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JAN 18 1994
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

Case No. 82,895

JOHN PAUL JONES, JR., Judge of Compensation Claims,

Petitioner,

v.

LAWTON M. CHILES, Governor, State of Florida,

Respondent.

PETITIONER'S REPLY TO GOVERNOR'S RESPONSE

In *Willits v. Askew,* 279 So. 2d 1 (Fla. 1973), the Supreme Court decided that the Governor can be required by a writ of mandamus to perform acts which are ministerial in nature, overruling *State ex rel. Axleroad v. Cone,* 137 Fla. 496, 188 So. 93 (Fla. 1939).

The issuance of a commission of reappointment to a judge of compensation claims upon the vote of the statewide nominating commission approving of his reappointment, is a ministerial act which the Governor must perform.

The Legislature, in enacting provisions in regard to the suspension, removal or retirement of public officers has provided that the execution of a commission by the Governor is a ministerial duty.[1]

> It is the intent of this part to provide that the formal execution of a commission by the Governor and a delivery thereof to the officer is a ministerial duty not necessary either to the performance of the duties of that

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[1] Part V of Chapter 112 of the Florida Statutes.

> officers or to the susceptibility to suspension of that officer. §112.46, Fla. Stat. (1993).

In discussing the issuance of the commission to a judge of compensation claims specifically, this Court, in *Orr v. Trask,* 464 So. 2d 131 (Fla. 1985) described the issuance of the commission to a judge of compensation claims upon the favorable vote for reappointment by the nominating commission to be a purely ministerial act by the Governor.

> The decision as to whether an incumbent will be reappointment rests entirely with the judicial nominating commission.
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> The reappointment of the deputy in November was purely ministerial. The governor had no discretion under the law to do otherwise. *Orr v. Trask,* supra, at 133-134.

In his response, the Governor does not claim that this was a discretionary act. He does not claim that this Court should not issue mandamus because the performance of the act sought to be performed was discretionary on his part. Therefore, it should be concluded that there is ample authority that the Legislative Branch, the Judicial Branch and the Executive Branch all consider the issuance of the commission to a judge of compensation claims for reappointment upon a favorable vote of the statewide nominating commission to be a ministerial act, which would be subject to mandamus upon the Governor's refusal to perform it.

The Governor's response is that the statute in question, §440.45(1), Fla. Stat. (1991), is unconstitutional insofar as it requires him to issue a commission of reappointment to a judge of compensation claims upon a favorable vote for retention by the statewide nominating commission.

The Governor's response makes the case a classic dispute between the Legislative Branch and the Executive Branch of government with an extra twist: the dispute does not involve an official who performs a function of the Executive Branch. It involves an official who performs a function of the Judicial Branch.

The only defense which the Governor really poses is that the statute, which requires that he perform this ministerial duty, is unconstitutional. Since the issuance of a commission is a ministerial act, the Governor's reasons for issuing it are irrelevant and immaterial. If he signs the commission cheerfully or signs it begrudgingly is of no matter. His reasons for performing a non-discretionary act are of no consequence because it is a non-discretionary act.

Similarly, the Governor's reason for refusing to perform a non-discretionary act is immaterial and irrelevant. Whether his refusal to perform a non-discretionary act is cheerful or begrudging; whether his refusal is for a good reason or a bad reason, or for no reason at all, is of no consequence. Mandamus is the appropriate remedy to require the performance of a non-discretionary act because no wrongdoing is involved by anyone. The law simply regards it as an act which the law requires to be done. Having said that we must turn then to the Governor's contention that this statute is constitutionally invalid. In this regard, his argument is incorrect. The statute is constitutionally valid. The Legislature does have the power under the Constitution to limit the Governor's powers in this manner by general law. Indeed, separation of powers and due process of law require that they do so.

The Governor's response is that the judge of compensation claims is located within the Department of Labor and Employment Security under

the Secretary of Labor and Employment Security, who is under the Governor in the Executive Branch of the government. He claims that under Art. IV, §1(a), Fla. Const., he must have the exclusive power to appoint and direct the activities of the officers located within the Executive Branch.

The Governor states the issue:

> The Legislature in enacting s. 440.45(1), Florida Statutes impermissibly usurped the constitutional power of the governor to directly supervise an executive department placed under his supervision, by vesting the nominating commission with exclusive authority to reappoint incumbent judges of compensation claims. (Governor's Response 4).

The Governor claims that he alone has the power to "directly supervise an executive department placed under his supervision" and that the Legislature "usurped the constitutional power of the governor". (Governor's Response 4).

The Governor's position is incorrect. The reason it is incorrect is that the judge of compensation claims, although located with the Executive Branch, is a state officer exercising quasi judicial powers which are exclusively judicial in nature. The determining factor is what function of the government he performs, not where he is located. Since the function he performs is not executive, he is not subject to the "power of the governor to directly supervise an executive department placed under his supervision". To put it simply, it is not where he is, but what he does, that is important.

Historically, the judge of compensation claims has been regarded as performing a judicial function which is not subject to the supervision of the Executive. This is the view of the Legislature. This is the view of the Supreme Court of Florida. This is the view of the Supreme Court of the United States.

Prior to 1935 in Florida, a claim for injury at work was a claim for common law damages for the commission of a tort.[2] However, in 1935, the Florida Legislature adopted the Florida Workers' Compensation Law.

In the 1911/1913 New York Workmen's Compensation Act, the substantive right of the employee to sue at common law was abolished and a substitute statutory remedy of liability without fault that paid for medical expenses and limited amounts for disability was adopted. In conjunction with that, the procedural right to go to court [and have a trial by jury] was abolished and an administrative agency exercising quasi judicial powers was created to hear and determine claims. This scheme of substituting a statutory right and a procedural remedy was held to be constitutional by the United States Supreme Court in 1917 in *New York Central R. R. Co. v. White,* 243 U. S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). It was widely copied, such that nearly all states had workers' compensation laws by 1920. 1 Larson "The Law of Workmen's Compensation", §5.30 at Page 39 (1992).

In 1935 the Florida Legislature adopted the Workers' Compensation Law which abolished the right of the employee to sue in Circuit Court, thereby carving that jurisdiction out of the Circuit Courts of this State. The Court no longer had jurisdiction over such claims. Ch. 17481, §11, Laws of Fla. (1935). At the same time, the Legislature created an administrative agency exercising quasi judicial powers called the Florida Industrial Commission to conduct hearings and decide the claims under the Florida Workers' Compensation Law. Ch. 17481, §44, Laws of Fla. (1935). The 1935 commission consisted of a chairman and two members of the cabinet who

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[2] There was also an employer's liability act adopted in Florida in 1913 for certain limited hazardous occupations in which the common law defenses to such suits were abolished and the test of liability was comparative negligence. Chapter 769, Fla. Stat.

were appointed by the Governor. They had authority to engage deputy commissioners. Under the 1935 Act, either the commissioners or the deputy commissioners could hear and decide cases. Ch. 17481, §25(c), Laws of Fla. (1935).

In 1961, the statute was amended by Ch. 61-133, Laws of Florida, to amend §440.45 to provide for the appointment of full time deputy commissioners who had to be lawyers of at least three years' experience. In 1967, the title deputy commissioner was changed to judge of industrial claims, although the duties remained the same. Ch. 67-609, Laws of Fla.

