IN THE SUPREME COURT OF FLORIDA

COMMISSION ON ETHICS, STATE OF FLORIDA, ETC.,	)	
Appellants,	)	
v.	)	CASE NO. 67,689
WILMA SULLIVAN, ET AL.,	)	
Appellees.	)	

APPELLANTS' INITIAL BRIEF

JIM SMITH
Attorney General

ARDEN M. SIEGENDORF
Assistant Attorney General
The Capitol
Tallahassee, Florida 32301

PHILIP C. CLAYPOOL
Staff Attorney
Commission on Ethics
Post Office Box 6
Tallahassee, Florida 32302

COUNSEL FOR THE STATE OF FLORIDA
COMMISSION ON ETHICS

TABLE OF CONTENTS

TABLE OF CITATIONS

UNITED STATES CONSTITUTION

FLORIDA CONSTITUTION

FLORIDA STATUTES

OTHER

INTRODUCTION

Appellants, the State of Florida Commission on Ethics and its members, Defendants below, will be referred to in this brief as the Commission on Ethics or as the Commission. Appellees, Wilma Sullivan and John Sullivan, Plaintiffs below, will be referred to as Appellees or as the Sullivans. As all pages in the Record have been numbered consecutively, page references to the Record will be made as R [page number]. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE

AND FACTS

Except as otherwise noted, all facts contained in this statement have been taken from the parties' Stipulation of Facts. (R 1,272-1,314).

On January 27, 1981, a sworn complaint was filed with the State of Florida Commission on Ethics alleging that Wilma Sullivan violated Section 116.111, Florida Statutes, and thereby breached the public trust (referencing Article II, Section 8(f), Florida Constitution) while serving as Supervisor of Elections for Leon County, Florida. At the time the complaint was filed, Wilma Sullivan held no public office or employment, although she was Supervisor of Elections at the time of the actions alleged in the complaint.

Also on January 27, 1981, a separate sworn Complaint was filed with the Commission alleging that John Sullivan violated Section 99.012(7), Florida Statutes, and thereby breached the public trust (referencing Article II, Section 8 (f), Florida Constitution) while serving as Deputy Supervisor of Elections for Leon County, Florida. At the time the complaint was filed, John Sullivan was Supervisor of Elections for Leon County, Florida.

On February 25, 1981, the Commission determined that the complaints were legally sufficient and ordered a preliminary investigation of the complaints.

By letters dated March 17, 1981, Wilma Sullivan and John Sullivan were formally notified that a hearing would be held before the Commission on April 1, 1981, to determine the manner of disposition of the complaints pursuant to Commission Rule 34-5.06, F.A.C.

On March 19, 1981, the Sullivans filed Motions to Dismiss for Lack of Jurisdiction. The motions were heard at the April 1, 1981, meeting of the Commission, at which time the Commission voted to continue the matters pending receipt of memoranda of law. On May 13, 1981, the matters were reconsidered and reargued before the Commission. The Motions to Dismiss were denied and a public hearing was ordered in each complaint as to whether John Sullivan breached the public trust by his failure to take a leave of absence from his position as Deputy Supervisor of Elections as required by Section 99.012(7), Florida Statutes, when he sought election to the position of Leon County Supervisor of Elections; and as to whether Wilma Sullivan breached the public trust by the appointment as Leon County Supervisor of Elections of her son to serve as Deputy Supervisor of Elections, and by her appointment, or advocacy of the appointment or employment, of other relatives to positions in the office of the Supervisor of Elections in Leon County, in violation of Section 116.111, Florida Statutes.

On May 22, 1981, Wilma Sullivan sought a Writ of Prohibition from the First District Court of Appeal. On June 25, 1981, the Court denied the Petition.

On June 12, 1981, the Sullivans appealed the above orders of the Commission and other issues directly to the First District Court of Appeal. On October 23, 1981, the District Court of Appeal issued a "Per Curiam Affirmed" opinion. Sullivan v. Florida Commission on Ethics, 407 So.2d 1110 (Fla. 1st DCA 1981).

Previously, on May 27, 1981, the Sullivans had filed individual complaints against the Commission in the Circuit Court, Leon County, seeking declaratory judgments and injunctive relief. (R 1-12)

On March 4, 1982, the Circuit Court rendered a Final Declaratory Judgement holding, in essence, that the Commission had no jurisdiction over the complaints against the Sullivans. By its Revised Opinion dated April 19, 1983, the First District Court of Appeal quashed the judgment of that Court and held, in essence, that its earlier "Per Curiam Affirmed" decision was res judicata on the issue of the Commission's jurisdiction over the complaints and that the Commission had jurisdiction over the complaints at least under Chapter 112, Florida Statutes. This Court subsequently denied review of that decision. State Commission on Ethics v. Sullivan, 430 So.2d 928 (Fla. 1st DCA 1983), pet. for rev. den., 436 So.2d 101 (Fla. 1983).

On September 16, 1983, the Circuit Court entered a non-final order holding that the Commission was subject to Chapter 120, Florida Statutes, and should proceed in accordance with that Chapter on the complaints against the Sullivans. The First District Court of Appeal affirmed by opinion dated March 27, 1984, and this Court subsequently denied review. State Commission on Ethics v. Sullivan, 449 So.2d 315 (Fla. 1st DCA 1984), pet. for rev. den., 458 So.2d 271 (Fla. 1984).

After holding a "probable cause" hearing, the Commission by order dated February 1, 1985, found probable cause and ordered a public hearing on the question of whether John Sullivan violated Section 112.313(6), Florida Statutes, arising from his failure to resign or take a leave of absence without pay from his position as Deputy Supervisor of Elections while a candidate for Leon County Supervisor of Elections during the 1980 election, as required by Section 99.012(7), Florida Statutes. Following a "probable cause" hearing the Commission also by order dated February 1, 1985, found probable cause and ordered a public hearing on the question of whether Wilma Sullivan violated Section 112.313(6), Florida Statutes, arising from her hiring of relatives contrary to Section 116.111, Florida Statutes.

