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Florida Elections: Legislative Intent Questioned in Purported Regulations of Corrupt Practices

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Eleven states have enacted such statutes making collective negotiations mandatory upon employers of public school teachers.[51] Florida is now in a position to follow the lead of these other states and to enact some meaningful, effective legislation in the public employee area.

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FLORIDA ELECTIONS: LEGISLATIVE INTENT QUESTIONED IN PURPORTED REGULATION OF CORRUPT PRACTICES

Maloney v. Kirk, 212 So. 2d 609 (1968)

Plaintiff, a qualified elector of Florida, challenged the title of Claude R. Kirk, Jr. to the office of governor.[1] Plaintiff charged numerous violations of the state's Corrupt Practices Act,[2] including improper receipt, handling, and disbursement of campaign funds in the 1966 primary and general elections, and he contended that Governor Kirk's election should therefore be invalidated under Florida Statutes, section 104.27.[3] The circuit court dismissed the complaint, finding that section 104.27 is an invalid legislative addition to the constitutional qualifications of candidates for governor insofar as it purports to authorize a decree voiding the election of a constitutional officer for violation of a statute controlling election contributions and expenditures. The Florida supreme court affirmed per curiam, without opinion. Justice Roberts, with Chief Justice Caldwell and Justice Adams, specially concurred, adopting the opinion of the circuit court, which they published in full. Justice Ervin concurred with opinion; Justice Drew, joined by Justice Thornal, dissented.

Although a majority of the justices favored dismissal of the complaint against Governor Kirk, the ground of their affirmance is not clear.[4] No opinion accompanied the order, but the supreme court has not thereby bound itself to the opinion of the circuit court. The mere affirmance of the decision

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51. Deemer & Fowks, *supra* note 11.

1. Suit was authorized by FLA. STAT. §104.27 (9) (1967).

2. FLA. STAT. §99.161 (1967).

3. FLA. STAT. §104.27 (2): "The nomination or election to office of any person who wilfully violates the provisions of §99.161, or cause to violate, may be declared void by the court of competent jurisdiction in which event the nomination for office shall be held as in other cases where a vacancy occurs."

4. The attribute of a "per curiam" may imply a variety of connotations, *e.g.*, a review of questions of fact, questions that involve nothing more than the discretion of the trial court, or questions that involve settled rules of law. It may be used to affirm or reverse cases on the authority of some other case; there is "no limit to the grounds that may prompt a per curiam opinion," Newmons v. Lake Worth Drainage Dist., 87 So. 2d 49, 51 (Fla. 1956).

reached by the lower court does not technically preclude rejection, at some future date, of the circuit court's reasoning. The court thus avoided a binding decision on the validity of section 104.27; its action, however, has left the statute subject to serious constitutional question.[5]

The Florida Constitution clearly delineates the qualifications required of candidates for the office of governor[6] and also specifies certain general disqualifications.[7] It was settled in *Thomas v. State*[8] that the constitution is a limitation of power as well as a grant of power to the legislature, and that specific constitutional provision with reference to a subject amounts to a prohibition of inconsistent legislative action in the same area. Thus, the Florida Legislature is denied authority to add or detract from constitutionally established qualifications of candidates for governor. The circuit court claimed that forbidding a successful candidate from occupying public office by voiding his election because of possible improper campaign contributor influences is merely an indirect imposition of qualifications not enumerated in the state constitution and is not regulation of election.[9]

There is a fundamental difference between fixing qualifications of a candidate for office and determining the validity of his election. The constitution does determine eligibility, but the legislature is empowered to insure proper and valid elections, with adequate penalties for violations.[10] The circuit court chose to place the requirements listed in section 104.27 within the category of qualifications for office and found them incompatible with the state constitution. The court's holding is a tenable one, but there are several arguments that would support a decision to consider section 104.27 as an election regulation.

First of all, the statute operates against the election, not against the candidate. Theoretically, a candidate whose title to office is voided is not disqualified; his removal and the resulting vacancy are created by the invalidity of the election.[11] As Justice Ervin's opinion points out, the statute provides for no prejudice to the violator's future candidacy.[12]

Florida courts have dealt previously with section 104.27, although the instant case is the first to challenge a governor's title under this provision. In *Evans v. Carroll*,[13] a district court upheld the invalidation of a lesser public official's election for improperly reported campaign contributions. The

5. Five justices affirmed the decision of the lower court to dismiss, and, although only three concurred specifically with the lower court's reasons for invalidating the statute, a fourth agreed to its unconstitutionality, 212 So. 2d at 614.

6. FLA. CONST. art. IV, §3 (1885). The new Florida Constitution adopted in November 1968, contains essentially the same qualifications in art. IV, §5.

7. FLA. CONST. art. VI, §5 (1885). The new constitution sets out some of these disqualifications in art. VI, §4.

8. 58 So. 2d 173, 176 (Fla. 1952).

9. 212 So. 2d at 613 (1968).

10. *Id.* at 623; *see* FLA. CONST. art. III, §26, art. VI, §9 (1885). Ervin v. Capitol Weekly Post, 97 So. 2d 464, 469 (Fla. 1957) discusses the court's recognition of this particular legislative power.

11. 212 So. 2d 609, 613 (1968).

12. *Id.* at 617 (concurring opinion).

