w/o o/a

IN THE SUPREME COURT OF FLORIDA

ROBERT HARDEN,	:	
Appellant,	:	
v.	:	CASE NO. 67,531
ELSIE GARRETT, KEITH BRACE, BILL PEEPLES, SAM PRIDGEN, LEWIS LINDSEY, NELLIE THOMPSON, and JAMES G. WARD,	:	
Appellees.	:	

ANSWER BRIEF OF APPELLEE JAMES G. WARD

Appeal taken from the Circuit Court
of the Second Judicial Circuit,
in and for Leon County, Florida
(On Certification)

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PRELIMINARY STATEMENT

References to the Record on Appeal will be designated herein as "R", followed by the appropriate page number.

ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN ITS FINAL ORDER BY DISMISSING THE ELECTION CONTEST COMPLAINT HEREIN, AND BY DETERMINING THAT THE COURTS OF THE STATE OF FLORIDA ARE WITHOUT JURISDICTION TO ENTERTAIN A LEGISLATIVE CANDIDATE'S PUTATIVE STATUTORY REMEDY TO CONTEST AN ELECTION.

STATEMENT OF THE CASE AND FACTS

Appellee Ward accepts the statement of the case and facts as set forth on page 1 of the Brief of Appellant with the exception of those portions of paragraph E(1) on page 2 thereof in which Appellant characterizes the Harden-Ward election in a manner which goes far beyond the findings of the trial court.

SUMMARY OF ARGUMENT

On November 21, 1984, Appellant Robert Harden went to the wrong place. He went to the Circuit Court instead of to the Florida House of Representatives to pursue his claim that the election for State Representative, District 5, should be re-held. He now asks this Court to cure his mistake by rewriting portions of the State Constitution to discard crucial elements of the doctrine of separation of powers.

The trial court properly held that it lacked jurisdiction to grant Mr. Harden the relief he requested in that Article III, Section 2, of the State Constitution vests each chamber of the legislature with the exclusive authority to judge the "qualifications, electons and returns" of its members. The judicial branch is specifically precluded from exercising jurisdiction in legislative election contests per the terms of Article II, Section 3, of the Constitution which prohibits members of one branch of government from exercising powers and duties constitutionally vested in another coequal branch.

Appellant Harden attempts to overcome the clear imperative of Article III, Section 2, by urging its alleged inconsistency with other constitutional provisions and by arguing that it constitutes bad public policy. However, he is unable to cite any relevant authority to support his claims; to the contrary, the bulk of the authority cited by him clearly supports the

holding of the trial court. He is simply unable to provide any meaningful rationale for ignoring the clear and unambiguous reservation of authority contained in Article III, Section 2.

The statute pursuant to which Mr. Harden seeks relief, Section 102.168, Florida Statutes, is inapplicable to legislative races in that said statute is inconsistent with Article III, Section 2 and, further, that the remedy provided by said statute is inconsistent with the explicit provisions of Article III, Section 15(d). However, if this Court must construe Section 102.168, Florida Statutes, as providing the courts with jurisdiction to entertain this cause, said statute must be declared unconstitutional on the bases that it directly contradicts the provisions of Article III, Section 2, and that it is an improper delegation of legislative power to the judicial branch in contravention of the provisions of Article II, Section 3.

I.

WHETHER THE TRIAL COURT ERRED IN ITS FINAL ORDER BY DISMISSING THE ELECTION CONTEST COMPLAINT HEREIN, AND BY DETERMINING THAT THE COURTS OF THE STATE OF FLORIDA ARE WITHOUT JURISDICTION TO ENTERTAIN A LEGISLATIVE CANDIDATE'S PUTATIVE STATUTORY REMEDY TO CONTEST AN ELECTION.

A. Article III, Section 2 of the State Constitution Provides the Exclusive Remedy for Contesting Elections to Legislative Office.

