Florida Law Review

Volume 36 | Issue 3 Article 7

July 1984

Florida's Sunshine Law and Its Application to a State University Search Committee

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CASE COMMENTS

FLORIDA'S SUNSHINE LAW AND ITS APPLICATION TO A STATE UNIVERSITY SEARCH COMMITTEE*

Wood v. Marston, 442 So. 2d 934 (Fla. 1983)

Petitioners[1] contended that the public's exclusion[2] from the meetings of a special committee organized to aid in the selection of a college dean[3] violated Florida's Sunshine Law.[4] The trial court granted a permanent injunction requiring respondents to open future meetings to the public.[5] Reversing the trial court, the First District Court of Appeal ruled the committee did not constitute a "board" or "commission" subject to the Sunshine Law.[6] On certiorari,[7] the Florida

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*Editor's note: This comment received the *George W. Milam Award* for the outstanding case comment Spring Semester, 1984.

1. 442 So. 2d 934 (Fla. 1983). Petitioners represented local media interests. *Id.* at 937.

2. *Id.* at 937. The committee was advised by a university vice president to treat any discussion of the qualifications of particular candidates as privileged communication. In other words, the evaluation process was to take place out of the sunshine. *Id.*

3. *Id.* In January 1980, Joseph R. Julin, Dean of the College of Law of the University of Florida announced his intention to resign. Marston v. Wood, 425 So. 2d 582, 583 (1st D.C.A. 1982), *rev'd,* 442 So. 2d 934 (Fla. 1983). FLA. STAT. § 240.227(1) & (5) (1979) vests in the university president authority to appoint academic deans. This authority is subject to the U. OF FLA. CONST. ch. IV, § 2(A)(3): "In making this appointment the President shall give consideration to the opinion of the faculty of the college concerned by consultation with a special committee of at least three faculty members elected by the faculty of the college." The voting committee consisted of seven faculty members and Chesterfield Smith, Esq., a past president of the A.B.A. In addition, the faculty chose two law students to serve as non-voting members of the committee. The purpose of the committee was to solicit and screen applicants for the deanship, submit a list of the best qualified candidates to the faculty for their approval, and forward the list to university president Robert Q. Marston for his final selection. 442 So. 2d at 936-37.

4. FLA. STAT. § 286.011(1) (1980) provides:

> All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

5. 442 So. 2d at 937. The injunction was complied with in all respects and a new dean was eventually chosen. Nonetheless, respondents appealed the final judgment. *Id.*

6. Marston v. Wood, 425 So. 2d 582 (1st D.C.A. 1982), *rev'd,* 442 So. 2d 934 (Fla. 1983). The appellate court found it unnecessary to reach the question whether the University of Florida or its president was an "agency" for Sunshine Act purposes. Conceding the committee played a role in the decisionmaking process, the court viewed that role as only a "winnowing function," by which the committee removed from the faculty the burden of evaluating applicants who were less than fully qualified. *Id.* at 584.

7. *See* FLA. CONST. art. V, § 3(b)(3) (granting the Florida Supreme Court jurisdiction to resolve conflicting district court decisions). The holding in Marston v. Wood, 425 So. 2d 582

Supreme Court quashed the First District's decision and HELD, the committee's performance of a properly delegated decisionmaking function necessitated compliance with the Sunshine Law.[8]

During the late 1960s, public demand for open government led to the passage of open-meeting or "Sunshine" acts.[9] These laws were statutory attempts to provide public access to the deliberations of state and local government.[10] While criticized as overly broad and ambiguous,[11] Florida's statute[12] has nevertheless enjoyed broad support in the Florida courts.[13]

Early cases considered by the courts involved agencies whose coverage under the law was easily justified.[14] Rejecting technical distinc-

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(1st D.C.A. 1982), *rev'd*, 442 So. 2d 934 (Fla. 1983) conflicted with Town of Palm Beach v. Gradison, 296 So. 2d 473 (Fla. 1974); News-Press Pub. Co. v. Carlson, 410 So. 2d 546 (Fla. 2d D.C.A. 1982); Krause v. Reno, 366 So. 2d 1244 (Fla. 3d D.C.A. 1979).

