047

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 25 1991
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

LAWTON CHILES, etc. et al.,

Appellants,

v. CASE NO. 78,792

CHILDREN A, B, C, D, E and F, etc.,

Appellees.
_____/

INITIAL BRIEF OF APPELLANTS

ON APPEAL FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL COURT, DADE COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellants were the defendants in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Appellees were the plaintiffs in the trial court.

The following symbols will be used in this brief:

"R" Record on Appeal

"TR" Transcript of Proceedings

STATEMENT OF THE CASE AND FACTS

Appellees, six children in foster care, filed a complaint for declaratory relief and emergency motion for restraining order seeking an immediate injunction prohibiting the defendants from cutting the budget. All of the appellants were named in their official capacity as members of the Administration Commission. Appellants filed a timely motion to dismiss. On October 17, 1991, the trial court heard argument upon appellees' complaint and appellants' motion to dismiss and thereafter entered an order declaring §§ 216.221 and 216.011(1)(ll), Fla. Stat. (1989), unconstitutional and enjoining the Appellants from attempting to cut the budget "or taking any other action" pursuant to the budget reduction procedure established in Chapter 216, Fla. Stat. Thereafter, this appeal was timely filed.

THE VENUE ISSUE

In the trial court, the Appellants asserted the venue privilege to be sued at the seat of government in Leon County. The trial court denied a change of venue.

The Administration Commission believes that the trial court clearly erred in denying a change of venue and that proposed budget adjustments under § 216.221, Fla. Stat., do not fall within the sword-wielder exception to that privilege. See Carlisle v. Game and Fresh Water Fish Comm'n, 354 So.2d 362 (Fla. 1977); Smith v. Williams, 35 So.2d 844, 846-47 (Fla. 1948);

Department of Revenue v. First Fed. Sav. & Loan Ass'n, 256 So.2d 524 (Fla. 2d DCA 1971). Plaintiffs have no constitutional right to funding of the guardian ad litem program, nor, if they did, was there any showing of an immediate threat to the funding of that program.

Nevertheless, in order that the Court may address the more significant issues posed by this case, the Administration Commission is disinclined to press its venue argument. The Court may wish to comment on the continuing vitality of this principle in order to forestall future efforts to interrupt the most basic functions of state government by circuit courts remote from the seat of government.

SUMMARY OF THE ARGUMENT

Unless there is a bona fide controversy based on present ascertainable facts, a trial court lacks jurisdiction to render declaratory relief under Chapter 86, Fla. Stat. Martinez v. Scanlon, 582 So.2d 1167 (Fla. 1991). The allegations in the complaint clearly demonstrate that the appellees were attempting to enjoin the Administration Commission from voting upon or enacting any proposals to reduce the budgets of various state agencies, including the judicial branch, to prevent an estimated deficit resulting from a shortfall in revenue collections. While appellees allege that such reductions would result in the loss of their guardian ad litem and access to the courts, there was no

evidence presented to demonstrate that the loss had actually occurred, that the loss would necessarily occur from the reduction of the budget, or that their allegations were anything more than mere speculation. Therefore, a present controversy requiring court resolution did not exist.

Section 216.221, Fla. Stat., lawfully empowers the executive branch to reduce the approved state agency budgets when it has been determined that a deficit will occur in the General Revenue Fund. The Florida Constitution places joint responsibility for a balanced budget with the legislative and executive branches of government. The statute authorizing budget reductions by the Administration Commission is narrowly tailored to apply in situations where a deficit occurs after the Legislature has adopted a balanced budget and the Governor has allowed it to become law.

Pursuant to Article V, § 14, Fla. Const., the judicial branch has no power to fix appropriations. The term "appropriation" is not defined in the Florida Constitution. It is only defined and elucidated in Chapter 216, Fla. Stat. Therefore, as long as the Administration Commission acts within the constraints imposed by Chapter 216, Fla. Stat., and other statutes, it is not unlawfully exercising a legislative power when it reduces the budgets of state agencies and the judicial branch in order to avoid a deficit.

