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EXECUTIVE SUSPENSION AND REMOVAL OF PUBLIC OFFICERS UNDER THE 1968 FLORIDA CONSTITUTION*

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The Governor's constitutional power to suspend Florida public officers, subject to review by the senate,[1] plays a vital role in Florida government. Public officers are the repositories of the sovereign power of the state and the instruments through which the power is exerted. In a real sense, the structure and operation of state and local government in Florida is largely determined by the way in which the power of the state is distributed among its public officers, the manner in which their power is exercised, and the extent to which such officers are made subject to external authority. The cohesion of the state as a political and governmental entity depends to a significant degree on the constitutional powers invested in the Governor to oversee the performance and functioning of public offices throughout the state.

The greatest of these powers is the Governor's prerogative to issue an executive order suspending public officials from office without prior hearing. The long shadow that this executive power casts over sixty-seven courthouses tends to establish Florida as a state instead of a loose confederation of counties. And the felt presence of the power in state offices makes the Governor's "supreme executive power" a reality in the executive branch and limits the extent to which an ossified, autonomous bureaucracy, impervious, and indifferent to public needs and forces outside itself, can develop in Tallahassee.

The executive power of suspension serves a vital public need. It provides an effective remedy, unique among the states,[2] for the chronic ill of democratic government—the entrenchment of corruption, neglect of duty, and other evils in public office. By virtue of the executive power of suspension, mini-

* A Table of Headings and Subheadings is appended to this article.

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1. FLA. CONST. art. IV, §7. Executive suspensions were formerly governed by FLA. CONST. art. IV, §15 (1885).

2. Parsons, *The Suspension and Removal of Florida Public Officers by the Governor, 1945-1960*, 15 U. FLA. L. REV. 400 (1962). *See also* the valuable analysis in Parsons, *Suspension, Reinstatement and Removal of Public Officers in Florida, 1945-1970*, 7 Governmental Research Bull. Sept.-Nov. 1970 (Institute for Social Research, The Florida State University).

mum standards of public administration are established and may be enforced throughout Florida.[3]

Several factors make the suspension power effective. It is unquestionably authoritative, being vested by express constitutional provision in the hands of the chief executive officer in whom is reposed the supreme executive power of the state. The suspension power is clearly superior to any power or attribute of sovereignty possessed by a suspended officer. So long as the Governor's action purports to be based upon one or more of the grounds specified in the constitution, it is not likely to be circumvented or delayed by jurisdictional controversy. The power is also effective because it is placed in the hands of a single executive officer who has discretion to act without the delays of committee decisionmaking. In addition, the power can be exercised in a swift, summary fashion without prior notice or hearing.[4] The Governor merely issues a simple order of suspension and files it with the department of state, whereupon the order is effective immediately.[5] Moreover, the practical potential and effectiveness of the power is much greater in the hands of the Governor than elsewhere because of the manner in which it can be implemented and reinforced by the extensive investigative powers of the Governor's office.[6] Indeed, when one reflects upon the suspension power, it becomes difficult to understand how corruption and other undesirable conditions can ever firmly establish themselves in state or county offices in Florida.[7]

The senate is constitutionally charged with the duty to review the Governor's executive suspensions and, upon such review, either reinstate the suspended official or permanently remove him from office.[8] Although the Governor has exclusive authority to initiate suspensions, the senate has the

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3. The Governor's power of suspension "enables him to perform his constitutional duty to take care that the laws be faithfully executed." State *ex rel.* Gibbs v. Rogers, 141 Fla. 237, 193 So. 435 (1940).

4. Fair v. Kirk, 317 F. Supp. 12 (N.D. Fla. 1970), *aff'd mem.*, 401 U.S. 928 (1971); State *ex rel.* Lamar v. Johnson, 30 Fla. 433, 11 So. 845 (1892).

5. FLA. STAT. §112.40 (1969).

6. *See* FLA. STAT. §14.06 (1969). The Governor may require information in writing from all executive or administrative state, county, or municipal officers upon any subject relating to their duties. FLA. CONST. art. IV, §1 (a). *See In re* Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968), in which reference is made to a select commission appointed by the Governor to investigate reports concerning the conduct of a judge of the Dade County Criminal Court of Record.

7. The possibility that the suspension power may be abused or misused by particular Governors should not impel the legislature or the courts to dull its sharp constitutional edge, or to limit its broad constitutional sphere of application. As discussed below, prompt and effective review by the senate is the intended means of correcting any misuse of the power. The power itself should not be undermined, thereby impairing the vital public purposes that it is intended to fulfill. Similarly, particular officers or classes of officers should not be insulated from the operation of the executive power of suspension by restrictive interpretations of the constitutional language. No sound public purpose is served by immunizing particular officers from suspension and removal for malfeasance, misfeasance, neglect of duty and the other constitutional grounds.

8. FLA. CONST. art. IV, §7 (b).

responsibility to make final dispositions of them.[9] The senate is entrusted with the great duty and responsibility to ensure that the awesome executive power of suspension is used to achieve its constitutionally intended public purposes and to see that no officer is removed for grounds other than those provided by law.

The purpose of this article is to survey the operation and application of the executive suspension section of the 1968 Florida constitution. The procedure by which officers are suspended and either reinstated or removed is considered and the grounds of suspension are reviewed. The applicability or nonapplicability of the suspension power to particular classes of officers is discussed. In addition, the authors attempt to cast some light upon the role of the executive suspension power within Florida's new constitutional government and to suggest solutions to some of the problems that arise in connection with the interpretation and application of the power.

SUSPENSION AND REMOVAL PROCEDURE

Roles of the Governor and Senate

The suspension power operates within a constitutional framework of great complexity. It involves and substantially affects the intricate and delicate balance of sovereign powers distributed among the executive, legislative, and judicial branches and between the state and local administrations of Florida government. In contrast to the complexity of the power viewed in its constitutional aspect, however, is the remarkable simplicity of the procedure by which suspension proceedings are conducted.

The procedural simplicity of suspension proceedings is not accidental, but is clearly contemplated by the applicable constitutional and statutory provisions. The effectiveness of both the Governor's suspension function and the senate's review function depends in large measure on freedom from procedural encumbrances. Prompt action is of the essence of the Governor's suspension power and responsibility and also of the senate's review. To minimize improper disruptions of the democratic process and to ensure that the rights of the suspended officer and the public are not destroyed by despotic or demagogic misuse of the power of suspension, it is important that the senate provide a prompt and effective review of the Governor's action with scrupulous regard for the essential requirements of due process without becoming bogged down in unessential procedural technicalities and delays.

The Governor's act of suspension is simplicity itself. The Governor merely files an executive order of suspension with the secretary of state, whereupon the suspension is effective.[10] The suspension order is constitutionally required to state the grounds of suspension;[11] furthermore, the order is statutorily required to "specify facts sufficient to advise both the officer and the senate as

9. FLA. CONST. art. IV, §7(a). The Governor also has an unrestricted right to reinstate a suspended official at any time before removal by the senate. *Id.*

10. *Id.* FLA. STAT. §112.40 (1969).

11. FLA. CONST. art. IV, §7(a).

to the charges made or the basis of the suspension."[12] The order must specify facts rather than conclusions, and mere conclusory recital of one or more of the constitutional grounds of suspension is insufficient.[13] However, the order is not required to be as specific as a criminal indictment or information.[14]

The Governor's power of suspension is executive in nature.[15] It is in no sense judicial or quasi-judicial, although it involves judgment and discretion and includes "the power to hear and decide."[16] The Governor is not required to provide any notice or hearing before issuance of the order of suspension,[17] but he undoubtedly has the authority and discretion to hold a pre-suspension conference or hearing for investigative purposes.

Of course, the absence of any requirement for a pre-suspension hearing is not intended to condone the careless or ill-considered issuance of a suspension order. The Governor's plenary executive power to issue such an order without notice or hearing carries with it a heavy burden of executive responsibility to make a proper factual investigation before the power is exercised. On the other hand, when the power should be exercised, it should be done promptly and without undue administrative delay.

Although executive suspension proceedings are not criminal in nature, the role of the Governor in the proceedings is essentially that of a prosecutor.[18] He therefore has the prosecutorial functions of investigation and presentation of factual support for the asserted grounds of suspension. Proceedings in the senate or its committee are required to be prosecuted by the Governor, his legal staff, or an attorney designated by him.[19]

The constitution contemplates the joint action of the Governor and senate in suspension and removal proceedings with each agency having its proper

12. FLA. STAT. §112.41 (1) (1969). In addition, a 1971 amendment to senate rule 12.3 provides that the senate select committee may request the Governor to file a statement of further facts and circumstances supporting the suspension order and require the suspended officer to file a response to the Governor's statement within twenty (20) days after receipt thereof.

13. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 128, 155 So. 129, 133 (1934); Annot., 129 A.L.R. 988 (1934).

14. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 128, 155 So. 129, 133 (1934).

15. State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 880, 138 So. 392, 394 (1931).

16. *Id.*

17. By statute, copies of the suspension order are required to be delivered by the department of state to the officer suspended, the secretary of the senate, and the attorney general. FLA. STAT. §112.40 (1969).

18. In the first suspension orders considered by the senate under the 1968 constitution, appropriate steps were taken to ensure that the Governor did not mistakenly assume that his constitutional duties were at an end upon his issuance of a suspension order. In reporting to the senate the initial organizational steps taken, the chairman of the Select Committee on Executive Suspensions said: "As soon as this Committee was appointed by the President, I took it upon myself, as Chairman, to personally call upon the counsel for the Governor for the purpose of giving him as much notice as possible of the time and place of the proposed hearings and of establishing without any doubt that the role of the Governor's office in these proceedings would be that of prosecutor. That is, that the Governor's office would accept the responsibility of preparing and presenting the evidence." FLA. S. JOUR. Special Sess. 5 (Feb. 17, 1969).

19. FLA. STAT. §112.43 (1969).

role and function.[20] While the Governor has exclusive power to initiate the proceedings, the senate's responsibility is to review the Governor's action and to make the final decision.

One important change in the suspension procedure provided by the 1968 constitution permits the senate to act promptly on executive suspension orders and eliminates the possibility that senate review may be delayed or precluded by action of the Governor. The 1885 constitution merely provided that "the cause of suspension shall be communicated to the officer suspended and to the Senate at its next session."[21] This procedure was unsatisfactory even though the suspended officer automatically resumed his duties if the senate failed to act on the suspension.[22] Under the 1968 constitution, the suspension order is filed with an independent officer, the secretary of state,[23] who is charged with the duty to deliver copies to the suspended officer, the secretary of the senate, and the attorney general.[24] The order does not become effective until it is filed with the secretary of state.[25] No further communication by the Governor to the senate is required to permit the senate to act on the matter.[26] Moreover, the undesirable delay in reviewing and disposing of suspensions until the next session of the senate has been eliminated. The senate may now act promptly on suspensions since it may be convened in special session for this purpose by the president of the senate or by a majority of its membership.[27]

The 1968 constitution also significantly changed and improved the operation of the executive suspension power by directing that the senate act "in proceedings prescribed by law."[28] Pursuant to this constitutional mandate, the basic rules of senate procedure have been established by statute.[29] The statutory rules of procedure are, and should remain, uncomplicated and

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20. *See In re* Advisory Opinion to Governor, 69 Fla. 508, 68 So. 450 (1915), which contains one of the clearest expositions of the operation of the suspension and removal power under the 1885 constitution.

21. FLA. CONST. art. IV, §15 (1885).

22. *Id.* The procedure of returning the suspended officer to his duties, despite the fact that he may have been suspended on good and sufficient grounds in the first instance, provided a poor solution to the problem of delayed senate review. The proper solution, and the one that protects the interests of both the public and the officer, is to eliminate the delay. This is done in the 1968 constitution and the implementing statutes.

23. FLA. CONST. art. IV, §7 (a).

24. FLA. STAT. §112.40 (1969).

25. *Id.*

26. *Id.*

27. FLA. CONST. art. IV, §7 (b). A 1971 amendment to Senate Rule 12.3 provides, with certain exceptions, that the senate select committee, master, or examiner shall conclude its hearings and make final recommendations to the senate within six months after the effective date of the suspension order and that the senate shall act upon such recommendations within thirty days after such recommendations are reported to the senate. Of course, senate rules may be waived or suspended by a two-thirds vote of all senators present. Senate Rule 11.2.

28. *Id.*

29. FLA. STAT. §§112.40-.48 (1969). In addition, certain procedures of the senate and select committee are defined in senate rule 12.

free from the technical difficulties and delays associated with the pleading and motion practices common to court procedure.