This is a case of State. It goes to the very heart of the doctrine of separation of powers and the dignity to be afforded one branch of government by a concomitant co-equal branch. Article II, Section 3 of the State Constitution divides the powers of the state government into three co-equal branches - Legislative, Executive, and Judicial - and prohibits a person belonging to one branch from exercising <u>any powers</u> appertaining to either of the other branches unless <u>expressly</u> provided in the Constitution. Our courts have been called upon on scores of occasions over the years to protect the prerogatives of one branch from actual or perceived incursions from another and have, in fact, consistently protected such prerogatives under the doctrine of separation of powers.

Article III of the State Constitution enumerates the powers of the legislative branch. The first sentence of Section 2 of said Article reads as follows:

> SECTION 2. Members; Officers.-Each house shall be the sole judge of the qualifications, elections, and returns of its members, and shall biennially chose its officers, including a permanent presiding officer selected from its membership, who shall be designated in the Senate as President of the Senate, and in the House as Speaker of the House of Representatives.
>
> (Emphasis added.)

The people, through their Constitution, have thus vested the legislature with exclusive jurisdiction over issues of its members' right to hold legislative office. No other provision of our Constitution even suggests, much less explicitly states, that this exclusive power may be delegated to another branch of government as would be required by Article II, Section 3.

Mr. Harden now asks this Court to overcome the clear and exclusive reservation of the right of the legislature to judge its members as set forth in Article III, Section 2, by suggesting that said provision be read in the broader context of the State Constitution as a whole. In order to do so, however, the courts must ignore not only the explicit provisions of Article III, Section 2, but the entire doctrine of separation of powers as manifested in Article II, Section 3 as well.

Article II, Section 3, is as much a limitation on the power of the judiciary as of either of its coequal branches. The principles of law relating to the role of the judiciary

in this tripartite balance of power are set forth at **10 Fla.Jur. 2d, Constitutional Law, Section 168**, which reads:

> It is highly important that the courts do not encroach upon the domain of the legislative and executive branches of government, and the courts have been careful to keep within their proper sphere. They have scrupulously declined to invade the domain of the legislative or executive departments, and have refrained from nullifying their acts except where they were plainly and clearly in conflict with constitutional provisions. Indeed, it has been said that the judicial branch of government, more than any other, has the duty to maintain and preserve the provisions of organic law relating to the separation of the three branches of government. Thus, it has been declared that the constitution does not contemplate that the exercise of a purely legislative power or of a purely executive power shall be subject to judicial review, except to a limited extent in proper cases to determine whether control in organic law has been violated by a particular exercise of such a purely legislative or purely executive power to the injury of rights secured by the dominant constitution. The courts may not and will not substitute their judgment with reference to matters properly within the domain of the legislative and executive branches of government.

Mr. Harden presents an eloquent argument for the proposition that it may be better public policy for contests of legislative elections to be heard by the judiciary instead of by the legislature. However, it is respectfully submitted

in light of the explicit language of Article III, Section 2, that it is not for this Court to decide the wisdom of the public policy embodied therein; this decision has already been made by the people themselves through the adoption and ratification of their Constitution.

In **Pepper v. Pepper, 66 So.2d 280 (Fla. 1953)**, Justice Mathews provides compelling insight as to why the courts should not infringe on clearly delineated legislative prerogatives:

> The courts have been diligent in striking down acts of the legislature which encroached upon the judicial or the executive departments of the government. They have been firm in preventing the encroachment by the executive department upon the legislative or judicial departments of the government. The courts should be just as diligent, indeed, more so, to safeguard the powers vested in the legislature from the encroachment by the judicial branch of the government.
>
> 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 of years. Experience has shown the wisdom of this separation. If the judicial department of the government can take over the legislative powers, there is no reason why it cannot also take over the executive powers; and in the end, all powers of the government would be vested in one body. Recorded history shows that such encroachments ultimately result in tyranny, in despotism,