No facts have been adduced which show that the Administration Commission has affected core judicial functions or that the statutory law contemplates such action by the Commission. In the absence of such a showing, appellees lack standing. Moreover, to the extent § 216.221, Fla. Stat., is a delegation of a legislative power, the statute appropriately guides and constrains the Administration Commission. The Commission must observe any funding priorities established by the Legislature and may not reduce budgets or releases except by amounts necessary to avoid a deficit. The Administration Commission must notify the Legislature of its intended action and the Legislature may express its objection or take action by convening a special session. For these reasons, Appellants urge this Court to quash the trial court's injunction and reverse the final judgment declaring §§ 216.011(1)(11) and 216.221, Fla. Stat., unconstitutional.

ARGUMENT

I.

THE TRIAL COURT ERRED IN NOT DISMISSING THE COMPLAINT FOR LACK OF A JUSTICIABLE CONTROVERSY UNDER CHAPTER 86, FLA. STAT.

The complaint alleged that appellant Chiles had indicated that the Administration Commission intended to cut the judicial budget by $8.4 million. Paragraph 12 alleged that the Governor publicly announced that at the October 22 meeting, he and the

other Commission members planned to cut more than $600 million dollars from the state budget, including more than $8 million from the judicial branch. Until such time as the alleged threatened action occurs, there is no justiciable controversy between the parties to support a declaratory action pursuant to Ch. 86, Fla. Stat. Martinez v. Scanlon, 582 So.2d 1167 (Fla. 1991) (there must be a bona fide, actual, present, practical need for the declaration and the declaration should deal with a present, ascertained, or ascertainable state of facts or present controversy as to a state of facts). Neither the complaint nor the affidavit executed by Michael Rossman, as next friend and guardian ad litem, demonstrated the existence of a present controversy or injury to the plaintiffs.

A factual situation analogous to the instant case occurred in Williams v. Howard, 329 So.2d 277 (Fla. 1976). In that case, the Supreme Court cited and quoted with approval from May v. Holley, 59 So.2d 636 (Fla. 1952); State ex rel. Fla. Bank and Trust Co. v. White, 21 So.2d 213, 215 (Fla. 1944); and Bryant v. Gray, 70 So.2d 581 (Fla. 1954); and indicated that the Court had repeatedly held that the mere possibility of injury at some indeterminate time in the future does not supply standing under the Declaratory Judgment Act. Additionally, the Court stated:

> In our jury instructions we admonish jurors to refrain from speculation or conjecture. The courts should be at least as disciplined when called upon to declare the rights of parties who assert

> that they will be affected by a state of facts which have not arisen or by matters that are contingent, uncertain, or rest in the future.

Williams, supra, at 283 (emphasis added).

Cramp v. Board of Public Instruction of Orange Co., 118 So.2d 541 (Fla. 1960), is also instructive. There, a teacher alleged that he feared that the school board would discharge him for his refusal to subscribe to the so-called loyalty oath required by § 876.05, Fla. Stat. No testimony was taken. The Court was required to look to the allegations of the complaint to determine if they revealed justification for the relief sought. The Court held that the complaint lacked specific and unequivocal factual allegations demonstrating the necessity for a temporary injunction in order to prevent irreparable injury. See also Department of Revenue of State v. Markham, 396 So.2d 1120 (Fla. 1981), and F.V. Investments N.V. v. Sicma Corp., 415 So.2d 755 (Fla. 3rd DCA 1981).

Appellees have argued that there are between 2,500 to 3,000 children in foster care in Dade County alone who may lose their access to the courts and their guardian ad litem if the Administration Commission is allowed to cut the budget of the judicial branch. This assertion amounts to nothing more than the mere possibility of injury at some indeterminate time in the future and is insufficient to support standing under Florida's Declaratory Judgment Act.

II.

THE TRIAL COURT ERRED IN DECLARING §216.221, FLA. STAT., UNCONSTITUTIONAL AS AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

Appropriations for each branch of government are fixed by the Legislature pursuant to law. See Article VII, § 1, Fla. Const. The term "appropriation" is not defined in the state constitution. As defined in Chapter 216, Fla. Stat., an appropriation is simply "legal authorization to make expenditures for specific purposes within the amounts authorized in the appropriations act." Section 216.011(1)(b), Fla. Stat. (1991). Where revenues fall short, the Administration Commission created by § 14.202, Fla. Stat., is empowered to reduce budgets and releases "within the amount authorized" pursuant to § 216.221, Fla. Stat. (1991). Such action is not the equivalent of reducing an appropriation, and hence is not the exercise of a legislative power. Rather, it is a reduction of the sums available for expenditure within an appropriation.