At the same time, the Industrial Commission consisted of a chairman and two members appointed by the Governor, not more than one of whom was a representative of employers and not more than one of whom was a representative of employees, by reason of their previous experience. This was the state of affairs at the time of the Government Reorganization Act of 1969 which implemented Art. IV, §6 of the Florida Constitution and Art. XII, §16 of the Florida Constitution. The Act transferred the Florida Industrial Commission to the then newly created Department of Commerce, and its function was assigned to the Division of Labor and Employment Opportunities. *Florida Industrial Commission v. Neal,* 224 So. 2d 774 (Fla. 1st DCA 1969).

Under the Government Reorganization Act of 1969, the Florida Industrial Commission (of which the judges of industrial claims had been the deputy commissioners) was transferred. §17(8) of the Government Reorganization Act of 1969 created within the Division of Labor and Employment Opportunities an Industrial Relations Commission consisting of the Director of the Division as chairman and two other members to be appointed by the Governor, not more than one appointee could be a person

who on account of his previous experience was a representative of employers, and the other as a representative of employees.[3]

It is the Government Reorganization Act of 1969 which clarifies separating the location of the judges in the workers' compensation system from the function they perform.

Just prior to the 1979 reform of the Florida Workers' Compensation Law, the situation had progressed to the point that can be described by the 1977 statute. The commission was now called the Industrial Relations Commission. The chairman of the commission was no longer the head of the agency which administered the Workers' Compensation Law. That was a separate agency, but both were located within the Department of Commerce. §20.17, Fla. Stat. (1977).

Although the statute provided that the commission was located within the Department of Commerce, it was not under the Department of Commerce.

§20.17(3)(b)1, Fla. Stat. (1977) provided:

> The commission is vested with all authority, powers, duties and responsibility relating to review of orders of judges of industrial claims in workers' compensation proceedings under Chapter 440.... Orders of the commission relating to workers' compensation under chapter 440 shall be subject to review only by petition for writ of certiorari to the Supreme Court...

§20.17(3)(b)2, Fla. Stat. (1977) provided:

> The commission in the performance of the powers and duties under chapter 440 and 443 shall not be subject to control, supervision, or direction by the Department of Commerce.

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[3] Ch. 69-106, §17(8), Laws of Fla.

The Industrial Relations Commission in its performance of its only function, which was the review of orders of judges of industrial claims, was described by this Court as the equivalent of a district court of appeal in *Scholastic Systems, Inc. v. LeLoup,* 307 So. 2d 166 (Fla. 1974).

The Supreme Court of Florida commented in regard to the Industrial Relations Commission's review of workers' compensation cases:

> We recently treated the IRC as a judicial body in our opinion at 285 So. 2d 601 (Fla. 1973), adopting its Workmen's Compensation Rules of Procedure. In our opinion we delineated the review of workmen's compensation cases by the IRC as 'judicial' and expressly recognized the judicial nature of its function. The federal court system has both 'Article I courts' and 'Article III courts,' an example of the former being the tax court. A body may be a 'court' without being named within the constitutional article dealing with the judicial (in the case of our state constitution, Art. V), so long as it fulfills the requirements making it a judicial body of review. Our task is to determine what *qualities* are necessary in order for a body exercising judicial functions to meet constitutional requirements. Black's Law Dictionary, Rev. 4th Ed., informs us that such a body is: (p. 425)
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> > 'A tribunal officially assembled under authority of law at the appropriate time and place, for the administration of justice. In re Carter's Estate, 254 Pa. 518, 99 A. 58.
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> > 'An agency of the sovereign created by it directly or indirectly under its authority, consisting of one or more officers, established and maintained for the purpose of hearing and determining issues of law and fact regarding legal rights...' [citing authority]. *Scholastic Systems, Inc. v. LeLoup,* supra, at 169-170.

These comments about the Industrial Relations Commission are equally applicable to the judge of industrial claims. *In re Workmen's Compensation Rules of Procedure,* 285 So. 2d 601 (Fla. 1973).

In *Scholastic Systems, Inc. v. LeLoup,* supra, the Supreme Court of Florida pointed out that a judge of industrial claims is not an administrative official:

> The IRC now occupies a position in the structure of our state government equivalent to the 'Article I' courts found in the federal system. The lack of the word 'court' in its title is irrelevant; the Board of Tax Appeals was no less a judicial body before its title was changed to that of 'Tax Court of the United States." As Shakespeare said: 'What's in a name? That which we call a rose by any other name would smell as sweet.' [5. Romeo and Juliet, Act II, Scene II, line 43.] We conclude, then, that whatever its title, the Industrial Relations Commission fulfills the requirements of a judicial body of review.
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> ...We have just above elucidated the judicial nature of the IRC review; moreover, JIC hearings are not 'administrative action' in this sense but rather are quasijudicial in nature... Id., at 171.

Chief Justice Roberts had expressed similar views earlier in writing for the Court in *Pierce v. Piper Aircraft Corp.,* 279 So. 2d 281 (Fla. 1973).

This was the state of things when the reform of the Workers' Compensation Law was done in 1979. At that time the Industrial Relations Commission was abolished and the review of the decisions of the judges of compensation claims was transferred to the First District Court of Appeal. Ch. 79-312, §1, at 1649, Laws of Fla. This was a transfer of function which this Court held to be constitutional in *Rollins v. Southern Bell Telephone & Telegraph Co.,* 384 So. 2d 650 (Fla. 1980).

In the meantime, the title of the judge of industrial claims was changed to deputy commissioner, although his functions remained the same. Ch. 79-40, §35, at 258-260; Ch. 79-312, §19, at 1659-1660, Laws of Fla.

This was a misnomer because the commission having been abolished, the workers' compensation judge was now called a deputy commissioner of a non-existent commission.

In 1989, the title of deputy commissioner was changed to judge of compensation claims, the title at the present time. §440.45, Fla. Stat. (1989).

In 1979, the Department of Commerce was retitled as the Department of Labor and Employment Security, of which the Workers' Compensation Division is a part. §20.17, Fla. Stat. (1979).

§440.45(3), Fla. Stat. provides that the judges of compensation claims shall be within the Department of Labor and Employment Security under the Secretary of that department. So we know where they are located. The real question, however, is what do they do. See *Scholastic Systems v. LeLoup,* supra.

Under §440.25, Fla. Stat., the judge of compensation claims conducts the hearing to decide whether to grant or deny a claim for benefits. Under §440.25(3)(e), Fla. Stat., he enters a formal order of his decision.

Under §440.20(8), Fla. Stat. this order is payable within 30 days unless it is appealed in the manner provided in §440.25, Fla. Stat. If not paid during that period of time there is a penalty under this provision.

§440.25(4)(a), Fla. Stat. provides:

> Beginning on October 1, 1979, procedures with respect to appeals from orders of judges of compensation claims shall be governed by rules adopted by the Supreme Court. Such an order shall become final 30 days after mailing of copies of such order to the parties, unless appealed pursuant to such rules.

§440.27(1) Fla. Stat. provides:

> Review of any order of a judge of compensation claims entered pursuant to this chapter shall be by appeal to the District Court of Appeal, First District. Appeals shall be filed in accordance with rules of procedure prescribed by the Supreme Court for review of such orders.

