O/A 11-7-85

IN THE SUPREME COURT OF FLORIDA

COMMISSION ON ETHICS, STATE OF FLORIDA, ETC.,	:	
Appellants,	:	
vs.	:	CASE NO. 67,689
WILMA SULLIVAN and JOHN SULLIVAN,	:	
Appellees.	:	

ANSWER BRIEF OF APPELLEES

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

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and
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STATEMENT OF THE CASE AND FACTS

Appellees, by counsel, wish to express to the attorneys for the Florida Commission on Ethics -- and to commend same to this Honorable Court -- for their thoroughly professional and cooperative litigation of this cause, and for their excellent Initial Brief.

Appellees largely accept the Statement of the Case and Facts presented by the Appellant-agency, subject to the following.

The Florida Commission on Ethics, having received sworn complaints of "breach of public trust" violation of Article II, §8(f), Fla. Const., have undertaken to prosecute John Sullivan and to prosecute Wilma Sullivan for (a) Article II, §8(f), "breach of public trust" and (b) violation of Chapter 112, Fla. Stat. That prosecution has been enjoined by the circuit court herein, pending determination by this Honorable Court of the issues herein.

The prosecution of John Sullivan and of Wilma Sullivan, as enjoined by the circuit court below, was noticed to be pursuant to Rules Chapter 34-5, Fla. Admin. Code, which chapter had (over objection of the Appellant-agency) been adjudicated by the Division of Administrative Hearings under §120.60, Fla. Stat., pursuant to which controlling rules of the Appellant-agency were invalidated, which matter is now on appeal (by FCOE) to the First District Court of Appeal.

As to the second trial issue, these Appellees' challenge to Chapter 79-391, Laws of Florida [appearing as §99.012(7), Fla. Stat., the last part thereof], the circuit court ruled that inasmuch as §99.012(7) was inapplicable to John Sullivan, it was without title defect. That is, Sullivan in effect lacked standing to challenge an amendment not applicable to him, and thus as to him no defect was found.

SUMMARY OF ARGUMENT

The APPELLANTS' INITIAL BRIEF is a plea for constitutionally exotic dispensation.

The Florida Commission on Ethics was created by the Legislature at §§112.320, 112.321, Fla. Stat. (as later amended by the Legislature) -- and was allowed at legislative sufferance to police financial disclosure conflicts, at Article II, §8(h), Schedule, Fla. Const. -- but is not (a) a fourth branch of Florida government, nor (b) a transcendental will-o-the-wisp uninstantiated in the branches of Florida government.

Article II, §3, Fla. Const., establishes a tripartite government: legislative, executive, judicial -- and prohibits unpermitted exercise of powers beyond the specified branches.

The "legislative" branch consists of "a Senate" and "a House of Representatives ...." Article III, §1, Fla. Const. Appellant-agency is neither.

The "judicial" branch consists of "a Supreme Court, District Courts of Appeal, Circuit Courts and County Courts." Article V, §1, Fla. Const. Appellant-agency is none of these.

The "executive" branch remains.

Appellant Commission is a legislative creation, §§112.320, 112.321, Fla. Stat., subject to the Administrative Procedure Act, State Commission on Ethics v. Sullivan, 449 So.2d 315 (Fla. 1st

DCA 1984). [The A.P.A., Chapter 120, Fla. Stat., specifically "shall not apply to (1) The Legislature. (2) The courts," §120.50, Fla. Stat.]

Yet, the Appellant-Commission -- appointive by the Governor and by the Senate President and by the House Speaker, §112.321, Fla. Stat., and removable by the Governor, President, Speaker and Supreme Court Chief Justice in concert, §112.321, Fla. Stat. -- clearly is violative of the Constitution's mandates respecting appointment (by the Governor) and removal (by the Governor).

The Constitution is clear that even a "board" must be "appointed by" and must serve "at the pleasure of the Governor," Article IV, §6, Fla. Const., except under specified circumstances not here applicable.

Vacancies in office occur not only upon one leaving an existing office, but upon the creation thereof, Article X, §3, Fla. Const., whereupon the Governor is to "fill by appointment any vacancy in state or county office," Article IV, §1(f), Fla. Const., absent a constitutional provision to the contrary.

The Appellant-Commission flirts with a patent violation of the prohibitions of Article II, §3, Fla. Const., and Article II, §5, Fla. Const., by its claim to exemption from the executive branch of Florida government ... and from the three branches of Florida government per se.

Appellants' invocation of the thesis that a statute is incorporated into the Florida Constitution and thereby establishes the Florida Commission on Ethics as a constitutional body, disregards the legal history pertinent to the event, and is refuted by the jurisprudence of this state.

Appellees have indeed invoked the Removal/Disqualification provisions of §112.321, Fla. Stat.

The Supreme Court may not re-write §112.321(1), Fla. Stat., in derogation of legislative intent, in order manifestly to change and re-legislate the statute in constitutionally valid form.

Irrespective of which branch houses the Ethics Commission, §112.321(1), Fla. Stat. -- providing for appointment and removal -- is constitutionally invalid.