> and in destruction of constitutional processes.
>
> **66 So.2d 280, 284.**

Representative Ward does not suggest that this Court will seriously consider such an encroachment on the prerogatives of the legislature. In fact, this Court has consistently held that it lacks jurisdiction to adjudicate issues arising out of the qualifications or elections of members of the legislature. **See, State v. Junkin, 1 So.2d 177 (Fla. 1941); Opinion of Justices, 12 Fla. 651; English v. Bryant, 152 So.2d 167 (Fla. 1963; and McPherson v. Flynn, 397 So.2d 665 (Fla. 1981). McPherson** is, course, the Court's most recent interpretation of Article III, Section 2. It contains a concise but comprehensive analysis of the doctrine of separation of powers as manifested in the exclusive right of the legislature to pass upon the qualifications and elections of its members. While that case addressed a challenge to the "qualifications" of a member of the House of Representatives, there is <u>no basis whatsoever</u> for distinguishing the principles involved as they relate to "elections and returns," phrases of co-equal dignity.

As stated by the Court:

> [4.5] As the United States Supreme Court has pointed out under the parallel articles of the federal constitution, the doctrine of separation of powers requires that the judiciary refrain from deciding a matter that is committed to a coordinate branch of government by the demonstrable text of the

> constitution. **See Powell v. McCormack, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).** Such is the case here. Article III, Section 2, Florida Constitution, makes each house the sole judge of its members' qualifications, a stronger mandate than the federal constitution. Article III, Section 15(c) establishes the standing qualifications for a legislator, who must be "an elector and resident of the district from which elected." The constitution grants the sole power to judge these qualifications to the legislature in unequivocal terms. The courts of this state, therefore, have no jurisdiction to determine these constitutional qualifications.
>
> **397 So.2d at 667, 668.**

In the instant case, Appellee Ward was elected to office on November 6, 1984, and his two-year term commenced as of that date per Article III, Section 15(d). On November 14, 1984, the State Canvassing Commission certified him as the winner of the election for member of the House of Representatives, Fifth House District. He subscribed to his Oath of Office and was seated in the House of Representatives on November 20, 1984, and continues to serve as a member of said body. There can be no doubt under any reasonable theory of law that James Ward has, in fact, been duly elected as a member of the House of Representatives and that his term of office has, in fact, commenced. As such, the exclusive jurisdiction of the legislature per Article III, Section 2 has attached and the judicial branch is precluded

by the express provisions of Article II, Section 3 from exercising any of the powers so vested in a concomitant branch.

As stated in **McPherson:**

> That the original complaint may have been filed prior to the actual seating of the petitioner is of no consequence. The issue of qualifications is nonetheless within the purview of legislative powers. Article II, Section 15(d) provides that the term of legislative office shall begin upon election. It is undisputed that the Petitioner is presently seated in the House. We need not determine whether the courts of Florida ever had jurisdiction; we need only determine that they do not now have jurisdiction.
>
> **397 So.2d at 668.**

Section 102.168, Florida Statutes, authorizes an unsuccessful candidate to contest an election in circuit court and does not, by its terms, exempt legislative races from such contests. We are aware of the Court's discussion of this statute in **McPherson v. Flynn, op cit.** However, the **McPherson** discussion is clearly for purposes of articulating why the election contest mechanism is not available on a generic basis to challenge the qualifications of a candidate to hold office. It <u>cannot</u> be properly read as suggesting that this statutory process is available to contest the election of a member of the legislature.

It is important to note that the **McPherson** Court explicitly framed the issue which it was to decide:

> For purposes of our analysis, we restate the issue to be decided:

> whether the courts of this state have jurisdiction to inquire into a person's qualifications to hold office, when that person has already been duly elected and has taken office as State Representative?
>
> For the following reasons we answer this question in the negative.
>
> **397 So.2d at 667.**

As such, any insight as to the applicability of Section 102.168, Florida Statutes, to legislative races must come in the form of dictum as opposed to a ruling directly on point.

