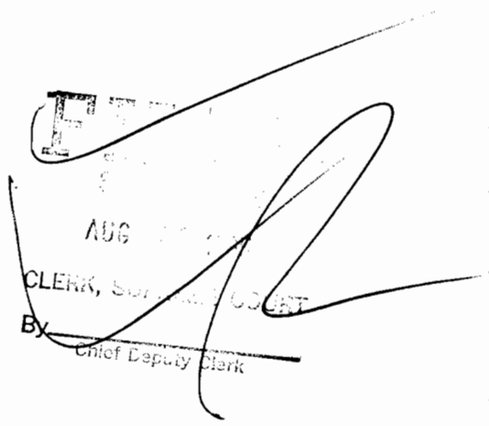
THE FLORIDA HOUSE OF REPRESENTATIVES and JAMES HAROLD THOMPSON as Speaker of the Florida House of Representatives and as a citizen and tax payer of the State of Florida,

Petitioners,

vs.

THE HONORABLE D. ROBERT GRAHAM, Governor of the State of Florida and GEORGE FIRESTONE, Secretary of State of the State of Florida,

Respondents.



AMENDED PETITION FOR WRIT OF MANDAMUS

JURISDICTION

Jurisdiction exists in this Court pursuant to Article V, Section 3(8), Florida Constitution. This Court should exercise its jurisdiction because:

(a) This case raises a significant constitutional issue between the legislative and executive branches involving the relative powers of those branches and such issues should rightfully be decided in this Court.

(b) The case challenges gubernatorial vetoes which cast doubt upon the expenditure of substantial amounts of public funds, thereby creating lingering uncertainty which hampers the state's ability to finance authorized state projects.

(c) The case solely involves issues of law and there are no disputed issues of fact to be resolved.

Brown v. Firestone, 382 So.2d 654 (Fla. 1980); Division of Bond Finance vs. Smathers, 337 So.2d 805 (Fla. 1976); Dickenson v. Stone, 251 So.2d 268 (Fla. 1971).

FACTS

The Florida Constitution, in Article XII, Section 9(a)(2), carries forward from the 1885 Constitution the Public Education Capital Outlay program or "PECO". The section provides for all proceeds of the revenues derived from the gross receipts taxes to be placed in a trust fund to be used to finance capital projects for the state's educational system. The constitution designates the State Board of Education to administer the fund. The Board is authorized to issue state bonds pledging the full faith and credit of the state to finance or re-finance capital projects authorized by the Legislature. Such

bonds are primarily payable from revenue in the PECO trust fund. In addition, funds from the trust fund may be used directly to finance projects authorized by the Legislature when funds are available after meeting bond requirements.

The PECO program is administered pursuant to Chapter 235, Florida Statutes, which was subject to sunset review during the 1985 session.[1] The 1985 Legislature enacted CS/SB 848 (App. 1-40) which substantially amended and re-enacted Chapter 235 pursuant to sunset review, amended Chapter 203 and authorized a number of new PECO projects, stating the maximum cost of each such project to be financed with PECO funds.

On June 14, 1985, the Governor submitted to the Secretary of State his message vetoing a number of specific provisions of CS/SB 848 which authorized PECO projects. [App. 41-47]

NATURE OF RELIEF SOUGHT

Petitioners seek a determination by this Court that the aforesaid vetoes of specific provisions of the 1985 PECO bill, CS/SB 848, are unconstitutional and the issuance of a writ of mandamus ordering the Secretary of State to expunge the vetoes from the official records of the state.

ARGUMENT

THE SEPARATION OF POWERS DOCTRINE

The issues raised by this petition involve one of the most fundamental doctrines of democratic government; separation of powers. The legislative power of the state is vested in the Legislature[2] and, by virtue of the separation of powers doctrine embedded in the Constitution, no aspect of the legislative power may be exercised by either of the other two branches.[3] The importance of this doctrine cannot be understated. As this Court has said:

> The separation of governmental power was considered essential in the very beginning of our Government, and the importance of the preservation of the three departments, each separate from and independent of the other becomes more important and more manifest with the passing years. Experience has shown the wisdom of this separation. * * * Recorded history shows that such encroachments ultimately result in tyranny, in despotism, and in destruction of constitutional processes.

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[1] Chapter 81-223, 82-137 and 82-240, Laws of Florida.

[2] Article III, Section 1, Florida Constitution.

[3] Article II, Section 3, Florida Constitution.

Pepper v. Pepper, 66 So.2d 280 (Fla. 1953). The veto power of the Governor, while an important check on the legislative branch, is nevertheless an intrusion into the exercise of the legislative power and is carefully circumscribed by the Constitution. Thus, Article III, Section 8, provides:

> In all cases except general appropriations bills, the veto shall extend to the entire bill.