8. *See* 442 So. 2d at 941.

9. *See* Project, *Government Information and the Rights of Citizens*, 73 U. MICH. L. REV. 971, 1187-1221 (1975); Note, *Government in the Sunshine: Promise or Placebo?*, 23 U. FLA. L. REV. 361 (1971) [hereinafter cited as *Promise or Placebo?*]; Note, *Open Meeting Statutes: The Press Fights for the "Right to Know"*, 75 HARV. L. REV. 1199 (1962).

10. *Id. See* Canney v. Board of Pub. Instr., 278 So. 2d 260 (Fla. 1973) (the Sunshine Law was intended to cover any gathering of a public board where members discuss matters on which official action may foreseeably be taken); City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971) (Sunshine Law seeks to prohibit the evil of closed door government).

11. *See* Little & Tompkins, *Open Government Law: An Insider's View*, 53 N.C.L. REV. 451 (1975) (Florida's requirement of total openness places difficult burdens upon public officials); Wickham, *Let the Sun Shine In! Open-Meeting Legislation Can Be Our Key to Closed Doors in State and Local Government*, NW. U.L. REV. 480 (1973); Kalil, *Florida Sunshine Law: Is Florida Sunshine the Most Powerful of Disinfectants?*, 49 FLA. B.J. 72 (1975).

12. *See supra* note 4. The current statute is modeled after a similar state provision passed in 1905. *See* FLA. STAT. § 165.22 (1941). The earlier statute required meetings of a city or town council to be open to the public. This provision was rendered largely ineffective by the holding in Turk v. Richard, 47 So. 2d 543 (Fla. 1950), which construed the statute as applying only to "formal assemblages" required by law. *Id.* at 544. The Florida Supreme Court in City of Miami Beach v. Berns held this statute superseded by FLA. STAT. § 286.011 (1971). 245 So. 2d 38, 40 (Fla. 1971). The present Sunshine Law was enacted in 1967. *See* FLA. S. JOUR. 679 (June 1967); FLA. H.R. JOUR. 958-59 (June 1967). *See also* Wyatt, *Sunshine Law: How It Was*, Fla. Times-Union, Feb. 20, 1977, at B-5, col. 7-8.

13. *See, e.g.*, Board of Pub. Instr. of Broward County v. Doran, 224 So. 2d 693 (Fla. 1969). Plaintiff alleged that defendant school board was excluding the public from meetings. Defendants contended the Sunshine statute was overly vague and ambiguous and failed to afford them procedural due process. The Florida Supreme Court upheld the constitutionality of the statute and stated that the intent of the Sunshine Law was to cover any gathering of members where action would foreseeably be taken. *Id.* at 698. *See also* Florida Parole & Probation Comm'n v. Thomas, 364 So. 2d 480, 481 (Fla. 1978); Canney v. Board of Pub. Instr. of Alachua County, 278 So. 2d 260, 263 (Fla. 1973).

14. *See* City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971) (city council); Jones v. Tanzler, 238 So. 2d 91 (Fla. 1971) (city council); Board of Pub. Instr. v. Doran, 224 So. 2d 693 (Fla. 1969) (school board); Shaughnessy v. Metropolitan Dade County, 238 So. 2d 466 (Fla. 3d D.C.A. 1970) (county commission); Canney v. Board of Pub. Instr. of Alachua County, 231 So. 2d 34 (Fla. 1st D.C.A. 1970) (school board); Times Pub. Co. v. Williams, 222 So. 2d 470 (Fla. 2d D.C.A. 1969) (school board).

tions, these decisions favored complete access to the entire decision-making process.[15] A more difficult judicial task, however, has been the formulation of criteria to determine if certain stages of the deliberative process escape the coverage of the Act.[16] In particular, courts have questioned the applicability of the Sunshine Law to sub-groups and committees appointed by governmental agencies.[17]