Article VII, Section 1(d) of the Florida Constitution states: "Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period." This section requires the State to meet its legal liabilities. It does not impose an affirmitive obligation upon the legislature to fund its appropriations. There is no constitutional impediment to reducing budgets in order to avoid deficit spending.

Executive or administrative officers may, by statute, be authorized to exercise functions that are quasi-legislative in their nature, when the function is not a power that has been assigned exclusively to one of the departments of the government by the Florida Constitution. McMullen v. Newmar Corp., 129 So. 870 (Fla. 1930). See also, Chiles v. P.S.C. Nominating Council, 573 So.2d 829 (Fla. 1991). While the power to legislate and appropriate funds is initially vested in the Legislature by Article III, §§ 1, 12, Fla. Const., taking appropriate action to prevent deficit spending is clearly executive in nature. Moreover, under § 216.221, Fla. Stat., the Legislature has retained a significant oversight role in this process.

Chapter 216, Fla. Stat., involves the Governor in all phases of planning and budgeting. Additionally, the Legislature, pursuant to § 216.221, Fla. Stat., has specifically charged the Governor, as chief budget officer, with the duty to ensure that revenues collected will be sufficient to meet appropriations and that no deficit occurs in any state fund. If, in the opinion of the Governor, after consultation with the Revenue Estimating Conference, § 216.136(3), Fla. Stat., a deficit will occur in the General Revenue Fund, he must certify it to the Administration Commission. The Commission may, by affirmative action, reduce all approved state agency budgets and releases by a sufficient amount to prevent a deficit in any fund. Moreover, § 216.292, Fla. Stat., permits the Executive Office of the Governor to

approve transfers of appropriations under various circumstances. However, no agency of the state government is permitted to contract to spend or enter into agreement to spend any monies in excess of the amount appropriated to each agency. See § 216.311, Fla. Stat.

The power given the Administration Commission under § 216.221, Fla. Stat., is not the legislative power to "say what the law is," and hence there is no real issue here as to delegation of a legislative function. The Legislature's intent is stated in the Appropriations Act. The Administration Commission can do nothing to affect that intent. It is only "the power to say what the law is that is being prohibited from being delegated." Dept. of Ins. v. Southeast Volusia Hosp. Dist., 438 So.2d 815, 820 (Fla. 1983). This has long been the law in Florida.

> The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying the law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.

State v. Atlantic Coastline R. Co., 47 So. 969, 976 (Fla. 1908). The Administration Commission does not purport to say what the law is under the facts of this case or by operation of the statutes under attack.

This Court also stated in Atlantic Coastline R. Co., supra, that

> [i]n order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted under the provisions of the Constitution.

Id. at 975 (emphasis added). This test is not met. Checking deficit spending is clearly not a singularly legislative function.

Assuming, arguendo, that § 216.221, Fla. Stat., involves delegation of a legislative power, it has definite limitations, designates the officials authorized to adjust agency budgets, requires adherence to legislatively set priorities and involves legislative oversight. Section 216.221(1), Fla. Stat., provides that all appropriations shall be maximum appropriations based upon the collection of sufficient revenues to meet and provide for such appropriations. It places upon the Governor, as chief budget officer, the duty to ensure that revenues collected will be sufficient to meet the appropriations and that no deficit occurs in any state fund.

Subsection (2) provides that if in the opinion of the Governor, after consultation with the Revenue Estimating

Conference, a deficit will occur in the General Revenue Fund, he shall so certify it to the Administration Commission. The Commission may, by affirmative act, reduce all approved state agency budgets and releases within a specified limit: that is, no more than necessary to prevent a deficit in any fund. It further provides that in the absence of any direction by the Legislature in the General Appropriations Act, the Commission, pursuant to the provisions of § 14.202, Fla. Stat., may reduce all approved state agency budgets by a sufficient amount to prevent a deficit in any fund or may authorize the use of the Working Capital Fund only to prevent a deficit in the General Revenue Fund; however, the commission may not reduce agency budgets or releases to increase funds in or restore funds to the Working Capital Fund in excess of the amount determined by the first Revenue Estimating Conference held after the regular legislative session.