The senate is authorized to appoint a select committee for the purpose of hearing the evidence and to recommend the removal or reinstatement of the suspended officer to the senate.[30] In the alternative, the senate may appoint a special examiner or special master to hear the evidence and make recommendations,[31] but in actual practice all suspension hearings to date under the 1968 constitution have been conducted by the senate's Select Committee on Executive Suspensions.[32] The committee is required to afford a full and complete public hearing although either the senate or the committee may conduct portions of the hearing in executive session.[33] The suspended official must be notified of the time and place of the hearing sufficiently in advance to afford him an opportunity fully and adequately to prepare his defenses, which may be presented by him or by his attorney.[34]

The action of the senate, either removing or reinstating the suspended officer, is to be set forth in a report and an order signed by the president of the senate and filed with the department of state.[35] As is true of the executive order of suspension, the senate's action becomes effective immediately upon the filing of the order with the department of state.[36] The department of state is required to deliver copies of the senate order to the Governor, the officer involved, and the governing body of the county, district, or state.[37] Upon reinstatement, the suspended official is entitled to receive such pay and emoluments of his office as he would have received if he had never been suspended,[38] and the senate may make provision for payment of the officer's costs and reasonable attorney's fees.[39]

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30. *Id.* §112.41 (3) (1969).
31. *Id.* §112.41 (4) (1969).
32. Prior to enactment of the statutory procedure in 1969, the Select Committee on Executive Suspensions conducted the initial suspension hearings under the 1968 constitution on the basis of rules of procedure and substantive interpretations developed by the committee with the assistance and advice of committee counsel. The committee's initial rules and interpretations are set forth in detailed reports appearing in FLA. S. JOUR. Special Sess. (Feb. 17, 1969). These initial rules and the experience developed in the initial suspension proceedings provided the basis for the statutory procedure subsequently enacted as FLA. STAT. §112.40 *et seq.* (1969).
33. FLA. STAT. §112.47 (1969). A 1971 amendment to senate rule 12.3 provides that the select committee, master, or examiner may hold a pre-hearing conference with counsel for the Governor and for the suspended official to narrow the issues, identify the witnesses, and review the testimony and other evidence anticipated to be presented by each side.
34. *Id.*
35. *Id.* §112.45 (1) (1969).
36. *Id.*
37. *Id.*
38. *Id.* §112.45 (2) (1969).
39. *Id.* §112.44 (1969).

Misconduct Prior to Present Term of Office

Under the constitution of 1885, the Supreme Court of Florida consistently adhered to the view that an officer could not be suspended for misconduct occurring prior to his present term of office.[40] The executive power of suspension was deemed to be restricted in all respects to the official's current term of office.[41] An official's reappointment or re-election to office was regarded as a condonation of known prior offenses.[42] An exception to this rule was recognized for misconduct of a continuing nature such as a persistent failure to perform law enforcement duties. Such neglect of duty in a prior term, continuing into the officer's present term, constituted a valid ground for suspension.[43]

The foregoing judicial rules of construction[44] have been replaced by section 112.42, Florida Statutes, which provides:

> The governor may suspend any officer on any constitutional ground for such suspension that occurred during the existing term of the officer or during the next preceding four years . . . .

The rigid restriction imposed by the judicial rule left something to be desired from a policy standpoint. An officer's re-election certainly cannot be regarded as a condonation of prior offenses that were not publicly known at the time of his re-election. Under the former rule, an official could circumvent suspension proceedings and their attendant public disclosure of his misconduct simply by resigning from office and thereafter standing for re-election before an electorate ignorant of his misdeeds.

The statute provides a needed relaxation of the previous court rule. It also serves the useful purpose of providing a reasonable period of limitation prior to which offenses and misconduct cannot provide grounds for suspension. However, the broad, permissive language of the statute clearly contemplates the exercise of sound discretion by the Governor in determining whether prior misconduct warrants suspension of officials in particular cases. The statute is not meant to add to the constitutionally defined disqualifications from holding public office. Nor does it in any way require or justify suspension of an officer for arbitrary and unsubstantial reasons. Except in

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40. *E.g.*, Rosenfelder v. Huttoe, 156 Fla. 682, 24 So. 2d 108 (1945); State *ex rel.* Hardee v. Allen, 126 Fla. 878, 172 So. 222 (1937); *In re* Advisory Opinion to the Governor, 64 Fla. 168, 60 So. 336 (1912). *Cf.* State *ex rel.* Hand v. McDonald, 154 Fla. 456, 18 So. 2d 16 (1944).

41. *See In re* Advisory Opinion to the Governor, 31 Fla. 1, 12 So. 114 (1893).

42. State *ex rel.* Hardee v. Allen, 126 Fla. 878, 172 So. 222 (1937).

43. *Id.* at 884, 172 So. at 225.

44. The Senate Select Committee on Executive Suspensions considered itself bound by these judicial rules in its suspension hearings held in January and February 1969. FLA. S. JOUR. Special Sess. 7 (Feb. 17, 1969). Because of the rule against suspension for prior misconduct, and for other reasons set forth in its reports, the committee recommended "with reluctance" that certain suspended members of the Board of County Commissioners of Taylor County be reinstated. *Id.* at 20, 21.

cases of commission of a felony, the ground for suspension should have some rational and substantial bearing on the officer's performance of his duties and responsibilities in his present office.

Re-Suspension After Reinstatement: The Question of Res Judicata

In its special session held on February 17, 1969, the Florida Senate considered the cases of several public officers who were re-suspended by the Governor after they had been reinstated by the senate.[45] The senate was therefore squarely confronted with the problem of determining the legal effect of its reinstatement of an official and whether such reinstatement precludes the Governor from re-suspending the same official on the same or other charges at a later time.

After studying the problem, the Select Committee on Executive Suspensions recommended that the senate adhere to the following rules:[46]

> (1) A public official may not be suspended or removed upon the same grounds and for the same offenses for which the official was previously suspended and which were previously heard and determined by the Senate.
>
> (2) An official should not be suspended or removed on the basis of charges or evidence which were known or which reasonably should have been known to the Governor and his counsel at the time when other charges and evidence against the same official were presented to a previous session of the Senate.

In the first of these recommendations, the select committee proposed that the senate's action in reinstating a suspended official should be deemed final and subject to the doctrine of res judicata.[47] The committee's second recommendation, precluding the Governor's piecemeal assertion of grounds for

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45. *Id.* at 6-7.

46. *Id.*

47. The doctrine of res judicata was applied to proceedings before a municipal personnel board to remove a city employee in Rubin v. Sanford, 168 So. 2d 774 (3d D.C.A. Fla. 1964). The Supreme Court of Florida has ruled that the doctrines of res judicata and double jeopardy do not apply to proceedings of the Judicial Qualifications Commission. *In re* Kelly, 238 So. 2d 565, 570 (Fla. 1970). However, important differences exist between the executive suspension procedure and proceedings of the Judicial Qualifications Commission. The supreme court has broad discretion and flexibility in acting on the commission's recommendations. The court may order "removal, discipline or retirement, as it finds just and proper, or wholly reject the commission's recommendation." FLA. CONST. art. V, §17A (3). Intermediate disciplinary sanctions clearly are not final in nature. As the court pointed out in the *Kelly* case, a reprimand does not amount to an acquittal. *In re* Kelly, 238 So. 2d 565, 570 (Fla. 1970). In contrast, the senate is empowered only to make *final* dispositions of suspension proceedings by removing or reinstating the suspended officer. FLA. CONST. art. IV, §7 (b). In addition, the Judicial Qualifications Commission operates entirely within the judicial branch. FLA. CONST. art. V, §17A (2). Its proceedings, therefore, do not raise the kind of jurisdictional questions that arise from the distinct separation of power present in the executive suspension procedure.

suspension, is analogous to court rules requiring compulsory joinder of claims or prohibiting the splitting of causes of action.

Both of the proposed rules were explicitly recited and applied in the select committee's reports concerning the officials whose cases had raised the issue in the first instance.[48] In each of these cases, the select committee's report was adopted by the senate.[49]

Both rules are essential to the proper functioning of the executive suspension procedure.[50] After the senate has completed a full hearing and has

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48. FLA. S. JOUR. Special Sess. 8 (Feb. 17, 1969) (suspension of George A. Kelsey, Constable, District Three, Seminole County); *id.* at 9 (suspension of W. Hugh Duncan, Justice of the Peace, Fourth District, Seminole County); *id.* at 20-28 (suspensions of W. N. Wood, *et al.*, Members of Board of County Commissioners, Taylor County).

49. Neither rule precludes the Governor from suspending an official on grounds that arose after reinstatement or that could not reasonably have been discovered by the Governor in an earlier proceeding. Moreover, neither rule applies in cases in which the senate takes no action on the initial suspension. This occurred in the case of Robert J. Haslett, Clerk of the Criminal Court of Record of Polk County. The initial suspension order was based on criminal indictments. The senate considered the matter but took no action pending a jury trial on the criminal charges. Under the 1885 constitution, this resulted in the automatic reinstatement of the officer. The Governor issued a second suspension order. The officer was later convicted of the criminal charges. During the pendency of his appeal, the senate considered the second suspension order and removed the official from office. *Id.* at 11.

50. In its report to the senate, the select committee explained the reasons and policy considerations that underlie the rules:

"The Committee has determined that under the law of Florida a public official may not be suspended or removed upon the same grounds and for the same offenses for which the official was previously suspended and which were previously heard and determined by the Senate. Under the Florida Constitution of 1885 and the 1968 Revision of the Florida Constitution, the action of the Senate in removing or reinstating a suspended official is final and may not be reviewed by any other authority, State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 155 So. 129, 92 ALR 988 (1934); State *ex rel.* Kelly v. Sullivan 52 So. 2d 422 (1951); Advisory Opinion to the Governor, 196 So. 2d 737 (1967). It is firmly established under the Florida Constitution and the Constitution of the United States that no person shall twice be put in jeopardy for the same offense. Even in civil actions the principle of res adjudicata requires that once a case has been finally determined, it cannot be litigated again. The provision of the Constitution that only the Senate can remove a public official for misconduct in office could be nullified if the Governor could indefinitely resuspend public officials after reinstatement by the Senate. Therefore, it is the recommendation of this Committee that the Senate should not consider as grounds for suspension or removal of a public official any charges previously heard and determined at a prior session of the Senate.

"Similarly, it is the recommendation of the Committee that an official should not be suspended or removed on the basis of charges or evidence which were known or which reasonably should have been known to counsel for the Governor at the time when other charges and evidence against the same official were presented to a previous session of the Senate. Before suspending any official a careful investigation should be conducted by the Governor to discover and verify all misconduct of the official in his current term of office. Suspension of an official should be based upon all acts of misconduct in his present term which are known or which reasonably should be known to the Governor. If a governor can make charges against an official in piecemeal fashion, then an official elected by the people and reinstated by the Senate can be suspended and resuspended indefinitely. This type of wrongful suspension denies law and justice to the suspended official and the people who elected him and imposes unreasonable costs to the suspended official, to the

decided that a suspended officer should be reinstated, the Governor should not thwart the constitutional authority of the senate and defeat the established rights of the officer by summarily re-suspending him.[51] The senate's action in removing or reinstating the officer is intended to be final and conclusive and is not subject to judicial review.[52] Therefore, it should not be subject to executive veto either.

Rights of Suspended Officers

Florida courts have said repeatedly that a public officer has a property right in his office that may not be unlawfully taken away or illegally infringed upon.[53] However, public officers do not have a property interest in their offices in the ordinary sense of that term, nor is an office "property" in the constitutional sense.[54] The officeholder's interest in his office is more

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Senate, and to the taxpayers who must bear the dual expense of a suspended official and his appointed replacement." *Id.* at 7.

51. Summary resuspension is unwarranted inasmuch as the Governor has ample means to make a thorough investigation prior to initial suspension. FLA. STAT. §14.06 (1969). He may require information in writing from all executive or administrative state, county, or municipal officers upon any subject relating to their duties. FLA. CONST. art. IV, §1(a). *See In re* Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968), in which the Governor had appointed a "Select Commission" to review allegations and reports concerning conduct of a judge of the Dade County Criminal Court of Record. The supreme court observed that the select commission had no official status except to assist and advise the Governor in gleaning the facts. *Id.* at 720.

52. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 129, 155 So. 129, 134 (1934); Annot., 92 A.L.R. 988 (1934).

53. *See, e.g.*, Piver v. Stallman, 198 So. 2d 859, 862 (3d D.C.A. Fla. 1967).

54. A municipal office is not property in the constitutional sense. City of Jacksonville v. Smoot, 83 Fla. 575, 92 So. 617 (1922). Numerous federal cases recognize that neither public officers nor public employees have property rights in their positions. Phaire v. Merwin, 161 F. Supp. 710 (D.C.V.I. 1958). Appointment to and tenure in public office is neither property nor contract. *Id.* at 713. Government employment is not property within the meaning of the due process clause of the United States Constitution. Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965). Government employment is a privilege and not a property right. Birnbaum v. Trussell, 371 F.2d 672, 677 (2d Cir. 1966). *See also* Snowden v. Hughes, 321 U.S. 1 (1944); Wetherington v. Adams, 309 F. Supp. 318 (N.D. Fla. 1970). Constitutional rights and interests of the officeholder nevertheless may be violated by an arbitrary or procedurally deficient discharge of a public officer or employee. *See* Birnbaum v. Trussell, 371 F.2d 672 (2d Cir. 1966); Jones v. Board of Control, 131 So. 2d 713 (Fla. 1961). *See also In re* Kelly, 238 So. 2d 565 (Fla. 1970). *Cf.* State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 881, 138 So. 392, 395 (1931), which concludes that an officer's right to his office is protected by the fourteenth amendment. It is more correct to say that the improper or wrongful discharge or removal of a public employee or officer may entail a violation of his constitutionally protected individual rights, even though he has no right, as such, to work for the government. Federal holdings have been summarized in these terms: "The principle to be extracted from these cases is that, whenever there is a substantial interest, other than employment by the state, involved in the discharge of a public employee, he can be removed neither on arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist." Birnbaum v. Trussell, 371 F.2d 672, 678 (2d Cir. 1966). *See also* McCarley v. Sanders, 309 F. Supp. 8 (M.D. Ala. 1970). Of course, the

aptly described as an enforceable substantive right, rather than as a property interest or estate.[55] It is a right or interest that cannot be bartered or sold, but that is held by the officer for the benefit of society.[56] In the absence of constitutional limitations, the legislature may abolish an office at its pleasure even though this is done during the term for which the officer was elected or appointed.[57]

A public officer's rights in his office are conditional. He accepts and holds his office subject to the terms and conditions established by law.[58] In particular, public officers in Florida accept and hold their offices subject to the constitutional power of the Governor and the senate to suspend and remove them.[59] An officer has no vested rights or interests in his office that are impervious to the constitutional power of suspension and removal. His removal from office in accordance with applicable constitutional and statutory provisions does not improperly deprive him of his property or rights any more than does the normal expiration of his term of office.[60] However, the removal of an officer having a fixed term of office must be in accordance with lawfully established grounds and procedural requirements. He may be suspended from office summarily and without prior hearing,[61] but he cannot be permanently removed from office without observance of fundamental requirements of due process, including reasonable notice and a fair hearing.[62] Officers without fixed terms who serve at the pleasure of a designated agency may be dismissed summarily without notice or hearing.[63]

Florida courts' descriptions of public officers' rights as "property" may be accepted at face value by federal courts. *See* Fair v. Kirk, 317 F. Supp. 12 (N.D. Fla. 1970), *aff'd mem.*, 401 U.S. 928 (1971).