ARGUMENT

Issue I

THE TRIAL COURT WAS CORRECT IN HOLDING §112.321(1), FLA. STAT., UNCONSTITUTIONAL.

> Sometime the vindication of the obvious is more important than the elucidation of the obscure ... especially when the obvious is under attack.
>
> O. W. Holmes, Jr.

1. A Different Historical Prospective.

The Florida Commission on Ethics (FCOE) was created by statute, §§112.320, 112.321, Fla. Stat., but ran into trouble under Chapter 75-199, Laws of Florida (1975) -- viz., a nine-member body, but the Governor's appointees being only four, the House Speaker's two, the Senate President's two ... equalling only eight members.

The answer to the problem: the Governor shall appoint the ninth member pursuant to Article IV, §1, Fla. Const., because Chapter 75-199 "'created or continued' the office of ninth member of the Commission on Ethics," and a vacancy in state office -- which occurs upon creation thereof -- is to be filled by the Governor. 1976 Op. Att'y Gen. Fla. 076-152 (July 1, 1976).

Subsequently -- years after the adoption of the Sunshine

Amendment, Article II, §8, Fla. Const. -- the Legislature amended §112.321(1), Fla. Stat., to provide for five gubernatorial appointments, two by the House Speaker, two by the Senate President, Chapter 82-98, Laws of Florida (1982); whereby the Legislature evinced the statutory character of a statutorily-created (and amended) creature subject to non-constitutional, purely statutory legislation.

Meanwhile, in 1981, the FCOE blankly denied to these Appellees the protections of Chapter 120, Fla. Stat. (Florida's Administrative Procedure Act), and sustained a decision of the First District Court of Appeal in State Commission on Ethics v. Sullivan, 449 So.2d 315 (Fla. 1st DCA 1984), reh. den., cert. den. by this Honorable Court. The holding: the FCOE is subject to Chapter 120, Fla. Stat., and the circuit court's non-final order was affirmed.

Chapter 120, Fla. Stat. (the A.P.A.), is by its own terms not applicable to "(1) The Legislature." nor to "(2) The courts." §120.50, Fla. Stat.

Whereupon, the Division of Administrative Hearings in Case No. 83-2786R, did rule against the FCOE's challenge to the Division's jurisdiction, and did thereupon invalidate important FCOE "rules." That Final Order is now on appeal by FCOE to the First District Court of Appeal, Case No. BH-139.

So far forth, then, we know historically that: (a) the FCOE is a statutory creature, (b) the Legislature may alter, amend or presumably abolish it, and has so amended it, in the normal course of Article III, §7, activity, (c) and that FCOE is under and subject to the A.P.A., Chapter 120, Fla. Stat.

One final historical note. The Florida Commission on Ethics is nowhere referenced in or by the text proper of the Sunshine Amendment. It is only in the "Schedule," which is purely statutory, 16 C.J.S., Constitutional Law, §15, that the statutory FCOE is mentioned. Even there, the Schedule does not declare that the "independent commission" required by Article II, §8(f), Fla. Const., is or shall be the FCOE. Rather, the Schedule expressly provides that the said independent commission "shall mean" the FCOE "until changed by law." Article II, §8(h), Fla. Const., Schedule.

Thus, we know that this statutory creature, treated legislatively as such again in 1982 (some six years after adoption of the Sunshine Amendment) is at legislative sufferance deputed to police Article II, §8(a)-(e), mandates "until changed by law."

It is in the effort to escape this constitutional, judicial and legislative history that the Appellant-agency makes herein its plea for a constitutionally exotic dispensation.

2. "Zeno's Paradox" Revived.

That "we can never get from point A to point B because there is an infinite number of distances, or half-spaces, to be traversed," is the infamous corruption of Zeno's thought by his avatars -- who classically mistook the infinitude of half-spaces to be traversed for the physical distance to be traveled from 'here' to 'there'.

Paradoxically, what Zeno was thought theoretically to be unable to do, but in reality could do, the FCOE asserts that it ought theoretically to be able to do, but constitutionally simply cannot do (as the learned trial judge below so ruled).

This perplexing paradox, i.e., the Appellant-agency's novel thesis, is reflected by FCOE's advocacy of the "incorporation by reference" thesis which ephemerally flowered in Isley v. Askew, 358 So.2d 32 (Fla. 1st DCA 1978), quashed at 372 So.2d 66 (Fla. 1979).

The Isley opinion employed the doctrine of "implication" to come to the unmediated conclusion -- bereft of supporting law -- that the people of the State of Florida somehow incorporated §112.321, Fla. Stat., into the Constitution of the State of Florida.

It is upon this fons et origo malorum that the Appellant-agency herein builds its case. The people of Florida, according to FCOE-Appellants, adopted a Sunshine Amendment enumerating certain functions at Article II, §8(a)-(e), Fla. Const., and

referencing as executor an independent commission at Article II, §8(f), which by statute was to "mean" but not to "be" a statutory commission at legislative sufferance, Article II, §8(h) -- thereby incorporating into the Constitution this statutory creature.