The crucial test in determining whether a statute amounts to an unlawful delegation of legislative power "is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the Legislature's intent." Southeast Volusia Hosp. Dist. at 819. There, this Court, in upholding the validity of § 768.54(3)(c), Fla. Stat., which dealt with assessments, indicated that questions concerning the existence of deficits were technical issues of implementation and not fundamental policy

questions which could necessitate constant legislative supervision.[1]

Subsection (5) of § 216.221 provides that any action taken pursuant to this section shall be reported to the legislative appropriation committees and the committees may advise the Governor, the Comptroller or the Commission concerning such action. Additionally, it provides that no less than seven working days prior to any final action by the Commission, the proposed plan for such action shall be submitted to the legislative appropriations committees for review and consultation and the committees may advise the Commission concerning such action.

Finally, subsection (6) provides that once a deficit is determined to have occurred and action is taken to reduce approved operating budgets, no action may be taken by the Commission to restore the reductions, either directly or

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[1] See also, Brown v. Apalachee Reg. Planning Council, 560 So.2d 782 (Fla. 1990), affirming the legislative authority granted to the Apalachee Regional Planning Council to set and collect fees for development of regional impact application and review costs. Compare, Lewis v. Bank of Pasco Co., 346 So.2d 53 (Fla. 1976), which is distinguishable from the instant case because it gave the Comptroller unrestricted and unlimited power to exempt particular records and items of information from the operation of the statute, thus, violating the requirement that the statute granting power to administrative agencies must clearly announce adequate standards to guide the agencies in the execution of the power delegated.

indirectly, without complying with the notice review and objection procedures set forth in § 216.177, Fla. Stat. (1991).

From the foregoing, it is clear that the Legislature, which is only scheduled to meet 60 days each year, Article III, § 3, Fla. Const., has properly empowered the Administration Commission to ensure that the Appropriations Act will comply with the constitutional mandate of a balanced budget, Article VII, § 1, Fla. Const.

A similar challenge to executive authority occurred in the case In re State Employees' Unions, 587 A.2d 919 (R.I. 1991), wherein the Governor, by executive order, authorized the Director of the Department of Administration to effectuate a shutdown of all state departments and agencies subject to executive order for a total of ten business days, between the date of the order and the end of the fiscal year.

The order was challenged, and, in affirming the denial of injunctive relief, the Rhode Island Supreme Court adopted many of the pertinent findings and conclusions of the trial court. The trial court had found that, pursuant to Section 35-3-16, RIGL, the Legislature had authorized the Governor to reduce or suspend appropriations for all executive departments in order that a balanced budget be maintained. Similar to Florida Statute 216.221, the Rhode Island statute provided that upon notification of the budget officer that actual revenue receipts or resources

will not equal the original estimates upon which appropriations were based or that it is indicated that spending will exceed appropriations, the Governor, for the purpose of maintaining a balanced budget, shall have the power to reduce or suspend appropriations for any or all departments or subdivisions with certain exceptions. It also contained provisions for notification of the Legislature. The trial court, in holding that there had been both an expressed and implied delegation of authority and discretion to effectuate personnel cost reductions, including the contemplated shutdowns, said:

> Plainly, the Legislature did not pass but the hilt of the sword to the Governor and, at the same moment, retain its blade. To the contrary the Legislature assigned and conveyed the saber and its cutting edge to the Governor with the authority to use it suitably in order to cut the state's deficit and to bring the state's budget to level balance.

In the instant case, the Administration Commission, by following the dictates of § 216.221, Fla. Stat., is properly exercising its authority to administer the budget in such a manner as to avoid the necessity of having to shut down the operation of state government. Clearly, the Commission is functioning within the authority properly given it by the Legislature.

In support of their argument that § 216.221, Fla. Stat., is an unconstitutional delegation of legislative power, appellees

relied upon Op. Atty. Gen. 87-57, In re: Advisory Opinion to the Governor, 509 So.2d 292, 311 (Fla. 1987); Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979); and Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla. 1976).

The question discussed in Op. Atty. Gen. 87-57 is clearly distinguishable from the issue in this case. That opinion addressed the proposed repeal by the Legislature of the services tax. The question with reference to the Administration Commission was whether the procedure set forth in 216.221, Fla. Stat., was a constitutionally sufficient method for providing that revenues will meet expenditures in the event of a prospective deficit resulting from the repeal of a tax. In answering that question, the opinion stated:

> The obligation to balance the budget falls upon both the Legislature and the Governor .... I must conclude that s. 216.221, F.S., was never intended to be used when an unbalanced budget occurs through the intentional actions of either the Legislature or the Governor through the use of his veto power.
>
> To permit the repeal of a revenue source which will result in an unbalanced budget during that fiscal period and to conclude that the Administration Commission may reduce expenditures constitutes an impermissible abdication by the Legislature of its constitutional duties.
>
> Section 216.221, F.S., would logically apply in those situations when a balanced budget has been adopted but due to unforeseen circumstances, such as occurred in 1982 when an unanticipated

> downward turn in the economy caused projected revenues to drop, it appears that a deficit will occur in the fiscal period.