In *Town of Palm Beach v. Gradison*,[18] the Florida Supreme Court extended the law's application to a citizens' planning committee.[19] Selected by the Town Council, the committee was formed to develop a comprehensive zoning plan.[20] The committee's responsibilities included guiding the planners, making tentative policy decisions, and generally acting as the "alter-ego" of the Town Council.[21] The council retained the authority, however, to override any measures initiated by the committee and indicated they "would do so without timidity."[22]

Following adoption of the zoning plan, defendants filed suit claiming the ordinance invalid because several of the committee meetings were closed to the public.[23] The Florida Supreme Court, declaring that a primary purpose of the Sunshine Law is to prevent the crystallization of non-public decisions prior to a ceremonial acceptance,[24] expanded the law's coverage to the inquiry and discussion stages of decisionmaking.[25] Resting its decision on broad-based policy arguments, the court concluded that a committee, appointed by a governmental agency and acting in an advisory capacity, falls within the ambit of the Sunshine statute.[26]

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15. *See, e.g.*, Times Pub. Co. v. Williams, 222 So. 2d 470, 473 (Fla. 2d D.C.A. 1969).

16. *See generally Promise or Placebo?*, *supra* note 9, at 364-65.

17. *Id.* at 365. *See also* Bigelow v. Howze, 291 So. 2d 645 (Fla. 2d D.C.A. 1974). In *Bigelow*, two members of a four-person finding committee, while traveling out-of-state together, discussed possible policy recommendations they would make to the full committee. The court held these discussions violated the Sunshine Law even though the full commission discussed the recommendations at a public meeting. *Id.* at 646.

18. 296 So. 2d 473 (Fla. 1974), *aff'g* IDS Properties, Inc. v. Town of Palm Beach, 279 So. 2d 353 (Fla. 4th D.C.A. 1973).

19. 296 So. 2d at 476.

20. *Id.*

21. *Id.* at 474.

22. *Id.* at 475.

23. *Id.* While full public meetings and hearings were eventually conducted, this occurred after the zoning plan was formulated, in closed sessions, between the consultants and the committee. *Id.*

24. *Id.* at 477.

25. *Id.* at 475. *See also* Times Pub. Co. v. Williams, 222 So. 2d 470, 473-75 (Fla. 2d D.C.A. 1969) (legislature intended the entire decisionmaking process to be affected by the statute). *See generally* Note, *Government in the Sunshine: Judicial Application and Suggestions for Reform*, 2 FLA. ST. U.L. REV. 537, 538 (1974).

26. 296 So. 2d at 478. Note, however, that the dissent held a purely advisory committee,

The *Gradison* court's focus on the public's interest in open-access to the decisionmaking process[27] was modified by the Second District Court of Appeal through enactment of the "remoteness exception." In *Bennett v. Warden,*[28] the president of a junior college appointed several employees to a Career Employees Council (CEC).[29] The president and the council met privately to discuss campus working conditions.[30] A labor organizer, attempting to unionize the workers, challenged this practice as violative of the Sunshine Law.[31]

The Second District determined that neither the CEC nor the president was a board or a commission under the Sunshine Law.[32] The court explained that regular meetings between an executive officer and his staff, regarding day-to-day administration, are not within the contemplation of the Sunshine statute.[33] Because the council performed a fact-finding role, it was not a policy-making body engaged in official action.[34] Emphasizing the council's position as "far too remote" in the decisionmaking process,[35] the court concluded the meetings lay outside the sanctions of the Sunshine Law.[36]

Application of the remoteness exception to a subordinate group in the decisionmaking process was considered by the Third District Court of Appeal in *Krause v. Reno.*[37] In *Krause,* Miami's City Manager appointed a citizens committee to assist him in selecting a Chief of Police.[38] Although the City Manager announced his intention to select a Police Chief from the candidates recommended by the com-

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subject to the ultimate will of the Town Council, was not a board or commission subject to the Sunshine Law. *Id.* at 478-81.