Thus, according to this unique thesis, the people of Florida adopted as organic law the Legislature's power to decide which commission should serve as executor of certain constitutional mandates, and, by that very adoption, nullified it ... by making the FCOE a constitutional body contrary to the clear language of Article II, §8(h), Fla. Const., Schedule. A paradox to be conjured with, indeed.

The real paradox, of course, is that Zeno could and did get from point A to point B (traversing an infinitude of half-distances) but that the Appellants' thesis gets nowhere constitutionally.

In fine, what began as a legislative annex to a constitutional amendment (i.e., a schedule to an amendment, which schedule is mere statutory legislation) shall now have become -- allegedly by the people's knowing act -- a whole constitutional sub-set, as if Jonah had swallowed the whale, rather than vice-versa.

In the event, however, the Appellant-agency's thesis is fundamentally flawed and has been proved to be wrong.

First, the Appellant-agency would have this Court make believe that the people of the State of Florida adopted Article II, §8, Fla. Const., for the purpose, among others, of nullifying Article II, §8(h) as a "Schedule", or that this Court ought to make believe that Article II, §8(h), is not a statutory schedule as it says that it is and as the people of the State of Florida adopted it. Without such legerdemain, Appellant-agency's thesis runs right into itself, textually and legally, and comes to a constitutional deadend.

Second, if the people of the State of Florida had adopted a self-nullifying amendment, in the sense above described, then the Legislature of the State of Florida would not have the authority by normal legislative means to alter a constitutional entity, as they plainly did in 1982 by amending §112.321, Fla. Stat., pursuant to Chapter 82-98, Laws of Florida (1982), and as the Appellant-agency herein admits that the Legislature may do. Absent repeal of Aristotle's Law of Contradiction, it cannot be that §112.321(1), Fla. Stat., is a constitutional provision, and yet the Legislature of the State of Florida may alter, amend or abolish it pursuant to standard legislative procedure under Article III, §7, Fla. Const. And, indeed, if Chapter 82-98, Laws of Florida (1982), which amended §112.321(1), Fla. Stat., is unconstitutional -- on the thesis that such statutory section has by some unknown means become a constitutional

provision -- then indeed §112.321, Fla. Stat., makes no sense whatsoever and is patently invalid as it stood in 1975 (before being legislatively amended).

Third, the Appellant-agency's thesis would lead us to believe that all legislatures are bound by the Legislature which "incorporated" §112.321 into the Florida Constitution, or are restrained from altering the statute on the grounds that the Sunshine Amendment was adopted in 1976 (cf., Chapter 82-98, Laws of Florida), which is directly contrary to the law of the State of Florida, which prohibits legislatures from binding its successors. W.O.W. v. Lake Worth Inlet District, 119 Fla. 782, 161 So. 717 (Fla. 1935). Indeed, it is the people of the State of Florida who may alter or amend their Constitution in whole or in part, Collier v. Gray, 116 Fla. 845, 157 So. 40 (Fla. 1934), and only then by the solemnities specified in and by Article XI, §6, of the Florida Constitution. Legislation requires its own solemnities as prescribed by the Constitution, Washington v. Dowling, 92 Fla. 601, 109 So. 588 (Fla. 1926), and there is no authority which would support the principle that a statute is a constitutional amendment. Indeed, a statute which attempts to amend the Constitution is itself invalid, and is violative of the constitutional methodology of amendment. Collier v. Gray, op. cit.

Fourth, the Appellant-agency's novel thesis assumes that by some unstated principle a statute may be "incorporated" into the Constitution of the State of Florida, and bases that assumption upon the more profound assumption that §112.321(1), Fla. Stat., is constitutional rather than unconstitutional or void. That is, if §112.321(1), Fla. Stat., has been void -- as adjudicated by the circuit court herein, sub judice -- then any attempted incorporation would have itself been invalid since a statute in violation of organic law, and so adjudged, is void. 10 Fla.Jur.2d, Statutes, §90. A statute which conflicts with the Florida Constitution never becomes law. 10 Fla.Jur.2d, Constitutional Law, §91. Indeed, to carry this argument further, continued reenactment by the Legislature of an unconstitutional statute does not have the effect of validating that statute, Hialeah Race Course, Inc. v. Gulfstream Park Racing Association, 245 So.2d 625 (Fla. 1971), since a statute must be valid at the time it became effective, State ex rel. Blalock v. Lee, 146 Fla. 385, 1 So.2d 193 (Fla. 1941), and the Legislature is without power to validate or vitalize an unconstitutional act, Smith Brothers v. Williams, 100 Fla. 642, 126 So. 367 (Fla. 1930), even by reenactment. Thus, the Appellant-agency's thesis rests upon an assumption foundationed by an erroneous, underlying assumption. No office was created. State v. Tippett, 134 So. 52 (Fla. 1931).