55. Flood v. State, 100 Fla. 70, 76, 129 So. 861, 864 (1930). Upon reinstatement, a suspended officer suffers no loss of salary or other compensation. FLA. STAT. §111.05 (1969).

56. DuBose v. Kelly, 132 Fla. 548, 562, 181 So. 11, 17 (1938).

57. City of Jacksonville v. Smoot, 83 Fla. 575, 92 So. 617 (1922).

58. Jones v. Board of Control, 131 So. 2d 713 (Fla. 1961); State v. Stuler, 122 So. 2d 1 (Fla. 1960); DuBose v. Kelly, 132 Fla. 548, 181 So. 11 (1938).

59. State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 138 So. 392 (1931); State *ex rel.* Holland v. Ledwith, 14 Fla. 220 (1872).

60. State *ex rel.* Holland v. Ledwith, 14 Fla. 220 (1872). No one has a right to work in government service on his own terms. Jenson v. Olson, 353 F.2d 825 (8th Cir. 1965).

61. Fair v. Kirk, 317 F. Supp. 12 (N.D. Fla. 1970), *aff'd mem.*, 401 U.S. 928 (1971); State *ex rel.* Lamar v. Johnson, 30 Fla. 433, 11 So. 845 (1892).

62. State *ex rel.* Landis v. Tedder, 106 Fla. 140, 146, 143 So. 148, 150 (1932); State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 881, 138 So. 392, 395 (1931).

63. Bryan v. Landis *ex rel.* Reeve, 106 Fla. 19, 21, 142 So. 650, 651 (1932); Burklin v. Willis, 97 So. 2d 129, 131 (1st D.C.A. Fla. 1957). As discussed later in this article, the termination of such an officer by the agency at whose pleasure the officer serves is not a suspension or removal of the officer as such. *See* text accompanying note 177 *infra*. The Governor's summary termination of an officer serving at the Governor's pleasure does not entail an exercise of the executive power of suspension. On the other hand, executive suspension and senatorial removal of an officer serving at the pleasure of an agency other than the Governor would necessarily have to be in accordance with the limitations and requirements of the constitutional and statutory provisions applicable to executive suspensions.

Under the 1885 constitution the public officer's "property right" in his office and his right to due process of law sometimes may have been more theoretical than real. The power of suspension and removal was exercised without the benefit of established procedural rules.[64] It is difficult to assess the role that senatorial courtesy may have played in senate hearings held in executive session. In some instances the speediness of the hearing accorded to a suspended officer appears to have been its primary constitutional virtue. Limitation of judicial review to a consideration of the sufficiency of the allegations of the executive suspension order left the former officeholder with no recourse if senate proceedings were deficient from an evidentiary standpoint or otherwise.[65]

The 1968 constitution specifically provides for senate action "in proceedings prescribed by law."[66] Pursuant to this constitutional mandate, the 1969 legislature undertook for the first time in Florida history to define the basic procedural steps and requirements of suspension and removal procedure.[67] Every suspended officer is now guaranteed a "full and complete hearing, public in nature" with notice sufficiently in advance to afford him an opportunity fully and adequately to prepare his defenses.[68]

Judicial Review

Florida courts have long recognized that the Governor's power to suspend public officers is a discretionary executive power that is in no sense judicial or quasi-judicial.[69] As long as the Governor acts within the confines of his constitutional authority, his action is not subject to judicial review.[70] However, because the suspension of an officer affects individual rights the courts have asserted the power to determine whether the Governor is acting

64. *See, e.g.*, State *ex rel.* Hand v. McDonald, 154 Fla. 456, 18 So. 2d 16 (1944), in which the senate appears to have acted upon conclusory suspension orders in executive session, without participation by the suspended officer and on the same day the senate received supporting factual information from the Governor's office.

65. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 155 So. 129 (1934).

66. FLA. CONST. art. IV, §7 (b).

67. FLA. STAT. §§112.40-.48 (1969).

68. *Id.* §112.47 (1969).

69. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 126, 155 So. 129, 133 (1934); State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 880, 138 So. 392, 394 (1931); Annot., 92 A.L.R. 988, 994 (1934).

70. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 127, 155 So. 129, 133 (1934); State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 880, 138 So. 392, 394 (1931). These pronouncements accord with the general rule that the judiciary lacks power to direct or coerce the Governor in the exercise of any administrative function and may advise him in regard to his executive powers and duties only when requested by him to do so. State *ex rel.* Axleroad v. Cone, 137 Fla. 496, 188 So. 93 (1939). In State *ex rel.* Crim v. Juvenal, 118 Fla. 487, 490, 159 So. 663, 664 (1935), the court said: "It is not the province of the judiciary to act as a general conservator of the Constitution as a restraint upon the powers or abuses of other branches of the government, even in cases where the Constitution appears to have been flagrantly violated."

within his constitutional jurisdiction.[71] Therefore, courts may review the jurisdictional sufficiency of the Governor's order of suspension in appropriate judicial proceedings.[72]

The court's review is strictly limited to a determination of whether the suspension order alleges "jurisdictional facts" that reveal a constitutional ground for suspension and removal of the officer.[73] No particular form of order is required,[74] but a purely conclusory suspension order is unacceptable. For example, a "mere arbitrary or blank order of suspension without supporting allegations of fact, even though it named one or more of the constitutional grounds of suspension," was held to be insufficient by the Florida supreme court.[75] The order will be deemed sufficient, however, if it names one or more of the constitutional grounds and supports it with alleged facts sufficient to constitute the grounds or cause of suspension.[76] The factual allegations need not be as definite and specific as the allegations of a criminal information or indictment.[77] In fact, evidentiary matter has no place in the suspension order.[78] Anything of an evidentiary character in the suspension order is gratuitous and of no concern to the court.[79] The court merely determines whether the order, on the whole, contains factual allegations "that bear some reasonable relation to the charge made against the officer."[80] In other words, the court's duty is at an end when it has determined the jurisdictional sufficiency of the order without determining the correctness of the order on the merits. The reviewing court is not to displace the discretion of the Governor and the senate by deciding whether the particular officer's suspension is warranted under the specific facts and circumstances of the case.[81]

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71. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 127, 155 So. 129, 133 (1934); State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 880, 138 So. 392, 394 (1931).

72. In most instances, quo warranto is brought by the suspended officer against the appointee named to replace him. In State *ex rel.* Kelly v. Sullivan, 52 So. 2d 422 (Fla. 1951), the Governor's appointee brought quo warranto against the suspended officer after the latter's reinstatement by the Governor. In State *ex rel.* Lamar v. Johnson, 30 Fla. 433, 11 So. 845 (1892), the appointee brought mandamus against the suspended officer to compel him to turn over the books and equipment of the office. *See* State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 138 So. 392 (1931), for a discussion of quo warranto and mandamus.

73. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 127, 155 So. 129, 133 (1934).

74. *Id.* at 128, 155 So. at 133.

75. *Id.*

76. *Id.*

77. *Id.*

78. State *ex rel.* Hardee v. Allen, 126 Fla. 878, 883, 172 So. 222, 224 (1937).

79. *Id.*

80. *Id.* at 882, 172 So. at 224; State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 127, 155 So. 129, 133 (1934). The legislature has now provided by statute that the suspension order "shall specify facts sufficient to advise both the officer and the senate as to the charges made or the basis of the suspension." FLA. STAT. §112.41 (1) (1969).

81. In Advisory Opinion to the Governor, 196 So. 2d 737 (Fla. 1967), the Supreme Court of Florida held that it may not give the Governor an advisory opinion whether a proposed suspension order contains sufficient allegations of jurisdictional facts. The court held that the initial determination of the existence of facts sufficient to activate the executive is solely an executive function that must be initially exercised by the chief executive

Courts may not review the evidence or make findings as to its weight or sufficiency because those are matters exclusively within the province of the senate.[82] All things pertaining to the evidence are questions for the senate;[83] the senate's judgment is final and not to be reviewed by the courts.[84]

Cases defining the narrow scope of judicial review of executive suspension orders do not provide a complete picture of the courts' role in suspension proceedings. Both in advisory opinions to the Governor and in adversary proceedings, the Supreme Court of Florida has ranged far beyond questions about the pleading requirements applicable to suspension orders and has created a large body of judicial precedent touching upon many other aspects of executive suspensions.[85] This large accumulation of case law has been accepted as authoritative by all parties and agencies involved in suspension proceedings. Moreover, there can be little serious doubt today that if an officer is removed from office without observance of minimum requirements of due process, or if any of his other constitutional rights are violated, he will be afforded relief in either federal[86] or Florida[87] courts.

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without judicial participation, either solicited or unsolicited. *But cf. In re* Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968), in which the court advised the Governor that he lacked executive authority to suspend a judge on the ground of incompetency for judicial decisions unsatisfactory to the Governor.

82. State *ex rel.* Hardee v. Allen, 126 Fla. 878, 172 So. 222 (1937). *Cf.* State *ex rel.* Graham v. Dean, 217 So. 2d 580 (2d D.C.A. Fla. 1969), in which the district court declared that the circuit court had held "on adequate evidence" that the suspended officer's rights to due process had not been violated and that the circuit court's finding must stand.

83. State *ex rel.* Hardee v. Allen, 126 Fla. 878, 882, 172 So. 222, 224 (1937).

84. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 129-30, 155 So. 129, 134 (1934).

85. In particular suspension proceedings, judicial review is by no means always restricted to the allegations in the suspension order. *See, e.g.*, State *ex rel.* Kelly v. Sullivan, 52 So. 2d 422 (Fla. 1951), in which the court determined the validity and effect of an executive order reinstating the suspended officer.

86. *See* Fair v. Kirk, 317 F. Supp. 12 (N.D. Fla. 1970), *aff'd mem.*, 401 U.S. 928 (1971), in which a three-judge district court considered, and rejected, a direct assault on the constitutionality of the executive suspension section of the 1968 Florida constitution. Fair conceded he had been afforded procedural due process in his hearing before the senate's Select Committee on Executive Suspensions. The court rejected Fair's contention that he was constitutionally entitled to notice and a hearing *prior* to his suspension from office. *Id.* at 17. At no point does the court express any doubt concerning its jurisdiction to adjudge whether federal constitutional rights have been violated in a Florida suspension proceeding. *See also* McCarley v. Sanders, 309 F. Supp. 8 (M.D. Ala. 1970), in which a three-judge district court invalidated the expulsion of a senator from the Senate of Alabama because he had not been afforded procedural due process.

87. The Florida Legislature has recognized that both the Governor and the suspended officer are entitled to due process in the senate's proceedings. FLA. STAT. §112.47 (1969). Present Florida law is clearly contrary to the view expressed in State *ex rel.* Hand v. McDonald, 154 Fla. 456, 463, 18 So. 2d 16, 20 (1944), that the senate may order the removal of a public officer without notice. It was recognized in Florida at an early date that a public officer has a property right in his office of which he cannot be deprived without due process of law. State *ex rel.* Holland v. Ledwith, 14 Fla. 220 (1872). In State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 881, 138 So. 392, 395 (1931), the court declared that "one's right to office and the emoluments thereof is protected by the Fourteenth Amendment." *See* State *ex rel.* Graham v. Dean, 217 So. 2d 580 (2d D.C.A. Fla. 1969), in which the district court tacitly acknowledged the circuit court's jurisdiction to adjudge whether the suspended officer had

GROUNDS FOR SUSPENSION AND REMOVAL

The Florida constitution of 1885 authorized the Governor to suspend officers for malfeasance, misfeasance, neglect of duty in office, commission of any felony, drunkeness, or incompetency.[88] The 1968 constitution adds a new ground, "permanent inability to perform his official duties,"[89] and makes slight changes of terminology in stating three of the old grounds: "neglect of duty *in office*" is shortened to "neglect of duty"; "commission of *any* felony" is replaced by "commission of *a* felony"; and "incompetency" is changed to "incompetence."[90]

Each of the grounds specified in the 1885 constitution was defined by the Supreme Court of Florida in the leading case of *State* ex rel. *Hardie v. Coleman* as follows:[91]

> Malfeasance has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful, which he has no right to perform or which he has contracted not to do. . . .
>
> Misfeasance is sometimes loosely applied in the sense of malfeasance. Appropriately used, misfeasance has reference to the performance by an officer in his official capacity of a legal act in an improper or illegal manner, while malfeasance is the doing of an official act in an unlawful manner. Misfeasance is literally a misdeed or a trespass, while nonfeasance has reference to the neglect or refusal without sufficient excuse to do that which was an officer's legal duty to do.
>
> Neglect of duty has reference to the neglect or failure on the part of a public officer to do and perform some duty or duties laid on him as such by virtue of his office or which is required of him by law. It is not material whether the neglect be willful, through malice, ignorance, or oversight. When such neglect is grave and the frequency of it is such as to endanger or threaten the public welfare it is gross. . . .
>
> The commission of a felony as ground for removal from office has reference to a felony as distinguished from a misdemeanor under our statute, and, as such, comprehends any crime punishable by death or imprisonment in the state prison. Section 5006, Revised General Statute

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been afforded due process. However, *see* text accompanying notes 53-63 *supra*. Generalizations concerning property rights in public offices are not applicable to officers without defined terms of office who are appointed at the pleasure of the appointing authority. Such officers may be summarily removed. *See* Dade County v. Kelly, 153 So. 2d 822 (Fla. 1963); Burklin v. Willis, 97 So. 2d 129 (1st D.C.A. Fla. 1957).