Section 112.320, Florida Statutes, creates the Florida Commission on Ethics. Section 112.321(1), Florida Statutes, provides that the Commission is to be composed of nine members to be appointed as follows:

(a) Five members by the Governor, no more than three of whom shall be from the same political party, and one of whom shall be a former city or county official;

(b) Two members by the Speaker of the House of Representatives;

(c) Two members by the President of the Senate.

Section 112.321(1) further provides that neither the Speaker nor the President shall appoint more than one member from the same political party; no member may hold any public employment; and no member shall serve more than two full terms in succession.

The members of the Commission on Ethics on January 1, 1981 and those members who have served on the Commission since that date were appointed in conformance with the above-described statutory criteria.

Between July 1, 1975 and October 1, 1982, Section 112.321, Florida Statutes, provided for a nine-member Commission on Ethics with two members appointed by the Speaker of the House and the President of the Senate each, and with only four members appointed by the Governor. In accordance with Attorney General Opinion AGO 76-152, the ninth member was appointed by the Governor in order to fill that vacancy in office.

On August 27, 1985 the Circuit Court entered a Final Order on the two remaining issues in the instant case. (R 1,437-1,443) First, the

Court held that the title of Chapter 79-391, Laws of Florida, which amended Section 99.012, Florida Statutes, was sufficient to provide the notice required by Article III, Section 6, Florida Constitution. The Sullivans have not noticed an appeal of this issue, and as the holding is not adverse to the Commission, further discussion is pretermitted.

The second issue resolved by the Circuit Court concerned the validity of Section 112.321(1), Florida Statutes, the trial court holding that Section 112.321(1) is unconstitutional by virtue of its violation of Article II, Section 3, Article X, Section 3, and Article IV, Section 6, Florida Constitution.

The Commission filed its notice of appeal to the First District Court of Appeal on August 29, 1985. (R 1,444) On Appellants' suggestion, the District Court subsequently certified the appeal directly to this Court as one requiring immediate resolution. (R 1,446). This Court accepted jurisdiction by order dated October 1, 1985.

SUMMARY OF ARGUMENT

Section 112.321(1), Florida Statutes, providing for the appointment of members of the Florida Commission on Ethics, is not unconstitutional.

By its nature as an independent watchdog agency, the Commission is designed to uniquely function in all three branches of state government, does in fact so function, and is not constitutionally precluded from being composed of gubernatorial and legislative appointees.

Although the 1885 Florida Constitution contained an appointments clause which required the Governor to appoint all non-elective state officers, the 1968 Constitution deleted said provision, thus permitting the present method of appointments to the Commission. Neither Article IV, Sections 1(f) or 6 nor Article II, Section 3, of the 1968 Constitution, prohibit legislative branch appointments to the Commission. Furthermore, this Court should hold that the "Sunshine Amendment" adopted by implication the statutory method then employed in selecting and appointing members to the Commission.

Assuming arguendo that the trial court was correct in holding that the Governor must appoint all members of the Commission, the order appealed should nevertheless be reversed because the law held unconstitutional contained a severability clause. Even if not

severable, the Court should recognize the de facto officer doctrine and at the very least, stay any adverse judgment for a reasonable period of time to allow the Commission continuing viability until the Legislature reconstitutes the Commission.

Finally, it is submitted that Appellees lacked standing to challenge the provisions of the questioned statute regarding the removal of Commission members.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN HOLDING SECTION 112.321(1), FLORIDA STATUTES, UNCONSTITUTIONAL.

Introduction

The so-called ethics reform movement, which generally is assigned historically to the post-Watergate era, actually began in Florida in 1967. The Legislature that year enacted the forerunner of what would be entitled the "Code of Ethics for Public Officers and Employees". Chapter 67-356, Laws of Florida. Of significance, too, was a proposal by the Constitutional Revision Commission that year to amend the State Constitution to provide that

> [a] code of ethics for all state employees and non-judicial officers prohibiting conflict between public duty and private interest shall be prescribed by law.

The proposal was approved by the Legislature and adopted by the electorate as Article III, Section 18, of the Florida Constitution the following year, 1968.

The initial standards of conduct, which were similar to current law, applied only to state officers and employees. In 1969, however, public officers and employees of all counties, cities, and other

political subdivisions of the state were brought under these standards by Chapter 69-335, Laws of Florida.

At that time penalties for violating the ethics laws constituted grounds for dismissal from employment, removal from office, or other penalty "as provided by law." There being no other penalty provided by law, the 1970 Legislature introduced criminal sanctions into the Code of Ethics, making violations misdemeanors punishable by a fine not to exceed $1,000 or imprisonment for up to one year. Chapter 70-144, Laws of Florida. A more detailed description of the provisions and intent of the early Code of Ethics may be found in Oldham v. Rooks, 361 So.2d 140 (Fla. 1978).

In the aftermath of Watergate, Florida (like many other states) created a Commission on Ethics to provide a means of administrative enforcement of the Code of Ethics. In conjunction with this shift to administrative enforcement, criminal penalties were deleted. Chapter 74-176, Laws of Florida.

Following substantial revisions of the Code of Ethics in 1975, the Attorney General opined that the Commission on Ethics was a part of the legislative branch of government. AGO 076-54 (March 10, 1976). That opinion was based upon the Commission's lack of executive-type enforcement powers, and upon the fact that the Legislature had not placed the Commission within one of the executive branch departments, as would have been required by Article IV, Section 6, Florida

Constitution, if the Commission had exercised a function of the executive branch.