§440.29(3), Fla. Stat. provides:

> The practice and procedure before the judges of compensation claims shall be governed by rules adopted by the Supreme Court, except to the extent that such rules conflict with the provisions of this chapter.

§440.24, Fla. Stat. provides that an order of a judge of compensation claims is enforceable and it provides the method for enforcement.

§440.021, Fla. Stat. provides:

> Workers' compensation adjudications by judges of compensation claims are exempt from Chapter 120 and no judge of compensation claims shall be considered an agency or a part thereof.

Since 1935 the workers' compensation adjudicators have been called deputy commissioners, judges of industrial claims, and judges of compensation claims. However, they had only one job, the hearing and deciding of workers' compensation claims. It is their only function.[4]

§440.33, Fla. Stat. describes the powers of the judge of compensation claims, which include the power to preserve and enforce order during the proceeding and do all the things that judges do at hearings.

Under the Workers' Compensation Law, the judge of compensation claims has only one job. He hears workers' compensation claims and he enters a final and binding order. What he does is a traditional judicial function. He orders one person to pay money to another person or he denies the claim of one person to be paid by another person. He has no other function.

In 1973, this Court adopted the Workers' Compensation Rules for the first time. It was not pursuant to any statutory mandate. Rather the

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[4] For a brief period of time the judges of compensation claims were also assigned to hear and decide claims involving the Florida Crimes Compensation Act and the Florida Birth-Related Neurological Injury Compensation Plan. This is not relevant here.

Industrial Relations Commission had adopted rules of practice and procedure and had submitted them to the Supreme Court for approval and the Supreme Court promulgated the rules as rules of the Supreme Court. In so doing, the Court described the judge of compensation claims as an officer of the state whose duties were devoted exclusively to the trial and disposition of workers' compensation claims of industrial employees. The Court further described such litigation to be more judicial than quasi-judicial. The case is styled *In Re: Florida Workman's Compensation Rules of Procedure,* 285 So. 2d 601 (Fla. 1973). It is described as a case of original jurisdiction. The Court ordered:

> Appended to this order are Workman's Compensation Rules of Procedure approved by the Industrial Relations Commission of the State of Florida and voluntarily submitted to this Court for examination and approval. A judge of industrial claims is a quasi-judicial officer under the authority of Florida Statutes, §20.17(7), F.S.A. whose duties are devoted exclusively to the trial and disposition of workman's compensation claims of industrial employees.
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> Because the total authority in workman's compensation cases involves the review on appeal of the judges of industrial claims and the Industrial Relations Commission, we deem such litigation to be more judicial than quasi judicial. (Original emphasis of the Supreme Court of Florida). Id., at 601.

The Court invoked Art. V, §2(a) of the 1973 Florida Constitution, which provided "the Supreme Court shall adopt rules for the practice and procedure in all courts...". Id., at 601. The Court further ordered that the rules appended "have the approval of this court to the extent authorized in the Constitution...". Id., at 602. Appended to the order are the rules for practice before the judge of compensation claims and the rules for practice before the Industrial Relations Commission.

In 1977, the Supreme Court of Florida amended the workers' compensation rules under the same title, *In Re Workmen's Compensation Rules of Procedure,* 343 So. 2d 1273 (Fla. 1977). In this opinion, the Supreme Court mentioned that following the adoption of the workers' compensation rules by the Supreme Court in 1973, the Legislature amended the statute by Ch. 74-197, §16, Laws of Fla., to provide:

> The practice and procedure before the commission and the judges of industrial claims shall be governed by rules adopted by the Supreme Court. §440.29(3), Fla. Stat.

Appended to the opinion were the rules. Mr. Justice England dissented. He was a minority of one. He stated that he did not understand how the Court could adopt workers' compensation rules and he did not think that the Legislature could enact a statute providing that the practice and procedure before the commission and the judges of compensation claims shall be governed by rules adopted by the Supreme Court.

First of all, this Court in adopting the rules of practice and procedure for the judges of compensation claims did so in the original case of *In Re Workmen's Compensation Rules of Procedure,* 285 So. 2d 601 (Fla. 1973) and has amended those rules under that same title to the present, 343 So. 2d 1273 (Fla. 1977), 390 So. 2d 698 (Fla. 1980), 460 So. 2d 898 (Fla. 1984), and 603 So. 2d 425 (Fla. 1992) under Art V, §2(a), Fla. Const.[5], The Supreme Court has adopted rules for the judges of compensation claims under the Court's constitutional authority to adopt rules for all courts. It is so because the Court has decided that it is so. Certainly the use by the people of the word "all courts" in Art. V, §2(a), Fla. Const., referring to courts with the generic small letter "c" refers to more than just the specific named courts

[5] 603 So. 2d 425.

in Art. V, Fla. Const. If they were referring to the specific named courts in Art. V, Fla. Const., they would have described such courts with the specific capital letter "C". The words "all courts" in the Constitution also mean courts outside of Art. V.[6] A state officer who functions as a judge is a judge. A state officer whose function is to operate a court, operates a court. Where the judge is located, or where the court is located, is not relevant.

The judge of compensation claims performs a function of deciding claims under a substituted remedy for common law actions that were carved out of the Circuit Court in 1935. He is a state officer. This office is created by general law in §440.45, Fla. Stat. The function of that office has been described by the Legislature in the Workers' Compensation Law as that of a judge. The powers and duties given to him in the Florida Workers' Compensation Law are those exclusively of a judge. He has no other function. This Court has treated the judge of compensation claims as operating a court. Most especially in adopting the rules of practice and procedure in 1973, this Court described the proceedings before the judge of compensation claims "to be more judicial than quasi judicial".[7] In that regard this Court was only stating an obvious reality by describing his function as exclusively judicial.

In summary then, historically, and in reality, and in terms of treatment by the Legislative Branch and in terms of treatment by the Judicial Branch, the judge of compensation claims is a state officer exercising quasi-judicial powers, who is located in the Executive Branch, but whose function is exclusively judicial in nature.

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[6] *Scholastic Systems, Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1974).

[7] 285 So. 2d 601.

In his response in several places, the Governor claims the right of direct supervision of the judges of compensation claims by reappointment by the Governor alone. He says it more than once. (Governor's Response 4, 5, 7, 8). Indeed, his second point is that the Legislature usurped his constitutional power to directly supervise an official of the Executive Branch by vesting a nominating commission with the exclusive authority to reappoint. (Governor's Response 4).

Having established that the judge of compensation claims is a state officer located within the Executive Branch but who performs an exclusively judicial function (the words of the Supreme Court)[8] under the Constitution he cannot be subject to the supervision of the Executive.

First of all, we all get sloppy about talking about the Governor's power to remove a state officer for cause. From time to time we talk about the Governor removing a miscrient state official for cause, removing a malefactor, a wrongdoer, for cause. Under the Constitution of the State of Florida, the Governor, by himself, does not have the power to remove a state officer for cause. Under Art. III, §17, Fla. Const. constitutional officers cannot be removed by the Governor at all. They are only subject to impeachment by the Legislature.[9]

State officers who are not subject to impeachment may be suspended by the Governor under Art. IV, §7, Fla. Const., for specific grounds for cause, which are malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties or

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[8] 285 So. 2d 601.