88. FLA. CONST. art. IV, §15 (1885).

89. FLA. CONST. art. IV, §7 (a).

90. *Id.* In addition, the 1968 constitution authorizes the Governor to suspend any elected municipal officer indicted for crime until the officer is acquitted, unless these powers are vested elsewhere by law or the municipal charter. FLA. CONST. art. IV, §7 (c). Under the 1885 constitution the Governor lacked authority to suspend municipal officers. *In re* Opinion of the Justices, 121 Fla. 157, 163 So. 410 (1935).

91. 115 Fla. 119, 125-27, 155 So. 129, 132-33 (1934); Annot., 92 A.L.R. 989, 992-93 (1934). The judicial definitions have been applied by the senate. *See* FLA. S. JOUR. Special Sess. 398 (May 13, 1970).

of 1920, section 7105, Compiled General Laws of 1927. Suspension and removal for the commission of a felony is not predicated on the current use of that term.

Drunkenness, as ground for suspension and removal, has reference to such use of spiritous, vinous, or malt liquors as impairs or incapacitates an officer in the efficient discharge of his official duties. The impairment or incapacity may be slight, temporary or permanent. It has been said to be a self-imposed disability, and in consequence is not to be regarded with that kindness and indulgence which we concede to blindness, deafness, or any other physical infirmity.

Incompetency as a ground for suspension and removal has reference to any physical, moral, or intellectual quality, the lack of which incapacitates one to perform the duties of his office. Incompetency may arise from gross ignorance of official duties or gross carelessness in the discharge of them. It may also arise from lack of judgment and discretion or from a serious physical or mental defect not present at the time of election, though we do not imply that all physical and mental defects so arising would give ground for suspension.

Incompetence

In a 1968 advisory opinion,[92] the supreme court re-examined its sweeping definition of incompetency as expressed in the *Hardie* case. The court pointed out that *Hardie* involved the suspension of a member of the executive branch — a sheriff — and indicated that the Governor would be limited to a much narrower definition of incompetency as a ground for suspending a judge.[93]

The court appeared to favor a concept of incompetency restricted solely to deficiencies and defects arising after the election of the suspended officer.[94] The court stressed the problems of separation of powers inherent in the Governor's suspension of a judge and made it clear that the ground of incompetency does not authorize the Governor to review judicial acts and decisions as such.[95] For good measure, the court cast serious doubt on the present validity of the *Hardie* definition of incompetency as applied to officers in the executive branch.[96]

Commission of a Felony

In specifying commission of a felony as a ground for suspension, the 1968 constitution undoubtedly refers to its own definition of the term

92. *In re* Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968).

93. *Id.* at 718.

94. *Id.* at 720.

95. *Id.* The court declared that if a judge should be adjudged mentally or physically incompetent by a court of competent jurisdiction, the Governor may use the judicial determination as a basis for suspension on the ground of incompetency. *Id.* Under the 1968 constitution anyone "adjudicated in this or any other state to be mentally incompetent" is disqualified from voting or holding office until removal of disability. FLA. CONST. art. VI, §4.

96. *In re* Advisory Opinion to the Governor, 213 So. 2d 716, 718 (Fla. 1968).

"felony,"[97] which includes Florida criminal offenses punishable by death or by imprisonment in the state penitentiary.[98] However, the new constitutional definition adds criminal offenses that would be punishable by death or by imprisonment in the state penitentiary "if committed in this state."[99]

An officer's conviction of a felony creates a vacancy in the office and renders any pending suspension proceedings moot.[100] On the other hand, the acquittal of a suspended officer in a criminal case to which neither the Governor nor the senate is privy does not bind those agencies and cannot prevent them from exercising their constitutional authority to determine whether a felony has been committed.[101] This does not mean that the Governor must ignore the existence and outcome of the criminal proceeding. In the event of the officer's acquittal, the Governor may reconsider his suspension order and decide as a matter of discretion that the officer should be reinstated, but he is not compelled to do so.[102]

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97. FLA. CONST. art. X, §10. The language of this section is identical to the text of the revision commission's recommendation. FLA. S. JOUR. Special Sess. 27 (June 24, 1968).

98. The 1885 constitution defined a felony as "any criminal offense punishable with death or imprisonment in the State Penitentiary." FLA. CONST. art. XVI, §25 (1885). In the definition in the *Hardie* case the court notes that suspension and removal of an officer for commission of a felony "is not predicated on the current use of that term." *See* text accompanying note 91 *supra*. This statement presumably refers to cases such as Chapman v. Lake, 112 Fla. 746, 151 So. 399 (1932), in which the court considered the power of the legislature to classify an offense as a felony simply by a statutory declaration that violators "shall be deemed guilty of a felony . . . ."

99. FLA. CONST. art. X, §10.

100. FLA. STAT. §114.01 (1969). Conviction of a felony is not among the conditions that are declared in the 1968 constitution to create vacancies in offices. FLA. CONST. art. X, §3. However, the constitution disqualifies a person convicted of a felony from holding office until restoration of civil rights. FLA. CONST. art. VI, §4. An officer becomes ineligible to hold an office by virtue of a disqualification that exists or arises during his term of office. *See* State *ex rel.* Landis v. Ward, 117 Fla. 585, 158 So. 273 (1934). In the case of the executive suspension of Noah J. Carter, Constable, District 9, St. Johns County, the Select Committee on Executive Suspensions reported to the senate that the committee had received a copy of the jury verdict finding the defendant guilty of the felony of accepting a bribe. The committee reported that no senate action would be necessary. The committee report was adopted by the senate. FLA. S. JOUR. Special Sess. 13 (Nov. 16, 1970).

101. In its report on the suspension of Robert J. Haslett, Clerk of the Criminal Court of Record, Polk County, Florida, the senate's Select Committee on Executive Suspensions said: "[T]he Senate may consider the merits of any suspension, and in so doing, the Senate is not bound by any determination by the Governor, a jury, or a court of law." FLA. S. JOUR. Special Sess. 11 (Feb. 17, 1969). An acquittal in a criminal prosecution will not bar a proceeding to revoke a physician's license by the State Board of Medical Examiners based on the same offense as the criminal prosecution. State *ex rel.* De Gaetani v. Driskell, 139 Fla. 49, 53, 190 So. 461, 463 (1939). In a suspension proceeding, more than a conclusory demonstration is necessary to prove the "commission of a felony." A real estate broker's license cannot be suspended on the ground that he is guilty of a crime involving moral turpitude without proof of every element of the crime. Reid v. Florida Real Estate Comm'n, 188 So. 2d 846, 854 (2d D.C.A. Fla. 1966).

102. For example, the sheriff of St. Johns County, Florida, was suspended three days after a grand jury indicted him for alleged acceptance of a bribe. Upon a trial of the charge in the circuit court, the jury acquitted the officer. Thereafter, the Governor issued an amended suspension order, broadening the grounds for suspension to include charges

Similarly, in particular cases the Governor may delay issuance of a suspension order if he concludes that the probable prejudice to either the prosecution or defense of the criminal case outweighs the risk to the public interest and the impairment of public confidence that may flow from a delay in suspending the officer.[103] In no event would such delay be mandatory. Moreover, in most instances the Governor's discretion will be guided by the constitutional objective of protecting the public interest by prompt executive action once it has been determined that grounds for suspension exist. Pursuant to a senate rule, the senate ordinarily defers action on the order of suspension pending the termination of the criminal case.[104]

Malfeasance, Misfeasance, and Neglect of Duty

In any suspension proceeding in which these grounds are asserted, the grounds must be defined with reference to the particular duties and responsibilities of the suspended officer.[105] Especially when discretionary activities of the officer are called into question, these grounds often raise elusive factual questions that must be resolved by the application of sound judgment to the facts and circumstances of the particular case.[106]

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that the sheriff had permitted widespread gambling, bolita, and houses of prostitution to flourish in St. Johns County. The sheriff was thereafter removed by the senate. FLA. S. JOUR. Special Sess. 4, 11 (Nov. 16, 1970).

103. The Supreme Court of Florida has prescribed a similar discretionary rule for the Board of Governors of the Florida Bar in bringing disciplinary proceedings against attorneys at law. *See* FLA. S. CT. BAR. R. art 11.02 (3) (b), Integration Rule of the Florida Bar.

104. FLA. S.R. 12.3 (b) (1970) provides: "An executive suspension of a public official who is under indictment or who has pending against him criminal charges filed by the appropriate prosecuting officer in a court of record shall not be referred to a select committee nor considered by the Senate until the pending charges have been dismissed or until final determination of the charges at the trial court level."

105. The concept of fault probably underlies each of these grounds. The supreme court has considered the relationship between the Governor's authority to suspend an official for neglect of duty in office and a statute authorizing the Governor to grant leaves of absence to state officers called into military service. *In re* Advisory Opinion to the Governor, 151 Fla. 44, 9 So. 2d 172 (1942). The majority of the court concluded that mere absence with leave in national war service, without more, did not constitute a ground of suspension and removal. In a separate opinion concurred in by Justice Thomas, Justice Buford disagreed. *Id.* at 58, 9 So. 2d at 177. Justice Buford pointed out that the public officer who suffers personal misfortune as a consequence of military service stands in the same position as other citizens who must abandon their businesses and professions. He said: "The office-holder is protected by no halo under the Constitution which will immunize him from sacrifice or which may guarantee his tenure of office regardless of his inability, because of the emergency, to give it his personal attention. *Id.* at 62, 9 So. 2d at 179.

106. The suspension of Lloyd F. Early, Superintendent of Schools of Palm Beach County, presented the problem of weighing a school superintendent's performance in a public school system that had fallen into a state of tumult and crisis, aggravated by acute conflict among the superintendent and members of the school board, the press, and a dedicated citizens' group that became "a general, investigative committee roaming through the school system striking the same kind of terror in the hearts of the staff and instructional personnel as the citizens experienced with vigilantes of another era." The senate adopted the select committee's report recommending reinstatement. In its report

For instance, suspension of a county solicitor for "neglect of duty," consisting of a failure to bring criminal prosecutions, presents a troublesome problem of reviewing the officer's quasi-judicial discretion.[107] Other difficult questions arise when peace officers are charged with either unduly lax or unduly zealous law enforcement efforts. For example, in considering the suspension of the sheriff of St. Johns County, the senate's Select Committee on Executive Suspensions concluded that the mere existence of flourishing illegal activities in that county did not constitute malfeasance or misfeasance on the part of the sheriff. As the committee said in its report: "Unless he knew or should have known of their existence, and either failed to act or actually permitted their continuation he could not be faulted."[108] Novel questions were also raised by the suspension of a constable and justice of the peace charged with malfeasance, misfeasance, neglect of duty and incompetency in office by virtue of their alleged operation of a "speed trap" in Coleman, Florida. The select committee was obliged first to define the elements of a "speed trap" and then to measure the definition against the facts. Concerning the element of "overemphasis," the committee concluded:[109]

> The question of overemphasis is a difficult and subjective one. When does a law enforcement officer overemphasize law enforcement? Or stated another way: How many arrests does a traffic officer have to make before he ceases doing his duty and begins operating a "speed trap"? The Committee considered all of the evidence presented and reached the conclusion that the number of arrests here was not unreasonable under the circumstances.

Statutory Grounds

The Florida Legislature has from time to time enacted numerous statutes that prescribe grounds for suspension and removal of public officers.[110] These statutes raise numerous constitutional problems and present many questions of statutory construction, which are considered in another section of this article.[111]

Officers Subject to Executive Suspension

The Governor's power of suspension applies only to public officers, not to public employees.[112] However, its application to public officers is the gen-

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the committee concurred in the suspended official's own appraisal that he had done a creditable job under the circumstances. Fla. S. Jour. Special Sess. 9-11 (Nov. 16, 1970). In such cases the Governor and senate can do no better than strive to "illuminate their course by the constitutional mandate and in its light protect society, and be just to the officer suspended." State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 130, 155 So. 129, 134 (1934); Annot., 92 A.L.R. 989 (1934).

107. State *ex rel.* Hardee v. Allen, 126 Fla. 878, 172 So. 222 (1937).

108. Fla. S. Jour. Special Sess. 11 (Nov. 16, 1970).

109. *Id.* at 12.

110. A listing of several of these statutes is contained in an appendix to this article.

111. *See* text accompanying notes 172-194 *infra.*

112. The courts consider many factors in distinguishing offices from employments. The most important distinguishing characteristic of an office is that a portion of the sovereign

eral rule, subject only to exceptions that are expressly defined in the constitution.[113] The suspension section explicitly excludes state officers subject to impeachment. As discussed below, members and officers of the legislature are exempt from the power. Municipal officers are likewise excluded from its operation with certain exceptions. With certain limitations discussed below, the executive suspension power reaches judges not subject to impeachment and other judicial officers. Questions concerning the application of the suspension power to county officers and state officers in the executive branch are intimately intertwined with questions concerning the legislature's authority to prescribe the structure and organization of county governments and the executive branch of state government, including the power to establish county and executive state offices and to regulate the manner in which the incumbents of such offices are selected, suspended, and removed. Accordingly, suspension of county and state executive officers is discussed below in connection with other aspects of the problem of legislative regulation.