Id. pp. 7-8.

The essence of that opinion was that the Legislature could not repeal a necessary revenue source and then require the Administration Commission to balance the budget. Such a bill, having the effect of creating an unbalanced budget, would violate the Constitution on the date it became law. The Legislature, in passing such a bill, and the Governor, in either signing or permitting the bill to become law without his signature, would be abdicating their constitutional duties to ensure that the budget was balanced for the fiscal period.

In re: Advisory Opinion to the Governor, supra, cited by plaintiffs, requested advice of the Supreme Court as to the facial validity of the statute imposing sales and use taxes on services. In its opinion concerning separation of powers, the Court indicated that it did not believe that the Act so lacked guidelines that neither the Department of Revenue nor the courts could determine which services the Legislature intended to tax. The court said:

> The specificity with which the Legislature must set out statutory standards and guidelines may depend upon the subject matter dealt with and the degree of difficulty involved in articulating finite standards. The same conditions that may operate to make

> direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation for the guidance of administrative agencies impractical or undesirable.

509 So.2d 292, 311.

Additionally, it should be noted that the services tax did not violate the constitutional right of access to the courts because the taxation of legal fees imposed a detached, incidental burden upon court access and was not levied in exchange for access to the courts or to purchase justice. Id. at 303.

Askew v. Cross Key Waterways, supra, is inapplicable upon its facts. In that case the Act gave the Administration Commission the power to designate areas of critical concern and regulate virtually all development in such areas without providing sufficient standards and guidelines. The statute, as written, permitted the Commission to exercise the policy role of determining which areas of the state and the resources therein, were of critical state concern. The Commission was granted primary and independent discretion rather than allowed to make a determination within defined limits and subject to review. The Court further indicated that its research in other jurisdictions failed to disclose one instance in which the legislative branch had unconditionally delegated to an agency of the executive branch the policy function of designating the geographic area of concern which would be subject to the land development regulation by the agency.

The instant case is distinguishable in several ways. First, the budget-reducing power given the Administration Commission is not a delegation in violation of Article II, § 3 of the Florida Constitution, because Article III, § 8 specifically involves the executive branch in the legislative process of adopting the budget, and reducing expenditures is an inherently executive function. The duties of the Commission are administrative in nature and consistent with the joint responsibility of the Legislature and the Governor to balance the budget. Furthermore, unlike the statutes in the Cross Key case, § 216.221, Fla. Stat., provides definite guidelines and a limited area within which the Commission may operate. Section 216.221, Fla. Stat., only becomes operational after the Revenue Estimating Conference certifies that a deficit will occur in the General Revenue Fund. Thereafter, the Commission may reduce all approved state budgets, but only by an amount sufficient to prevent a deficit. However, the Commission may not reduce any appropriations to the legislative branch that were placed in their reserve by the President of the Senate or Speaker of the House of Representatives, nor could the Commission reduce appropriations for education in any greater proportion than appropriations for other purposes from the general fund were diminished (see § 215.16(2), Fla. Stat.).

Any other specific directions by the Legislature in the General Appropriations Act will further reduce the discretion

afforded the Commission. Any proposed plan for any final action by the Commission must be submitted to the legislative appropriations committees for review, consultation and advice. Further, once the Commission has reduced approved operating budgets, no action can be taken by the Commission to restore the reductions, either directly or indirectly. It is readily apparent that the Legislature intended to authorize the Administration Commission to solve the estimated deficit within the above-described parameters. Moreover, not only does § 216.221, Fla. Stat., provide for prior notice to be given to the Legislature of the proposed final action of the Commission, but also §§ 11.011 and 11.012, Fla. Stat., provide methods for the Legislature to call themselves into session should they choose to solve budgetary crises themselves. Therefore, § 216.221, Fla. Stat., is a constitutional and permissible empowerment of the executive branch of Florida's government.

III.