The Court's subsequent discussion of the statute resulted from Respondent Flynn's attempt to utilize the statute as the legal basis for challenging the qualifications of candidate McPherson to hold legislative office. In finding Flynn's reliance thereon to be ill-founded, the Court distinguished the <u>elections contest</u> mechanism from challenges to the <u>qualifications</u> of candidates:

> The statutory election contest has been interpreted as referring only to consideration of the balloting and counting process. **State ex rel. Peacock v. Latham, 125 Fla. 69, 169 So. 597 (1936); Farmer v. Carson, 110 Fla. 245, 148 So. 557 (1933).** The balloting process is distinct from the legal qualifications of the candidates, and we can find no authority for extending an election contest to areas outside the balloting process. **See State ex rel. Gandy v. Page, 125 Fla. 453, 170 So. 118 (1936).** Additionally, Section 102.168 is limited, under these circumstances,

> to contesting the "certification of election." Section 102.151, Florida Statutes (1979), makes clear that this certificate concerns the number of votes, by stating, "The county canvassing board shall make and sign triplicate certificates containing the total number of votes cast for each person . . . ." We can therefore find no right of respondent to attack the petitioner's residency qualifications under statutory sections providing for contest of elections.

As such, it is abundantly clear that the Court's discussion of the election contest mechanism must be viewed as an explanation as to why this generic mechanism is not available to challenge the qualifications of a candidate. Conversely, the negative inference that the statute allows the use of the elections contest mechanism in legislative races is simply not available from the clear meaning of the Court's decision. As a result, a finding of jurisdiction predicated on **McPherson** is clearly unfounded.

Appellant Harden acknowledges in his Brief that federal and state courts have consistently held that the provisions of the federal and various state constitutions which are analogous to Florida's Article III, Section 2, do, in fact, give final and exclusive jurisdiction to Congress or to the appropriate legislative body to determine election contests relating to their respective members. Appellant then goes on to cite additional cases in support of the premise that this bedrock principle of separation of powers is subject to certain judicially-imposed limitations and exceptions. However, none of the cited cases

support Appellant's contention that the courts should ignore the explicit language of Article III, Section 2, in order to assert jurisdiction over this cause.

In **Bond v. Floyd, 385 U.S. 116, 17 L.Ed.2d 235, 87 S.Ct. 339 (1966)**, Julian Bond was denied membership in the Georgia House of Representatives by the Georgia House of Representatives. The United States Supreme Court found jurisdiction to reverse Mr. Bond's exclusion in that said exclusion was clearly and exclusively based on Mr. Bond's exercise of his First Amendment right of free speech as opposed to his qualification or election per the terms of the Georgia Constitution. In the instant proceeding, Mr. Harden never even asked the Florida House of Representatives to seat him in lieu of Representative Ward. As such, it is ludicrous to suggest that the House failed to consider his membership therein in contravention of some constitutionally-protected right.

Appellant also cites **Roudebush v. Hartke, 405 U.S. 15, 31 L.Ed.2d 1, 92 S.Ct. 804 (1971)**, for the premise that a recount under state law was not prohibited by the relevant provisions of the Federal Constitution. However, Appellant suggests that this decision is ". . . notwithstanding that Article I, Section 4, provides for the time, places and manner of holding elections for United States Senators." In fact, **Roudebush** was decided because Article I, Section 4, explicitly delegates said authority to the several states:

> SECTION 4. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; . . .

As such, this case simply does not support Appellant's position.

In summary, Appellant fails to cite any authority for the proposition that the legislative prerogatives explicated in Article III, Section 2, of the state constitution and as safeguarded in Article II, Section 3, thereof should, or even may, be overcome by the courts on the basis of some broader jurisdictional grounds. In fact, when seen in their true light, Appellant Harden's public policy arguments must be viewed as nothing but an apologia for his failure to seek redress in an appropriate formum - The Florida House of Representatives.