Fifth, as the Supreme Court of Louisiana put it in an interesting 1941 case:

> We cannot subscribe to the proposition that a constitutional amendment validating and ratifying particular legislation can be considered as having the effect of making the legislative act a part of the Constitution. In the first place, the terms "ratify", "approve" or "validate" are not the equivalent of the terms "to make part of" or "to incorporate into." See, State v. Kohnke, 109 La. 838, 33 So. 793. All valid enactments of the Legislature may be said to be approved or ratified. They are ratified or approved by anticipation but they do not on that account become part of the organic law. Where a law passed by the Legislature is made dependent upon the adoption of a constitutional amendment and such amendment is afterward approved by the people, the statute becomes operative from the date the proposed amendment has been approved. ... Hence, the only benefit which may be derived by having the people actually validate and ratify the legislation and the proposed amendment is to give to the law a retrospective approval, that is to say that the law which has been ratified will become operative and have the effect from the date of its passage rather than from the date upon which the constitutional amendment receives approval.

Peck v. City of New Orleans, 5 So.2d 508 (S. Ct. La. 1941), reh. den., at 521.

Neither the doctrine of "incorporation by reference" nor by "implication" of a Florida statute into the Constitution of the State of Florida is supportable by reference to the

jurisprudence or constitutional law of this state, and is flatly negated by the Constitution of the State of Florida.

Sixth, the law of the State of Florida is clear that where the words used in the Constitution are plain and clear, there is no necessity for resort to extrinsic means of interpretation, State ex rel. West v. Gray, 74 So.2d 114 (Fla. 1954), and ordinary language will prevail over some "construction" by the courts. Jacksonville v. Continental Can Company, 113 Fla. 168, 151 So. 488 (Fla. 1933). Thus, Appellant-agency's plea to this Court, that the Supreme Court of Florida either blink the statutory language of Article II, §8(h), Fla. Const., or find that the people of the State of Florida meant to nullify the statutory status of Article II, §8(h), upon adoption of the Sunshine Amendment, is without avail.

Finally, the spartan decision in Isley v. Askew, op. cit., was quashed by this Court. A quashed decision is one that is annulled, overthrown, or voided, Holland v. Webster, 43 Fla. 85, 29 So. 625 (Fla. 1901), and has no precedential effect herein.

All of which foregoing law the Appellant-agency would invite this Honorable Supreme Court to disregard or reverse by indulgence of the esoteric thesis advanced by the FCOE in its effort to have a statutory annex transmuted into a specific provision of the organic law of the State of Florida, without

which §112.321(1), Fla. Stat., cannot survive. The Appellant-agency misses this point entirely at page 34 of its APPELLANTS' INITIAL BRIEF, when it cites Weber v. Smathers, 338 So.2d 819, 820 (Fla. 1976), to the effect that the Sunshine Amendment, if adopted, will not conflict with other articles and sections of the Constitution; and misses this point precisely because the Florida Commission on Ethics is a statutory creature, statutorily mandated to perform certain limited constitutional functions at the sufferance of the Legislature "until changed by law."

* * *

The conditio sine qua non of the Appellant-agency's constitutionality is -- as the FCOE clearly perceives -- the validity of its paradoxical thesis of "incorporation by reference" or by "implication."

Unless the people of Florida pursuant to Article XI, Fla. Const., clearly intended to create a [statutorily defective] constitutional entity, thereby to nullify the "until changed by law" statutory character of Article II, §8(h) -- but yet to allow the Legislature by mere legislation to amend the Constitution or abolish its entities -- then the statutory Appellant-agency is subject to settled constitutional law:

1. Vacancies in office occurred upon creation of the FCOE. Art. X, §3, Fla. Const. Also, §114.01, Fla. Stat.

2. The Governor "shall fill by appointment any vacancy in state ... office ...." Art. IV, §1(f), Fla. Const. Also, §114.04, Fla. Stat.

3. There are but three branches of Florida government, Art. II, §3, Fla. Const., and the prohibition of cross-officiating is clear. Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978), reh. den., at 925.

4. The FCOE, subject to the A.P.A., State Commission on Ethics v. Sullivan, 449 So.2d 315 (Fla. 1st DCA 1984), reh. den., cert. den., is not the Legislature as defined at Article II, §1, Fla. Const., nor the courts as defined at Article V, §1, Fla. Const. -- and, indeed, the A.P.A. applies to neither. §120.50, Fla. Stat.

5. The FCOE is, and by constitutional requirement, must be an executive branch agency, Art. IV, §6, Fla. Const., albeit unlawfully created.

6. Because §112.321(1), Fla. Stat., is patently invalid and was adjudicated such, no FCOE office(s) as such was/were created, State v. Tippett, 134 So. 52 (Fla. 1931) ... precluding incorporation into the Constitution.

Thereby, the full circle of law from which the Appellant-agency seeks this Honorable Court's dispensation to exit.

The judgment on appeal should be affirmed.

Issue II

THE CIRCUIT COURT HEREIN DID NOT ERR IN HOLDING §112.321(1), FLA. STAT., TO BE INVALID.

Article II, §3, Fla. Const., establishes a tripartite government, legislative and executive and judicial -- and prohibits unpermitted exercise of powers beyond the specified branches. Article II, §1, Fla. Const., provides that the legislative branch consists of a senate and a house, and Article V, §1, Fla. Const., provides that the judicial branch consists of a Supreme Court, District Courts of Appeal, Circuit Courts and County Courts.