Judges and Judicial Officers

Supreme court justices, judges of district courts of appeal, and circuit judges are all subject to impeachment; consequently, they are not subject to the Governor's power of suspension.[114] However, judges of criminal courts of record, courts of crimes, civil courts of record and juvenile courts, as well as county judges and justices of the peace are not liable to impeachment and thus are all subject to executive suspension,[115] as are quasi-judicial

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power of the State has been delegated to it or that it performs distinctly governmental functions. State *ex rel.* Swearingen v. Jones, 79 Fla. 56, 84 So. 84 (1920). The leading Florida case on the subject is State *ex rel.* Clyatt v. Hocker, 39 Fla. 477, 22 So. 721 (1897). *Cf. In re* Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969), a decision under the 1968 constitution, in which the court appears to accept constitutional and statutory designations of the secretary of administration as an "officer" as controlling. A valuable discussion of the officer-employee distinction appears in Waldby, *The Public Officer-Public Employee Distinction in Florida*, 9 U. FLA. L. REV. 47 (1956).

113. FLA. CONST. art. IV, §7; *In re* Advisory Opinion to the Governor, 52 So. 2d 646 (Fla. 1951).

114. Impeachment of these judges is provided for in three sections of the 1968 constitution. FLA. CONST. art. III, §17; art. V, §§17A(1), (3). The jurisdiction of the Judicial Qualifications Commission likewise extends only to justices of the supreme court and judges of the district courts of appeal and circuit courts. FLA. CONST. art V, §17A. The recommendation of the Constitutional Revision Commission would have eliminated the Governor's power to suspend judges. Article 3, section 18 of the commission recommendation made "Justices of the supreme court and judges of other courts" liable to impeachment, while retaining the exclusionary term "any state officer not subject to impeachment" in article 5, section 5, dealing with executive suspensions. The revision commission likewise expanded the jurisdiction of the Judicial Qualifications Commission to include "any justice or judge, except judges of municipal courts and of courts of chartered counties." Revision Commission Recommendation, art. 5, §14(d).

115. *In re* Advisory Opinion to Governor, 75 Fla. 674, 78 So. 673 (1918).

116. *See, e.g.*, the record of senate proceedings wherein the State Attorney of the Third Judicial Circuit was reinstated. FLA. S. JOUR. Special Sess. 11-14 (Feb. 17, 1969).

117. State *ex rel.* Gibbs v. Rogers, 141 Fla. 237, 193 So. 435 (1940).

officers such as state attorneys,[116] assistant state attorneys,[117] and county solicitors.[118]

The Supreme Court of Florida has declared that the Governor's suspension power does not include any authority to review the accuracy or propriety of judicial decisions.[119] The court made it clear that the Governor's power of suspension operates within narrower limits when applied to judges than when applied to officers of the executive branch. The court explained that executive review of judicial decisions would be inconsistent with the doctrine of separation of powers, which contemplates an independent judiciary.[120] In addition, the court declared that the appellate jurisdiction constitutionally conferred upon Florida courts is exclusive and therefore precludes any appellate review of court decisions by the Governor.[121] Somewhat cryptically, the court added that if a court of competent jurisdiction declared a judge to be physically or mentally incompetent "the Governor may use such judicial determination as a basis for suspension on the ground of incompetency."[122]

Legislators and Legislative Officers

The Florida Legislature traditionally has enjoyed a high degree of autonomy as to its own personnel matters. Each house of the legislature is constitutionally designated as the "sole judge" of the qualifications, elections, and returns of its members.[123] Each house is authorized to compel the pres-

118. State *ex rel.* Hardee v. Allen, 126 Fla. 878, 172 So. 222 (1937).

119. *In re* Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968).

120. *Id.* at 718-19.

121. *Id.* at 720. *In re* Advisory Opinion to the Governor, 213 So. 2d 716 (Fla. 1968). *Cf.* State *ex rel.* Hardee v. Allen, 126 Fla. 878, 172 So. 222 (1937), in which a sharply divided court grappled with the problem of a county solicitor suspended on account of "neglect of duty," consisting of a failure to prosecute certain alleged criminal activities. In important respects the 1937 dissenting opinions of Justices Ellis and Davis closely resemble the unanimous opinion of the court expressed in its 1968 advisory opinion. Both dissenting justices emphasized that the county solicitor is a quasi-judicial officer who is required to exercise a judicial judgment and discretion in deciding whether prosecutions should be brought and maintained. *Id.* at 896, 172 So. at 229. Justice Davis pointed out that in acting as a "one-man grand jury," a county solicitor is expected to act as an impartial investigating officer rather than an official accusor. He said: "The courts have no power to review the judgments and findings of a Grand Jury, or substitute accusatory officer, and certainly the Governor has no right to exercise judicial powers in that regard." *Id.* at 897, 172 So. at 230. Moreover, Justice Davis recognized that because of the element of judicial discretion, executive suspension of judicial officers is quite different from suspension of executive officers. He persuasively suggested that a prosecuting attorney's "neglect of duty" consisting of lax law enforcement is both different in character, and more difficult to demonstrate, than that of sheriffs, policemen, and other executive law enforcement officers. He said: "A county solicitor is in no sense a county detective nor vested with the right to usurp the powers of the local sheriff and policemen as enforcement officers by ferreting out supposed crimes and prosecuting them on his own knowledge." *Id.* at 896, 172 So. at 229-30.

122. *In re* Advisory Opinion to the Governor, 213 So. 2d 716, 720 (Fla. 1968).

123. FLA. CONST. art. III, §2. The language of this section is identical to that of the revision commission's proposed draft. The 1968 provision: "Each house shall be the sole

ence of absent members in such manner and under such penalties as it may prescribe.[124] Each house may punish a member for contempt or disorderly conduct,[125] and each house may expel a member by a two-thirds vote.[126]

These constitutional provisions reveal an unmistakable intent that each house of the legislature shall have exclusive and plenary authority over the qualifications, discipline, and expulsion of its own members. In such matters, the legislature is traditionally immune from both judicial review and executive interference. The Supreme Court of Florida has repeatedly declared that it lacks jurisdiction to determine the rights of one who has been elected a member of the legislature to hold such office.[127] Likewise, the executive power of suspension has never been conceived to be applicable to members of the legislature. The specific grant of authority to each house to expel a member by two-thirds vote is manifestly intended to provide the exclusive means by which legislators can be involuntarily unseated. Although the Governor is granted authority to suspend from office "any state officer not subject to impeachment,"[128] this provision was never intended to provide a supplemental procedure for expelling legislators. Such executive interference with the legislature would produce abundant conflict and confusion.[129] Moreover, the senate's duty to review executive suspension orders would occasion unseemly turmoil and conflict between the senate and the house of representatives.[130]

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judge" negates outside interference much more pointedly than the earlier constitutional expression, "Each house shall judge . . . ." FLA. CONST. art. III, §5 (1885). However, the expression "sole judge" is not new to Florida law. The Supreme Court of Florida declared in 1868: "As to the eligibility of persons to be members of the Legislature, the Legislature itself is the sole judge." Opinion to the Governor, 12 Fla. 652 (1868).

124. FLA. CONST. art. III, §4(a).

125. *Id.* §4(d).

126. *Id.* Noteworthy similarities of language and procedure appear in FLA. STAT. §165.18 (1969) ("The city or town council may judge of the election returns and qualifications of its own members . . . and compel attendance of its members; and two-thirds of the council may expel a member of the same or other officer of the city or town for disorderly behavior or malconduct in office.") The constitution specifies no grounds for expulsion of members of the legislature. The constitution specifies a two-thirds vote only for expulsion of *members* of the legislature. The municipal corporations law more broadly specifies a two-thirds vote of the city council for expulsion of either a council member or "other officer of the city or town."

127. English v. Bryant, 152 So. 2d 167 (Fla. 1963); State *ex rel.* Rigby v. Junkin, 146 Fla. 347, 1 So. 2d 177 (1941); Opinion to the Governor, 12 Fla. 652 (1868). In 1966 state legislatures abruptly became subject to judicial review by federal courts if a disqualified or expelled legislator claimed a violation of his rights under the United States Constitution. Bond v. Floyd, 385 U.S. 116 (1966). It has been said that until the *Bond* decision was announced, no state or federal court had assumed power to determine the qualifications of an elected member of a legislative body since the ratification of the Federal Constitution. Annot., 17 L. Ed. 2d 911, 912 (1967).

128. FLA. CONST. art. IV, §7. Members of the legislature are not subject to impeachment. FLA. CONST. art. III, §17(a).

129. For example, one can readily conceive of the anomalous conflict that would result from the Governor's reinstatement of a suspended legislator pursuant to FLA. CONST. art. IV, §7(a).

130. The Supreme Court of Florida has observed that FLA. CONST. art. III, §§2, 5,

The legislature enjoys exclusive control over its officers and employees as well as its members.[131] The legislature has taken pains to specify that the "offices, committees and divisions" of the legislature are not subject to the financial and other controls applicable to "agencies of government" generally and that the selection and control of legislative employees "shall be the sole prerogative of the legislature."[132] Article III of the 1968 constitution, as well as applicable statutes,[133] leave little doubt that officers of the legislature are excluded from the class of state officers who are subject to executive suspension.

The mere performance of legislative or quasi-legislative functions does not exempt public officers from executive suspension. Members and officers of the legislature are exempt from executive suspension because of the institutional autonomy of the legislature itself, not simply because their duties are legislative in nature. The doctrine of separation of powers does not preclude the suspension of officers such as county commissioners, who have quasi-legislative duties[134] but are not part of the institutional structure and administrative machinery of the legislature itself.

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grant numerous powers to "each House, acting independently of the other . . . ." Hagaman v. Andrews, 232 So. 2d 1, 4 (Fla. 1970). This is equally true of FLA. CONST. art. III, §4. Executive suspension of legislators would permit the anomaly of a house member expelled by the house and reinstated by the senate.

131. Officers of the legislature are identified in FLA. CONST. art. III, §2 and in FLA. STAT. §11.15 (1969). The president and secretary of the senate and the speaker and clerk of the house of representatives serve at the pleasure of the senate and house respectively. FLA. CONST. art. III, §2. The auditor general serves at the pleasure of the legislature. *Id.* His appointment may be terminated at any time by a majority vote of both houses. FLA. STAT. §11.43 (1969). The department of administration has no power to exercise any manner of control over the legislative auditing committee or the staff of the auditor general. *Id.* §11.44(2). Personnel matters of the legislature are generally regulated by FLA. STAT. ch. 11 (1969) and by the rules of the senate and house of representatives.

132. FLA. STAT. §11.25 (1969). Similar prohibitions against interference with the legislative auditing committee and the staff of the auditor general are contained in FLA. STAT. §11.44(2) (1969).

133. *See, e.g.*, the code of ethics for public officers and employees contained in FLA. STAT. ch. 112, §§112.311-.19, (1969). Violations of the prescribed standards of conduct constitute grounds for removal from office. *Id.* §112.317 (1969). Complaints concerning violations by "any person liable to removal from office or suspension by the governor shall be reported to the governor and his administrative officers in the executive department." *Id.* §112.318(3) (1969). However, complaints concerning violations by legislators and legislative employees are to be filed with the president of the senate or the speaker of the house of representatives, who shall refer the complaint to an appropriate committee. *Id.* §112.318(1) (1969). The senate and house rules also contain standards of conduct and ethics for senators and representatives, violations of which constitute grounds for expulsion or other disciplinary action. FLA. H.R. 5.14; FLA. S.R. 1.39.

134. County commissioners perform both quasi-legislative and quasi-judicial functions. Johnson v. Wakulla County, 28 Fla. 720, 9 So. 690 (1891). The Dade County home rule amendment expressly provided for the application of the executive suspension power to all officers provided for in the Dade County home rule charter. FLA. CONST. art. VIII, §11(1)(i). This appears to include members of the Dade County Board of County Commissioners, which was authorized to exercise the powers formerly vested in the legislature with respect to the affairs, property, and government of Dade County. State v. Dade County, 142 So. 2d 79, 85 (Fla. 1962).

Municipal Officers

Under the 1885 constitution the executive power of suspension did not apply to municipal officers. Although the suspension section referred broadly to "[a]ll officers . . . not subject to impeachment,"[135] municipal officers were excluded by judicial construction.[136] Removal of municipal officers was deemed to be a matter within the purview of the legislature's plenary power over municipalities and thus subject to regulation exclusively by the legislature.[137] Since 1869 municipal officers, including councilmen, have been subject under general law to expulsion from office for "disorderly behavior or malconduct in office" by a two-thirds vote of the city council.[138] However, removal of municipal officers is often governed by provisions of particular municipal charters. To the extent that charter provisions are in conflict with the general law, the charter provisions are controlling.[139]

Under the 1968 constitution, the Governor is expressly empowered to suspend any elected municipal officer indicted for crime until the officer is acquitted.[140] In addition, the Governor is authorized by statute to suspend any elected or appointed municipal official when any grand jury presents or returns a true bill against him as a result of actions pertaining to his official conduct or duties.[141] The Governor is further empowered to remove the

135. FLA. CONST. art. IV, §15 (1885).

136. *In re* Opinion of the Justices, 121 Fla. 157, 163 So. 410 (1935). The court declared that article 4, section 15, applied only to state or county officers or statutory district officers not liable to impeachment.

137. *Id.* at 161, 163 So. at 411. See Justice Thornal's enlightening discussion of the legislature's absolute control over municipalities in Cobo v. O'Bryant, 116 So. 2d 233 (Fla. 1959).

