IN THE SUPREME COURT OF FLORIDA

ROBERT HARDEN,

Appellant,

vs.

ELSIE GARRETT, KEITH BRACE, BILL PEEPLES, SAM PRIDGEN, LEWIS LINDSEY, NELLIE THOMPSON, and JAMES G. WARD,

Appellees.

CASE NO. 67,531

REPLY BRIEF OF APPELLANT

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

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ARGUMENT

The excellent ANSWER BRIEF of James G. Ward errs by "exclusive particularity."

This is, after all, "a constitution we are expounding," and the object is not to make a fetish of a few words therefrom, but to harmonize the provisions in order to insure the charter's functionality pro bono publico. Wheeler v. Meggs, 78 So. 685 (Fla. 1918); Scarborough v. Webb's Cut Rate Drug Company, 8 So.2d 913 (Fla. 1942); Miami Shores Village v. Cowart, 108 So.2d 468 (Fla. 1958); Jackson v. Consolidated Government of Jacksonville, 225 So.2d 497 (Fla. 1969).

The object is not to secure a party's legislative power or clubby suzrainity, nor "prerogatives," (Ward ANSWER BRIEF at 14) but the rights of the people as guaranteed by the Constitution of the State of Florida.

The object is indeed to secure the "inherent" political power of "the people" exercisable by free-and-fair elections, the corruption or negation of which is addressable by "access to the courts" of this state, thereby effectuating a res publica (or public polity).

For it is a basic principle of our government "that the people should choose whom they please to govern them" by free and fair elections. Alexander Hamilton, 2 Elliot's Debates,

257, cited in Powell v. McCormick, 395 U.S. 486, 89 S.Ct. 1944 (1969).

In that context -- a matrix of principles basic to our civil society and instantiated in the Constitution of Florida -- the issue is whether the circuit courts have jurisdiction (as Chapter 102, Fla. Stat., enacted by the Legislature says that they do) to entertain an election contest which happens to involve legislative candidates.

Apparently so, for that is precisely what the Legislature has provided at §102.168, Fla. Stat., as the vehicle for access to the courts in vindication of the people's basic right to a free-and-fair election.

Appellee Ward, then, has assumed the burden of arguing in derogation of the obvious, even as the circuit court's order-on-appeal militated against Judge Tolton's and Judge Miner's own 1984 orders: i.e., importing a principle of legislative-majorities' suzrainity supervening upon and superceding (perhaps even nullifying) the very statute which vests the courts with jurisdiction to adjudicate basic rights.

The invitation to exalt this exotic principle above, and in derogation of, the fundamentals of our constitutional arrangement is precisely the "public policy" thesis which is (a) instantiated in the order-on-appeal and Appellee's ANSWER BRIEF, and which (b) should be rejected.

Question: Are the courts of the State of Florida manifestly without jurisdiction to determine election contests?

Not obviously. Article V, §1, Fla. Const., vests the judicial power of the state in our courts, and Article V, §5, Fla. Const., treating of the circuit courts, has been construed to entitle those courts to make constitutional adjudications pursuant to Article I, §21, of the Florida Constitution. In Powell v. McCormick, 395 U.S. 486, 89 S.Ct. 1944 (1969), the Supreme Court of the United States held that the courts of the United States were empowered to determine cases arising under the Constitution, and that a case arose under the Constitution if one reading of the Constitution would sustain a claim as against another reading of the Constitution which would defeat it. 395 U.S. at 514; 89 S.Ct. at 1960.

Similarly, the courts of the State of Florida may entertain a suit going to the fundamental fairness or unfairness, rightness or wrongness of the conduct of an election, or the corruption or propriety of the election process itself as instantiated in the Florida Election Code; which jurisdiction is vouchsafed, on its face, by the legislative enactment of §102.168, Fla. Stat.

Question: Is the Legislature of Florida prohibited from vesting election contest jurisdiction in the circuit courts?

Not obviously. Statutes are presumed to be constitutional, as a matter of law, and the Florida Election Code is not patently or obviously in violation of the Constitution of the State of Florida. Nor, contrary to the argumentation made by Appellee Ward respecting the change in language as between the 1865 Constitution and 1868 Constitution, does the loss of "contested election" language deprive the Legislature of enacting a Florida Election Code (inasmuch as the Constitution of the State of Florida is a limitation rather than a grant of power).

Question: Could the Legislature of the State of Florida itself conduct elections, count ballots and certify results?

Perhaps so. So long as the end be proper, constitutionally, and the means be appropriate thereto, then there would appear to be no perceptible prohibition of such a legislative scheme.

Question: What bearing, then, does the Florida Election Code have upon the aforesaid power of the Legislature?