In the 1976 general election, the voters overwhelmingly adopted Article II, Section 8 of the Florida Constitution, commonly known as the "Sunshine Amendment." So far as it is pertinent here, the Sunshine Amendment provides:

> Section 8. Ethics in government.--A public office is a public trust. The people shall have the right to secure and sustain that trust against abuse. To assure this right:
>
> (f) There shall be an independent commission to conduct investigations and make public reports on all complaints concerning breach of public trust by public officers or employees not within the jurisdiction of the judicial qualifications commission.
>
> (h) Schedule--On the effective date of this amendment and until changed by law:
>
> (3) The independent commission provided for in subsection (f) shall mean the Florida Commission on Ethics.

The adoption of the Sunshine Amendment had two primary effects upon the Commission on Ethics. First, the Commission was afforded constitutional status as an entity with constitutional powers and responsibilities. See, Florida Commission on Ethics v. Plante, 369 So.2d 332 (Fla. 1979), and Myers v. Hawkins, 362 So.2d 926 (Fla. 1978). Secondly, regardless of the "branch status" of the Commission previously, the Commission became an "independent commission" by direct action of the people of the State.

As previously noted, Section 112.321(1), Florida Statutes, currently provides for a nine member Commission on Ethics, with five members being appointed by the Governor, two members being appointed by the Speaker of the House of Representatives, and the remaining two members being appointed by the President of the Senate. The Appellees challenged this method of appointment below, arguing that all nine members of the Commission are required by the Florida Constitution to be appointed by the Governor. The trial court agreed, finding that Article II, Section 3, Article X, Section 3, and Article IV, Section 6, Florida Constitution, require all members of the Commission on Ethics to be appointed by and serve at the pleasure of the Governor.

The Final Order of the trial court carries no presumption of correctness, as the Court found the statute to be unconstitutional. Kass v. Lewin, 104 So.2d 572 (Fla. 1958).

> Rather, the act of the Legislature comes to us clothed with presumed constitutionality and it remains the burden of one who contends for its invalidity to overcome this presumption even on appeal.

Larson v. Lesser, 106 So.2d 188, 191 (Fla. 1958). Because of the presumption of validity, the burden remains upon Appellees to demonstrate "beyond a reasonable doubt that the statute conflicts with some designated provision of the constitution." Metropolitan Dade County v. Bridges, 402 So.2d 411, 413 (Fla. 1981).

Appellants will show that although the 1885 Florida Constitution required the Governor to appoint all non-elective state officers, the 1968 Florida Constitution does not prohibit the present method of appointments to the Ethics Commission. Further, Appellants submit that it was contemplated by the framers of the Sunshine Amendment (Article II, Section 8, Florida Constitution) that the manner and balance of appointments to the Commission be left to the legislative process. In separate sections, this brief will show that neither the Governor's authority to fill vacancies [Article IV, Section 1 (f)], the administration of executive branch departments [Article IV, Section 6], nor the separation of powers provision [Article II, Section 3] prohibit legislative branch appointments to the Commission. Finally, the brief will discuss the validity of the statutory qualifications for members of the Commission and the impact of Isley v. Askew, 358 So.2d 32 (Fla. 1 DCA 1978), which is the only Florida case on point.

At the outset, it should be noted that the question of the manner of appointment of Commission members is not governed by the U.S. Constitution, as the states are not required by the U.S. Constitution to abide by the doctrine of separation of powers. Parcell v. State of Kansas, 468 F. Supp. 1274, 1277 (D. Kansas 1979), affirmed sub nom. Parcell v. Governmental Ethics Commission, 639 F.2d 628 (10th Cir. 1980). One of the issues raised in Parcell challenged on separation of powers grounds the composition of the Kansas Governmental Ethics

Commission, the members of which were appointed by the Governor (5), the President of the Senate (2), the Speaker of the House (2), the Minority Leader of the House (1), and the Minority Leader of the Senate (1). The Federal District Court and the Supreme Court of Kansas (on a certified question from the Tenth Circuit Court of Appeals) held that the method of appointment of the members of that Commission was not governed by the U.S. Constitution and did not violate the separation of powers doctrine adopted in Kansas.

Article IV, Section 1(f), Florida Constitution--The Governor's authority to fill vacancies

Appellants submit that Article IV, Section 1(f), controls the manner in which vacancies in office are to be filled, and that the trial court incorrectly read this provision to apply to all appointments, including all initial appointments. This is demonstrated by the history of the vacancy provision, as expressed by the Constitution Revision Commission and legislative records included in the Record. See, Hayek v. Lee County, 231 So.2d 214 (Fla. 1970), and In re Advisory Opinion to the Governor, 343 So.2d 17 (Fla. 1977), regarding the value of such materials in constitutional construction.

The Constitution of 1885 contained an appointments provision mandating appointment by the Governor of all non-elective state and

county officers. That provision, Article III, Section 27, provided as follows:

> The Legislature shall provide for the election by the people or appointment by the Governor of all State and county officers not otherwise provided for by this Constitution, and fix by law their duties and compensation.

Although the 1968 Constitution requires the Legislature to fix the duties and compensation of state and county officers [by Article II, Section 5(c)], the 1968 Constitution contains no express language mandating the election or appointment by the Governor of all state and county officers. In this situation, former Article III, Section 27, regarding appointments would become a statute, subject to modification by the Legislature, even if it is not inconsistent with the 1968 Constitution. Article XII, Section 10, Florida Constitution (1968).

Notably, the framers of the 1885 Constitution also felt that a provision regarding the filling of vacancies by the Governor was required (Article IV, Section 7):

> When any office, from any cause, shall become vacant, and no mode is provided by this Constitution or by the laws of the State for filling such vacancy, the Governor shall have the power to fill such vacancy by granting a commission for the unexpired term.

Clearly, both the vacancy and the appointments provisions were intended to fulfill different purposes.