138. FLA. STAT. §165.18 (1969). A number of other general laws also contain provisions concerning suspension or removal of municipal officers. *See* the compilation of statutes in the appendix to this article. In addition, removal provisions may be found in special acts. *See* State *ex rel.* Wilcox v. Armstrong, 127 Fla. 170, 172 So. 861 (1937). A bill introduced in the 1971 session of the legislature, proposed to be enacted as section 112.49, Florida Statutes, will clarify the status of officers in merged or consolidated city-county governments. The bill provides that any official of such a merged government who shall exercise the powers and duties of a county officer, shall be deemed to be a county officer and therefore subject to the Governor's constitutional power of suspension.

139. Burklin v. Willis, 97 So. 2d 129 (1st D.C.A. Fla. 1957). *See* Bauer v. City of Gulfport, 195 So. 2d 571 (2d D.C.A. Fla. 1967).

140. The Governor's constitutional power is conditioned on the absence of regulation by statute or charter provision. FLA. CONST. art. IV, §7(c). However, the 1971 legislature will consider a proposed amendment to chapter 112, Florida Statutes, which will make it clear that the Governor's power of suspension is not affected by statutory or charter provisions for the suspension or removal of state, county, or municipal officers. The bill, proposed to be enacted as section 112.50, Florida Statutes, will provide that the Governor's suspension power exists concurrently with any statutory or charter authority. The bill further provides that the Governor's power of suspension shall exist concurrently with any statutory power to suspend or remove such officers. The 1968 constitution explicitly extends the application of other gubernatorial powers to municipal officers. In particular, the Governor is now authorized to require information in writing from municipal officers. *Id.* §1(a). He may institute judicial proceedings against them. *Id.* §1(b).

141. FLA. STAT. §166.16(1) (1969). The legislature is not constitutionally precluded

official if he is adjudged guilty of any of the charges contained in the indictment.[142]

The senate does not act upon suspensions and removals of municipal officials.[143] Although judicial review of statutory removal of municipal officers is analogous to review of the Governor's suspension orders issued pursuant to his constitutional powers,[144] the cases reveal certain differences. In the case of municipal officers, review is usually by mandamus.[145] In addition, review extends beyond a bare consideration of the alleged "jurisdictional facts" to a consideration of the sufficiency of the evidence.[146]

LEGISLATIVE REGULATION OF SUSPENSION AND REMOVAL

The Constitutional Background

To what extent does the executive suspension section of the 1968 constitution limit the authority of the legislature to regulate the suspension and removal of public officers by statute? This question presents itself in connection with the statutory reorganization of the executive branch[147] as well as the legislative establishment of chartered county governments[148] pursuant to the 1968 constitution. The question is also raised by numerous statutes enacted prior to the adoption of the 1968 constitution, which provide for the suspension or removal of public officers.[149] The question must be considered in the context of the important changes in Florida state and local government accomplished or provided for by the 1968 constitution. In

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from assigning supervisory duties with respect to municipalities to executive state officers. Coen v. Lee, 116 Fla. 215, 156 So. 747 (1934).

142. FLA. STAT. §166.16(4) (1969).

143. In its initial consideration of executive suspensions under the 1968 constitution, the senate unanimously adopted the report of the Select Committee on Executive Suspensions concluding that the senate is neither required nor authorized to act upon the suspension of municipal officials under article IV, section 7(c), of the Florida constitution, or section 166.16, Florida Statutes. The committee reported that this conclusion had been reached by committee counsel, by the attorney general in a letter opinion dated Feb. 7, 1969, and by the senate president. FLA. S. JOUR. Special Sess. 6 (Feb. 17, 1969).

144. Bryan v. Landis *ex rel.* Reeve, 106 Fla. 19, 142 So. 650 (1932).

145. *E.g.*, State *ex rel.* Hawkins v. McCall, 158 Fla. 655, 29 So. 2d 739 (1947); Nelson v. Lindsey, 151 Fla. 586, 10 So. 2d 131 (1942); Etzler v. Brown, 58 Fla. 221, 50 So. 416 (1909).

146. *E.g.*, State *ex rel.* Hawkins v. McCall, 158 Fla. 655, 29 So. 2d 739 (1947); Nelson v. Lindsey, 151 Fla. 586, 10 So. 2d 131 (1942); Etzler v. Brown, 58 Fla. 221, 50 So. 416 (1909).

147. *See* FLA. STAT. ch. 20 (1969), implementing FLA. CONST. art. IV, §6.

148. Chartered county governments may be established pursuant to either general or special law. However, a local referendum is required for the adoption, amendment, or repeal of the charter. FLA. CONST. art. VIII, §1(c). By either charter or special law approved by referendum, the legislature may abolish constitutional county offices or provide for choosing county officers other than by election. *Id.* §1(d).

149. A tabular compilation of such statutes is set forth in an appendix to this article. The compilation may not be exhaustive. Neither the index to Florida Statutes nor any other published texts or indexes provide a complete listing of such statutes. In the final analysis, legal research in this area reduces itself to the frustrations and eye strain of a page-by-page search through each volume of Florida Statutes.

particular, the constitutional powers of both the legislature and the Governor must be examined.

Perhaps the most far-reaching innovations of the 1968 constitution are those that increase the power and authority of the legislative branch. The effectiveness of the legislature as a working organization is greatly increased.[150] The scope of the legislature's lawmaking authority is broadened by the elimination of numerous restrictions contained in the 1885 constitution.[151] The 1968 constitution reveals an overriding purpose and intent to unshackle the legislature from excessively detailed constitutional restrictions and to afford it broad, flexible lawmaking discretion.[152] This intent is particularly evident in provisions relating to government structure and organization. The legislature is given what has been termed a "clear mandate" to prescribe the organization of the executive branch.[153] It is also authorized to alter the structure of county governments.[154] At the same time, acquisition of state auditing functions[155] formerly performed in the executive branch and the strengthening of legislative committees[156] gives the legislature a new capability to review the performance of state and local offices.[157]

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150. Great increases in legislative capability have resulted, in particular, from provisions for annual sessions, simplified means of convening special sessions, and authorization of interim legislative committees to compel attendance of witnesses and production of documents. FLA. CONST. art. III, §§3, 5. In addition, the functioning of the legislative committee system has been immensely strengthened and improved in recent years.

151. Of particular importance in connection with the suspension and removal of public officers is the abandonment of the prohibition against providing for the selection of statutory state and county officers by any means other than "election by the people or appointment by the governor." FLA. CONST. art. III, §27 (1885). This provision formerly tended to eliminate conflicts between the executive suspension power and the prerogatives of non-gubernatorial appointive and supervisory authorities. As discussed below, the 1968 constitution permits such conflicts to arise by sanctioning the statutory creation of appointive county offices and the removal of executive departments from the Governor's supervision.

152. As is true generally of state constitutions, the Florida constitution is a limitation on legislative power rather than a grant thereof. Sun Ins. Office, Ltd. v. Clay, 133 So. 2d 735 (Fla. 1961). Except as limited by the state and federal constitutions, the legislature's lawmaking authority is plenary. *See* Armistead v. State *ex rel.* Smyth, 41 So. 2d 879 (Fla. 1949). A central objective in the efforts to revise the constitution of 1885 was to shorten, simplify, and streamline its terms and eliminate "statutory" detail. Legislative lawmaking discretion tended to be broadened to the extent that this objective was achieved. Proceedings of the Constitutional Revision Commission reflect a common purpose to reduce and eliminate restrictions on legislative discretion. For example, in the debates on the executive article, the Honorable Robert M. Ervin referred to the "policy which has been adopted here to streamline the constitution and to let the Legislature have all of the flexibility to meet with the problems of this state as and when they arise." [1966-1968] *Hearings on the Executive Department, art. IV, §4, Amendment 12, Before the Florida Constitutional Revision Commission* at 83.

153. *In re* Advisory Opinion to the Governor, 225 So. 2d 512, 515 (Fla. 1969).

154. FLA. CONST. art. VIII, §1.

155. FLA. CONST. art. III, §2. *See* FLA. STAT. §§11.30-.47 (1969).

156. FLA. CONST. art. III, §5.

157. In the Governmental Reorganization Act of 1969, the legislative branch is declared to have the "broad purpose of determining policies and programs and reviewing program performance." FLA. STAT. §20.02(1) (1969).

The strengthening of the legislative branch was not designed to reduce the power and effectiveness of the executive branch in general or of the Governor in particular. The aim was to revitalize state government by increasing the effectiveness of both the legislative and executive branches. Nor did the constitutional recognition of the statutory "cabinet system"[158] that had evolved under the 1885 constitution signify an intent to diminish the Governor's executive powers. Measured against the bare language of the 1885 constitution, the provisions of the executive article of the 1968 constitution superficially appear to reduce the role and authority of the Governor in the executive department. Measured against the actual diffusion, dilution, and atrophy of the Governor's "supreme executive power," which resulted from a gradual process of attrition under the 1885 constitution, the new executive article achieves a considerable strengthening of the office of the Governor.[159] Although the reality of the cabinet system was given constitutional sanction, it was simultaneously simplified and, to some extent, rationalized.[160] The effectiveness of the Governor's office was increased to the extent permitted by political realities.[161]

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158. For discussions of the "cabinet system" as it developed under the 1885 constitution *see* McCollum, *The Florida Cabinet System—A Critical Analysis*, 43 FLA. B.J. 156 (1969); Waldby, *The Public Officer-Public Employee Distinction in Florida*, 9 U. FLA. L. REV. 47 (1956).

159. Under the 1885 constitution, Florida Governors served a four-year term and were ineligible for reelection to the next succeeding term of office. FLA. CONST. art. IV, §2 (1885). Cabinet officers were not so disabled and could therefore serve several terms in succession. *See* FLA. CONST. art. IV, §20 (1885). The Governor's ineligibility to succeed himself tended to undermine both the political muscle and the administrative effectiveness of the office. It tilted the balance of power in favor of the cabinet and the legislature despite the constitutional grant of "Supreme Executive power" to the Governor. FLA. CONST. art. IV, §1 (1885). The 1968 constitution markedly increased both the political and administrative potential of the Governor's office by permitting the Governor to serve two terms in succession. FLA. CONST. art. IV, §5 (b).

160. The Constitutional Revision Commission rejected a proposal that the legislature be afforded unqualified discretion simply to prescribe the administration of executive departments "by law" instead of designating the particular options for the "direct supervision" of executive departments, which are set forth in article IV, section 6, of the 1968 constitution. Moreover, the particular options ultimately adopted in the 1968 constitution eliminate the earlier legislative practice of establishing boards administered by various groupings of some, but not all, cabinet members. Although the 1968 constitution permits executive departments to be placed under the direct supervision of a single cabinet member, this option appears to be intended to permit the legislature to provide each cabinet member with a department performing that member's particular constitutional duties and related functions. FLA. CONST. art. III, §8. It does not appear to be intended to permit the reduction of the Governor, as the chief executive officer of the state, to the role of an outcast in the executive branch. It is important to note, moreover, that bills prescribing the organization of the executive branch are subject to the Governor's veto power.

161. During the debates before the Constitutional Revision Commission, the Honorable Earl Faircloth asked the Honorable John J. Crews, Jr. if the constitution might not be improved by eliminating the placement of executive departments under the supervision of individual cabinet members. The following enlightening colloquy ensued:

Mr. Faircloth: "[W]ould it not be improved if we further struck out the next three words, 'a cabinet member,' which would then remove the fragmentation of the executive

The "supreme executive power" of the state remains vested in the Governor and he remains charged with the duty to "take care that the laws be

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power without the governor having any supervision over a single cabinet member to whom the Legislature might assign some responsibility or to a group of cabinet members, exclusive of the governor? Would that not be an evil that would be corrected?"

Mr. Crews: "Well, Mr. Faircloth, I learned a long time ago not to get over in an argument that couldn't . . . possibly gain anything but lose you votes. I personally think that the proliferation of the executive power is bad in this state. But I don't want to go any further and cause anyone [not] to vote for this good amendment because I said something there that they didn't like."

. . . .

Mr. Faircloth: "Is what you are trying to tell us, Mr. Crews, that your philosophy is that you do not intend to uncover more snakes this afternoon?"

Mr. Crews: "I don't want to violate the rules, but, Mr. Faircloth, I think that you put your finger on it right there." [1966-1968] *Hearings on the Executive Department, art IV, §4, Amendment 12, Before the Florida Constitutional Revision Commission* at 83.

In the debates before the Commission on a substitute amendment offered by Messrs. Lawton M. Chiles, Donald H. Reed, Jr., and John J. Crews, Jr., containing provisions similar to those of article IV, section 6, of the 1968 constitution, Judge Crews made the following revealing remarks:

Mr. Crews: "Mr. Chairman, Lady and Gentlemen of this convention, for a number of years many of us have watched the steady decline of state government. Many have attributed that to malapportionment of the legislature. I think one would be oblivious to facts if he did not agree that that was one of the reasons.

"I suggest to you that there is another reason, and that is the decline, particularly in the State of Florida, of the powers of the governor.

"Now, this amendment is offered, this substitute amendment is offered with the firm conviction that it will slightly, oh so slightly, improve the status of the chief executive of this state in the administration of the executive department. Second, it will also allow the people of Florida to know, and insomuch as we have the cabinet system, who is responsible.

"Now, how many members know, how many people of Florida know the three members of the cabinet comprising the railroad assessment board, or the securities and exchange commission? Most people in Florida I suspect are of the opinion when thinking on those two important matters that the governor would have some voice in the administration of that executive and administrative function. But he does not. . . .