The Appellant-Commission is a legislative creation under §§112.320, 112.321, Fla. Stat., subject to the Administrative Procedure Act, State Commission on Ethics v. Sullivan, 449 So.2d 315 (Fla. 1st DCA 1984), and thereby falls into the constitutionally unambiguous requirement that the members of the FCOE must be appointed by and serve "at the pleasure of" the Governor. Article IV, §6, Fla. Const. That gubernatorial power attached upon the creation of the office, and upon continuation of the office. Article X, §3, Fla. Const. See also, §§114.01 and 114.04, Fla. Stat. It is the power, and has been the power and authority of the Governor of the State of Florida, by constitutional edict, to appoint the FCOE, Article IV, §1(f),

Fla. Const. -- nor did the Legislature of the State of Florida write any other provision for appointment or removal, nor did the people of the State of Florida approve any constitutional provision different therefrom (even as they touched the FCOE only by a statutory Schedule).

Yet, the FCOE prays this Court -- under this head or foundational thereof -- to indulge various theories and to effectuate various judicial acts hereinafter considered.

1. The Plea For Judicial Rewrite.

The Appellant-Commission herein, and under this head, urges the Supreme Court of Florida to rewrite §112.321(1), Fla. Stat., as it was legislated and has been amended to date.[1/]

It is respectfully urged that the Appellant-agency has forgotten that the courts of the State of Florida, in construing a statute, may not invade the province of the Legislature and add or delete words which change the plain meaning of the

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1/ FCOE variously entreats this Court to reverse the invalidation of §112.321(1), Fla. Stat., by judicially rewriting the statute to provide for gubernatorial appointment (contra the legislative enactment) and/or to sunder the Removal language of the statute from the Appointment language so that the Chief Justice, legislative leaders and Governor may remove [gubernatorial] appointees.

statute, nor vary the intent of the Legislature with respect to the meaning of the statute in order to render a statute constitutional. Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981); State v. Elder, 382 So.2d 687 (Fla. 1980); State v. Keaton, 371 So.2d 86 (Fla. 1979). The courts do not rewrite legislation to make it more reasonable. State v. Barquet, 262 So.2d 431 (Fla. 1972) at 433; Devin v. City of Hollywood, 351 So.2d 1022 (Fla. 4th DCA 1976), reh. den., at 1025.

Indeed, every statute must be construed as a whole and the legislative intent determined from what is said in the statute, in the course of which a court is without power to go outside the statute in search of "excuses to give a different meaning to words used in the statute," inasmuch as the statute should be so construed "as to give a meaning to every word and phrase in it" according to the state's "plain meaning." Vocelle v. Knight Brothers Paper Company, 118 So.2d 664 (Fla. 1st DCA 1960), reh. den., at 667.

And, clearly, §112.321(1), Fla. Stat., provides for appointment by the House Speaker, Senate President and Governor, and for removal by the Chief Justice, House Speaker, Senate President and Governor -- without which removal provision we would be back to these Appellees' first point: the members of

the FCOE are to be appointed by and serve "at the pleasure" of the Governor, according to the Constitution of the State of Florida.

Nevertheless, the Appellant-agency requests this Honorable Court to rewrite §112.321(1), Fla. Stat., as though (a) the Legislature had intended the Governor to appoint [and remove?] all FCOE members, and (b) the people of the State of Florida -- on FCOE's thesis -- had approved such. Obviously, the Appellant-agency has argued itself into a curious position whereby it urges this Court to ignore Article II, §8(h), of the Florida Constitution or the "until changed by law" language thereof, on the dubious grounds that the people of the State of Florida meant to nullify that statutory annex, and now argues that the august solemnity with which the people of the State of Florida allegedly incorporated the FCOE into the Constitution ought to be ignored as this Court is urged to rewrite §112.321, Fla. Stat.

2. De Facto vs. De Jure: A Plea For Time.

Alternatively, FCOE urges this Court to stay its judgment for a reasonable period of time pursuant to the United States Supreme Court's decision in Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), without mentioning that in that cause no punitive or penal action was to be taken by the federal elections commission against individuals, as is clearly

the case and has been adjudicated to be the case herein. That is, the actions of the FCOE are penal in nature, and cannot be allowed to proceed if they are constitutionally invalid. See, Zerweck v. State Commission on Ethics, 409 So.2d 57 (Fla. 4th DCA 1982). The agency's penal actions herein are void. Burch v. Louisiana, 441 U.S. 1306, 60 L.Ed.2d 92, 99 S.Ct. 1623 (1979).

In this respect, the Commission as Appellants does not make clear whether "a reasonable period of time" should be granted it after adjudication of the invalidity of the FCOE in order to continue to prosecute these Appellees. These Appellees timely challenged the Commission, secured an adjudication of invalidation, and there has been no de facto validity to the acts of the Commission in these proceedings. No authority to the contrary has been presented by Appellant-agency.

At bottom, however, Appellants err in their treatment of the purportedly "de facto" agency. That is, before the FCOE as legislated at §112.321, Fla. Stat., can be accorded de facto privileges, there must be in law a de jure basis for same. Tobler v. Beckett, 297 So.2d 59 (Fla. 2d DCA 1974); 63A Am.Jur.2d, Public Officers and Employees, §586. The point of the judgment on appeal being that no office as such was lawfully created. State v. Tippett, 134 So. 52 (Fla. 1931).