In his Final Order, Judge Miner held that Article III, Section 2, is "pellucidly clear in that each House of the Legislature is the 'sole' judge of the 'qualifications, elections and returns' of its members." Nonetheless, he then discussed the origins and evolution of Article III, Section 2, in order to demonstrate the correctness of this interpretation as a matter of constitutional construction. A reiteration of his discussion in the form of paraphrase and expansion may be useful for purposes of demonstrating the correctness of his conclusion. What is now Article III, Section 2 finds its genesis in Article IV, Section 7 of the Constitution of 1838, which reads in relevant part:

> . . . each House shall be the judge of the qualifications, elections and returns of its members; but a contested election, shall be determined in such manner, as shall be directed by law.
>
> (Emphasis added).

In other words, the framers of our original constitution clearly authorized the legislature to delegate legislative elections contests to other branches of government. This identical wording was carried forward in the constitutions of 1861 and 1865, respectively.

Significantly, the Constitution of 1868 omitted the authority of the legislature to delegate contests of elections of its members. Article IV, Section 6 thereof reads in material part:

> Each house shall judge of the qualifications, elections, and returns of its own members . . .

This provision was carried forth verbatim as Article III, Section 6 of the Constitution of 1885.

Perhaps the most telling rewrite of what is now Article III, Section 2 occurred in the 1968 revision to the Constitution of 1885, the product of which is Article III, Section 2 in its current form. The 1968 Revision Commission included the phrase, ". . . be the sole judge . . ." the only substantive change to the 1885 provision.

The principles of statutory construction are generally applicable to the construction of constitutions. **10 Fla.Jur.2d Constitutional Law Section 21.** It is therefore useful to review the applicable principle of statutory construction to probe the significance of the changes made in the current Article III, Section 2 over the course of its evolution:

> With regard to a statutory amendment, the rule of construction is to assume that the legislature intended the amendment to serve a useful purposes. In making material changes in the language of a statute, the legislature is presumed to have intended some objective or alteration of the law unless the contrary is clear from all the enactments on the subject. The courts should give appropriate effect to the amendment. The omission of a word in the amendment of a statute will be assumed to have been intentional. Hence, when the legislature amends a statute by omitting words, it is to be presumed that the legislature intended the statute

> to have a different meaning than that accorded it before the amendment. And, where it is apparent that substantive portions of a statute have been omitted by process of amendment, the courts have no express or implied authority to supply omissions that are material and substantive, and not merely clerical and inconsequential.
>
> **49 Fla.Jur.2d Statutes 2d 132.**

The failure of the framers of the Constitution of 1868 to carry forward the phrase, "but a contested election shall be determined in such manner as shall be directed by law" from the Constitution of 1865 can only be interpreted as a removal of the legislature's ability to so delegate as opposed to an inadvertent act or omission. By the same token, the addition of the word, "sole" by the framers of the 1968 Revision can only be viewed as making absolute the principle of nondelegation embodied in the Constitution of 1868 and 1885.

All of this would be an exercise in legal semantics if the House of Representatives had not seen fit to effectuate the provisions of Article III, Section 2 in its Rules. Rule 5.5 of the Rules of the Florida House of Representatives reads as follows:

> 5.5 - Contested Seat.-In cases of contest for a seat in the House, notice setting forth the grounds of such contest shall be given by the contestant to the House within three calendar days after the House first convenes, and in such case,

> the contest shall be determined by majority vote as speedily as reasonably possible.

This Rule was in effect at the time of the election at issue in this proceeding. It was ratified and readopted on November 20, 1984 in the form of House Resolution R1. **Journal of the House of Representatives, November 20, 1984, p.10.**

Appellant Hardin contends that he is unable to avail himself of the relief afforded by Rule 5.5 in that he is not a member of the legislature. This is specious in that a challenge per the Rule would be directed at the seating of Representative Ward - clearly a "member" of the legislature - with the potential result of his replacement by Mr. Hardin.