13. 108 So. 2d 782 (2d D.C.A. Fla. 1959).

supreme court had earlier reviewed this application of section 104.27 (in denying a direct appeal by Evans) and found it constitutional.[14]

Other jurisdictions have election regulations with penalties similar to those imposed by this statute. For example, the Wisconsin supreme court ruled, in *State ex rel. La Follette v. Kohler,*[15] that the legislature was competent to provide for revocation of a governor's certificate to office and for invalidation of his election in cases of corrupt practices. The Maryland supreme court invalidated the certification of a gubernatorial candidate and removed his name from the ballot because of his failure to appoint a campaign manager in accordance with that state's corrupt practices act.[16] Among other state courts that have dealt with this question, a significant number have similarly enforced the penalty for such violations.[17] In addition, of those states that have invalidated statutes of this nature, some did so because the law in question had provided for a candidate's future disqualification from holding office.[18] This sanction was not included in Florida's statute.

The circuit court sought to support its contention that the legislature had placed additional qualifications upon candidates for governor by asserting that the severity of the penalty imposed upon a candidate for violating the Corrupt Practices Act is out of step with sanctions provided for in other areas of the election code. Justice Roberts repeated the lower court's statement that if the purpose of the statute had been purity of the ballot, the legislature would have imposed the same penalty for bribery, intimidation of electors, and other similar offenses that tend directly to affect the ballot rather than render the legally elected officers subject to possible corrupt influences.[19]

In questioning the severity of the penalty, the circuit court assumed that violations of the Corrupt Practices Act would influence only future actions of elected candidates, and that improper expenditures or contributions would not be calculated to influence voting to such an extent as to prevent the election from being "a true expression of the popular will."[20] There is merit in Justice Drew's charge that this assumption by the circuit court is really a judicial negation of the exercise of the legislature's power to determine what

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14. 104 So. 2d 375 (Fla. 1958); *see* Johnson v. Harris, 188 So. 2d 888 (1st D.C.A. Fla. 1966). This is the only other Florida case arising under §104.27; although its constitutionality was not challenged specifically, the procedure outlined by the statute was not questioned by the court.

15. 200 Wis. 518, 228 N.W. 895, 907 (1930).

16. Secretary of State v. McGucken, 244 Md. 70, 222 A.2d 693 (1966).

17. Bradley v. Clarke, 133 Cal. 196, 65 P. 395, 396 (1901) (additional oath of office was invalidated, but legislature may revoke office for commission of enumerated corrupt practices); Dupin v. Sullivan, 355 S.W.2d 676, 678 (Ky. 1962) (election of city trustee voided); Owen v. Brooks, 300 Ky. 743, 190 S.W.2d 326 (1945) (school board election); Hayes v. Abney, 186 Miss. 205, 188 So. 533 (1939); Tipton v. Sands, 103 Mont. 1, 60 P.2d 662 (1936) (supreme court chief justice's election voided).

18. State v. Regan, 113 Mont. 343, 126 P.2d 818 (1942); State v. Carrigan, 82 N.J.L. 225, 82 A. 524 (1912); Kilday v. State, 75 S.W. 2d 148 (Tex. Civ. App. 1934), *aff'd,* 127 Tex. Crim. 113, 75 S.W.2d (1934).

19. 212 So. 2d at 614.

20. *Id.* at 613.

is reasonably calculated to have an improper influence on voting.[21]

The Corrupt Practices Act was enacted in 1951 in response to a demand by the public that positive steps be taken to safeguard the sanctity of the election of public officials. Indignation, in part over disclosures made before the Kefauver Committee at Miami and Tampa in 1949 (concerning contributions by gamblers to a 1948 gubernatorial candidate), spurred the legislature to develop more stringent laws governing campaign finances.[22] The severity of the penalty imposed under section 104.27 appears to have been calculated to assure strict compliance by the candidates to the established financial restrictions.

In view of the history surrounding the enactment of this legislation and of the practice in many other states having similar provisions, the constitutional ground upon which the circuit court based its rejection of section 104.27 remains a questionable one. Arguments advanced against the court's contentions have logical consistency and some support in precedent. Since support exists both for the statute's constitutional validity and for its invalidity, the final decision to reject or retain it should be determined as a matter of policy in election regulations.

Ideally, continuation of this strict policy in regard to election finances would benefit Florida voters, for it would make more difficult the undetected entry of special interest money into Florida campaigns.[23] There are practical difficulties that tend to negate its potential benefit to the voters. For instance, a successful suit against the governor, completed after he had occupied the office for a substantial period, would call into question the validity of all his official acts to that time. The length of the litigation itself would compound this problem. Further, there is no limit to the number of independent suits that could be brought against a successful candidate by political opponents as well as impartial citizens. This might keep his title to office constantly in doubt and thereby minimize the effectiveness of his administration.

If the desirability of such a law is found to outweigh the problems its operation creates, the legislature could amend it to remove some of its procedural difficulties and, perhaps, the constitutional objections voiced by the opinions in this case. For example, the statute could be changed to impose a limitation of elapsed time following an election within which action must be brought and completed by a challenging voter. This would allow a candidate's certificate of office to be withheld, avoiding the necessity of a judicial ouster which Justice Ervin found constitutionally questionable,[24] and quiet a candidate's title to office from the beginning.

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21. *Id.* at 624 (dissenting opinion). The supreme court recognized the power of the legislature to determine what conduct constitutes improper practice or undue influence in an election in *Ex parte* Hawthorne, 116 Fla. 608, 156 So. 619 (1934).

22. Roady, *Ten Years of Florida's "Who Gave It—Who Got It" Law*, 27 LAW & CONTEMP. PROB. 434, 436 (1962).

23. *Id.* at 434.

24. 212 So. 2d at 617 (concurring opinion).