Early in the 1968 Constitution Revision Commission proceedings, the Executive Department Committee prepared a draft of a section to be placed in an article on general provisions. This draft (R 789-790) contained both the appointments and vacancy provisions, as well as a definition of "vacancy in office." By the time the Commission's June 30, 1966 preliminary draft was released, the language of the Executive Department Committee's draft was placed in Article II, Section 3, which still included both the appointments and vacancy provisions. (R 791-794)

The only transcribed testimony found in the Archives relating to appointments was that of the Honorable Charles R. Holley before the Executive Committee. (R 795-800) In the excerpt pertaining to appointments and vacancies included in the Record here, the suggestion is made that vacancies be filled by appointment by the Governor, but that the Legislature be allowed to provide for appointments by other than the Governor.

On August 30, 1966, responsibility for Article II was transferred to the Human Rights Committee (R 801), which prepared a Final Report of September 20, 1966 under the Chairmanship of the Honorable B. K. Roberts. (R 806-809) That Committee continued both the appointments and vacancy provisions in Article II, as Sections 3(d) and (e), respectively. In that draft, the term "vacancy in office" was defined to occur "upon the creation of an office," as well as upon the happening of other events. Clearly, the esteemed members of the Human

Rights Committee did not view an appointments provision as being superfluous or unnecessary in light of the vacancy provision and this definition of vacancy.

A tentative draft dated "10-10-66" (R 810-812) retained both the appointments and vacancy provisions in Article II, Section 3, with the recommendation that appointment by the Governor subject to approval of three members of the Cabinet be permitted. (R 812) However, by the time of the Commission's November 10, 1966 draft, the appointments provision was stricken entirely from the draft and the vacancy provision was placed in Article IV, Section 1(f), along with the definition of vacancy. (R 813-825, at pp. 819-820, 823-825) Justice Roberts' attempt to reinstate the appointments and vacancy provisions in Article II, Section 3 was defeated. (R 826-828)

The proposed revision by the Commission which was introduced in the House as Joint Resolution No. 71 tracked the Commission's November 10, 1966 version and continued the exclusion of an appointments clause. (R 829-832) In the Legislature, the vacancy provision was amended "to clarify that appointive officers were being appointed for the remainder of a full term. . . ." (R 834) The definition of vacancy was transferred to Article X, Section 3, where it presently is located. (R 834)

There could scarcely be a clearer indication that the vacancy provision was intended to apply only to vacancies, when appointment

would be made for the remainder of a full term, and not to all appointments, for a full term. However, the Draft of Proposed 1968 Constitution submitted by the Legislature to the people with an analysis by the Legislative Reference Bureau provides an even clearer indication of intent. (R 836-863) This document was published by the Legislature for free public distribution (R 863) and is an extremely important indication of the people's understanding of the 1968 Constitution.

Under Article II, Section 5(c), the analysis concludes:

> The portion of present Section 27 of Article III requiring that all non-constitutional state and county officers be either elected by the people or appointed by the Governor is deleted.

(R 839-840) In other words, the people who ratified the 1968 Constitution were informed that the former requirement that the Governor appoint all non-elected state officers would be deleted--not transferred or modified elsewhere--in their new constitution. This point is reemphasized by the analysis at the end of Article III. (R 845) With respect to the vacancy provision in Article IV, Section 1(f), the analysis states merely that subsection (f) would replace Section 6 of Article IV and Section 6 of Article XVIII relating to the filling of vacancies by the Governor. (R 845) The analysis hardly indicates that the new vacancy provision was intended to replace the prior appointments provision also. Finally, the analysis pertaining to the definition of vacancy in Article X, Section 3, does not even

treat vacancy "upon creation of an office" as worthy of mention. (R 852)

In summary, it is clear that neither the framers nor the adopters of the 1968 Constitution intended that the vacancy provision constitute an appointments clause which would require all of the members of the Ethics Commission (or any other body) to be appointed by the Governor. Although the language of the vacancy provision and of the definition of "vacancy" might be construed (as the trial court apparently did) to require that appointments be made only by the Governor, the intent of the people in adopting a constitutional provision is the touchstone of constitutional interpretation. In re Advisory Opinion to the Governor, 343 So.2d 17 (Fla. 1977). Appellants therefore submit that the language of the 1968 Constitution is not sufficiently clear to prove beyond a reasonable doubt that the statute providing for appointment of members of the Ethics Commission by legislative officers is unconstitutional, especially in light of the intent of those who framed and adopted the 1968 Constitution. This is true also in light of the specificity of Article IV, Section 6 (1968), regarding the appointment of the heads of executive branch departments and in light of the specificity of Article III, Section 27, Florida Constitution (1885), the former appointments provision.

Because the 1968 Florida Constitution omitted the appointments provision contained in the 1885 Constitution, the result in this case is not controlled by Buckley v. Valeo, 424 U.S. 1, 46 L.Ed. 2d 659, 96

S.Ct. 612 (1976). In Buckley the U.S. Supreme Court invalidated the Federal Elections Commission, holding that the appointment of four of the six members of the Commission by the Speaker of the House of Representatives and the President pro tempore of the Senate violated the principle of separation of powers contained in the appointments clause, Article II, Section II, Clause 2, U.S. Constitution. The Court's decision in Buckley was based on that appointments clause, which specifically provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . . .

As the Kansas Constitution, like the Florida Constitution, does not contain a general gubernatorial appointments provision, the courts in Parcell, supra, found that Buckley did not control their decision regarding the Kansas Governmental Ethics Commission.

Appellants suggest that the vacancy provision of Article IV, Section 1(f), authorizes the Governor to fill a newly created office if that office has not been filled already by appointment or election as provided by law. This interpretation is supported by Hoy v. Firestone, 453 So.2d 814 (Fla. 1984), in which this Court held that judicial offices created effective the first Tuesday after the first Monday in January, 1985, would be filled in accordance with legislative direction by election in the general election of 1984.

Since the Commission on Ethics was created in July of 1974 and the original appointments were made by the Governor, the Speaker and the President, there were no vacancies in office existing in 1974 to be filled by the Governor. Clearly there have been no vacancies continuing from 1974 to the present which would authorize the Governor to fill all nine positions on the Commission.