27. *Id.* at 475.

28. 333 So. 2d 97 (Fla. 2d D.C.A. 1976).

29. *Id.* at 100.

30. *Id.* at 98.

31. *Id.* Appellee was a labor organizer for the Communication Workers of America. Her efforts to unionize the workers were apparently frustrated by the closed meetings.

32. *Id.* at 99. The court held Bennett was an executive officer of the Board of Trustees, "no different than any other executive officer of any other board, agency or commission of government. By definition and capacity, then, he is clearly outside the ambit of the Sunshine Law." *Id.*

33. *Id.* at 99-100. The court stressed the inefficiency of requiring every meeting, every contact, and every discussion to be a public meeting under the Sunshine law. *Id.* at 100.

34. *Id.*

35. *Id.* The president's recommendations resulting from a meeting with the CEC would be passed to an Administrative Council, comprised of administrative officials under the president (whose meetings were open to the public). From there the recommendations would be submitted to the Board of Trustees for ultimate ratification or rejection. *Id.*

36. *Id.* at 100.

37. 366 So. 2d 1244 (Fla. 3d D.C.A. 1979).

38. *Id.* at 1246, 1248. The committee consisted of Krause and four private citizens. After reviewing approximately 165 applications, the committee was to select the top 14 or 15 applicants. These individuals would then be granted interviews and the top five candidates recommended to the City Manager for possible appointment. *Id.* at 1246.

mittee,[39] he retained authority to do otherwise.[40] Following a closed meeting of the City Commission and the search committee, the plaintiff sought an injunction to prevent further violation of the Sunshine Law.[41] The Third District consulted analogous statutory provisions and determined the City Manager was an "agency"[42] responsible for appointment of a "board" as defined in the Sunshine statute.[43] Rejecting defendant's argument that the "remoteness" exception applied, the court ruled the exception inapplicable because the board had direct influence on the City Manager.[44]

Factually similar to *Krause*,[45] the instant case extended the Sunshine Law to a screening committee appointed by a university president.[46] Citing *Bennett*, the respondents contended the committee

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39. *Id.* at 1246.

40. *Id.* Charter of the City of Miami Section 16; Code of the City of Miami, Sections 43-2. *Id.*

41. 366 So. 2d at 1245. Respondent, a State Attorney, filed a complaint for declaratory and injunctive relief. *Id.*

42. *See* FLA. STAT. § 119.011(2) (1977), Florida Public Records Law, which works in tandem with FLA. STAT. § 286.011 to assure openness in and access to government, defines "agency" as: "Any state, county, district, authority or municipal officer, department, division, board, bureau, commission or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." FLA. STAT. § 20.03(11) (1977) Government Reorganization Act defines "agency" as: "any official, officer, commission, authority, council, committee, department, division, bureau, board, section or another unit or entity of government." FLA. STAT. § 120.52(3), Administrative Procedures Act defines "agency head" as: "[T]he person or collegial body in a department or other governmental unit statutorily responsible for final agency action."

43. 366 So. 2d at 1252. "In our opinion it is the fact of the board, not the source of the board, taking official acts which is subject to the legislator's 'dominion and control' which is determinative." *Id.* at 1252-53.

44. *Id.* at 1247. *Cf.* Note, *Exemptions to the Sunshine Law and the Public Records Law: Have They Impaired Open Government in Florida*, 8 FLA. ST. U.L. REV. 265, 275-77 (1980) (suggesting that the president in *Bennett*, like the City Manager in *Krause*, appointed a group to assist him in making recommendations to a legislative board subject to the Sunshine Law. Therefore, the president in *Bennett* should have been classified as an "agency" under the statute).

45. *Cf.* Marston v. Wood, 425 So. 2d 582 (1st D.C.A. 1982), *rev'd*, 442 So. 2d 934 (Fla. 1983). The appellate court attempted to distinguish the cases on two alleged factual differences. First, the faculty of President Marston was, in essence, staff, while the search committee in *Krause* was composed of lay-persons. Second, the faculty committee was "too remote" from the decisionmaking process. *Id.* at 584-85. *See also supra* note 6 and accompanying text.