THE TRIAL COURT ERRED IN DECLARING § 216.011(1)(ll), FLA. STAT. (1989), UNCONSTITUTIONAL AS VIOLATIVE OF THE SEPARATION OF POWERS DOCTRINE FOUND IN ARTICLE II, SECTION 3, FLA. CONST.

The judicial branch of state government is, of course, one of the three co-equal branches of state government. Appellants take no issue with that proposition. In fact, this case presents an occasion for reaffirming that bedrock principle.

This case, however, involves only the question of how each branch is to comply with the constitutional imperative of a balanced budget. The prudent mandate of Article VII, Section 1(d) for "pay as you go" fiscal management prohibits deficit spending by the state. It applies with equal force to three branches of government and their agencies, boards and commissions.

Although perhaps less than artful, the inclusion of the judicial branch within the definition of "state agency" in §216.011(1)(ll), Fla. Stat. (1989), is simply a shorthand device to avoid recurrent use of the clumsy expression "state agency and the judicial branch." The Legislature has the authority to define terms within a statutory scheme in a manner that differs from their normal or literal meaning. See, e.g., Simmons v. Schimmel, 476 So.2d 1342, 1344 (Fla. 3d DCA 1985). The inclusion of the judicial branch within the definition of agency ensures that it will be impacted when deficits occur. The only pertinent inquiry is whether the Administration Commission's proper exercise of authority under §216.221, Fla. Stat., offends judicial prerogative. Clearly, it cannot, and the Commission's powers under §216.221, Fla. Stat., are sufficiently circumscribed to avoid such unconstitutional intrusions.

The trial court's basis for holding the definition of "state agency" unconstitutional is unclear; the judgment states only that it "is absolutely contrary to the constitutionally

mandated separation of powers." Appellees' provide no further enlightenment. If the power to reduce budgets is purely legislative and incapable of being exercised by executive officers no matter how circumscribed, then, of course, it could not be entrusted to the judicial branch either. Under this theory, the Legislature must convene whenever there is an anticipated revenue shortfall or remain in continuous session.

Such a result is neither good constitutional law nor does it take into account the intricacies of fiscal administration of a multi-billion dollar annual budget, especially in crisis situations. Again, because this is a controversy about the facial validity of §§ 216.011(1)(ll) and 216.221, Florida Statute, the issue at stake is whether the proper action of the Administration Commission under § 216.221, Florida Statute, can offend judicial prerogative. In other words, to find these statutes invalid, this Court must hold that there is no way they can be constitutionally applied.

First, as discussed, the Administration Commission operates subject to both legislative oversight and legislatively set priorities that must be observed in any action taken under §216.221, Fla. Stat.

Second, the core functions -- the judicial functions -- of the judicial branch cannot be impaired by any action of the Administration Commission. For example, the number of judgeships

for county courts, circuit courts and district courts of appeal are prescribed by law. See §§ 34.022, 26.031 and 35.06, Fla. Stat. Article V, Section 3, Fla. Const. provides for the number of justices on this court as well as for various court officers. The officers, employees, committees and divisions of the judicial branch continue to perform services in the State courts system as provided in the Constitution, by law, by court rule or by administrative action of the Chief Justice, whichever is applicable. See §25.382(2), Fla. Stat.

Only if the action of the Commission infringes upon the essential judicial functions can there be any claim of a violation of separation of powers. In this respect, the appellants have raised what is, at best, a hypothetical possibility; they lacked standing to raise matters of conjecture, and, in the absence of concrete facts, the trial court lacked jurisdiction under Chapter 86, Fla. Stat. to render what was, at best, an advisory opinion. Martinez v. Scanlon, supra. That a complainant may suffer injury "in some indefinite way in common with people generally" does not confer standing. United States v. Richardson, 418 U.S. 175 (1974). The remedy for dissatisfaction with legislative appropriations, in amount or character, is the ballot box. Id.

In announcing its ruling from the bench, the trial court offered its view of what it thought to be a more politic procedure, i.e., require that the Governor call a special

legislative session upon a showing of a revenue shortfall. (TR.53) This Court should not stamp the resultant decision with approval. Rather, this Court should recall its decision In re: Order on Prosecution of Criminal Appeals, 561 So.2d 1130 (Fla. 1990), wherein the Court held:

> Further, while it is true that the legislature's failure to adequately fund the public defender's offices is at the heart of this problem, and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function. See Art. VII, § 1C, Fla. Const., ('no money shall be drawn from the treasury except in pursuance of appropriation made by law.'). 'The judiciary cannot compel the legislature to exercise a purely legislative prerogative.' *Dade County Classroom Teachers Association vs. The Legislature*, 269 So.2d 684, 686 (Fla. 1972).