"Now, then, without adopting this substitute, the people will yet come to Tallahassee, or look toward Tallahassee, without ever knowing to whom to look to hold for responsibility. But if we limit it to whether it is either in the governor, a cabinet member, which in and of itself is not too good, but realizing from a practical standpoint that we'd have the bankers of Florida, if you tried to bother with the comptroller, and we'd have the insurance business and all of its related facets of power and influence against us, in the legislature and otherwise, if we tried to bother with the treasurer being the insurance commissioner. We'd have the school teachers if we had the superintendent of public instruction. . . .

"Now, understanding that, we provide for it, we go that compromise, but we say then that that is enough, let's don't take any more the power of the governor and the understanding of the people looking to their chief executive, that he be a member of these boards and that all members of the cabinet sit on those boards, if any sit on there, other than the one in the one department.

"It will bring sunshine, it will bring light, it will bring responsibility. And I suggest, oh, even more important, it will allow Florida to meet some of the challenging issues that the legislature now can meet from a legislative standpoint, from an executive standpoint." *Id.* at 117-120.

faithfully executed."[162] The retention of these salient grants of authority refutes any theory that the 1968 constitution reduced the Governor to the status of a coequal member of a "plural executive."[163] Although the "administration" of executive departments can be removed by statute from the Governor's "direct supervision," this does not mean that such departments are thereby placed beyond the limits of the Governor's constitutional duties and concerns. In particular, the legislature's mandate to reorganize the executive branch does not sanction a statutory short circuiting of the Governor's constitutional power to suspend from office "any state officer not subject to impeachment." The clear language of the suspension section indicates that officers remain subject to executive suspension even though they may be placed in executive departments that are not administered under the Governor's exclusive and direct supervision.

Other provisions of the 1968 constitution confirm that the Governor's responsibilities are not confined to state officers in those executive departments under his direct supervision. The Governor is authorized to transact all necessary business with the officers of government.[164] He may require information in writing from all executive or administrative state, county, or

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162. FLA. CONST. art. IV, §1 (a).

163. This was clearly explained by Senator John E. Mathews in the Constitution Revision Commission debates on executive reorganization. Senator Mathews made these important observations:

"We ought to draw the lines as to what philosophy that we are embracing. Now, the constitution of 1885 starts out about like this draft, saying that: 'The supreme executive power shall be vested in a governor.' Now, that's stronger language than we find in the constitution of the United States, whose executive article starts out and says: 'The executive power shall be vested in a president of the United States.' Those are the basic grants of executive power, except for the state we say 'The supreme executive power . . . .' Now I don't know that any governor has ever gone into court to test some of these things that we have done with reference to assigning responsibilities to various cabinet boards and other boards, if the governor wanted to assert his constitutionally granted supreme executive power. Now, under the constitution of the United States, Congress knows that any board that it creates is subject to supervision by the president of the United States under the simple grant of power, that 'The executive power shall be vested in a president . . . .' We are carrying on this language even stronger in Florida, that the supreme executive power shall be in the governor of the state.

"Now, if we're going to be consistent with that, I believe, if I'm right, if it's ever challenged in court, if Florida's constitution is interpreted by the courts like the federal constitution, then I don't think that the legislature in creating boards can deprive the man in whom the supreme executive power is vested of his general right of supervision. The fact that we have done it in the past, and by acquiescence the governor has not exercised his authority, is no sign that the authority is not basically there by the constitution.

. . . .

"This is a chance for us to be consistent in the constitution. And in drawing the lines as to what your philosophy is, if you are going to tailor statutes into the constitution, they should be consistent with the grant of supreme executive power. If we are not, if we're not going to have the supreme executive power in a governor, then we are opening up an entirely different type of constitution than that that has endured throughout all these years." [1965-1968] *Hearings on the Executive Department, art. IV, section 4, Amendment 12, Before the Florida Constitutional Revision Commission* at 105-07.

164. FLA. CONST. art. IV, §1 (a).

municipal officers upon any subject relating to the duties of their respective offices.[165] He may initiate judicial proceedings against any executive or administrative state, county, or municipal officer to enforce compliance with any duty or restrain any unauthorized act.[166] The Governor is also charged with the duty, in presenting his annual message to the legislature, to propose such reorganization of the executive department as will promote efficiency and economy.[167]

The Governor's powers and duties with respect to state officers, including the power of executive suspension, are necessary and incidental to the Governor's supreme executive power and his duty to see that the laws are faithfully executed. This does not mean that the executive suspension power is exclusive in the sense that it precludes any and all legislative action with respect to suspension and removal of public officers. In discharging its responsibility to prescribe the organization of the executive branch and chartered county governments, the legislature should be accorded wide latitude in defining the terms and conditions on which public officers shall hold their offices. The legislature should not be precluded from regulating the suspension and removal of officers by statutory provisions that are supplemental to and compatible with the Governor's constitutional power of suspension.[168] In particular cases, the Governor's power of suspension may exist concurrently with the statutory authority of some other agency to suspend, remove, or otherwise dismiss a particular officer.[169] However, the 1968 constitution reveals a clear intent that the Governor's power to suspend "all state officers not subject to impeachment" cannot be diminished or abrogated by conflicting statutory provisions.

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165. *Id.*

166. *Id.* §1 (b).

167. *Id.* §1 (e).

168. In Bryan v. Landis *ex rel.* Reeve, 106 Fla. 19, 142 So. 650 (1932), the Supreme Court of Florida declared that "in the absence of constitutional limitation, the Legislature has ample power to prescribe the conditions under which municipal or other officers may be appointed or removed." *Id.* at 22, 142 So. at 652. However, the legislature's power to provide for and regulate the removal of constitutional officers may be limited. In *In re* Investigation of Circuit Judge, 93 So. 2d 601 (Fla. 1957), it is broadly declared that "where the constitution creates an office, fixes its term and provides upon what conditions the incumbent may be removed before the expiration of his term, it is beyond the power of the legislature or any other authority to remove or suspend such officer in any manner than that provided by the constitution." *Id.* at 604. This generalized statement probably should not be applied in the same fashion to all constitutional officers. The power of the legislature to regulate the removal of circuit judges and other officers subject to impeachment is undoubtedly slight, if it exists at all. The viability of FLA. STAT. §§114.02, .03 (1969), for example, which provide for the summary ouster of cabinet members, is subject to considerable doubt under the 1968 constitution. On the other hand, the legislature has extensive authority with respect to local taxing officials and other constitutional county officers and such authority may well encompass provisions touching upon their suspension and removal. *See* FLA. CONST. art. VIII, §6 (e).

169. The Supreme Court of Florida concluded that the Governor had concurrent power to suspend the Dade County Director of Public Safety despite the fact that that officer was hired by the county manager and served at the will of the county manager, who had power to fire him without cause or notice. McNayr v. Kelly, 184 So. 2d 428

The 1968 constitution presents new possibilities of clashes between the Governor and other agencies having authority to appoint, supervise, or remove officers subject to executive suspension. Although the legislature presumably will avoid or minimize such conflicts wherever possible,[170] they nevertheless may be expected to occur from time to time, particularly within the crosscurrents of authority present in the executive department.[171] How-

(Fla. 1966). *See also* Dade County v. Kelly, 153 So. 2d 822 (Fla. 1963). The Dade County home rule amendment to the 1885 constitution explicitly provided that the power of the Governor and senate relating to suspension and removal of officers "shall not be impaired, but shall extend to all officers provided for in said home rule charter." FLA. CONST. art. VIII, §11 (i) (1885). The inclusion of this explicit confirmation of the continued effectiveness of the suspension section was a sensible precaution in drafting an amendment that surgically carved a unique, customized experiment in local self-government out of the complex provisions of the 1885 constitution. The Dade County home rule amendment contained many such precautionary recitals. The absence of such explicit recitals in the local government article of the 1968 constitution does not signify an intent to make the executive suspension power inapplicable to chartered county governments. In the shortened and "streamlined" 1968 constitution, such recitals would be unnecessary. *See In re* Advisory Opinion to the Governor, 52 So. 2d 646 (Fla. 1951), in which the supreme court declared that the executive power of suspension is the general rule, which is limited only by exceptions that expressly appear in the constitution.

Recognition that the Governor's power of suspension may exist concurrently with another agency's power to suspend, remove, or otherwise terminate particular officers will be of the utmost importance in resolving the questions of constitutional and statutory interpretation that will arise under the 1968 constitution. Rejection of the concept of concurrent jurisdiction to suspend and remove officers will necessarily lead to either an undermining of the executive power of suspension or an unsound restriction of the legislature's flexibility in fashioning state and county governmental organizations to serve public needs, or both. Recognition of the concept, on the other hand, will facilitate the simultaneous strengthening of both legislative and executive power intended by the 1968 constitution.

Bills introduced in the 1971 session of the legislature, proposed to be enacted as Sections 112.49 and 112.50, Florida Statutes, will make it clear that the Governor's constitutional power of suspension is not affected by statutory and charter suspension and removal provisions, but exists concurrently with them.

170. One means by which such conflict can be avoided is that of establishing particular positions as employments rather than as offices, since public employees are not subject to the executive suspension power. The legislature has discretion to determine whether statutory positions shall be created as offices or as employments. State *ex rel.* Holloway v. Sheats, 78 Fla. 583, 83 So. 508 (1919). However, the powers and other attributes of the position, rather than the label affixed to it, determine whether it is an office or an employment. McSween v. State Live Stock Sanitary Bd., 97 Fla. 750, 122 So. 239 (1929). *Cf. In re* Advisory Opinion to the Governor, 225 So. 2d 512 (Fla. 1969). *See* Waldby, *supra* note 158.

171. Such conflicts also occurred from time to time under the 1885 constitution. *See* State *ex rel.* Woodworth v. Amos, 98 Fla. 212, 123 So. 749 (1929), in which a disagreement arose between the Governor and the commissioner of agriculture, both of whom appeared to have statutory authority to dismiss agricultural inspectors summarily. The conflict did not involve the constitutional power of suspension and removal, since the term of the inspector was clearly subject to a plenary power of termination without cause. The question was simply whether the statute contemplated that the Governor or the commissioner, or both, possessed such power. The court held that the commissioner should act in an advisory capacity to the Governor who has ultimate and plenary power to remove.

An imbroglio concerning the removal of the state health officer is described in *In re*

ever, such conflicts are of relatively minor importance in comparison to the vital purposes served by the executive power of suspension. That power cannot be restricted to those cases in which it may be exercised without conflict with other political or administrative authority. The essential mission of the power is to provide a swift and sure means of dislodging corruption and malfeasance from public offices where other political and administrative processes have failed.

Statutory Regulation — Particular Problems

Each statute touching upon the suspension or removal of public officers has its own legislative history and context and raises its own peculiar questions and problems. Although each of these statutes cannot be discussed here in detail, certain statutory problem areas are treated in a general way in the following paragraphs.

Officers Serving at Pleasure of Governor. Officers without fixed terms of office, who are appointed to serve at the pleasure of the Governor, may be summarily terminated by the Governor without cause.[172] Since the term of such officers is conditioned on the will or pleasure of the Governor, the Governor may declare the term to be at an end at any time. The constitutional suspension section contemplates a "premature" suspension and removal of an officer before his term would otherwise expire. The section is inapplicable to officers whose terms may be summarily ended by the Governor.[173] Such an officer does not have the kind of "property right" in his office that is associated with officers appointed or elected for fixed terms. Having accepted his office conditioned on the Governor's pleasure, the officer cannot claim tenure and rights under the constitutional suspension section. By establishing statutory offices whose incumbents serve at the pleasure of the Governor, and not for a fixed term, the legislature does not impair or diminish the executive power that the suspension section vests in the Governor. Instead, the Governor's authority with respect to the officer in question is increased, and freed from the restrictions imposed by the suspension section, including senate review.

Officers Subject to Independent Appointive and Removal Authority. Under the 1885 constitution, state and county officers were required to be either

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Advisory Opinion to the Governor, 78 Fla. 9, 82 So. 608 (1919). The cryptic advisory opinion in this case casts little light on the Governor's executive powers and duties in the situation.

172. *In re* Advisory Opinion to the Governor, 76 Fla. 500, 80 So. 17 (1918). *See* State *ex rel.* Woodworth v. Amos, 98 Fla. 212, 123 So. 749 (1929). Most of the Florida cases concerning the dismissal of officers serving at the pleasure of the appointing authority are cases dealing with municipal officers. The leading case is Burklin v. Willis, 97 So. 2d 129 (1st D.C.A. Fla. 1957). *See also* State *ex rel.* Gibbs v. Bloodworth, 134 Fla. 369, 184 So. 1 (1938); Bryan v. Landis *ex rel.* Reeve, 106 Fla. 19, 142 So. 650 (1932).

173. *See In re* Advisory Opinion to the Governor, 76 Fla. 500, 80 So. 17 (1918).

elected by the people or appointed by the Governor.[174] Because the Governor had the sole and exclusive power to appoint such officers, conflicts between the executive power of suspension and independent appointing authorities tended to be precluded.[175] The 1968 constitution omits the Governor's exclusive power of appointment and thereby makes such conflicts possible.

The 1968 constitution affords the legislature broad flexibility in establishing statutory county offices. The traditional elective constitutional county offices may be abolished and replaced by statutory offices that may be appointive rather than elective.[176] Nor does the legislature appear to be precluded from establishing statutory county offices without fixed terms, whose incumbents serve at the pleasure of a local appointing authority.[177] Furthermore, when the legislature establishes chartered county governments or otherwise creates statutory county offices whose incumbents are appointed for fixed terms, there seems to be little doubt that the legislature may provide for the suspension or removal of such officers by local appointing agencies. However, nothing in the local government article of the 1968 constitution purports to restrict or limit the Governor's constitutional power to suspend such locally appointed statutory county officers. The suspension section's applicability to "any county officer" would therefore appear to give the Governor and senate concurrent authority with local agencies to suspend and remove such officers.[178] In case of conflict between the Governor's power of suspension and local agencies having statutory powers of appointment or removal, the supreme executive power of the Governor must necessarily prevail.

