O/a 11-7-85

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' REPLY BRIEF

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ISSUE I

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

Twas brillig, and the slithy toves
  Did gyre and gimble in the wabe;
All mimsy were the borogoves,
  And the mome raths outgrabe.

Beware the Jabberwock, my son!
Lewis Carroll

The arguments presented in Issue I of Appellees' answer brief virtually ignore the main argument of the Commission and attack only the rationale of 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). In attempting to "vindicate the obvious," Appellees have been forced to ignore the express language of the Constitution. Just as the order of the trial court failed to mention Article II, Section 8 of the Florida Constitution, Appellees have ignored the fact that: (1) Article II, Section 3, regarding separation of powers, applies "unless expressly provided herein"; (2) Article IV, Section 6 excepts executive functions which are "specifically provided for or authorized in this constitution"; and (3) the 1968 Constitution no longer requires all non-elected state officers to be appointed by the Governor. In doing so, Appellees and

the trial court have grossly oversimplified the issues presented and have, in effect, conceded the validity of the Commission's argument on these three issues.

Similarly, Appellees' view of the structure of this State's government is far too simplistic. Appellees argue that the Commission on Ethics must fall within the executive branch because the judicial branch consists only of the courts and the legislative branch consists only of the Senate and House of Representatives. This argument fails to account for the Public Service Commission being part of the legislative or judicial branches, but not being the Senate, the House of Representatives, or the courts. In re Advisory Opinion to the Governor, 223 So.2d 35 (Fla. 1969). This argument also fails to account for the fact that the Judicial Qualifications Commission and The Florida Bar both are part of the judicial branch, although neither agency is a court.

The main point of the Commission is that since the adoption of the 1968 Florida Constitution, the power to appoint state officers is not exclusively an executive function. Appellees make the simple argument that the Constitution does not authorize the Governor to make appointments to a legislative branch entity and that the Constitution does not authorize the Legislature to make appointments to an executive branch agency. However, the question is not whether such appointments are authorized by the Constitution (so long as they are

authorized by law), but whether such appointments are prohibited by the Constitution.

The Florida Constitution is a limitation on the power of the Legislature, not a grant of power to the Legislature. Therefore, if not expressly limited by the Constitution, the Legislature is free to provide for appointments as it sees fit. Here, there are no express limitations on the power of the Legislature to provide for the appointment of Commission members. Article IV, Section 1(f), regarding the filling of vacancies, applies only as an interim method of filling an office--for the remainder of a term of an appointive office. Article IV, Section 6, regarding executive departments, does not apply to the Commission on Ethics because the Commission's function is "specifically provided for or authorized in" Article II, Section 8(f). Accordingly, legislative appointments to the Commission could be prohibited only if the power to appoint members of the Commission is inherently an executive power which, under the separation of powers provision, could not be exercised by legislative branch officers.

Separation of Powers

Even under the 1885 Constitution the power of appointment was not considered to be inherently an executive power or function. State ex

rel. Buford v. Daniel, 99 So. 804, 808 (Fla. 1924). Appellees cite the case of State ex rel. Hatton v. Joughin, 103 Fla. 877, 138 So. 392 (1931), for the proposition that the power to appoint public officers under our Constitution is an executive power. However, that case pertained only to the constitutional suspension and removal process, which was described by this Court (as it clearly is) as being an executive power. Appellees also base their argument that the power to appoint public officers is an executive function on In re Advisory Opinion to the Governor, 9 So.2d 172 (Fla. 1942). However, that case dealt not with the Governor's authority to appoint officeholders, but with the Governor's authority to designate a person to perform the duties of an office where the incumbent has been called to military service. Further, where a circuit judge had been called to war service, this Court found in that opinion no inherent appointment authority in the executive which would authorize the Governor to appoint a replacement to perform the duties of that office.

Appellees' "animal, mineral or vegetable" view of the Constitution would invalidate the appointment of members of the Public Service Commission, an agency of the legislative or judicial branches whose members are appointed by the Governor. Similarly, if Appellees' interpretation of the Constitution is upheld by this Court, a number of other commissions, councils, and committees will be radically affected. As noted in the Motion Seeking to Leave to Appear as Amicus Curiae filed by Senate President Harry A. Johnston, II, these bodies