Article IV, Section 6, Florida Constitution--Administration of Executive Departments

The trial court also held that Article IV, Section 6, Florida Constitution, requires the Governor to appoint all members of the Commission on Ethics. To the extent relevant here, that entirely new provision of the 1968 Constitution states:

> Executive departments.--All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by and serving at the pleasure of the governor, except:
>
> (a) When provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office.

This provision has two primary concerns: (1) structuring the executive branch into not more than twenty-five departments (with certain constitutionally authorized exceptions); and (2) providing for the administration of each of these departments.

With respect to the first concern of this provision, all functions of the executive branch except those specifically provided for or authorized in the Constitution are required to be allotted among the not more than twenty-five departments of the executive branch. The Commission on Ethics exercises functions specifically provided for or authorized by Article II, Section 8(f), Florida Constitution, and by the Code of Ethics for Public Officers and Employees contained in Part III, Chapter 112, Florida Statutes, which in turn is specifically provided for and authorized in Article III, Section 18, Florida Constitution.

Therefore, to the extent that the Commission's functions are executive in nature, they need not be allotted among the twenty-five departments. Similarly, the Game and Fresh Water Fish Commission (Article IV, Section 9) has not been made a part of any of the executive branch departments. See Section 20.325, Florida Statutes. Nor has the Parole and Probation Commission, authorized by Article IV, Section 8(c), Florida Constitution, been made part of an executive department. See Section 20.32, Florida Statutes. In fact, no provision whatsoever regarding the Commission on Ethics appears in

Chapter 20, Florida Statutes, wherein the Legislature has structured the executive branch.

The second concern of Article IV, Section 6, deals with the administration of each department within the executive branch, requiring direct supervision by the Governor, the Lt. Governor, the Governor and Cabinet, a Cabinet member, or an officer or board appointed by and serving at the pleasure of the Governor (or confirmed by the Senate or approved by the Cabinet). However, since the functions of the Commission on Ethics need not be allotted to a department, being "provided for or authorized in this constitution", the Commission is not required constitutionally to be directly supervised by the Governor, Lt. Governor, etc., and is not required to be supervised by a board appointed by and serving at the pleasure of the Governor.

It is apparent that the Legislature does not view the Commission as being subject to Article IV, Section 6, as the Legislature has not placed the Commission in any executive branch department and has not provided for appointment of all members by the Governor. The Legislature's action, therefore, could indicate that the Legislature is of the opinion that the functions of the Commission, being provided for or authorized in the Constitution, need not be allotted among the departments of the executive branch even though they are properly functions of the executive branch. Alternatively, the Legislature could have understood the Commission's functions not to be functions

of the executive branch, also in which case the Commission would not be required to fit within the scheme of Article IV, Section 6. In this latter respect, see In re Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969), wherein this Court held that the Public Service Commission is not one of the functions of the executive branch to be allotted among the 25 executive departments. Notably, this Court also stated (at p. 40) that the 1968 Constitution would not prevent the Legislature from making the members of the P.S.C. elective or appointive, or from modifying the composition of the Commission.

In conclusion, Article IV, Section 6, addresses the administration of executive branch departments. As the Commission's functions are "specifically provided for or authorized" in the present Constitution, the Commission need not be, or be incorporated in, one of the 25 executive departments. Therefore, the members of the Commission are not required to be appointed by and to serve at the pleasure of the Governor by Article IV, Section 6, Florida Constitution.

Article II, Section 3, Florida Constitution--Separation of Powers

Article II, Section 3, Florida Constitution, provides:

> 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.

Appellants' research discloses no Florida case holding that the doctrine of separation of powers as expressed in the Florida Constitution invalidates appointments made by legislative branch officers. Cases such as Westlake v. Merritt, 95 So. 662 (Fla. 1923), all arose under the 1885 Constitution and construe the appointments provision which was deleted in the 1968 Constitution. For this reason, these cases cannot be relied upon to support the argument that the Governor must make all appointments to the Commission on Ethics.

Not only have Appellees thus far in this litigation not cited any cases construing the separation of powers provision to require gubernatorial appointments, but this Court has stated otherwise:

> The general provision of article 2 of the state Constitution that the powers of government shall be divided into three departments, and that no person properly belonging to one of the departments shall exercise any power appertaining to either of the others, except in cases expressly provided for by the Constitution, may not make the appointment of officers an exclusively executive power or function; and unless other organic provisions control, the legislative department may exercise itself or authorize officers of either of the other departments to exercise the power to appoint statutory officers and may make such authority restrictive or absolute, within organic limitations. [Citations omitted.]

State ex rel. Buford v. Daniel, 99 So. 804, 808 (Fla. 1924).

In the Daniel case the petitioner challenged a statute creating a county welfare board to be composed of five men and four women appointed by the Governor as being violative of the Governor's appointment power under Article III, Section 27 (1885), and as being an attempted exercise by the legislative department of a power conferred solely upon the executive department by Article II. This Court upheld the validity of the statute, noting that the Legislature may prescribe the qualifications of officers without violating the Governor's exclusive authority to appoint state and county officers under Article III, Section 27.

It is clear from the Court's quoted statement that where no specific provision of the Constitution controls the method of appointment of officers, the separation of powers provision does not require that all officers be appointed by the Governor. Under the 1968 Constitution, as demonstrated earlier in this brief, the 1885 appointments provision has been deleted and there is no provision which controls the method of appointment of Ethics Commission members. This leaves the Legislature free to determine who will make those appointments. In other words, the power to appoint is not inherently an executive power--it becomes strictly an executive power only where the Constitution expressly so provides.

The trial court apparently found that the exercise of the functions of the Commission by officers appointed by the legislative branch violates the separation of powers doctrine, because those

functions are executive in nature, and Article II, Section 3, states that no person in one branch may exercise the functions of another branch. This argument absolutely ignores an important exception to the doctrine--that the Constitution may provide otherwise. Article III, Section 18, and Article II, Section 8(f), provide the constitutional authorization for the Commission to exercise functions which otherwise likely would violate the separation of powers doctrine.