Mr. Hardin also indicates an apparent unwillingness to place his fate in the hands of the "transient majority" which constitutes the duly-elected Florida House of Representatives. First, it should be noted that Artice III, Section 2, of the State Constitution vests this same "transient majority" with the powers and duties of impeachment in regard to the governor, the cabinet, and members of the judiciary - powers and duties of a dignity which clearly transcend the issue of the membership in that body by one of 120 members thereof, yet entrusted in said body by the people through their Constitution.

Second, Mr. Hardin's contrary suggestions notwithstanding, it would be a fundamental violation of the respect due one branch of government from a coequal other for the courts

of this state to somehow entertain the notion that the House of Representatives would approach its constitutional duties under Article III, Section 2, with any less fairness, objectivity, or sense of responsibility than would the courts themselves.

Judge Miner's observations in this regard are worthy of notice:

> This Court observes that the Florida Legislature is comprised of men and women of both political persuasions who are fair, honest and honorable people, every bit as sensitive to and capable of righting wrongs if any there are as is this Court. While it is true that the fate of his challenge would rest in the hands of the "transient" majority as his counsel describes it and granted that the process may be fraught with political overtones because of the nature of that process, if he is to find judgment, it must come from the very people he seeks to join.
>
> R.13.

Article III, Section 2 explicitly and unequivocally provides that each house of the legislature is to be "the sole judge of the qualifications, elections, and returns of its members." The Florida House of Representatives has provided a means of exercising this provision in the form of Rule 5.5. Plaintiff Harden has failed to avail himself of this exclusive remedy and now seeks to cure his failure by seeking relief under a statute which, if interpreted in the manner suggested by Mr. Harden, is terminally inconsistent with at least three substantive provisions

of the State Constitution. The courts of this state lack jurisdiction to provide such relief and the trial judge's findings thereof should be affirmed.

B. Sections 102.168 and 102.1682, Florida Statutes, Do Not Apply to Elections to Legislative Office.

Since there is no common law right to contest elections, any statutory grant must necessarily be construed to grant only such rights as are explicitly set out. **McPherson v. Flynn, op cit.** The statutory mechanism created in Sections 102.168 and 102.1682, Florida Statutes, contemplate a judicial determination as to the rights of the contestant to the office being contested. Upon such a judicial determination in the form of a Judgment of Ouster, the Governor is required to revoke the commission of the "wrongful" holder of the office and to commission the person found in the judgment to be entitled to the office. In other words, the relief contemplated by these statutes is the replacement in office of the incumbent by the successful contestant. Conversely, the statute does not authorize the Court to void the election and allow the voters to re-vote. It contemplates no remedy short of removal and replacement.

As noted above, Article III, Section 2 reserves to each house of the legislature the right to judge the qualifications, elections, and returns of its members. The House of Representatives has provided a mechanism for the exercise of this prerogative in the form of Rule 5.5. However, in addition

to being inconsistent with the provisions of Article III, Section 2, and Rule 5.5, the relief contemplated by Section 102.1682 is directly contrary to the provisions of Article III, Section 15(d) which provides:

> Section 15. Terms and Qualifications of Legislators.-
>
> (d) Assuming office; vacancies. Members of the legislature shall take office upon election. Vacancies in legislative office shall be filled only by election as provided by law.

The Constitution explicitly provides that vacancies in legislative office may be filled only via elections. This conclusively precludes any provision of statutory law which would authorize a member of the judicial branch to require the Governor to replace a member of the legislature with a successful contestant.

The legislature is presumed to be cognizant of the substantive provisions of the Constitution and to enact statutes which are not inconsistent therewith. As such, it is inconceivable that the legislature would have enacted a statute which would allow the judicial and executive branches to remove and replace a legislator in light of the mandate of Article III, Section 15(d). The provisions of Sections 102.168 and 102.1682 are clearly inapplicable to the instant proceeding and jurisdiction predicated thereon is ill-founded.