This Court has recognized that:

> [T]he veto power is intended to be a negative power, the power to nullify, or at least suspend, legislative intent. It is not designed to alter or amend legislative intent.

Brown v. Firestone, 382 So.2d 654 (Fla. 1980). Thus, the veto power is the executive equivalent to the judicial power to declare legislation unconstitutional. Just as the courts may strike but not rewrite a law, so the Governor may veto but not rewrite a bill. The power to veto part, but not all of a bill, is the power to rewrite the legislation. This is particularly true in the case of PECO, an integrated body of legislation setting policy and priorities for Florida's educational system. By vetoing only portions of the PECO bill, the Governor has essentially reordered the priorities established by the Legislature, a strictly legislative function. In illustrating its point that the veto power was not designed to alter or amend legislative intent, this Court stated in Brown v. Firestone, supra:

> For example, when the Legislature designates under the Department of Education $5,000,000 for salaries, the Governor cannot veto the appropriation for salaries and utilize the money for another purpose; the veto must, in effect, destroy the fund. Otherwise, the Governor could legislate by altering the purpose for which the money was allocated. He could "create" another purpose to which to apply the appropriation.

The Governor's veto message itself reflects an intention to do precisely what the Court referred to in Brown:

> Funding such [vetoed] projects served to reduce the sums allocated through the distribution formulas to all school districts, community colleges and universities and constitutes a wasteful diversion of limited resources from identified high priority needs such as classroom space for Florida's increasing elementary and secondary school populations.

[App. 83]

The Constitution, in Article III, Section 8(a), recognizes a singular exception to the general rule that a veto must extend to the entire bill:

> The Governor may veto any specific appropriation in a general appropriation bill ***.

The issue before this Court is whether a PECO bill, or CS/SB 848 in particular, is "a general appropriation bill" within the meaning of Article III, Section 8(a).

THE PECO PROGRAM

An understanding of the constitutional provisions establishing the PECO program illustrates that, whatever this Court's construction of the veto provision may be, it clearly does not encompass a PECO bill. The PECO program is unique, and the very factors which make it unique remove it from the application of the line item veto power in Article III, Section 8(a).

PECO projects are not funded out of general revenue. They are funded through a trust fund established by Article XII, Section 9, of the Florida Constitution. The Constitution provides that all of the proceeds or revenues derived from the gross receipts taxes shall be placed in the trust fund. The fund is administered by the State Board of Education which is empowered to issue bonds pledging the full faith and credit of the State. The bonds are serviced by money in the trust fund. The constitution establishes the order of priority of use of the funds:

> The monies in the capital outlay fund in each fiscal year shall be used only for the following purposes and in the following order of priority:
>
> (a) For the payment of the principal of and interest on any bonds maturing in such fiscal year;
>
> (b) For the deposit into any reserve funds provided for in the proceedings authorizing the issuance of bonds of any amounts required to be deposited in such reserve funds in such fiscal year;
>
> (c) For direct payment of the cost or any part of the cost of any capital project for the state system theretofore authorized by the legislature, or for the purchase or redemption of outstanding bonds in accordance with the provisions of the proceedings which authorized the issuance of such bonds.

Id. It is apparent that the line item veto power was not intended to extend to PECO funding by the very fact that Article XII, Section 9(a)(2), does not require any legislative appropriation. The fund is administered by the State Board of Education subject only to the proviso that:

> * * * [N]o proceeds shall be expended for the cost of any capital project, unless such project has been authorized by the legislature.

Id. All of the funds necessary for the program have already been "appropriated" by the Constitution itself, and are available for use by the Board on authorized projects. There is no question that the money can only be used for <u>projects</u> that have been authorized by the Legislature. However, unlike general revenue, PECO funds have been earmarked and made available by the Constitution for administration by the Board. PECO is actually one of several financing programs provided for in Article XII, Section 9. Section 9(c) provides for revenues from the second gas tax to be placed in a fund for the acquisition and construction of roads. Section 9(d) provides for the revenues from motor vehicle license fees to be placed in a fund for school district and junior college district capital

outlay projects. Like PECO, the second gas tax fund and the motor vehicle licensing fund are administered by administrative boards created by the constitution. The gas tax fund is administered by the State Board of Administration and the motor vehicle licensing fund is administered, like PECO, by the State Board of Education. None of these special funding provisions call for a legislative appropriation. The only difference between PECO and the other Section 9 funds is that PECO projects are authorized by the Legislature whereas projects financed by the other funds are authorized at the local level.