The Commission on Ethics' functions concern officers and employees of all three branches. Article III, Section 18, requires the Legislature to prescribe a code of ethics for all State employees and non-judicial officers. Under Section 112.320, Florida Statutes, the Commission on Ethics serves as the guardian of the Code of Ethics which has been prescribed by the Legislature in response to the people's demand. In addition, Article II, Section 8(f), specifically provides for an independent commission to investigate and report on complaints concerning breach of public trust by public officers and employees who are not subject to the Judicial Qualifications Commission.

This Court has recognized that each branch of government has the "inherent authority" to adopt an ethical code, and each branch has its own separate authority and procedure for discipline of its officers. In re The Florida Bar, 316 So.2d 45 (Fla. 1975). Because the Legislature is not authorized by Article III, Section 18, to adopt an

ethical code for the judiciary, this Court held that the statutory code of ethics could not apply to judges without violating the separation of powers doctrine.

In a very fundamental sense, the Commission exercises executive, legislative, and judicial functions. Without the provisions of Article III, Section 18, and of Article II, Section 8(f), Florida seemingly could not have one commission to exercise these functions. The Commission is, therefore, unique among the agencies of Florida government. But its uniqueness is founded upon and mandated by the Constitution adopted by the people of Florida.

The "Sunshine Amendment" (Article II, Section 8) was intended to insure that every complaint brought against a public official involving a breach of the public trust was fully investigated and reported to the public. This was a major concern at the time of drafting the amendment, because the 1975 Legislature had limited the power of the Commission on Ethics to fully investigate complaints against legislators and impeachable officers and had shrouded those limited investigations in secrecy. See Section 112.324(2) and (3), Florida Statutes.

At the same time, questions had arisen in this State and in the nation concerning government's ability to enforce and maintain ethical standards, particularly in instances where members of a branch or body of government were called upon to consider misconduct of a fellow

officer. Thus, Article II, Section 8(f) and (h), establish an independent commission. However, because the Commission was to be appointive, it was not provided constitutional power to impose sanctions or disciplinary action. While the Commission was to be independent of control by any branch, it was not designed to interfere with the constitutional responsibilities of the legislative, executive, or judicial branches. Florida Commission on Ethics v. Plante, 369 So.2d 332, 337 (Fla. 1979).

The Constitution does grant the Commission the power to use moral force and persuasion through the vehicle of a public report. This is consistent with the basic theme running throughout the "Sunshine Amendment." The theory of enforcement is that public scrutiny--the disinfectant of the sunshine--will operate to assure adherence to required ethical standards.

The same lack of enforcement powers led the Attorney General to conclude in AGO 76-54 that the Commission on Ethics prior to the adoption of the Sunshine Amendment fell within the legislative branch. Under the statutory Code of Ethics, the Commission in investigating complaints may recommend disciplinary action or enforcement by another official, but the enforcement authority solely belongs to that official. See Section 112.324(4), Florida Statutes.

Even though the Public Service Commission has the power to enforce its own orders, this Court has concluded that it is a part of the

legislative or the judicial branch of government. In re Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969). In the context of inquiring who may make appointments without violating the separation of powers doctrine, it is notable that this Court also held in that case that the 1968 Constitution does not prevent the Legislature from placing the P.S.C. under the Governor or the State Cabinet, which would result in a legislative or judicial branch agency being headed by executive branch officers.

The framers of the Sunshine Amendment could have specified a method of appointment for members of the "independent commission," but they did not do so. This was a deliberate omission, as the document entitled "An Explanation of the Sunshine Amendment" shows (R 780):

> The schedule provides that the independent commission provided in subsection (f) of the amendment shall be the Florida Commission on Ethics unless changed by law. This allows the legislature the opportunity to change the composition of the Florida Commission on Ethics or change its duties. However, the constitution will require that there be a commission and that it have investigative powers.

Thus, the method of appointment of members of the Commission on Ethics has been left to the political process, with the balance of appointments to the Commission being determined through the normal give and take process between the legislative and executive branches. Clearly, it was the understanding of the framers that the Constitution did not require all members of an "independent commission" or the existing Commission on Ethics to be appointed by the Governor.

The Legislature's authority to prescribe appointments to the Commission may be limited by the Sunshine Amendment's requirement that the Commission be "independent." However, there is no reason to believe that the present balance of appointments by branch and by political party subjects the Commission to the domination or control of any one branch. Nor do Appellants understand Appellees to be arguing that the Commission is not sufficiently independent.

In conclusion, whatever branch the Commission on Ethics may be located in, the constitutional authority for the Commission's functions is sufficient (and may be necessary) to avoid violating the separation of powers doctrine.

Qualifications of Commission Members

Section 112.321(1), Florida Statutes, requires that no more than three of the Governor's appointees to the Commission shall be from the same political party and requires that one of the Governor's appointees be a former city or county official. In addition, that Section provides for confirmation of the Governor's appointees by the Senate. The Appellees argued below that these provisions unconstitutionally restrict the Governor's appointment power, although the trial court did not expressly rule on this argument.

As demonstrated in this brief, the 1968 Constitution does not specifically provide that the Governor must appoint all State officers. However, even under the 1885 Constitution this Court in numerous cases upheld similar statutory provisions as specifying legitimate qualifications for office. See State ex rel. Buford v. Daniel, 99 So. 804 (Fla. 1924), upholding a board to be composed of five men and four women; Advisory Opinion to the Governor, 23 So. 2d 158 (Fla. 1945), upholding a special road and bridge district board of commissioners of five members who were to be qualified, registered voters of Monroe County; and Advisory Opinion to Governor, 2 So.2d 372 (Fla. 1941), upholding the requirement that the Governor appoint Assistant State Attorneys with the confirmation of the Senate. These cases and others cited by the Courts therein clearly show that the Legislature is enpowered to specify qualifications for office and require confirmation by the Senate, even when the Constitution required the Governor to appoint all State and county officers who were not elected to office.