[9] The Governor, Lieutenant Governor, members of the Cabinet, Justices of the Supreme Court and Judges of the District Courts of Appeal, the Circuit Courts and County Courts. Art. III, §17, Fla. Const.

commission of a felony. The Governor does not have the power to remove, only the power to suspend. Art. IV, §7, Fla. Const. Obviously, if the suspended officer accepts his suspension permanently and goes away, he is gone, but that is at his option. Under Art. IV, §7(b), Fla. Const., it is the Legislative Branch, specifically the Senate, that is given the power under the Constitution, pursuant to general law, to remove from office the state officer who has been suspended by the Governor. Most importantly, the Senate has the power to overrule the Governor and reinstate the suspended official. Art. IV, §7(b), Fla. Const. The Legislature has adopted general law for this purpose and it is Part V of Chapter 112 of the Florida Statutes. Specifically, and in addition thereto, it has created the Commission on Ethics, an agency of the Legislature, in implementation of Art. II, §8, Fla. Const. §112.3191, et. seq., Fla. Stat.

In his response, the Governor refers to his general supervisory powers under Art. IV, §1(a), Fla. Const., for the proposition that the Legislature does not have the power to limit his reappointment powers with respect to an officer performing an exclusively judicial function. However, he does not point to any specific constitutional provision to support that claim. There is none. To the contrary there is the provision in Art. IV, §7, Fla. Const., which restricts his ability of remove a state officer, even for cause. Removal of a state officer for cause is a power which is shared by the Executive and the Legislative branches. Under Art. IV, §7, Fla. Const., the Governor suspends and the Senate either removes or reinstates. As the Governor cannot by himself remove a state officer even for cause; that is, without the consent of the Senate--the Legislative Branch, the Governor cannot claim that the Legislature cannot restrict his ability to refuse to reappoint for reasons that are not for cause. Since the Governor cannot

remove a state officer even for cause without the concurrence of the Legislative Branch, he cannot argue that the Legislative Branch cannot restrict his ability to refuse to reappoint for cause or not for cause.

In 1972, when the Petitioner was appointed to his initial appointment, it was for four years and until his successor is appointed and qualified.[10] In 1972, the people of Florida adopted §10, §11 and §12 of Article V of the Florida Constitution to provide for the merit selection and retention of judges by the creation of judicial nominating commissions. The initial appointment by the Governor is restricted to those names submitted to him by the judicial nominating commission in the manner provided by law. In the case of the justices of the Supreme Court and the judges of the District Court of Appeal, retention is by a vote of the electors without opposition. Circuit judges and county judges can be elected as well as appointed and are retained in office by election. The retention in office of a judge under Art. V, Fla. Const., is a process in which the Governor is not a participant. Once an Art. V judge is appointed by the Governor from the names submitted by the nominating commission, the judge and the Governor part their ways. This is true separation of powers. The Governor has no supervision over an Art. V judge and he has no reappointment or retention power over him. An Art. V judge is not an administrator of the Governor's politics or of the Governor's policies. This 1972 amendment to Article V of the Constitution was effective January 1, 1973. The following year, in 1974, the Legislature amended §440.45, Fla. Stat. The language was retained from the former statute, that a judge of compensation claims shall be appointed for a term of four years but shall remain in office until his

[10] §440.45, Fla. Stat. (1971).

successor is appointed and qualified. However, the statute was amended to provide that prior to the expiration of the term of office, the conduct of said judge shall be reviewed by the judicial nominating commission, which shall determine whether a judge of industrial claims shall be retained in office, and the report of this commission shall be furnished to the Governor no later than six months prior to the expiration of the term. The 1974 statute provided:

> If the judicial nominating commission votes not to retain the judge of industrial claims, he shall not be reappointed. §440.45, Fla. Stat. (1974).

§440.45, Fla. Stat. (1974) further provided:

> If the judicial nominating commission votes to retain the judge of industrial claims in office, then the Governor shall reappoint the judge of industrial claims for a term of four years.

The 1974 statute did not designate which judicial nominating commission was to perform this function. The 1975 Act was amended in §440.45 to provide that the appellate district judicial nominating commission in the appellate district in which the judge principally conducts hearings would perform this function.

Then in 1978, §440.45, Fla. Stat. was again amended to provide that initial appointments shall be made by the Governor from a list of three persons selected by the appellate district judicial nominating commission for the appellate district in which the judge will principally conduct hearings.

In 1990 and then again in 1991, the Legislature amended the Workers' Compensation Law to replace the appellate district judicial nominating commissions created under Art. V, Fla. Const., with a

statutory statewide nominating commission just for the judges of compensation claims. §440.45, Fla. Stat. (1990/1991).

The legislature history of these enactments clearly shows that after the people of Florida amended Art. V, Fla. Const., in 1972 (effective in 1973) to create judicial nominating commissions and a scheme of merit judicial selection and retention, the Legislature applied these same principles to the judge of compensation claims. Apparently the purpose of the constitutional amendment is to preserve separation of powers with respect to the judiciary from the other branches of the government and to separate Art. V judges from the potentially corrupting influences of the politics of the Executive Branch and the potentially corrupting influences of the politics of the Legislative Branch.

The Legislature's amendments to §440.45, Fla. Stat. which follow the 1972 amendment to Art. V, Fla. Const., are consistent with that expression of public policy by the people of Florida in amending Art. V, Fla. Const. The legislative enactments are consistent with, and trace, and copy the Art. V provisions. They implement that same policy. It would be absurd to suggest that the people of Florida wished to protect Art. V judges from the potentially corrupting influences of the politics and policies of the other branches of the government, but that the public wanted judges who happen to be located within other branches of the government, [although they performed exclusively judicial functions] to be subject to potentially corrupting political influences.

The Court will immediately recognize that the statewide nominating commission created by §440.45, Fla. Stat. (1991) mirrors the nominating commissions created under Art. V, Fla. Const. In his response, the Governor contends that the Legislature cannot constitutionally do this. In

this regard he relies on a 1923 case, *Westlake v. Merritt,* 85 Fla. 28, 95 So. 662 (1923). This is misplaced reliance because *Westlake* is neither factually nor legally applicable. In *Westlake,* the Legislature had passed a statute which limited the Governor's power to select members of the governmental board which would regulate chiropractic care to persons who had been nominated by the chiropractors' association. The chiropractors' association was voluntary and was not in any way an arm of the government. This Court held at that time that the Legislature could not restrict the Governor's appointment power in such a manner.

In his response, the Governor objects to the Legislature having provided in §440.45, Fla. Stat. that members of the nominating commission are appointed by the president of The Florida Bar (just the same as for the Art. V nominating commissions).

Under Art. V, §15, Fla. Const., the Supreme Court of Florida has exclusive jurisdiction to regulate the practice of law. The Florida Bar is governed by rules adopted by the Supreme Court. Membership is compulsory and The Florida Bar is an official arm of the court.[11] Thus the appointments by the president of The Florida Bar are not appointments by a voluntary, non-governmental association, as in *Westlake.* Instead, they are appointments from a mandatory membership, governmental body, which is an arm of the Judicial Branch.