3. "Standing" To Challenge §112.321(1), Fla. Stat.

Respecting the "removal" language of §112.321(1), Fla. Stat. -- which was enacted as a unity with the appointive provisions, and was invalidated as a unity with the appointive provisions -- the Appellant-agency argues that John Sullivan and Wilma Sullivan lack "standing" to challenge these words of the subject statute. The Sullivans, according to Appellant-Commission, lack "standing" because their rights are not, nor will they be, affected by the statute. Appellants' Initial Brief at 40-41.

This Honorable Court will note, however, how carefully the Appellant-agency has phrased its appellate challenge to the "standing" of John Sullivan and Wilma Sullivan. The reason for this is crystal clear: as well known to the Florida Commission on Ethics, Wilma Sullivan and John Sullivan filed, by their counsel, a SWORN PETITION TO DISQUALIFY AND/OR REMOVE PURPORTED MEMBERS OF THE FLORIDA COMMISSION ON ETHICS on or about November 4, 1981.

That SWORN PETITION is attached hereto and incorporated herein as an appellate proffer and remains pending. It is a public record, by any test of that term, and it is quite clear -- since a member of the Florida Commission on Ethics which brought these charges and is prosecuting these charges, himself decided

that he would sit as a judge of the Sullivans herein, until enjoined by the circuit court sub judice -- that the Sullivans have a meaningful interest in §112.321(1), Fla. Stat., in toto.

4. An "Independent Commission".

The Appellant-agency has stressed throughout its excellent brief the need for an "independent commission" to perform the few functions specified at and by Article II, §8(a)-(e), Fla. Const. By so doing, and by implicitly linking this "independent commission" to the Florida Commission on Ethics established by §112.321(1), Fla. Stat., the Appellant-agency has invited this Court to make a legislative decision. That is, Appellant-agency urges this Court to decide that it must be the statutory commission at §112.321(1), Fla. Stat., which must be the "independent commission" wanted by the people of the State of Florida [under any and all circumstances, apparently, including constitutional invalidity], supplanting the Legislature's Article II, §8(h), power to deputize the Board of Cosmetology or Landscape Architects, inter alia, to police ethics.

What the Appellant-agency fails to take account of is that all entities and officers of government are presumed by case law to do their job in a fair, impartial and lawful manner, "independent" of the political manipulations environmentally abounding. There is no reason to believe that only the FCOE

pursuant to §112.321(1), Fla. Stat., can be "independent."

More to the point, there is no notion of "independent commission" explicated by the APPELLANT'S INITIAL BRIEF. That is, as the circuit court sub judice was aware, the Florida Commission on Ethics' independence is such that:

> (a) It is funded by legislative, annual appropriation;
>
> (b) Its budget is controlled by the Governor's Department of Administration;
>
> (c) Its rules are promulgated under the Administrative Procedure Act and subject to invalidation by the Division of Administrative Hearings;
>
> (d) Its appointments are made by the Governor, and by the House Speaker, and by the Senate President; and
>
> (e) Its removals are made by the Chief Justice, and by the Governor, and by the House Speaker, and by the Senate President.

What kind of "independent commission" is this as distinguished from the "independent" judgment of any court or any department head or any board or any agency?

Yet, if the two words "independent commission" at

Article II, §8(f), Fla. Const., seem somehow to import a hitherto undefined meaning -- viz., the FCOE has constantly alleged that it is not in any branch of Florida government or, as the learned circuit judge put it, "hovers" over all branches of government -- then no excuse is made for the patent invalidity of §112.321(1), Fla. Stat., inasmuch as that provision is a legislative or statutory provision which does not gain immunity from constitutional challenge merely because the Legislature enacted, amended or has lately not touched said statute.

5. No "Vacancy in Office" Has Occurred?

The Appellant-agency argues that contrary to the clear and unambiguous language of Article X, §3, Fla. Const. -- which declares that a vacancy in office exists upon its creation -- this Court should find that since various members of the FCOE have been appointed (by Speaker, by President, by Governor) since 1974, there have never been any vacancies in office existing to date. APPELLANTS' INITIAL BRIEF at pages 20-22. See also, §114.01, Fla. Stat.

It is respectfully submitted by Appellees that this argument for the transfiguration of what "is" into what constitutionally "ought to be" or "must be", and which entreats this Honorable Court to erase from Article X, §3, of the Florida Constitution the clear and unambiguous language that a "vacancy

in office shall occur upon the creation of an office, ..." is without reason or authority.

6. Other Entities.

FCOE has sought at trial, and herein, to rescue §112.321(1), Fla. Stat., by fleeting analogy to the Game and Fresh Water Fish Commission -- but it is created, constituted and empowered by Article IV, §9, Fla. Const. Also, the Parole and Probation Commission -- which by express Article IV, §8(c), language is to be created, empowered, given legislative qualifications, method of selection and terms, and which is appointive by the executive. See, §947.02, Fla. Stat. See also, 1981 Op. Att'y Gen. Fla. 081-49 (July 8, 1981), Question I.