561 So.2d at 1136. Here, the trial court has effectively directed the Governor to call the Legislature into session to raise taxes. Both common sense and this Court's precedent brands this notion constitutionally bankrupt.

To suggest that the judicial branch can expect to remain unaffected by revenue shortfalls is tantamount to holding that the court be exempt from the constitutional prohibition against deficit spending. This suggestion also overlooks Article V,

Section 14 of the Florida Constitution which provides: "All justices and judges shall be compensated only by state salaries fixed by general law. The judiciary shall have no power to fix appropriations." The purpose behind this amendment is explained in the The Florida State Constitution A Reference Guide, Talbot D'Alemberte (1991) p. 88, wherein it is noted that:

> This prohibition on judicial power over appropriations was placed into the constitution to negate a theory debated at the time of the 1972 revision; that the judiciary could, by the exercise of extraordinary writ power, control budgeting for the judicial branch. There are no Florida cases in which this has been attempted.

Appellees rely heavily on Orr v. Trask, 464 So.2d 131 (Fla. 1985), in arguing that §216.221, Fla. Stat., lacks adequate guidelines or minimal criteria to guide the exercise of the Commission's discretion. The argument completely ignores not only the executive character of the Commission's function but also the "advise and consent" arrangement of the statute. The Governor must report any action to the legislative appropriations committees. The committees may then "advise" the Governor, the Comptroller or the Administration Commission. Proposed final action must be reported seven days in advance to the committees "for review and consultation," and the committees may again advise the Commission concerning the proposed action. This direct legislative oversight is far more effective than any "guidelines and criteria," and, in effect, renders them unnecessary.

The Legislature has chosen to give certain technical duties to the executive branch that are subject to clear statutory constraints and legislative oversight to avoid a constitutional condemnation -- deficit spending. There is no constitutional basis to invalidate that function. Budgetary decisions are both legislative and executive in nature and require the close cooperation of those two branches. As Justice Shaw wrote for six members of this Court in Orr v. Trask, supra:

> The separation of powers doctrine is founded on mutual respect of each of the three branches for constitutional prerogatives and powers of the other branches. Just as we would object to the intrusion of the executive or legislative branches into this Court's authority to promulgate rules of court procedures or to discipline parties before the courts as in contempt proceedings, we must be equally careful to respect the constitutional authority of the other branches. Art. II, §3; art. V, §§ 1, 2, 3 and 15, Fla.Const.; *Florida Motor Lines v. Railroad Commissioners*, 100 Fla. 538, 129 So. 876 (1930); *Markert v. Johnson*, 367 So.2d 1003 (Fla. 1978); *Ex parte Earman*, 85 Fla. 297, 95 So. 755 (1923). Courts should be loath to intrude on the powers and prerogatives of the other branches of government and, when necessary to do so, should limit the intrusion to that necessary to the exercise of the judicial power. *Forbes v. Earle*, 298 So.2d 1, 5 (Fla. 1974); *State ex rel. Davis v. City of Stuart*, 97 Fla. 69, 97, 99, 120 So. 335, 346 (1929).

467 So.2d at 135.

In summary, appellants urge the Court to hold that the concept of judicial independence, particularly in the sense of

fiscal independence, should not be taken to mean absolute independence from the other constitutionally established branches of government or other constitutional principles. Brennan, Judicial Fiscal Independence, 23 Fla.L.Rev. 277, 281 (1971). ("Although the exercise of governmental functions may be allocated among separate branches of government, the process of governing finally depends upon cooperation among various branches. None can effectively govern by itself. Indeed, the doctrine of checks and balances, as well as separation of powers, anticipates cooperation and joint agreement in governmental acts.") Chapter 212, Fla. Stat. gives unmistakeable expression to this cooperative blueprint, while respecting the zones of constitutional authority held exclusively by the respective branches.

CONCLUSION

The judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile transmission and Federal Express Mail this 25th day of October, 1991, to Karen A. Gievers, Esq., 750 Courthouse Tower, 44 West Flagler Street, Suite 750, Miami, FL 33130.

Louis F. Hubener
Assistant Attorney General

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