Furthermore, *Westlake* also was substantially modified by the amendment to Art. IV, §6(b), Fla. Const.

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[11] The introduction to The Florida Bar rules provides: "The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court."

While it is not essential to a decision in the present case, it is interesting to ask: where is the statewide nominating commission located and what is its function? We know that historically prior to 1990-1991, both the nominating for an initial appointment of a judge of compensation claims and the conducting of hearings and voting whether an incumbent judge of compensation claims should be retained in office were functions that were performed by the district court of appeal judicial nominating commissions for the respective appellate districts in which the judge of compensation claims principally conducted hearings.[12] This function was performed by an agency that was located within the Judicial Branch. It performed a function which could be considered judicial in nature, the appointment and retention of judges as part of management of the court system. Certainly an initial appointment of a District Court of Appeal judge by the Governor from a list of persons selected by a district court of appeal nominating commission is a function which is shared by the Judicial Branch and the Executive Branch.

The creation of the statewide nominating commission for judges of compensation claims in 1990-1991, mirrors the district court of appeal judicial nominating commission which preceded it. It consists of one-third lawyers appointed by the president of The Florida Bar, one-third lawyers appointed by the Governor, and these two bodies select lay members who constitute the remaining third. Under §440.45, Fla. Stat., as amended in 1990-1991, the statewide nominating commission performs the exact same function as the district court of appeal judicial nominating commission which preceded it. The question then becomes: is the nominating

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[12] §440.45, Fla. Stat. (1974-1989).

commission located in the Executive Branch, is it located in the Judicial Branch, or is it located in the Legislative Branch? Furthermore, what function does it perform? Its previous function, which is the same function which it now performs, was previously denominated as a judicial function. So the function is judicial. In creating the statewide nominating commission, the Legislature in amending §440.45, Fla. Stat. did not denominate the commission as being located in any of the Executive Branch departments. The Legislature did not consider thereby the nominating commission to be a member of the Executive Branch. In his response the Governor complains that the nominating commission is not under his direct supervision. This would seem to indicate that the Chief Executive does not consider the nominating commission to be located in the Executive Branch either. Possibly it is located in the Judicial Branch, which is its function. Possibly it is located in the Legislative Branch. See *Commission on Ethics v. Sullivan,* 489 so. 2d 10 (Fla. 1986). *Chiles v. Public Service Commission Nominating Council,* 573 So. 2d 829 (Fla. 1991).

The view of the Court in *Sullivan,* supra, seems to be that if a commission crosses legislative, judicial, and executive lines, it may be described as an arm of the Legislature. This would certainly satisfy the Governor's statement that the nominating commission is not subject to his control.

To further illustrate that the judge of compensation claims is a state officer performing an exclusively judicial function, we need only point to §440.442, Fla. Stat. which provides:

> The chief judge and judges of compensation claims shall observe and abide by the Code of Judicial Conduct adopted by the Supreme Court of Florida as of July 1, 1978, as well as all amendments thereto that are

> hereafter adopted by the court, except for the provisions of subparagraph C of Canon 6.

In adopting the code of judicial conduct *In Re The Florida Bar Code of Judicial Conduct,* 281 So. 2d 21 (Fla. 1973), this Court adopted the following language in regard to Canon 1:

> An independent and honorable judiciary is indispensable to justice in our society.

The code use of the word "independent" poses a question: independent of whom? Certainly, it means independent of the Executive and the Legislative branches.

§440.45(2), Fla. Stat. provides:

> Judges of compensation claims shall be subject to the jurisdiction of the Judicial Qualifications Commission.

In his response the Governor claims that the Legislature may not restrict his power of reappointment. He argues that the power of reappointment is his only means of direct supervision (his words)[13] of the judge of compensation claims. Not only can the Legislature restrict the Governor's power in this regard, but under constitutional guarantees of due process of law, it must do so. A case which illustrates this is Franklin Roosevelt's dispute with the U. S. Supreme Court, which resulted in his unsuccessful attempt to "pack the court". The reason for that attempt was the Supreme Court's decision in *Humphrey's Executor v. United States,* 295 U. S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935). William Humphrey had been nominated by President Hoover in 1931 to succeed himself as a member of the Federal Trade Commission. He was confirmed by the Senate for a seven-year term expiring in 1938. Following his election as President, Franklin Roosevelt asked Mr. Humphrey to resign on the ground of a

[13] Governor's Response 4, 5, 7, 8.

change in policy. Mr. Humphrey declined and President Roosevelt removed him. Mr. Humphrey sued for his position as a federal trade commissioner and for his salary from the date that the President removed him. He died in the course of the litigation and his executor continued it for the back salary. Humphrey's Executor won the case in the Supreme Court. The President was so angry that he sought to "pack the court" presumably with justices who would be sympathetic to his policies. Congress declined and another constitutional crisis was averted.

The Federal Trade Commission was an administrative agency whose function it was to prevent unfair methods of competition (antitrust) and to conduct hearings and issue orders (enforceable in the Circuit Court of Appeal). Its duties were quasi-judicial and quasi-legislative. It had no policy, except the policy of law. The Federal Trade Commission Act, 15 U.S.C. §41, 42 provided that the commissioners had tenure of office. They could only be removed by the President for specific causes which were enumerated as inefficiency, neglect of duty, or malfeasance in office. The President did not charge Mr. Humphrey with any of these specific statutory violations. Rather, he claimed that this was an unconstitutional interference by the Legislative Branch (Congress) with his executive power. This is the same claim which the Governor makes in the present case.

The Supreme Court of the United States held that it was the intent of Congress to limit the President's power of removal for the specific causes enumerated in the statute. In holding that Congress could limit the President's power in this regard, the Court pointed out that the Commission was created free of executive control, that it was quasi-legislative and quasi-judicial, and that it did not exercise executive power in the constitutional sense. The Court reasoned that the need for the

independence of the Commission against executive will was the determining feature. Therefore, the Court concluded that the Legislative Branch could constitutionally enact a statute which curtailed the Executive Branch's power of removal of a quasi-judicial or quasi-legislative officer by limiting such power to the circumstances which were stated in the statute.

The precise language is:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition" -- that is to say in filling in and administering the details embodies by that general standard - the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.
>
> If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious

question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (*Williams v. United States,* 289 U.S. 553, 565-567), continue in office only at the pleasure of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted, and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, *The Works of James Wilson* (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution, 4th ed., section 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see *O'Donoghue v. United States,* supra, at pp. 530-531.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is

not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have reexamined the precedents referred to in the *Myers* case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed from office by the President of the United States" certain things should follow, thereby, in connection with the debates, recognizing and confirming, as the court thought in the *Myers* case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the *Myers* case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 *Annals of Congress*, cols. 611-612.

In *Marbury v. Madison,* supra, pp. 162, 165-166, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the "decision of 1789."

> The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.
>
> To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise." 295 U.S. at 628-632, 55 S.Ct. at 874-875. (Emphasis added).

The Supreme Court was speaking of separation of powers. A quasi-judicial function must be performed separate and apart from any interference or participation by the executive, otherwise the quasi-judicial function is not being performed separately. Why must there be separation? The answer is: due process of law. Both the Constitution of the United States in Amendment 14 and the Declaration of Rights of the Florida Constitution in §2, §9, and §21 guarantee due process of law.