would include the Court's Restructure Commission, the Sentencing Commission created by Section 921.001(2)(a), Florida Statutes, the Florida Council on Criminal Justice, created by Section 23.152(e), Florida Statutes, and the Conflict Case Cost Containment Committee, created by Chapter 84-220, Laws of Florida, Item 1098A. Other boards and commissions which would be affected include the Study Commission on MARTA, whose members are appointed by the Governor, the President, and the Speaker under Chapter 85-83, Laws of Florida; the Columbus Hemispheric Trade Commission, whose members include senators, representatives, and gubernatorial appointees under Chapter 84-232, Laws of Florida; the International Currency and Barter Exchange Constitution and By-Laws Committee, whose members include senators, representatives, and gubernatorial appointees under Chapter 84-61, Laws of Florida; the Statewide Health Council, whose members include appointees by the Governor, the Speaker and the President under Section 381.493, Florida Statutes; and the Florida Education Council, whose members include, among others, gubernatorial, House and Senate appointees under Section 244.07, Florida Statutes. The Appendix to this brief contains a listing of bodies whose members are appointed, in part, by the President of the Senate and the Speaker of the House of Representatives.

In summary, the Florida Constitution (as a limiting document) does not preclude the Legislature from authorizing legislative appointments to executive branch agencies or preclude the executive from making

appointments to a legislative branch agency, except where expressly prohibited by the Constitution.

The Commission Does not Exercise Exclusively an Executive Function

Appellees argue that because the Commission is required to follow the Administrative Procedure Act, the Commission must be within the executive branch. However, to the extent that the Commission is subject to Chapter 120, Florida Statutes, it does not follow that the Commission is within the executive branch. Section 120.50, Florida Statutes, explicitly provides that the A.P.A. does not apply to the Legislature or the courts. However, the A.P.A. does apply to other entities of the legislative or judicial branches. For example, the A.P.A. applies to proceedings before the Public Service Commission, except where specifically provided otherwise. See A.S.I., Inc. v. Florida Public Service Commission, 334 So.2d 594 (Fla. 1976), and cases cited therein.

Although the Commission admittedly shares some characteristics with executive branch agencies, its powers are not necessarily executive in nature. For example, the Auditor General, clearly a legislative officer under Section 11.42, Florida Statutes, is authorized by Section 11.45, Florida Statutes, to audit and make public reports on executive and judicial branch agencies. Similarly,

the Commission investigates and makes public reports under Article II, Section 8(f), Florida Constitution. To this extent, therefore, the function exercised by the Commission could be performed by a legislative branch agency. As argued in its initial brief, the Commission has roots in all three branches of State government. The question of the Commission's branch status, however, need not be addressed by this Court, as the statutory scheme for appointment of Commission members would be valid regardless to which branch or branches of government the Commission ultimately may be assigned.

An Independent Commission

By adopting Article II, Section 8(f), Florida Constitution, the people of this State have required that there be an "independent commission" to investigate and report on complaints of ethical misconduct by public officers and employees. By adopting the schedule to the Sunshine Amendment, Article II, Section 8(h), the people both provided that the Commission on Ethics would be that "independent commission" and allowed the Legislature to create or designate another commission to fulfill this constitutional function. Appellees argue that because the Ethics Commission is designated in the schedule, the Commission is to be distinguished from other constitutional agencies. This is a distinction without a difference. Article IV, Section 9, provides that "[t]here shall be a game and fresh water fish commission

. . . ." The only difference between these two commissions is that one is given a specific name and the other is not--each still fulfills a constitutionally mandated function.

Clearly, the Legislature may abolish the Commission on Ethics, but it must provide for some independent commission to handle the duties of the Sunshine Amendment. This was contemplated by the framers of the Sunshine Amendment, who stated in "An Explanation of the Sunshine Amendment" (R 780) that the Legislature would be allowed the opportunity to change the composition of the Commission on Ethics or change its duties. Thus, the Constitution allows the possibility that both ethics and elections [see Article II, Section 8(b), Florida Constitution] functions could be combined in one commission with a composition different from that of the Commission on Ethics. Such a combination of functions is not unusual in other states.

Again, the Legislature under the Sunshine Amendment could abolish the Commission on Ethics and designate, as argued by Appellees, the Board of Cosmetology, to handle the constitutional functions of Article II, Section 8(f). However, if the Legislature were to do so, it also must provide that the board be "independent" in order to comply with the people's mandate of an "independent commission."

Appellees argue that the term "independent" is without any meaningful significance, as all officers should be presumed to be "independent." If that were the case, then there would be no need to

specify the requirement of an "independent commission" in the Constitution, as the presumption is that any word appearing in the Constitution was placed there with some specific purpose in mind.

The Commission suggests that the drafters of the Sunshine Amendment meant an "independent commission" to be one which would be free from domination and control by any one branch of government and whose investigations and findings could not be criticized as being controlled by that one branch. When viewed from this perspective, appointment of Commission members by officers from more than one branch may even be required by the Sunshine Amendment, in order to guarantee the Commission's independence. Certainly as a matter of policy it would be appropriate for a Commission which has authority over officers and employees in more than one branch to be appointed by officers within more than one branch.