It is significant that all of the funding provisions under Article XII, Section 9, were proposed by the Revision Commission and ratified by the electors at the same time as the veto provisions in Article III, Section 8. Presumably, if the framers of the 1968 Constitution had intended these funds to be subject to line-item veto, the language would have been quite different. It would at least have provided for appropriation of funds by the Legislature.[4] Instead, the Constitution expressly placed administration of the funds in the hands of the State Board of Education on which the Governor has one of seven votes and State Board of Administration on which he has one of three votes. The legislative reference to sums of money for PECO projects in CS/SB 848 is simply a convenient method of designating the authorized size of a given project. Thus, the bill states:

> The Legislature hereby finds and determines that the items and sums designated in this section shall constitute authorized capital outlay projects within the meaning and as required by s. 9(a)(2), Art. XII of the State Constitution, as amended, and any other law. * * * The sum designated for each specific allocation for a project is the maximum sum to be expended for each specified phase from funds accruing under s. 9(a)(2), Art. XII, of the State Constitution, as amended. The scope of each project shall be planned in such a way as to provide that the amounts specified shall not be exceeded, or any excess in cost shall be funded by funds other than those appropriated herein.

CS/SB 848, pp. 70, 71. It is significant that the Legislature could have authorized the same projects with the same limitations without ever making reference to money. It could simply authorize the projects by name, number or other designation as such projects are proposed, including scope and limitations, to the State Board of Education. The Board would then be authorized by Article XII, Section 9(2), to fund those projects in the manner and according to the priorities set out in the constitutional provision.

This Court has held that the Legislature may not draft a general appropriations bill

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[4] Even then it would have been questionable whether capital outlay expenditures constitute general appropriations.

in such fashion as to unreasonably preclude the exercise of the line item veto power. In Re. Opinion to the Governor, 239 So.2d 1 (Fla. 1970). By the same token, the Governor should not be permitted to exercise a line item veto on a bill which, by its nature, is clearly not a general appropriation bill simply by designating it as such.

THE VETO POWER

The exception contained in Article III, Section 8(a), authorizes a major executive intrusion into the legislative branch in direct contravention of the fundamental policy of separation of powers. In essence, it permits the Governor to "legislate" by reordering the priorities established by the Legislature. As such, it should be narrowly construed. Such strict construction is in keeping with the general rule that a proviso or exception in a constitution should be strictly construed. In Re Advisory Opinion to the Governor, 313 So.2d 717 (Fla. 1975). A strict construction is also in keeping with the principle that limitations upon legislative authority, including the gubernatorial veto, must be strictly construed. The lawmaking power of the Legislature is plenary and inherent, and limitations on such power must be clearly imposed by the Constitution. State v. Board of Public Instruction for Dade County, 170 So. 602 (Fla. 1936); State v. Davis, 166 So. 2(a), (Fla. 1936); Farragut v. City of Tampa, 22 So.2d 645 (Fla. 1945). On the other hand:

> The authority of an executive to set aside an enactment of the legislative department is not an inherent power, and can be exercised only when sanctioned by a constitutional provision, and only in the manner and mode prescribed.
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> * * * * *
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> The veto power is in derogation of the general plan of state government, and provisions authorizing it must be strictly construed, so as to limit its exercise to the powers expressly enumerated or necessarily implied.

82 C.J.S., Statutes, §52, p. 85.

In construing a constitutional provision, it is appropriate to consider the purpose for such provision. State ex rel. Dade County v. Dickson, 230 So.2d 130 (Fla. 1970). The most compelling purpose behind the exception in Article III, Section 8(a), can be discerned by consideration of the closely related proscription in Article III, Section 12:

> Laws making appropriations for salaries of public officers and other current expenses of the state shall contain provisions on no other subject.

The reference in Section 12 to "salaries of public officers and other current expenses of the state" has often been considered by this Court to be synonymous with a general appropriation bill:

> Provisions in a General Appropriations Bill on any subject other than "appropriations for salaries of public officers and other

> current expenses of the State" and matters reasonably related thereto are invalid and are not law.

In Re: Advisory Opinion to the Governor, 239 So.2d 1,9 (Fla. 1970). Also see, Advisory Opinion of the Justices, 14 Fla. 285 (1872); Amos v. Mosely, 77 So. 619 (Fla. 1917); Lee v. Dowda, 19 So.2d 570 (Fla. 1944); and Brown v. Firestone, supra. In Amos v. Mosely, supra, at 624, this Court noted the purpose of Section 12:[5]

> The purpose of such a provision is generally conceded to be to prevent including in bills appropriating money to carry on the government of the state measures foreign to that purpose, and by taking advantage of the necessities of the state, force the Legislature to adopt them, or stop the entire machinery of the government for want of funds to carry on.

