IN THE SUPREME COURT OF FLORIDA

Case No. SC01-765

THE FLORIDA SENATE; THE FLORIDA HOUSE OF REPRESENTATIVES; JOHN MCKAY, as President of the Florida Senate; TOM FEENEY, as Speaker of the Florida House of Representatives; STATE SENATOR RODOLFO GARCIA; and STATE REPRESENTATIVE FREDERICK C. BRUMMER,

Petitioners,

vs.

FLORIDA PUBLIC EMPLOYEES COUNCIL, AFSCME,

Respondent.

REPLY OF LEGISLATIVE PETITIONERS

BARRY RICHARD
Greenberg Traurig, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
Phone (850) 222-6891

Argument

FPEC posits the novel and unsupportable proposition that a judge, in response to a complaint alleging that the Legislature is about to take action which is unconstitutional, has the power to order the Legislature not to hold meetings on the subject, and that the Legislature must abide by the order until it is lifted or overturned. It takes little imagination to recognize the untenable consequences of such a proposition. Were such a principle to be recognized, it is reasonable to assume that numerous lawsuits would be filed by persons unhappy with prospective legislation, seeking temporary injunctions to stop the Legislature from proceeding with consideration of such legislation until final disposition by the court.

FPEC's claim is not unusual. It is commonplace for persons to challenge the constitutionality of legislative acts, although prior to this case, it has been assumed that such challenges cannot occur until after passage of an act. If such challenges could be directed at the legislative proceedings themselves rather than the final enactment, the Legislature, already faced with the task of fulfilling an enormous responsibility in a precious sixty days, would be continuously disrupted while its lawyers fought any number of battles to stave off or overturn injunctions. Every legislative session would bring with it the type of calendar

clogging, emergency trial and appellate proceedings experienced in the recent presidential litigation.

Fortunately, the foregoing scenario cannot occur so long as this Court continues it historic commitment to preserve the integrity of the separation of powers doctrine. FPEC offers no principled basis upon which to affirm the lower court and at the same time honor the principle of separation. Not a single case is cited, in Florida or elsewhere, that has ever recognized the authority of a court to stop a legislative committee from meeting. Instead, FPEC resorts to general principles having no application to the case at bar, inaccurate characterization of the nature of the Select Committee's nature and proceeding, and hyperbolic rhetoric about the audacity and mockery of two of the defendants.

FPEC states the truism that all branches of government are bound to respect the constitutional rights of every citizen, and that courts have the power to ensure that such rights are afforded. This undeniable statement of principle, however, misses the essential point in this proceeding. It is not the power of the courts to protect constitutional rights that is in issue, but the method by which they may do so.

When the Legislature passes an unconstitutional law, the proper role of the courts is to review it after its enactment, declare it invalid, and when

necessary, enjoin its enforcement. It is surely not the role of the courts to pass judgment on the validity of *prospective* legislation, or legislative proceedings leading to passage, and to enjoin the Legislature from acting. "It is the final product of the legislature that is subject to review by the courts, not the internal procedures * * * the legislature has the power to enact measures, while the judiciary is restricted to the construction or interpretation thereof." *Moffitt v. Willis*, 459 So. 2d 1018 (Fla. 1984).

It is true, as this Court noted in *Dade County Classroom Teachers Assoc. v. The Legislature*, 269 So. 2d 684 (1972), that on rare occasions, courts have taken it upon themselves to fashion relief when the Legislature has ignored a clear constitutional mandate. One notable example cited in the above case was the redrawing of legislative boundaries by federal courts when state legislatures failed to reapportion. Even in those exceptional cases, however, the courts have never ordered a legislature to pass specific legislation or enjoined a legislature from acting, much less meeting.

[1]

[1] In the case at bar, there is really no issue of a constitutional violation. With respect to collective bargaining, Article I, Section 6 of the Florida Constitution affords public employees the right "by and through a labor organization, to bargain collectively," and nothing more. The 20-day provision of Section 447.403, upon which FPEC obtained a temporary injunction, is neither required by nor implicit in the constitutional provision. The injunction was based, not upon an alleged constitutional violation, but the allegation that the Legislature had failed to abide by a statutory provision enacted by a prior Legislature.

FPEC's invocation of the principle that the foundation of procedural due process is fairness is equally misplaced. It is not necessary to address the question of whether anyone was treated unfairly in the due process sense because procedural due process is inapplicable to the legislative process. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915); *Jackson Court Condominiums, Inc. v. City of New Orleans*, 874 F.2d 1070 (5th Cir. 1989). In an effort to surmount this obstacle, FPEC attempts to remove the Select Committee meeting from the legislative ambit by labeling the Committee an "impasse resolution commission,"[2] and referring to the meeting of the Committee as a "quasi-judicial adjudicatory proceeding." [Response, pp. 12, 18] In fact, Section 447.403(4) refers to "the legislative body" and provides, in pertinent part:

> (c) The legislative body or a duly authorized committee thereof shall forthwith conduct a public hearing at which the parties shall be required to explain their positions with respect to the rejected recommendations of the special master;
>
> (d) Thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved, to resolve all disputed impasse issues;

After all else fails in the collective bargaining process, the statute simply throws

[2] The title is the product of counsel's imagination, appearing nowhere in Chapter 447 or elsewhere in the Florida Statutes.

the dispute to the appropriate "legislative body" to "take such action as it deems to be in the public interest."