A meaningful one, apparently. The Legislature chose, with presumptive correctness, to elaborate an extensive Florida Election Code, comprehensive and protective of the right to free-and-fair elections, in exercise of the "inherent" political power of "the people," with clear "access to the courts" in remediation of breaches of the Florida Election Code as to the conduct of elections or the balloting process.

Question: Is the Florida Election Code, in this respect,

a compromise of the Separation of Powers?

Apparently so. That is precisely what Checks and Balances effect. Every "judicial review" or injunction against operation of a statute is precisely this, as is the gubernatorial veto of legislation or the legislative appropriations process itself as to other departments. See, 10 Fla.Jur.2d, Constitutional Law, §136, et seq., and cases therein collected.

Question: Was the issue sub judice decided in/by State v. Junkin, 1 So.2d 177 (Fla. 1941) and McPherson v. Flynn, 397 So.2d 665 (Fla. 1981)?

No. Those decisions held, rather clearly, that the Legislature, rather than the courts, shall judge the "qualifications" of legislative candidates -- but no ruling whatsoever was made in respect of the electoral process, the "elections," the "returns" of candidates, or what the McPherson court called "the balloting and counting process."

Question: In the immortal words of John Stuart Mill, "so what?"

The Appellee Ward (page 8, ANSWER BRIEF) profoundly errs by his assertion that there is no difference between the "qualifications" language of Article III, §2, Fla. Const., and the "elections and returns" language of that section.

The difference, in fine, is that:

(A) The Legislature has itself legislated a

statutory scheme for protesting and/or contesting elections -- by any candidate, etc.; but

(B) The Legislature has not so provided in respect of "qualifications," and the Supervisors of Elections perform only ministerially as to the acceptance of qualification papers. (See p. 8, infra, herein.)

Thus, there is only legislative judgment as to legislative "qualifications," whereas the contest of an election itself is -- by explicit statute -- a judicial procedure: the "balloting and counting process" referred to in McPherson v. Flynn, op. cit.

Question: Doesn't House Rule 5.5 control (and supercede §102.168, Fla. Stat.)?

Not obviously. The House is empowered to enact "rules of procedure," and it is not at all clear that the House could engorge itself of a power in derogation of the right of the people to have "access to the courts" or in derogation of the "judicial power" of the courts or of the right of the people to free-and-fair elections. Moreover, there is no authority for the proposition that Robert Harden, who is not a member of the House, is in any way bound by Rule 5.5, nor that his rights can be ousted by some kind of House rule.

Question: Just what power does the House of Representatives have under Article II, §3, Fla. Const.?

The decision of the United States Supreme Court in Powell v. McCormick, 395 U.S. 486, 89 S.Ct. 1944 (1969), is extremely instructive. Taken together with the teaching of our Supreme Court in Gray v. Bryant, 125 So.2d 846 (Fla. 1960) -- that the constitutional provisions must not be construed to deny the will of the people -- it would appear to provide a controlling rule.

The United States House of Representatives, notwithstanding its argument pursuant to Article I, §5, of the United States Constitution that it alone could judge whether a duly elected congressman might be accepted into the chamber, was held to have the power to judge of those qualifications, and only of those qualifications, found in the Constitution of the United States. The courts of the United States, pursuant to Article III, §1, U.S. Const., are possessed of a judicial power which will allow them to adjudicate all cases arising thereunder, including those cases wherein one reading of the Constitution will sustain a claim but a contrary reading of the Constitution will defeat a claim. 395 U.S. at 514, 89 S.Ct. at 1960.

As to the question of "justiciability" or the "political question doctrine" -- jurisdiction clearly being vested in the courts -- the Supreme Court of the United States held that the

courts must first determine the meaning of the constitutional provision, Article I, §5, U.S. Const., and that the House of Representatives could not exclude from participation a duly elected person who satisifes the constitutional qualifications. 395 U.S. at 522, 89 S.Ct. at 1964.

That is, the power of the legislative chamber to judge the qualifications, elections and returns of its members, merely entitles Congress to judge those qualifications set forth in the Constitution, and does not bar the federal courts from adjudicating the claims of one to membership. 395 U.S. at 548, 89 S.Ct. at 1978. The Supreme Court found Adam Clayton Powell's claims to be justiciable, including his claim for declaratory judgment and mandamus as against the House officers.

The Florida Constitution clearly prescribes qualifications for members of the Legislature. Article III, §15(c), Fla. Const. Thus, this Honorable Court in McPherson v. Flynn, op. cit., quite properly held that judgment as to those constitutionally stated qualifications was vouchsafed to the Legislature. The court did, as did the Supreme Court in Powell v. McCormick, interpret the Constitution.