Taken in this light, the composition of the Commission also serves rather than defeats the underlying purpose of the separation of powers of state government, which is to prevent the exercise of autocratic power by any single branch. Pepper v. Pepper, 66 So.2d 280 (Fla. 1953). If the Governor were to appoint all members of the Commission, encroachment upon the legislative branch would be distinct possibility, and vice versa. In any event, the framers of the Sunshine Amendment left this decision to the legislative process.

Yet to the extent that the Legislature may be limited in prescribing the method of appointment of Commission members by the requirement that the Article II, Section 8(f) Commission be "independent," the Legislature still would have a wide range of choices which would satisfy the requirement that the Commission be free from domination and control by one branch. Although a Commission composed equally of executive, legislative, and judicial appointments might provide the best balance among the three branches, a five-to-four balance of appointments does not evidence such domination and control by the executive branch as to limit the Commission's independence.

Finally, it should be noted that if this Court finds that the requirement of Article II, Section 8(f) of an "independent" commission mandates a balance of appointments, then this provision should constitute an implied exception to the general rules of Article II, Section 3, and Article IV, Section 6. As a more specific and later-in-time provision of the Constitution, the Sunshine Amendment necessarily would control over earlier and more general provisions of the Constitution.

If this Court finds that under ordinary circumstances the Governor would be required by the Constitution to make all appointments to the Commission on Ethics, the Commission maintains that the reasoning of Isley v. Askew, supra, provides a sound rationale for upholding the validity of Section 112.321(1), Florida Statutes. The people clearly meant that the then-existing Commission on Ethics, including its then-existing duties and composition, be specifically authorized by Article II, Section 8. At the same time, as noted earlier in this brief, the people clearly permitted future legislatures the authority to change the powers, duties, or composition of the Commission. The net effect, therefore, is similar to the effect of providing for the composition of judicial nominating commissions in the schedule to Article V, which may be changed by general law. See Article V, Section 20(c)(5), Florida Constitution. Parenthetically, it should be noted that three members of each judicial nominating commission, which exercise an executive function, are to be appointed by The Florida Bar, a judicial agency. Therefore, this Court may and should effectuate the will of the people by adopting the reasoning of the First District Court of Appeal as articulated in Isley.

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.

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 Commission is not asking the Court to rewrite Section 112.321(1), Florida Statutes. Rather, the Commission would urge this Court to give effect to the severability clause which was enacted as part of the law which provides for legislative appointments to the Commission. Article II, Section 8(f), imposes the requirement on the Legislature that there be a commission to fulfill a constitutionally mandated function. Therefore, the Commission suggests that invalidating only the appointment of the four legislative appointees would be less onerous and would give effect to the Legislature's primary intent that there be an ongoing Commission on Ethics.

Regarding the de facto officer status of Commission members if this Court finds that gubernatorial appointment is required by the Constitution, the Commission agrees with Appellees' statement that a de jure office must be created before de facto status can be accorded. However, Appellees are not arguing that no office of member of the Commission on Ethics was lawfully created. Instead, their arguments pertain to the question of whether the method of appointment of office

holders is valid. Further, if no office was lawfully created, then there has been no office to be filled by appointment by the Governor as a vacancy, and Appellees and the trial court are in error in their understanding of Article IV, Section 1(f).

Standing to Challenge Provisions Regarding the Removal of Commission Members

Appellees base their standing on the fact that they petitioned the Governor, the Speaker, the President, and the Chief Justice to remove the members of the Commission on Ethics. As Appellees' petition, contained in the appendix to their answer brief, was not a part of the proceedings below, it is de hors the record and should not be considered here. Florida Livestock Board v. Hygrade Food Products Corp., 141 So. 2d 6 (Fla. 1st DCA 1962).

However, should this Court find that Appellees' petition is properly before the Court, Appellees still do not have standing to challenge the removal provisions of Section 112.321(1), Florida Statutes. Having invoked the removal process of that section, Appellees should be estopped from challenging the constitutionality of that process. Moreover, Appellees' petition sought the removal of Commission members on the sole ground that Section 112.321(1) violates the Governor's constitutional authority to appoint. Appellees now are

claiming that they have standing to challenge the removal provisions of Section 112.321(1) on the basis of a petition alleging that section to be unconstitutional. Appellees' bold attempt at bootstrapping still does not demonstrate that they are, or will be, affected by Section 112.321(1), Florida Statutes. Accordingly, this portion of the trial court's order should be reversed.

CONCLUSION

Appellees have conceded much of the Commission's argument and have not met their burden of demonstrating the unconstitutionality of Section 112.321(1), Florida Statutes. Therefore, the order on appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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