Too, FCOE takes interest in the Public Service Commission, and In re Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969). That opinion is not precedential, Collins v. Horten, 111 So.2d 746 (Fla. 1st DCA 1959), having been without adversary argument, being merely advisory and not controlling over actual cases. Petition of Kilgore, 65 So.2d 30 (Fla. 1953).

Nevertheless, this Court's said 1969 Advisory Opinion was a function of the Governor's question: Should he put the P.S.C. in one of the 25 executive departments? It had never been therein as the Railroad Commission (or successive incarnations) and needn't be, as Florida's "elective" utilities

regulator. Judicial decisions re. the P.S.C. have not been confirmatory of FCOE's position herein. In Gator Freightways, Inc. v. Mayo, 328 So.2d 444 (Fla. 1976), this Court expressed "no view" pertinent hereto. In Florida Retail Federation, Inc. v. Mayo, 331 So.2d 308 (Fla. 1976), the Court held narrowly that Chapter 120, Fla. Stat., provisions did not pertain to the subject matter therein. In ASI, Inc. v. Fla. P.S.C., 334 So.2d 594 (Fla. 1976), the Court at 595 simply noted that the "parties agree" to the applicability of Chapter 120, Fla. Stat. Research reflects no adjudications respecting the issues herein.

6. Separation of Powers: Is the "Legislative Branch" Safe Harbor?

Appellant-agency conceives the validity of §112.321(1), Fla. Stat., in terms either of its incorporation into the Constitution as a constitutional body which, like a Canterville Ghost, makes appearance as well in the ambit of legislative competence (as in the 1982 legislative amendment) or in terms of the FCOE's subsistence in the legislative branch of government.

Appellant-agency's theorizing is constrained by Article II, §3, Fla. Const., which establishes a tripartite government and uniquely prohibits persons in any one of those branches from acting -- by accident or by "assignment" -- in a role assigned by the Constitution to another branch. Askew v. Cross Key

Waterways, 372 So.2d 913 (Fla. 1978) at 925, reh. den.

Pursuant to which constitutional principle our organic law declares vacancies in office to exist upon creation of office, Article X, §3, Fla. Const., and empowers the Governor to "fill by appointment any vacancy in state ... office" when "not otherwise provided for in this constitution, ..." Article IV, §1(f), Fla. Const. (emphasis added).

(The Constitution, of course, has not "otherwise provided" for "appointment" by Senate President, House Speaker and Governor -- nor for "removal" by the Chief Justice in concert with legislators and the Governor, which is why FCOE argues for "incorporation by reference," treated under ISSUE I, supra herein.)

Indeed, the power to appoint public officers under our Constitution is an executive power. In re Advisory Opinion to the Governor, 9 So.2d 172 (Fla. 1942); State ex rel. Hatton v. Joughlin, 103 Fla. 877, 138 So. 392 (Fla. 1931), reh. den. See also, §§114.01, 114.04, Fla. Stat.

Although Appellants urge this Court to reject the Westlake v. Merritt, 95 So. 662 (Fla. 1923), line of cases prohibiting legislative encroachment upon the magisterial appointive power, APPELLANTS' INITIAL BRIEF at 26, and yet urge the notion of legislative suzrainity pursuant to State ex rel. Buford v. Daniel, 99 So. 804 (Fla. 1924), ibid, without

acknowledging that there (a) at page 808 this Court authorized legislative authority subject to "organic provisions" of the Constitution, and (b) the old Article III, §27, therein construed empowered "The Legislature," the more timely construction of Article II, §3, in Askew v. Cross Key Waterways, op. cit., provides a clearer point of departure.

By the same token, considering the removal language of §112.321(1) in tandem with the appointment language, the Governor's power is "independent of, and may not be impinged upon by, a statute ...." Bruner v. State Commission on Ethics, 384 So.2d 1339, 1340 (Fla. 1st DCA 1980).

We are, in fine, concerned with an executive role, Askew v. Cross Key Waterways, op. cit., or function constitutionally specified.

Thus, Appellants are understandably concerned to find in our Constitution an escape from Article II, §3, or authorization therein for the Chief Justice and legislative officers to play the (inter-branch) roles assigned them by §112.321(1), Fla. Stat.

Inter-branch roles which may constitutionally be performed are, indeed, found specified in and by the Constitution. See, Article III, §17, Fla. Const., "Impeachment".

However, an examination of the Chief Justice's powers, Article V, §2(b), Fla. Const., or of the powers of legislative

officers, Article III, §2, Fla. Const., (or even at §§114.01, 114.04, Fla. Stat.), fails to disclose such empowerment.

For a seminal discussion of the federal law on the subject, see Duplantier v. United States, 606 F.2d 654 (5 Cir. 1979), reh. den., cert. den., 449 U.S. 1076, 66 L.Ed.2d 798, 101 S.Ct. 854, for discussion of applicability of legislation to coordinate branches. See also, Buckley v. Valeo, 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976). Contrary to Appellants' assertion at page 14 of their Initial Brief, the Parcell v. State of Kansas, 468 F.Supp. 1274 (D. Kan. 1979), aff'd Parcell v. Govt'l Ethics Comm., 639 F.2d 620 (10 Cir. 1980), decisions do not render the U.S. Constitution uninstructive.