Whatever else the foregoing provision may be held to mean in its application to local legislative bodies, it can mean only one thing with respect to the Florida Legislature because the Legislature is empowered to perform only one function in this context: pass laws. FPEC never mentions what function the Select Committee was to perform other than to recommend legislation to the full Legislature, but there is no other constitutional function that the Committee could perform.

[3] Notwithstanding FPEC's creative terminology, the meeting that the lower court attempted to enjoin was a quintessential part of the legislative process. In addition to being factually inaccurate in the current setting, FPEC's argument invites courts to circumvent the separation of powers doctrine by simply characterizing a legislative meeting as "quasi-judicial" or "quasi-administrative" or some other non-legislative sounding term.

FPEC argues that the defendants were bound to obey the lower court's injunction even if it was an illegal order. Long ago, this Court recognized an important distinction with respect to the obligation to obey an order when its validity is under challenge:

> Disobedience of a lawful order, judgment, or decree is such an interference with the due administration of justice as

---

[3] If the purpose of Section 447.403 had indeed been to authorize a legislative committee to engage in "quasi-judicial adjudicatory" functions, then the statute would itself have been unconstitutional as a violation of the separation of powers doctrine.

> to constitute a contempt. But disobedience of a void order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt. One may question the order which he is charged with refusing to obey only in so far as he can show it to be void.

State ex rel. Everette v. Petteway, 179 So. 666, 671 (Fla. 1938). The question is whether the order is simply voidable upon review by a superior court, or void on its face as for lack of jurisdiction. The holding is consistent with general common law principles as illustrated by *Walker v. City of Birmingham*, 388 U.S. 307 (1967), upon which FPEC relies. The United States Supreme Court upheld a contempt citation after the petitioners failed to obey a temporary injunction not to engage in mass street parades and demonstrations, on the claim that it violated their First Amendment rights. The Court noted that:

> Without question the state court that issued the injunction had, as a court of equity, jurisdiction over the petitioners and over the subject matter of the controversy. And this is not a case where the injunction was transparently invalid or had only a frivolous pretense to validity.

Id. at 388 U.S. 315.

In the case at bar, the lower court was without subject matter jurisdiction over the internal proceedings of the Florida Legislature and the order was "transparently invalid." FPEC obliquely acknowledges the above dichotomy by quoting the *Rubin v. State*, 490 So. 2d 1001, 1003 (Fla. 3d DCA 1986), to the effect that a court may punish by contempt the failure to obey an erroneous order when the court was "*acting with proper jurisdiction and authority."* [emphasis added] FPEC asserts that in the instant case, "the circuit court had jurisdiction of the subject matter under Rule 1.610 * * *." [Brief, p. 23] Of course, subject matter jurisdiction cannot be conferred by a rule, and is not conferred by Rule 1.610, which

just lays out the procedures for issuance of a temporary injunction.

The proposition suggested by FPEC would present legislators with a Hobson's choice: bring legislative proceedings to a halt while review is sought any time a judge issues a temporary injunction, or face penalties for contempt. As a co-equal branch of government, the Legislature is not required to obey orders of courts that invade the exclusive province of the Legislature in violation of Article II, Section 3 of the Florida Constitution.

In an effort to engender resentment by the Court against the Legislature, FPEC condemns the conduct of two Select Committee members for allegedly displaying a toothbrush and jail uniform, and decries the fact that the Legislature "defied" and "mocked" the lower court order, and "dared" the court to enforce it. The issue is entirely irrelevant. The First Amendment requires public officials in all three branches to be thick skinned in the face of criticism, and to refrain from using the power of office to punish free expression, regardless of whether or not it is justified or in good taste.

In *Pennekamp v. State of Florida*, 328 U.S. 331 (1946), the Court reviewed a contempt citation issued against the Miami Herald for publishing editorials and a cartoon that "were predicated on inaccurate, distorted, incomplete and biased reports," and that imputed partisanship and favor by circuit judges to persons charged with crime. *Id.* at 328 U.S. 367. The Court held that such out-of-court expressions could not be punished for contempt in the absence of proof that they presented a "clear and present danger to the fair administration of justice in Florida." *Id.* at 328 U.S. 348.

The brief of FPEC fails to provide this Court with any logical foundation for sustaining the lower court orders. The Court is respectfully urged to grant the petition.

GREENBERG TRAURIG, P.A.
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(850) 222-6891

_____
BARRY RICHARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax to Carolyn Snurkowski, Assistant Attorney General, Charmaine Millsaps, Assistant Attorney General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; to Jerry G. Traynham, Esq., Ben R. Patterson, Esq., Patterson & Traynham, Post Office Box 4289, Tallahassee, Florida 32315-4289; and to Charles T. Canady, Esq., General Counsel, Executive Office of the Governor, Room 209, The Capitol, Tallahassee, Florida 32399-1050; and by hand to L. Ralph Smith, Circuit Court Judge, Leon County Courthouse this _____ day of _____, 2001.

_____
BARRY RICHARD

\\tal-srv01\RICHARDB\201994v01\4B%Y01!.DOC\4/17/01