Art. II, §3, of the Florida Constitution specifically provides:

> 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.

The providing of due process of law in regard to a workers' compensation claim, both as to procedural due process and substantive due process, requires a judicial proceeding. The claim in such a case must be

decided based on the facts and the law. The policies and politics of the Executive Branch cannot be involved, otherwise it is not due process of law. When the judge of compensation claims hears and decides a case, his decision must be based on the facts and the law. The policies and politics of the Governor are not involved in such determination. This is what the Supreme Court of the United States was talking about in *Humphrey's Executor.* If the Governor were now to be successful in his argument that §440.45, Fla. Stat. (1991) is unconstitutional, it would mean that the Legislature is, as he claims, powerless to restrict his ability to directly supervise the judge of compensation claims.

A proceeding before the judge of compensation claims in which the judge knew that his retention in office was dependent upon the Governor, would not and could not be a proceeding which provided due process of law.

It is not that the Governor would do anything improper or that the judge would do anything improper. Rather, if the judge of compensation claims knows that at the end of his term, his retention in office is dependent upon the pleasure of the Governor, then he must be influenced by the policies and politics of the Governor. Indeed those policies and politics would permeate any determination of the facts and any determination and application of the law. It cannot be that way. This is what the Supreme Court meant in *Humphrey's Executor v. U. S.,* supra, that the administrative official exercising exclusively quasi-judicial powers must be completely free of the will of the executive.

What the Governor asks for is a declaration that §440.45, Fla. Stat. is unconstitutional insofar as the provision that he must reappoint a judge of compensation claims who has been voted upon for retention by the nominating commission. If that is to be declared unconstitutional, then the

reappointment is at the pleasure of the Governor. There would be no restriction whatsoever upon the Governor's power to reappoint or not to reappoint an incumbent judge of compensation claims. If that were applied to an Art. V judge such as a Supreme Court Justice, we would immediately recognize that that could not constitutionally be so. It could not be. Suppose that a Supreme Court Justice, having been nominated by the Supreme Court nominating commission and then appointed by the Governor to a term of six years was subject to re-examination by that nominating commission and, just like §440.45, Fla. Stat., if the nominating commission voted that he would not be retained, he would then be removed. But if the nominating commission voted for retention, the Governor would not have to accept that vote for retention. He could reject it out of hand. What would happen? We would immediately recognize that such a provision could not provide separation of powers or due process of law, because the Supreme Court Justice involved would always have to consider in deciding any case: What are the Governor's policies in regard to this case? What is the Governor's politics in regard to this case? What would the Governor want? He does not have to ask and the Governor does not have to tell him. The "executive will" (the Supreme Court's phrase in *Humphrey's Executor v. U. S.,* supra) would permeate any decision by the justice involved. This cannot be, whether it is a Supreme Court justice or a judge of compensation claims.

Therefore, the question recurs in the present case whether we look at where the judge of compensation claims is located or we look at what is his exclusive function. If we look at where he is located, which is the Governor's contention, the judge of compensation claims must be subject to the Governor's direct supervision through the Secretary of the Department.

The Governor argues that the Legislature cannot limit his power of supervision by restricting his power of reappointment. If that is so, then the judge of compensation claims does not provide due process of law. The judge of compensation claims' decision, although an exclusively judicial one, would then be performed by the Executive Branch, in violation of separation of powers and subject to its politics and policies in violation of due process of law. On the other hand, if we look to what is the function being performed, and it is undisputed that the function is exclusively judicial in nature, then not only can the Legislature restrict the power of the Governor with respect to reappointment, but under due process of law and under separation of powers, it must do so.

In his response, the Governor claims that the Legislature has usurped his power. To the contrary, the Governor claims power which the Constitution forbids him having. A state officer exercising quasi-judicial powers which are exclusively judicial in nature cannot be subject to the supervision of the Executive in the manner claimed by the Governor here. *Humphrey's Executor v. U. S.*, supra.

In part three of his response, the Governor claims that it is contrary to public policy to allow the Legislature to deprive him of the power of overruling the nominating commission. The nominating commission is charged by the statute of conducting a hearing to determine the fitness of the judge of compensation claims for retention. What the Governor asks for is the unlimited ability to overrule the commission, regardless of the reason. Plainly, his public policy argument is without precedent since the Legislative Branch is the public policy maker and the Governor is charged with the duty to implement those policies. He may make policies so long as they do not conflict with those which the Legislature has enunciated. The

Governor's argument to this Court that he must have the power to overrule the commission, would destroy due process of law and separation of powers insofar as the function of the judge of compensation claims is concerned. If that were to happen, the judge of compensation claims would know that in any decision that he makes, he must please the Governor because when it comes times for his reappointment, he may not get reappointed because of politics or political agenda. His conduct of hearings, his decisions, would have to be permeated with those concerns. They are not the concerns of the law; they are not the concerns of due process of law. This is why we have separation of powers.

In his response the Governor states that the vote of the commission to retain Judge Jones was eight to six, with one member absent. (Governor's Response 9). Consequently the Governor makes the response "Accordingly, the Governor questions whether the petitioner's reappointment would be in the best interests of the citizens of this state." (Governor's Response 9). He then argues against constitutionality by saying he ought to have the discretion to overrule the majority! He says he ought to be able to side with the six rather than side with the eight. But he says he cannot because the statute creates a non-discretionary duty on his part to accept the vote of the majority who conducted the merits hearing. Under his argument, they are restricted by merits considerations, but he claims the unlimited discretion to overrule them.

There is, however, a flaw in this part of the Governor's argument. On November 30, 1993, the chief judge sent a memorandum to Betty Allen, the Governor's appointment secretary, naming 12 judges, including Judge Jones, who have been voted for reappointment by the nominating commission but are pending their commissions. (Appendix 1).

At least the Governor is consistent in his argument that he thinks the statute is unconstitutional in that he has not only not reappointed Judge Jones, he has not reappointed anyone, including 11 others: Judge Jacobson, whose term expired on December 9, 1992; Judge Lewis, whose term expired on December 11, 1992; Judge Jones, whose term expired on December 14, 1992; Judge Turnbull, whose term expired on February 5, 1993; Judge Johnson, whose term expired on February 20, 1993; Judge Kuker, whose term expired on February 12, 1993; Judge Hurt, whose term expired on May 10, 1993; Judge Willis, whose term expired on September 29, 1993; Judge DeMarko, whose term expired on November 14, 1993; Judge Harnage, whose term expired on December 27, 1993; Judge Vocelle's term, which will expire on January 26, 1994; and Judge Lazzara's term, which will expire on March 18, 1994. (Appendix 2).

Certainly the Governor's position that this provision in §440.45, Fla. Stat. is unconstitutional, is consistent with his failure to reappoint not only Judge Jones, but 11 others, including two whose terms expired before Judge Jones'. However, the Governor in his response did not make the contention that he denied reappointing the others for any reason other than his contention that the statute is unconstitutional. He did not mention them at all.

It is unfortunate that this has occurred since Art. IV, §1(c), Fla. Const., provides:

> The governor may request in writing the opinion of the justices of the Supreme Court as to the interpretation of any portion of this Constitution upon any question affecting his executive powers and duties.