What if, arguendo, the Legislature had placed the FCOE in, and made it a part of, the "legislative branch," (though not to exercise the "legislative power of the state" exercisable only by "a senate" and "a house" per Article III, §1, Fla. Const.)?

Nothing in the Florida Constitution appears to authorize the Chief Justice or the Governor to "remove" legislative officers. Indeed, in Harden v. Garrett, S. Ct. Case No. 67,531, it has been urged that Article III, §2, Fla. Const., makes the Senate and House the "sole and exclusive" authorities empowered to remove legislators.

Nothing in the Florida Constitution appears to authorize the Governor to "appoint" legislative officers (if Articles X, §3, and IV, §1(f), are inapplicable, as FCOE insists). Indeed, the Constitution provides at Article III, §1, for election of legislative officers, and special elections are, by Article VI, §5, to be prescribed by law.

Nor, again, is there a single constitutional provision superordinate of Article II, §3, which authorizes a concert of Judicial-Executive-Legislative officials to perform the executive roles assigned by §112.321(1), Fla. Stat. Cf., Art. III, §17, Fla. Const.

A "legislative branch" FCOE would, per §112.321(1), Fla. Stat., engorge the Chief Justice and Governor of appointive/removal powers beyond the manifest constitutional parameters.

A "judicial branch" FCOE would, per §112.321(1), Fla. Stat., engorge the Governor and legislators of appointive/removal powers beyond the manifest constitutional parameters. Cf., Article V, §11, Fla. Const. (gubernatorial appointment of judges); Article V, §12, Fla. Const. (removal of judges).

(As to the militia, the Constitution specifically vests the Governor with appointive power, subject to Senate confirmation. Article X, §2(c), Fla. Const.)

(As to the Constitutional Revision Commission, the Constitution specifically assigns roles to officers of the three

branches, Article XI, §2, Fla. Const., because "expressly provided" in the Constitution, per Article II, §3.)

In fine, transportation of the FCOE into the legislative branch (or the judicial) does nothing to validate §112.321(1), Fla. Stat., because such an act of translocation does nothing to grant §112.321(1), actors constitutional powers commensurate with those imputed to them by §112.321(1), Fla. Stat. Call it aardvark or achegosaurus, it requires the vertebral support of the Constitution, but is without it.

Which, it is respectfully submitted, is precisely why Appellants, in acknowledgment of the Article II, §3, command that inter-branch powers be "expressly provided herein," and the command of Article IV, §1(f), that the Governor fill by appointment all vacancies in state office unless "otherwise provided for in this constitution," must argue for the perplexing proposition of incorporation by reference of §112.321(1), Fla. Stat., into the Constitution as though "expressly provided" by that charter.

Appellees rest, then, upon the conviction of the learned trial judge that the statutory Appellant-agency is not transcendent of the Florida Government as established by Article II, §3, Fla. Const., and upon the law cited under ISSUE I, supra herein, to refute the paradoxical thesis of incorporation by reference.

CONCLUSION

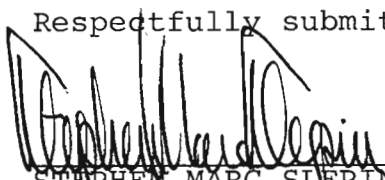
Section 112.321(1), Fla. Stat., an appointive and removal system enacted by the Legislature in 1974, and amended by the Legislature in 1982 (six years after the adoption of the Sunshine Amendment) is constitutionally invalid.

The Florida Commission on Ethics, as a statutory creation, is not outside, does not "hover" above, and is not free of the mandated three branches of government, Article II, §3, Fla. Const., and is clearly, and by case law, an executive branch agency.

If the Commission were in the legislative branch, §112.321(1), Fla. Stat., would nonetheless be invalid.

The final judgment of the circuit court sub judice should be affirmed.

Respectfully submitted,



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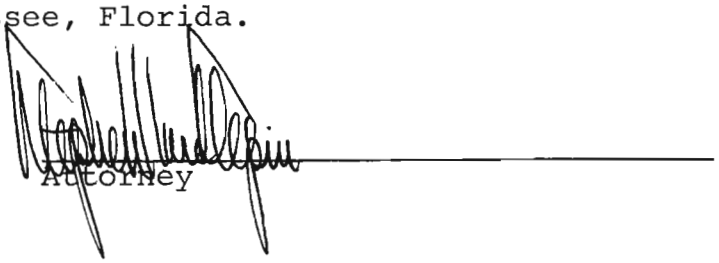
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been hand delivered this 28th day of October, 1985 to PHILIP C. CLAYPOOL, Esquire, Staff Attorney, Commission on Ethics, 2105 - The Capitol, Tallahassee, Florida; and ARDEN M. SIEGENDORF, Esquire, Assistant Attorney General, Department of Legal Affairs, 1601 - The Capitol, Tallahassee, Florida.



Attorney