Isley v. Askew

The issue of the validity of the method of appointment of Commission members was presented to the First District Court of Appeal in Isley v. Askew, 358 So.2d 32 (Fla. 1 DCA 1978), quashed for lack of jurisdiction, 372 So.2d 66 (Fla. 1979). There, the District Court

held that the "Sunshine Amendment," by incorporating as a constitutional entity the existing Commission on Ethics,

> by necessary implication, adopted the method and procedure provided in Section 112.321, Florida Statutes (1975), as the constitutional procedure to be employed by the authority therein designated in the selection and appointment of one to serve in the office of Member of the Florida Commission on Ethics.

Id. at p. 34. For this reason, the Court found that Article IV, Section 1(f) does not require the appointment of all members of the Commission by the Governor, since that section expressly provides that it will apply "when not otherwise provided for in this Constitution." Similarly, said the Court, the separation of powers clause of Article II, Section 3, would not be violated, because that provision applies "unless expressly provided herein." With respect to the separation of powers section, Appellants have argued earlier in this brief that the "independent commission" of the Sunshine Amendment is a constitutionally recognized exception to that section. This Court quashed the District Court's decision for lack of a demonstrated jurisdictional ground. 373 So.2d at 67.

This Court has examined the "Sunshine Amendment" and held that "the proposed amendment, if adopted, will not conflict with other articles and sections of the Constitution, and the wording that is to appear on the ballot is legally adequate." Weber v. Smathers, 338 So.2d 819, 820 (Fla. 1977). The primary concern in construing the "Sunshine Amendment" is ". . . to ascertain the intent of the framers

and voters, and to interpret the provision before us in the way that will best fulfill that intent." Williams v. Smith, 360 So.2d 417, 419 (Fla. 1978), citing Gray v. Bryant, 125 So.2d 846, 852 (Fla. 1960).

Since the "Sunshine Amendment" was enacted by citizen initiative, as opposed to joint legislative resolution, there is no legislative history associated with the amendment in the traditional sense. Myers v. Hawkins, 362 So.2d 926 (Fla. 1978). The explanatory flyer referenced in Myers (R 11-18) states:

> The schedule provides that the independent commission provided in subsection (f) of the amendment shall be the Florida Commission on Ethics unless changed by law. This allows the legislature the opportunity to change the composition of the Florida Commission on Ethics or change its duties. However, the constitution will require that there be a commission and that it have investigative powers.

Under these circumstances, the Amendment itself incorporates the Commission on Ethics as constituted, and grants the Legislature the power to change the composition of the Commission. The District Court in Isley recognized this provision as an exception to the executive appointment power, and such construction should be upheld as implementing the intent of the Amendment. Furthermore, a construction abolishing the independent Florida Commission on Ethics as a constitutional body would not be in keeping with the long-recognized principle of constitutional law that the provisions of the Constitution should be construed as consistent with each other, and a construction which renders inoperative any constitutional provision

should be rejected. State v. Bryan, 50 Fla. 293, 30 So. 929 (1905); State v. Butler, 70 Fla. 102, 69 So. 771 (1915); Askew v. Game and Fresh Water Fish Commission, 336 So.2d 556 (Fla. 1976); Smathers v. Smith, 338 So.2d 825 (Fla. 1977).

The opinion of the District Court of Appeal in Isley, although quashed on jurisdictional grounds, appropriately construed the provisions of the "Sunshine Amendment" and approved the composition of the Florida Commission on Ethics. In addition, the District Court's rationale is a reasonable and proper construction of the inter-relationships of these constitutional provisions which, although obviously not binding upon this Court, should be adopted here.

ISSUE II

ASSUMING ARGUENDO THAT THE TRIAL COURT WAS CORRECT IN HOLDING THAT THE FLORIDA CONSTITUTION REQUIRES THE GOVERNOR TO APPOINT ALL MEMBERS OF THE COMMISSION ON ETHICS, THAT COURT NEVERTHELESS ERRED IN HOLDING SECTION 112.321(1), FLORIDA STATUTES, TO BE INVALID IN ITS ENTIRETY.

The Final Order of the trial court (at R 1443) holds that Section 112.321(1), Florida Statutes, is unconstitutional, finding that appointments to the Commission by the Governor and legislative branch and removals from the Commission by the executive, legislative and judicial branches violate Article II, Section 3, Article X, Section 3, and Article IV, Section 6, Florida Constitution. The Commission urges this Court to reverse the holding of the trial Court for the reasons expressed in the first part of this brief.

However, assuming arguendo this Court finds that the trial court was correct in holding that the Florida Constitution requires the Governor to appoint all members of the Commission, nevertheless this Court should conclude that the trial court erred in holding Section 112.321(1) to be invalid in its entirety, as the chapter law which enacted the present method of legislative appointments contained a

severability clause, and as Appellees have no standing to challenge the provisions of Section 112.321(1) regarding removal of Commission members.

Severability and De Facto Officer Status

If the Court finds that the Constitution does not permit four members of the Commission on Ethics to be appointed by legislative branch officers, the Court need not and should not invalidate all of the provisions relating to the composition of the Commission. Chapter 75-199, Laws of Florida, which amended Section 112.321(1), Florida Statutes, to provide the current authorization for legislative appointments to the Commission, contained a typical severability clause.

With respect to severability clauses, this Court has stated:

> We have a duty to uphold the validity of legislative enactments to the extent possible, and the expression of a legislative preference for the severability of voided clauses, although not binding, is highly persuasive.

State v. Champe, 373 So.2d 874, 880 (Fla. 1978). This Court may sever the offensive portions of Section 112.321(1), Florida Statutes, simply by striking the fourth and fifth sentences of that subsection, which are the only sentences which relate to legislative appointments.