It would have been more orderly for the Governor to have done that, but he did not.[14]

The Governor's response points out most appropriately why the Legislature deprived the Governor of the power to overrule the nominating commission. Shall he side with the majority of eight, or shall he side with the minority of six? He was not there. That hearing was based on the merits. What the Governor requests is the ability to overrule the commission without any limitation, without any reason. Plainly, §440.45(1), Fla. Stat. (1991) denies the Governor that ability. The statute provides that upon a favorable vote of the nominating commission for retention, the Governor shall reappoint. §440.45(1), Fla. Stat. (1991).

There is a description of the events of that hearing before the statewide nominating commission by the First District Court of Appeal in *Milmir Construction v. Judge J. Paul Jones,* 18 FLW D2267 (Fla. 1st DCA, October 19, 1993), in which the Court held that Judge Jones was not subject to disqualification.

> In their motion for disqualification of Judge Jones, the E/C show that they were represented by a member of the law firm of Rissman, Weisberg, Barrett, Hurt, Donahue and McLain (hereafter "the Rissman Weisberg firm"). In February 1992, a hearing was held before the Statewide Nominating Commission to determine whether Judge Jones should be retained in office. A senior member of the Rissman Weisberg firm, Steven Rissman, is a member of that commission and challenged Judge Jones' reappointment by questioning him at length concerning his qualifications, background, demeanor, temperament, and fitness to sit as a judge of compensation claims (JCC). The ability of Judge Jones to act in a fair and impartial manner in the handling of claims, particularly where the E/C were represented by a member of the Rissman Weisberg firm,

[14] Ironically, the statutory provision in question in the present case is §440.45, Fla. Stat. (1991) which was enacted by the Legislature in special session by Ch. 91-1 and Ch. 91-2, Laws of Fla., which the Respondent, Governor, signed into law.

was questioned by Rissman at the hearing. Certain derogatory remarks made by Judge Jones concerning the testimony of experts in whom he has little faith were brought out at the hearing and Judge Jones did not deny them. The chairman of the commission asked Judge Jones if it were not true that in a conversation the judge had made personally disparaging remarks about Rissman, including accusing him of a campaign to unseat Judge Jones and calling Rissman a "scumball." Judge Jones admitted that he made these remarks. Robert Donahue, a shareholder in the Rissman Weisberg firm, testified at the hearing that there is a widely held belief within the claims industry that Judge Jones is biased in favor of claimants. Two former associates of the Rissman Weisberg firm contradicted that testimony and stated that only the Rissman Weisberg firm holds this belief and that the firm had fostered it in the insurance industry. The motions for disqualification were supported by properly executed affidavits.

* * * * * * * * * * * * * * * *

While we agree with the petitioners that the grounds for the motion for disqualification were legally sufficient if the motion had been made shortly after the February 1992 commission hearing, the motion in this case was made in March of 1993, over one year later. This is not a question of the litigant failing to timely act, as it appears that the E/C moved for a disqualification shortly after the Rissman Weisberg firm noticed its appearance on their behalf in the cause. Rather, we agree with Judge Jones that the grounds for disqualification were, in effect, stale:

> Lawyers, once in controversy with a judge, would have a license under which the judge would serve at their will. Tempers do cool, and anger does dissipate. Prior recusals, without more, do not objectively demonstrate an appearance of partiality.

Diversified Numismatics v. City of Orlando, 949 F.2d 382, 385 (11th Cir. 1991) (footnotes omitted). We also note that the Florida Supreme Court has rejected the notion of a blanket, ongoing disqualification of a judge from hearing all cases in which a particular attorney may

appear before the court. *Livingston v. State,* 441 So. 2d 1083, 1085 (Fla. 1983). [15]

The Governor's response admits that the Legislature restricted his power by requiring that he issue a commission of reappointment upon a favorable vote for retention by the nominating commission. He admits that the Legislature made it a non-discretionary act and that he must comply with it unless the statute is unconstitutional. However, his claim in his response that he did not comply because he believed that he was doing the right thing is really quite irrelevant, either in regard to Judge Jones or the 11 others, who he has not reappointed.

The Governor plainly does not have the right to interfere with the judicial function or with the legislative function. He makes no claim that he ought to be able to overrule the Ethics Commission, for example, on the basis that he is the best judge of what is good for the citizenry. Yet he claims that public policy is violated when the Legislature restricts his ability to overrule the nominating commission.

People disagree a great deal about what is right. They disagree about what is fair. They disagree about what is reasonable. The Governor's complaint is that §440.45(1), Fla. Stat. (1991) does not permit him to refuse to reappoint when he disagrees with the nominating commission.

Under point 3 of his response, the Governor contends that he was acting rightly. That is an irrelevant consideration to mandamus. It is an irrelevant consideration to the failure to perform a non-discretionary act which is why mandamus is not based upon fault considerations.

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[15] *Milmir Construction v. Judge J. Paul Jones,* 18 FLW D2267 (Fla. 1st DCA, October 19, 1993). Cf. *Indian River Colony Club, Inc. v. Judge J. Jones,* 18 FLW D2271 (Fla. 1st DCA, October 19, 1993).

The Petitioner had his hearing before the nominating commission, which voted for his retention. After that, under the statute, the Governor was obligated to issue him his commission. The Governor did not do so. The Governor's only real defense is that the statute is unconstitutional.

Plainly it is constitutional and it should be fairly assumed that upon a declaration by this Court to that effect, that the Governor would perform his duty.

In his response, the Governor contends that the Petitioner had contended that his reappointment should have occurred on September 3, 1992. (Governor's Response 2). This is incorrect. The Petitioner does not make that contention. The statute in question, §440.45, Fla. Stat. (1991) does not state a specific date upon which the Governor was to issue the commission following the nominating commission's favorable vote and report to him. It would appear that mandamus would not lie until the Governor announced that his failure to re-appoint was deliberate. It is doubtful that mandamus could have been entertained by any court until the Governor had announced that he was, in fact, refusing to make the re-appointment. This did not occur until December 15, 1993, when Mr. Peterson sent the letter to Mr. Rosen announcing that none of the judges whose commissions had not been issued would be re-appointed. Rather, the Governor was going to wait until after January 1, 1994, until a new commission would be created under the new statute and that he expected to run all of the judges through the process again. Actually, the Governor's position as announced by Mr. Peterson is inconsistent. In his December 15 letter, he says that the new commission should either conduct a new hearing and vote again on the question of retention of the incumbent judge, or it should accept the vote of the previous commission in this regard, but in

either event, it should submit the incumbent judge's name together with two other choices, as the amended statute would require. (Amended Appendix to Petition). This seems to conflict with his position that the former statute is unconstitutional and therefore the vote of the previous commission was not binding on him. It is clear that the Governor took the position as of December 15, 1993, that he would not comply with the then existing law. At that point, the Petitioner was entitled to mandamus and he filed suit for it two days later.

Holdovers between re-appointments are actually quite common. Indeed, as already pointed out, there are 12 such judges right now. A correct review of the remedy is that Judge Jones was entitled to his re-appointment as of December 15, 1993, having held over until that date, when the Governor advised that he would not issue the commission. Under the statute, he would not come up for re-appointment until four years later.