Clearly, the same purpose underlies the provision in Article III, Section 8(a), allowing the Governor to veto specific appropriations in the general appropriation bill. If the Governor were forced to veto the entire appropriation bill, then the price of such a veto would be the halting of the entire machinery of state government, a prospect which would clearly have an unduly chilling effect upon the exercise of the veto power. No other justification can be cited of sufficient magnitude to warrant the departure from the separation of powers doctrine represented by the exception in Article III, Section 8(a). While this purpose is sufficiently compelling to justify executive intrusion into the legislative function, it does not apply to a PECO bill. By its nature, the PECO bill does not appropriate salaries and other current expenses of the state. The veto of the entire bill would have little or no impact upon the continued operation of state government.[6] The Legislature does appropriate funds for salaries and current expenses related to the administration of the PECO program, but it is a significant indication of the contemporaneous interpretation by both branches that the Legislature and the Governor have traditionally set forth such appropriations as separate items in legislative enactments and in the Governor's proposed budget. In fact, such appropriations in 1985 and most previous years have appeared in the general appropriation bill.

In order to consider the PECO bill a general appropriation bill, it would be necessary to define that term to include any bill which makes appropriations embracing distinct items or involving two or more subjects. However, that is precisely the type of language which the framers of the 1968 constitution rejected on two separate occasions. Article IV, Section 18, of the 1885 Constitution provided:

> The Governor shall have power to disapprove of any item or items of any bills making appropriations or embracing distinct items....

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[5] Then Article III, Section 30, Florida Constitution (1885).

[6] During the 1984 session, the Governor did, in fact, veto the entire PECO bill.

The 1968 Constitution amended the provision to delete reference to "appropriations of money embracing distinct items" and replaced it with the current reference to "a general appropriation bill". Of equal significance was a subcommittee draft of Article III, Section 8, considered and rejected by the 1967 Constitution Revision Commission:

> In all cases except bills containing appropriations on two or more subjects, herein called general appropriation bill, the veto shall extend to the entire bill.

[App. 48; Fla. State Archives, 1967 CRC, Series 720, Box 6, Fldr. 2] The rejection of language from the 1885 Constitution and from the subcommittee draft reflects a clear intent that in order to be considered a general appropriation bill, a bill must do more than appropriate money embracing distinct items or covering two or more subjects. Indeed, if that were the sole criteria, numerous bills, including at least four major bills in 1985,[7] would be subject to line item veto. This would be far beyond the authority the legislative or executive branches have historically presumed the governor to possess. A more sensible and workable definition of a general appropriation act was that given by the United States Supreme Court in the early case of Bengzon v. Secretary of Justice, 299 U.S. 410, 415, 81 L.Ed. 312, 315 (1937). In the Bengzon case, the Supreme Court was considering precisely the same issue now before this Court and was interpreting the section of the Phillipines Constitution equivalent to Article III, Section 8, of the Florida Constitution. The Court stated:

> The term "appropriation act" obviously would not include an act of general legislation; and a bill proposing such an act is not converted into an appropriation bill simply because it has had engrafted upon it a section making an appropriation. An appropriation bill is one the primary and specific aim of which is to make appropriations of money from the public treasury. To say otherwise would be to confuse an appropriation bill proposing sundry appropriations of money with a bill proposing sundry provisions of general law and carrying an appropriation as an incident.

Any reasonable definition of a general appropriation bill would surely not include the 1985 PECO bill, CS/SB 848. It is obviously a substantive bill and, to the extent that it makes "appropriations" at all, they are clearly incidental to the substantive provisions. Only one of thirty-five sections and twelve of eighty pages authorize expenditure of funds.

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[7] Chapters 85-276 (growth management), 85-360 (Apalachicola Bay), 85-247 (anatomical gifts) and 85-148 (Lake Apopka restoration), Laws of Florida.

The remainder of the bill is comprised of substantial amendments to Chapters 235 and 203 enacted pursuant to sunset review. Indeed, the inclusion of the contents of CS/SB 848 in the appropriation bill would be indisputably unconstitutional since none of its many provisions involve salaries of public officers or other current expenses of the state.[8]

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[8] It is generally recognized that initial capital outlay is not included within the term "current expenses". See, 25 C.J.S., pp. 45-46; Osage County Ex. Bd. v. Missouri-Kansas-Texas R. Co., 340 P.2d 217 (Okl. 1959); State v. Brown, 148 N.E. 95 (Ohio 1925); Sheldon v. Purdy, 49 P. 228 (Wash. 1897); Thompson v. Mayo, 204 S.W. 747 (Ark. 1918); State v. Jorgenson, 136 N.W. 2nd 870 (S.D. 1965); Section 216.011(1)(m), (v) and (o), Florida Statutes.