C. Sections 102.168 and 102.1682, Florida Statutes, Are Unconstitutional Delegations of Legislative Authority if They Authorize the Judiciary to Entertain Contests to Legislative Office.

Article II, Section 3 of the State Constitution reads as follows:

> Section 3. Branches of Government.-The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

The doctrine of separation of powers as embodied in Article II, Section 3 and the corollary doctrine of invalid delegation of legislative authority have been pervasive subjects of constitutional interpretation in Florida for a considerable period of time. However, virtually all of these cases have focused on defining whether the "power" or "authority" allegedly delegated was legislative, executive or judicial for purposes of determining whether an unauthorized delegation had, in fact, occurred. Conversely, there is very little authority concerning statutes which seemingly delegate to a given branch of government certain powers and duties which are vested in another per the express and explicit terms of the State Constitution. In all likelihood, this arises from the concise and direct wording on the subject which is found in Article II, Section 3.

In **City of Auburndale v. Adams Packing Association, 171 So.2d 161 (Fla. 1965)**, a statute authorizing municipalities

to annex areas containing less than ten registered voters was held unconstitutional because it delegated legislative power to the judiciary by giving to the circuit courts the power to determine, upon an objection to annexation, the conditions under which such annexation could take place. In holding the statute unconstitutional under Article II, Section 3, the court found the statute at issue to be in contravention of the express constitutional delegation to the legislature of the sole power over the creation and abolishment of municipalities:

> The legislature shall have power to establish, and to abolish, municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend same at any time.
>
> **Id. at 162-63, citing Article VII, Section 8,Florida Constitution.**

The court stated further, "annexation, being exclusively a legislative function, cannot, in accordance with the concept of divided powers expressed in Article II, Florida Constitution, be delegated to, or exercised by, a nonlegislative body such as the judiciary." **City of Auburndale at 163.**

The provision of Article III, Section 2 whereby "(E)ach house shall be the sole judge of the qualifications, elections, and returns of its members . . ." is of no less dignity than the provision of Article VII, Section 8 construed in **City of Auburndale.** As a result, any statutory attempt to delegate this exclusive authority to another branch of government must

be rendered invalid. It is the duty of the court not to condemn a law as unconstitutional if a construction favorable to its constitutionality can be given without violating the plain intent of the legislature, and this rule applies to elections laws. **D' Alemberte v. State, 56 Fla. 162, 47 So. 489 (1908).** As such, it is incumbent on this Court to either construe Sections 102.168 and 102.1682 as being inapplicable to elections for legislative office or to declare said statutes unconstitutional as violative of Article II, Section 3 and Article III, Section 2 of the State Constitution. In either event, this Court must affirm that the judicial branch lacks jurisdiction to entertain this cause.

CONCLUSION

Judge Miner correctly found that the provisions of Article III, Section 2, and Article II, Section 3, of the State Constitution operate as an absolute barrier to judicial branch jurisdiction over the "qualifications, elections and returns" of members of the Florida Legislature. If the doctrine of separation of powers as manifested in these provisions is to be afforded the dignity clearly intended by the framers of the Constitution and by the people through their ratification thereof, Judge Miner's Final Order Dismissing Complaint must be affirmed.

Respectfully submitted this 15th day of October, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Initial Brief of Appellee James G. Ward has been furnished by U. S. MAIL to STEPHEN MARC SLEPIN, ESQ., Slepin, Slepin, Lambert & Wass, 114 East Park Avenue, Tallahassee, Florida 32301; and by U. S. MAIL to JOHN R. DOWD, ESQ., P. O. Box 404, Shalimar, Florida 32579; GREGORY ANCHORS, ESQ., P. O. Box 297, Niceville, Florida 32578; JAMES G. MOORE, ESQ., P. O. Box 746, Niceville, Florida 32578; and GEORGE R. MILLER, ESQ., P. O. Box 687, DeFuniak Springs, Florida 32433, this 1st day of October, 1985.

John H. French, Jr.

JOHN H. FRENCH, JR.