46. *See* 442 So. 2d 934. The court recognized the unique circumstances surrounding the application of the Sunshine law to a state university. The necessity for academic freedom and an uninhibited exchange of ideas free from governmental reprisal were sensitive issues noted by the court. The court concluded, however, that while important, in the instant case these concerns were outweighed by Florida's commitment to open government. *Id.* at 941. *Cf. In re* Dinnan v. Board of Regents, 661 F.2d 426 (5th Cir. 1981) (noting the importance of academic freedom in a university, but recognizing its limits in the context of public policy prohibiting discrimination). *See generally* Shurtz, *The University In the Sunshine: Application of the Open Meeting Laws to the University Setting*, 5 J.L. & ED. 453 (1976) (There is little doubt

was composed of staff members operating merely as fact-finders and not as decision-makers.[47] The instant court rejected this argument and observed that the applicant screening process is primarily a policy-based, decisionmaking function.[48] Moreover, the instant court refused to insulate from public scrutiny the committee's official acts simply because certain members could be designated as faculty-staff.[49] The court declared that faculty members appointed to an advisory committee with governmental authority relinquish their staff identity and consequently fall within the ambit of the Sunshine Law.[50]

Citing a tenuous connection between the committee and the final dean selection, the respondents also argued for application of the remoteness exception as defined in *Bennett*.[51] Although the university president as the ultimate decision-maker[52] was not legally required to follow the committee's advice,[53] the instant court held the exception inapplicable.[54] The court declared that "no official act which is in and of itself decisionmaking can be remote from the decisionmaking process," regardless of the number of intermediate steps necessary to reach the ultimate decision.[55]

In concurrence, Justice Overton agreed with the majority decision that an executively created committee imbued with decisionmaking

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that the state university is included in the definition of a public entity or agency, since it is a developmental arm of the state carrying out the state objective of education.).

47. *See* 442 So. 2d at 939-41. *See also supra* note 45 and accompanying text.

48. *See* 442 So. 2d at 939. *Cf.* Marston v. Wood, 425 So. 2d 582, 587 (1st D.C.A. 1982), *rev'd*, 442 So. 2d 934 (Fla. 1983) (Wigginton, J., dissenting). In a dissenting opinion Judge Wigginton noted that the screening process effectively decided which applicants would not be considered for the dean's job. "I think it plain that if the university's decision on who to hire as dean may be covered by the Sunshine law, then the decision on who not to hire must be covered too." *Id. Cf. supra* note 6 and accompanying text.

49. 442 So. 2d at 941. *See* Occidental Chem. Co. v. Mayo, 351 So. 2d 336 (Fla. 1977). In *Occidental*, the Florida Public Service Commission adopted a lengthy rate increase document after only minimal public discussion. Petitioner filed for a writ of certiorari in the Florida Supreme Court requesting that the rate increase be invalidated. Petitioner alleged that either by meeting secretly to discuss the rate hike, or by delegating decisionmaking authority to staff, the commission violated the Sunshine statute. In deciding for respondents, the Florida Supreme Court created the "staff exception" to the Sunshine statute. Citing *Bennett*, the court held that staff are not subject to the law, as long as formal action occurs in public. *Id.* at 341. *See also* News-Press Pub. Co. v. Carlson, 410 So. 2d 546 (Fla. 2d D.C.A. 1982).

50. *Id.* at 473. *See also* News-Press Pub. Co. v. Carlson, 410 So. 2d 546, 548 (Fla. 2d D.C.A. 1982).

51. *See* 442 So. 2d at 940-41. *See also supra* note 45 and accompanying text.

52. Relying on a statutory analysis similar to that applied in *Krause*, the instant court labeled the university a state agency under the Sunshine Law. 442 So. 2d at 938.

53. *Id.* at 940-41. *See also supra* note 3 and accompanying text.