Therefore, if the legislative appointments of four current members of the Commission are invalid, the statute still would provide for a nine member Commission and the Governor would be authorized by the Constitution to fill the remaining four positions as vacancies.

Alternatively, the Commission urges this Court to afford de facto validity to the actions of the Commission on Ethics and to stay its judgment for a reasonable period of time, should the Court find that portions of Section 112.321(1) are invalid and not severable. In Buckley v. Valeo, 424 U.S. 1, 46 L.Ed. 2d 659, 96 S.Ct. 612 (1976), the United States Supreme Court invalidated the Federal Elections Commission, but afforded de facto validity to past acts of the Commission and stayed its own judgment temporarily to allow the Commission to continue to function until Congress could reconstitute the Commission by law. 424 U.S. at 142-143, 46 L. Ed. 2d at 758.

The de facto officer doctrine also has been recognized and applied in Florida. See, generally, 9 Fla. Jur. 2d Civil Servants, Sections 166-174. A person is a de facto officer where the duties of the office are exercised "under color of an election or an appointment by or pursuant to a public, unconstitutional law, before the same is adjudged to be such." 43 Am. Jur. Public Officers, Section 471, pp. 225-226, cited with approval in State ex rel. Hawthorne v. Wiseheart, 28 So.2d 589 (Fla. 1946). The acts of a de facto officer are valid as to third persons and the public until his title to office is adjudged

insufficient. See 9 Fla. Jur. 2d Civil Servants, Section 174, and cases cited therein.

Therefore, in the event that the Court finds that the appointment of members of the Commission on Ethics by legislative branch officers is unconstitutional and that the offensive provisions are not severable, the Commission suggests that the Court also should find that the actions of the Commission be afforded de facto validity and that the Court should stay its judgment in order to allow the Commission to continue to function until the Florida Legislature is able to reconstitute the Commission by law. The Commission suggests that a reasonable time period would be one ending at the close of the next regular session of the Legislature.

Standing to Challenge Provisions Regarding the Removal of Commission Members

The Final Order of the trial court concludes in part (R 1443) that Section 112.321(1), Florida Statutes, is unconstitutional insofar as it provides:

> Any member of the Commission may be removed for cause by majority vote of the Governor, the President of the Senate, the Speaker of the House

> of Representatives, and the Chief Justice of the Supreme Court.

In the view of the trial court, this removal procedure is violative of Article IV, Section 6, Florida Constitution, which requires Commission members to serve at the pleasure of the Governor.

The issue of the validity of this removal process was not raised by Appellees until the final hearing below, at which time counsel for the Commission objected (R 1,389) on the two grounds that the question had not been raised in the parties' Stipulation of Issues to be Adjudicated (R 1,131), which mentions only the Governor's appointive and vacancy-filling authority, and, more importantly, that the Appellees had no standing to raise the issue.

It is a basic principle of law that the constitutionality of a statute may be challenged only by one whose rights are, or will be, affected by the statute. City of Cape Canaveral v. Chesnick, 227 So. 2d 502 (Fla. 4th DCA 1969). In that case, the Court held that the trial court should not have decided the constitutionality of a zoning ordinance which the trial court had factually found did not apply. As the ordinance did not apply, the Court found that the plaintiff lacked standing to raise the question of the constitutionality of the ordinance.

The rule regarding standing to raise constitutional issues has been stated as follows:

> The courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, affected by it. Even though a statute is unconstitutional, only those who have a right to raise a question of its unconstitutionality may invoke the aid of the courts to have it judicially set aside. A court will not entertain an objection made to the constitutionality of a statute by a party whose personal or property rights it does not affect, and who therefore has no interest in defeating it. Thus, the constitutionality of a statute may not be attacked by one who does not come within the purview of the statute and whose rights are not affected thereby, by an amicus curiae, or by one who does not come within the class against which the statute is alleged to discriminate.
>
> * * *
>
> One who is not himself denied some constitutional right or privilege may not be heard to raise constitutional questions on behalf of some other person who may at some future time be affected.

10 Fla. Jur. 2d Constitutional Law, Section 62 (pp. 283-285), including numerous citations of case precedent.

Appellees have not and cannot demonstrate that a justiciable controversy is presented in this proceeding with respect to the removal of Commission members. The declaration that Section 112.321(1) is unconstitutional insofar as removal proceedings for Commission members are concerned does not place them in any better situation. Appellees cannot show that their rights or duties have been or will be affected by the removal proceedings of Section 112.321(1).

Although Appellants suggest that a Commission member subject to removal under this provision would have standing to raise this issue, Appellees clearly are not affected by the removal provision in any manner different from any other member of the general public. Therefore, this Court should reverse the order of the trial court insofar as it purports to address the constitionality of the removal process specified in Section 112.321(1), Florida Statutes.

CONCLUSION

For the reasons stated herein, Section 112.321(1), Florida Statutes, is constitutional. The trial court's conclusion to the contrary should be reversed.

To the extent that this Court may reject Appellants' Point I and hold that the Florida Constitution of 1968 requires the Governor to appoint all members of the Commission on Ethics, the de facto officer doctrine, the severability of the statute, and the lack of standing to challenge removal of Commission members mandate a reversal in part.

Respectfully submitted,

JIM SMITH
Attorney General

ARDEN M. SIEGENDORF
Assistant Attorney General
and Commission Advocate
The Capitol
Tallahassee, Florida 32301
(904) 488-1891

PHILIP C. CLAYPOOL
Staff Attorney
Commission on Ethics
Post Office Box 6
Tallahassee, Florida 32302
(904) 488-7864

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been delivered by hand this 15th day of October, 1985 to Stephen Marc Slepin, of Slepin, Slepin, and Waas, 1114 East Park Avenue, Tallahassee, Florida 32301.

Philip C. Claypool
Staff Attorney
Commission on Ethics