However, the Florida Constitution merely provides that senators "shall be elected" and that representatives "shall be elected," Article III, §15(a), (b), Fla. Const. -- but specifically provides no means of election, nor criteria for election

(majority vote, plurality vote, stolen election, etc.) ... leaving same to legislative discretion as instantiated in the Florida Election Code.

Thus, the judicial power of the courts of Florida is not ousted by Article III, §2 -- any more than the judicial power of the United States was ousted by Article I, §5, U.S. Const. -- and the clear prescriptions of §102.168, Fla. Stat., are accorded their operation in accordance with the right of the people to free-and-fair elections and access to the courts.

The Legislature itself, that is, unbound as to the "balloting and counting process" in the sense that it is constitutionally bound respecting qualifications of members, has elected to vest the courts of this state with jurisdiction to entertain challenges to an unfair or corrupt election process. Thereby, the Legislature has itself, until or unless the Florida Election Code be properly repealed, elaborated its criteria applicable to the election process.

That conclusion is confirmed by Article III, §15(d), Fla. Const., which acknowledges that vacancies in legislative office are to be filled "by election as provided by law." Thus, the fundamental character of the free-and-fair election process is recognized by, and we would argue that it is incorporated into, the Constitution of the State of Florida.

Appellee Ward has attempted to fudge the distinction between §102.168, Fla. Stat., and §102.1682, Fla. Stat., by lumping them together, beginning at page 20 of his ANSWER BRIEF.

Section 102.168, Fla. Stat., is the judicial remedy legislated pursuant to the obligation and clear power of the Legislature. Section 102.1682, Fla. Stat., providing for a judgment of ouster, is a remedy provided by the Legislature, but cannot operate, if it be valid, to negate a separate statute: §102.168, Fla. Stat.

We know that in considering "whether an election should be set aside" the courts will consider under the Florida Election Code whether there has been substantial compliance with the essential requirements of the voting law (there the absentee voting law) and whether irregularities complained of adversely affect the sanctity of the ballot and the integrity of the election. Bolden v. Potter, 452 So.2d 564 (Fla. 1984), at 566; Boardman v. Esteva, 323 So.2d 259 (Fla. 1975), reh. den. That is, the jurisdiction of the circuit courts under the Florida Constitution and/or under the Florida Election Code, is not divested nor negated depending upon whether the wrong candidate who has been certified in an irregular or corrupted election is ousted or is subjected to a new election.

Finally, Appellee Ward argues, beginning at page 22 of his ANSWER BRIEF, that both §102.168 and §102.1682 are

unconstitutional if they do what they appear to do, i.e., to provide a cause of action. Omitting to mention Marbury v. Madison, Appellee Ward argues this thesis on the assumption that the House of Representatives' majority may blink elections, may blink the integrity or corruption of "election as provided by law," Article III, §15(d), Fla. Const., and may not delegate to Supervisors of Elections and to courts the roles that in fact are reflected in and by the Florida Election Code.

That assumption is, as hereinbefore argued, without foundation in our basic law or body of beliefs.

CONCLUSION

The Constitution of the State of Florida establishes "qualifications" for membership in the Senate and House of Representatives, Article III, §15, Fla. Const., if or as -- but only if or as -- such members are elected as provided by law. Ibid.

The law, according to which elections are to be held, and ballots are to be processed and counted and certified, is the Florida Election Code, inclusive of Chapter 102, Fla. Stat., and §102.168, Fla. Stat.

The Legislature is empowered, under state decisions and by implication of federal case law, to judge the "qualifications" of its members in accordance with, but without adding to, the qualifications specified at Article III, §15, Fla. Const.

The Legislature of the State of Florida is empowered -- in accordance with the right of the people to exercise their franchise, to have access to the courts, and to insure that legislative office shall be filled only by election as provided by law -- to elaborate a Florida Election Code, and to grant access to the courts by those who are aggrieved by a corrupted or improper or irregular election which deprives the people of their right to choose whom they please to govern them.

The order-on-appeal, in derogation of these basic

principles, is in error and should be reversed and the cause remanded for final adjudication on the merits (trial having already eventuated).

Respectfully submitted this 11th day of October, 1985.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been mailed this 11th day of October, 1985 to JOHN H. FRENCH, JR., Esquire, Post Office Box 1876, Tallahassee, Florida, 32302; JAMES G. MOORE, Esquire, Post Office Box 746, Niceville, Florida, 32578; JOHN R. DOWD, Esquire, Post Office Box 404, Shalimar, Florida, 32579; GREGORY M. ANCHORS, Esquire, Post Office Box 297, Niceville, Florida, 32578; and GEORGE R. MILLER, Esquire, Post Office Box 687, DeFuniak Springs, Florida, 32433.

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