54. 442 So. 2d at 940-41. The court distinguished *Bennett* by the lack of substantive policy matters discussed between the president and the CEC. The CEC was merely a repository of useful facts. *Id.*

55. *Id.*

authority falls within the scope of the Sunshine Law.[56] Citing *Bennett,* however, Justice Overton declared that a governmental executive using his staff in a strictly investigative, fact-finding role will not violate the Sunshine Law.[57] To avoid future conflicts, Justice Overton suggested that executive officials clearly delineate the responsibilities of any specially created boards or commissions.[58]

The instant case is a logical extension of *Krause.*[59] Both cases concerned a de-facto delegation of power from a parent agency to a sub-group which elevated the sub-group to the level of a board or commission under the Sunshine Law.[60] As in the instant case, the grant of discretionary authority in *Krause* and *Gradison* was tempered by withholding from the committee the legal and administrative capacity to effect a final decision.[61] The instant court, however, correctly determined that decisionmaking power is not vested solely in the officials ultimately responsible for a final judgment.[62] That power exists throughout the entire decisionmaking process.

The instant court's holding substantially restricted future use of the remoteness exception. In *Bennett,* the Second District defined the exception as a vertical relationship, with the Career Employees Council (CEC) located significantly below and "remote" from the official decision-maker.[63] This definition was subsequently applied by the Third District in *Krause,* but remoteness was rejected because the committee's actions were perceived as directly influencing the City Manager's final selection.[64] In essence, the *Krause* analysis regards decisionmaking as a hierarchical chain, where influence on a final decision is gauged by proximity to the final decision-maker.

The instant court modified *Krause* by conceptualizing the decisionmaking process as a horizontal relationship. Assuming power is distributed along a continuum, each official act by a board or commission is potentially subject to the Sunshine Law, regardless of the proximity to the ultimate decision-maker. Therefore, rather than a

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56. *Id.* at 942 (Overton, J., concurring).

57. *Id.*

58. *Id.* In Justice Overton's view a university president could, under the current Sunshine statute, examine applications for a dean's position, have his staff verify the information, conduct personal interviews, and consult with faculty members concerning their views without violating the law. *Id.*

59. *See generally* Vickory, *The Sunshine Law and Advisory Committees,* 57 FLA. B.J. 427-29 (1983).

60. *See* 442 So. 2d at 938-39.

61. *See supra* notes 22, 39, 40 & 57 and accompanying text.

62. 442 So. 2d at 939. The power of the faculty as a whole to review and reject the decisions of the committee does not alter the fact that decisions were made. *Id.*

63. 333 So. 2d at 100.

64. 366 So. 2d at 1247.

function of proximity, remoteness is a function of the capacity to perform an official act capable of measurably influencing a final judgment.[65] This analysis significantly curtails the remoteness exception's future application. Because both the collective inquiry and discussion stages of decisionmaking are embraced by the Sunshine Law,[66] a court is unlikely to find any official act beyond the statute's reach. In addition, this approach discourages parties from fabricating numerous intermediate steps to shield themselves from the Sunshine Law's restrictions.[67]

Critics of the instant case may contend that the ruling's impact reaches significantly beyond the Court's intended result. A better decision, critics might argue, could have been effected by a narrowly drawn judicial exemption. Public-policy and the legislative intent behind the Sunshine Act argue against such an exemption. The legislature, as the representative arm of government, is the proper forum to make substantive changes in the application of the laws.[68] The instant court, by clarifying and narrowing the remoteness exception, articulated a formula flexible in content and broad in application. The decision does not, as the court hastened to reassure, mandate public participation in the decisionmaking process.[69] The public will neither be choosing a police chief nor appointing a college dean. Yet by reaffirming a commitment to open government, the instant decision leaves intact the spirit and intent of Florida's Sunshine Law.

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65. *See* 442 So. 2d at 941.
66. 296 So. 2d at 477.
67. *See* 442 So. 2d at 941.
68. *See* 245 So. 2d at 41. *See generally* Note, *supra* note 44.
69. 442 So. 2d at 941.