The Governor's suggestion that a statute which did not have an effective date until a later time applies to this case is without precedent. If that were true, a government official could simply refuse to perform a non-discretionary act in hope that the law might be changed so that it would no longer be required. If the law were changed at a later time, when a suit is brought to compel his actions before the new law went into effect, he would argue [as the Governor does here] that a statute applies, which was not in force at the relevant time. Obviously that is not the law. *Florida Industrial Commission v. Neal,* 224 So. 2d 774,(Fla. 1st DCA 1969) is an example. At that time the Industrial Relations Commission consisted of three members. The statute provided that not more than one of them could, by previous experience, be a representative of employers, nor more than one of them be a representative of employees. At a time when there already was a

representative of employers, the Governor appointed Thomas W. Johnson as chairman of the commission. His previous experience denominated him as a representative of employers. Constance Neal brought suit against the Industrial Commission on the grounds that it was improperly constituted because it had two employer representatives, when the statute required that the Commission have no more than one. The First District Court of Appeal held that the Commission was unlawfully constituted. After the suit was filed but before decision, the Legislature passed the Government Reorganization Act of 1969. At that time, the Legislature amended the statute to provide that the Commission shall consist of a chairman, without denominating his previous experience, and two other members, one from employers and one from employees. The Court held that even though the statute was changed after the lawsuit was brought so that the Commission would then have been lawfully constituted, nonetheless, the decision with reference to the prior Commission still stood. The Court decided:

> Because of the difference between the provisions of the two statutes with which we are dealing, the question presented by this case now before us will perhaps not arise in the future. Nevertheless, it is our view that appellee is entitled to a decision on the merits of this appeal and our holding herein may prove helpful to the executive branch of government in making future appointments to membership on the Industrial Relations Commission. 224 So. 2d 774, at 779.

Although the *Neal* case was declaratory judgment, the principle would apply to mandamus as well. The Petitioner was entitled to his commission at the time that he filed suit on December 15, 1993, when the Governor officially denied that he would issue it. He was certainly entitled to his commission on December 17 when he filed suit.

The Governor's response refers to a statute that did not take effect until some two weeks later, which is after the fact and is not relevant or material to the present controversy. The 1994 statute is not involved.

The Governor's response speaks about his general powers of appointment. The Constitution specifically provides in regard to removal, that the Governor can only suspend a state officer and removal is accomplished by concurrence in the suspension by the Senate. As already expressed in regard to the separation of powers and due process grounds of the U. S. Supreme Court's decision in *Humphrey's Executor v. U. S.*, supra, the Chief Executive cannot have the power to remove, not for cause, an official of the Executive Branch of the government exercising quasi-judicial powers, which are exclusively judicial in nature. This would offend separation of powers and due process of law. Therefore, what is the nature of retention or re-appointment in this regard? The Governor contends that it is not removal. Of course, common sense tells us that it is. If an official is not retained, he is removed. This is why the Legislature required the Governor to reappoint in §440.45(1), Fla. Stat. (1991).

The Governor's response refers to *Wright v. Florida Medical Examiner's Commission,* 18 FLW S509 (Fla. 1st DCA, September 30, 1993). (Governor's Response 6), The case should be cited as *Wright v. Chiles,* 625 So. 2d 846 (Fla. 1993). Dr. Wright's case stands for the proposition that this Court has jurisdiction to issue mandamus against the Governor for a commission. However, it is of no assistance to the Governor on the merits because the statute and the facts in that case were completely different. Dr. Wright was a medical examiner, not a judge. He did not perform a function which was exclusively judicial in nature.

In *Wright v. Chiles,* the Supreme Court held:

> The resolution of this dispute depends upon the interpretation of section 406.06(1)(a), Florida Statutes (1991), which reads in pertinent part:
>
> > A district medical examiner shall be appointed by the Governor for each medical examiner district from nominees who are practicing physicians and pathology, whose nominations are submitted to the Governor by the Medical Examiners Commission.

The Court pointed out that the statute required nominations in the plural, which meant that although the commission had in practice in the past submitted a single nomination, this had not been challenged. The statute in regard to the medical examiner's appointment does not in any way compare to the statute in regard to the retention of judges of compensation claims. §440.45, Fla. Stat. (1991) is specific that the nominating commission is to pass upon the retention of an incumbent judge of compensation claims and upon their favorable vote for retention, the Governor shall reappoint.

The statute provides:

> If the Judicial Nominating Commission votes to retain the Judge of Industrial Claims in office, then the Governor shall re-appoint the Judge of Industrial Claims for a term of four years. §440.45(1), Fla. Stat. (1991).

The Governor claims that the Legislature usurped his prerogatives in adopting this statute. This is incorrect. The Governor claims power which the Legislature has properly limited because of separation of powers and due process of law. Indeed they must limit such power for these reasons.

This statute is constitutionally valid because the judge of compensation claims performs an exclusively judicial function. See *Humphrey's Executor v. United States,* supra.

The Petitioner is entitled to his commission under the 1991 statute in force when the Governor announced on December 15, 1993, that he would not comply with the statute. Mandamus should issue.

Respectfully submitted,

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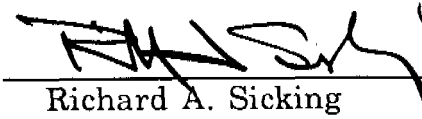
Miami, Florida 33129
(305) 858-9181

By: _____
Richard A. Sicking
Florida Bar No. 073747

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy has been furnished by U. S. Mail to Deborah K. Kearney, Esquire, J. Hardin Peterson, Jr., Esquire, Attorneys for Respondent, Office of the Governor, 209 The Capitol, Tallahassee, Florida 32399-0001, this 17th day of January, 1994.

By: 
Richard A. Sicking

APPENDIX

INDEX TO AMENDED APPENDIX

MEMORANDUM

DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY

TO : Betty Allen

FROM : Shirley Walker

DATE : November 30, 1993

Below is the list of compensation judges awaiting commissions.

JCCC'S PENDING COMMISSIONS

1. Melanie Jacobson - West Palm Beach
2. John Paul Jones - Satellite Beach
3. Daniel Lewis - Fort Lauderdale
4. Daniel Turnbull - Fort Myers
5. Alan Kuker - Miami
6. William Johnson - Miami
7. Charles Hurt - Orlando
8. Joe E. Willis - Sarasota
9. Michael DeMarko - Pensacola
10. Henry Harnage - Miami
11. Charles Vocelle - Lakeland
12. John J. Lazzara - Tallahassee

JCC's PENDING COMMISSIONS

		Current Term Expired/Expires
1.	Melanie Jacobson/West Palm Beach	12/09/92
2.	Daniel Lewis/Fort Lauderdale	12/11/92
3.	John Paul Jones/Satellite Beach	12/14/92
4.	Daniel Turnbull/Fort Myers	02/05/93
5.	William Johnson/Miami	02/20/93
6.	Alan Kuker/Miami	03/12/93
7.	Charles Hurt/Orlando	05/10/93
8.	Joe E. Willis/Sarasota	09/29/93
9.	Michael DeMarko/Pensacola	11/14/93
10.	Henry Harnage/Miami	12/27/93
11.	Charles Vocelle/Lakeland	01/26/94
12.	John J. Lazzara/Tallahassee	03/18/94