The executive reorganization section of the 1968 constitution raises questions of somewhat greater difficulty. In particular, problems of interpretation are presented by the ambiguous language of subsection (a), which provides:[179]

> [W]hen provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office.

This language has apparent reference to the legislature's preceding option

174. FLA. CONST. art. III, §27 (1885). The Governor's exclusive power of appointment under this section was not deemed to apply to district officers, as opposed to state and county officers. Town of Palm Beach v. City of West Palm Beach, 55 So. 2d 566 (Fla. 1951). However, statutory district officers are subject to the executive power of suspension. *In re* Opinion of the Justices, 121 Fla. 157, 163 So. 410 (1935).

175. *But see* State *ex rel.* Woodworth v. Amos, 98 Fla. 212, 123 So. 747 (1929); *In re* Advisory Opinion to the Governor, 78 Fla. 9, 82 So. 608 (1919).

176. FLA. CONST. art. VIII, §1 (d).

177. Under the Dade County home rule amendment officers may be appointed to serve at the pleasure of the county manager. *See* McNayr v. Kelly, 184 So. 2d 428 (Fla. 1966); Dade County v. Kelly, 153 So. 2d 822 (Fla. 1963).

178. FLA. CONST. art. IV, §7. If enacted by the 1971 legislature, proposed section 112.50, Florida Statutes, will confirm that the Governor's power of suspension is not affected by, but exists concurrently with, statutory and charter provisions for suspension or removal of state, county, or municipal officers.

179. FLA. CONST. art. IV, §6 (a).

to place executive departments under the direct supervision of "an officer or board appointed by and serving at the pleasure of the governor . . . ."[180] That is, subsection (a) appears to authorize the legislature to qualify the Governor's preceding authority to appoint such officers or boards by making such appointments subject to either senate confirmation or the approval of three cabinet members. However, subsection (a) does not appear to be limited to heads of executive departments since it refers broadly to "any designated statutory office."

Subsection (a) also appears to permit the legislature to condition the *removal* of any designated statutory officer on senate confirmation or the approval of three cabinet members. It is at this point that the subsection becomes difficult to reconcile with the executive suspension section. The language of the subsection is ambiguous and appears to have been selected without clear comprehension of the interrelationship between the removal provisions of the subsection and the suspension and removal procedure set forth in section 6.

The problem of reconciling the two provisions cannot be resolved properly without due consideration of the Governor's supreme executive power, his responsibility to see that the laws are faithfully executed, his authority to require written information from or to initiate judicial proceedings against "*any* executive or administrative state . . . officer . . . ." and the important public interests served by the executive power of suspension. It seems doubtful that the language of subsection (a) is intended to sanction the establishment of statutory offices in the executive branch that are beyond the reach of the Governor's power of suspension.[181]

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180. *Id.* §6.

181. *Id.* §6(a). Nor should subsection (a) be construed to permit the senate's removal of an officer under article IV, section 7(b), to be conditioned on the approval of three cabinet members. The suspension section clearly contemplates that the senate's decision to remove or reinstate a suspended official shall be final. In *In re* Advisory Opinion to the Governor, 78 Fla. 9, 82 So. 608 (1919), it was held that the executive suspension section of the 1885 constitution authorized the Governor to suspend only such officers as had been elected by the people or appointed by the Governor. The choice of language in this conclusory opinion clearly has reference to article III, section 27, of the 1885 constitution, which was omitted from the 1968 constitutional revision. The case should not be accepted as sound authority for such a restriction of the suspension section under the 1968 constitution.

See also the questionable dictum in Blackburn v. Brorein, 70 So. 2d 293 (Fla. 1954), to the effect that although deputy sheriffs are officers they are not subject to suspension by the Governor. As a practical matter, the Governor's power to suspend sheriffs probably reduces the question of his power to suspend deputy sheriffs to a problem of largely theoretical significance in individual cases. As legal precedent, however, the idea that an express constitutional grant of jurisdiction to the chief executive can be superseded by a conflicting statutory arrangement is a notion that strikes at the foundations of constitutional government. As pointed out in *In re* Advisory Opinion to the Governor, 52 So. 2d 646 (Fla. 1951), the executive power of suspension is the general rule and exceptions to it are limited to those expressly named in the constitution. No such express exception as to deputy sheriffs appears in either the 1885 or 1968 constitutions.

Statutory Grounds for Suspension and Removal. In cases arising under the 1885 constitution, the Supreme Court of Florida repeatedly declared that the constitutional grounds of suspension and removal are exclusive and that the Governor lacks executive jurisdiction to suspend officers on grounds other than those specified in the constitution.[182] All of these cases involved suspensions on constitutional grounds of officers having fixed terms of office. None of these cases suggests that the Governor is limited to the constitutional grounds in terminating an officer serving at the Governor's pleasure. As discussed above, the Governor may summarily terminate such officers without cause and the constitutional grounds are neither exclusive, nor, indeed, applicable, in such cases. Nor do any of the foregoing cases involve statutory grounds of suspension. They therefore do not reach the question of whether the constitutional grounds are exclusive in the sense that they cannot be defined, supplemented, or altered by statute.

In numerous statutes, the legislature has provided for the suspension or removal of officers on grounds that, to a greater or lesser extent, vary from the constitutionally specified grounds.[183] Many of these statutes merely declare that specified acts or omissions shall be deemed to constitute malfeasance or other constitutional grounds of suspension and removal.[184] It would appear to be within the province of the legislature to define particular instances of such grounds as malfeasance, misfeasance, and neglect of duty, so long as the statutory definitions do not purport to diminish the scope of the constitutional grounds and thereby impair the Governor's constitutional jurisdiction. Although some of these statutes speak in mandatory terms,[185] they should be properly construed as permissive in the sense of authorizing but not requiring the Governor to exercise his suspension power.[186] Otherwise, such statutes would be objectionable as legislative attempts to interfere with the Governor's constitutional discretion to decide whether a suspension order should be issued in any particular instance.

The constitutional grounds of suspension also should not be deemed to be exclusive in the sense of precluding legislative specification of supplemental grounds.[187] Such an interpretation would unreasonably interfere with the

182. *See* State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 155 So. 129 (1934); State *ex rel.* Hatton v. Joughin, 103 Fla. 877, 138 So. 392 (1931); State *ex rel.* Bridges v. Henry, 60 Fla. 246, 53 So. 742 (1910); Annot., 92 A.L.R. 988 (1934).

183. *See* the compilation of such statutes set forth in an appendix to this article.

184. *E.g.*, FLA. STAT. §§111.04, 137.06 (1969).

185. *E.g.*, FLA. STAT. §§40.32, 839.04 (1969).

186. Such statutes likewise should not be construed as controlling the discretion and judgment of the senate in reviewing executive suspension orders.

187. Many questions of statutory construction are raised by these statutes. In many instances, the statutory grounds specified should be deemed to be declaratory of the constitutional grounds and insignificant and arbitrary variations of terminology should not cause undue concern. For example, the statutory ground of "nonfeasance" should be recognized as an instance of poor legislative draftsmanship and should not be deemed to add anything of substance to the constitutional grounds. On the other hand, certain statutory grounds clearly appear to exceed and supplement the constitutional grounds. *E.g.*, FLA. STAT. §104.27 (1969), which provides for suspension and removal of officers on account of violations of laws regulating campaign contributions and expenditures.

legislature's powers and responsibilities in creating and regulating the incidents of public offices. Every sound consideration of public policy leads to the conclusion that the legislature should have a broad discretion in defining particular acts, violations, and omissions as grounds for suspension as the public need may require and as may be appropriate to the effective functioning of particular offices. Moreover, if the legislature may establish offices whose incumbents serve at the pleasure of the Governor, it is illogical to say that the legislature is powerless to specify supplemental grounds for suspension and removal of officers having fixed terms. In short, the constitutional grounds of suspension should be deemed to be exclusive only in the absence of supplemental statutory grounds.

Although it seems clear that the constitutional grounds of suspension may be supplemented by statute, it is doubtful that the constitutional grounds can be limited or reduced by legislative action. Any statutory limitation or restriction of the constitutional grounds would constitute a futile legislative attempt to divest the Governor of an executive jurisdiction that is explicitly conferred upon him by the constitution.

Therefore, statutory grounds cannot be deemed to qualify or limit the operation of the constitutional grounds. For example, a statutory authorization to suspend an officer for "gross inefficiency or misconduct"[188] does not convert the constitutional ground to "gross" neglect of duty. Similarly, statutory authorization to suspend an officer for *conviction* of a crime[189] does not impair the Governor's authority to suspend the officer for *commission* of a felony.

Legislative Regulation of Procedure. The 1968 constitution explicitly authorizes the legislature to prescribe "by law" the senate proceedings whereby suspended officers are removed or reinstated.[190] The legislature presumably may regulate other procedural aspects of the suspension and removal process by statutory enactments that do not conflict with the constitution. However, the basic procedure prescribed by the constitution cannot be superseded by conflicting statutory provisions. The legislature undoubtedly lacks the authority to redistribute the particular powers that are explicitly vested in the Governor and the senate by the suspension section of the constitution. For example, the 1968 constitution gives the Governor only the power to suspend, but vests the power to remove in the senate. The senate's constitutional role and duty in the suspension-removal process cannot be abrogated or renounced by statute. Accordingly, statutes that purport to authorize the Governor to "remove"[191] an officer from office should probably be construed as declaratory of the executive power to "suspend" officers. Similarly, it should be deemed to be beyond the authority of the legislature to provide for the automatic suspension or removal of an officer to whom the suspension section

188. FLA. STAT. §460.03 (1969).
189. *E.g.*, FLA. STAT. §471.08 (4) (1969).
190. FLA. CONST. art. IV, §7 (b).
191. *E.g.*, FLA. STAT. §391.02 (1969).

applies,[192] to limit the period of an officer's suspension,[193] or to make suspension and removal of an officer mandatory rather than discretionary.[194]

CONCLUSION

In a democratic society, any interference with the tenure of an elected public officer is a grave matter. But a mature democratic society does not accept the sophistry that a corrupt elected official should not be removed from office because his election demonstrates that he is what the people want. The people of Florida have expressly declared in their constitution that it is *not* their will or desire to condone malfeasance, misfeasance, neglect of duty, drunkenness, and other specified evils in their public offices. Moreover, the people have conferred upon their Governor the clear authority and duty to eliminate such evils when they occur. The diligent performance of that duty is one of the most important responsibilities of the chief executive. Likewise, one of the most important constitutional responsibilities of the Florida Senate is to fairly and effectively review the Governor's exercise of his power of suspension to ensure that it is not misused or abused. In the words of Justice Terrell:[195]

> No more solemn duty is imposed on the Governor and the Senate, and in the performance of that duty they should illuminate their course by the Constitutional mandate and in its light protect society, and be just to the officer suspended.

192. *E.g.*, FLA. STAT. §561.05 (1969). *See* FLA. STAT. §§114.02-.03 (1969), which provide for the occurrence of vacancies in cabinet offices by operation of law. As discussed above, these enactments are of doubtful constitutionality.

193. *E.g.*, FLA. STAT. §§40.35, .32, 215.10 (1969). These statutes simply have not been adjusted to the suspension procedure as set forth in the 1968 constitution.

194. *E.g.*, FLA. STAT. §§40.32, 839.04 (1969).

195. State *ex rel.* Hardie v. Coleman, 115 Fla. 119, 130, 155 So. 129, 134 (1934).

APPENDIX

FLA. STAT. (1969)	OFFICER (S) AFFECTED	AGENCY AUTHORIZED	ACTION AUTHORIZED	GROUNDS
§11.47 (4)	Any officer subject to audit by the auditor general	Unspecified	Remove from office	Wilful failure or refusal to produce records or *information* for audit
Ch. 20	Governmental Reorganization Act of 1969			
§40.32	Clerks of certain courts of record	Governor	Shall be suspended until next meeting of the legislature "when the governor shall report his action to the senate"	Failure to transmit unexpended jurors' funds to comptroller within 10 days after adjournment of court
§40.35	Clerks of certain courts of record	Governor	May suspend until next session of the legislature	Failure to account to comptroller for funds for jurors and witnesses and pay over any balance, within 2 weeks after adjournment of term of court; comptroller shall report such failure to Governor, who may suspend clerk "on account of such report"
§104.27 (2)	Any person elected to office	Unspecified	Suspension and removal from office	Wilful violation of §99.161, pertaining to campaign contributions and expenditures
§104.271	Any candidate	Unspecified	Removal or impeachment and disqualification to hold office	Falsely, wilfully, or maliciously charging an opposing candidate with certain election law violations
§110.041 (1) (a)	Career service commissioners	Governor/ Senate	Suspension and removal	"The governor may suspend a commissioner only for cause subject to removal or reinstatement by the senate"

§111.04	"Any person"	Unspecified	"[S]hall be regarded as having committed misfeasance in office and shall be subject to removal, suspension or discharge as provided by law"	Failure to comply with §111.03, which requires monthly statements and transmittal of funds to state treasurer, from all state administrative offices where fees or other perquisites are collected
§112.317	Officers and employees of state agencies and of counties, cities, and other political subdivisions of the state; legislators and legislative employees	Various; see §112.318	Violation shall constitute grounds for dismissal from employment, removal from office or other penalty as provided by law	Violation of any provision of ch. 112, pt. III, Code of Ethics for public officers and employees
§§114.01 (1)- (8)	"Every office"	Self-executing	Office "shall be deemed vacant"	Death, resignation, or removal of incumbent and other specified reasons
§§114.01 (9), (10)	"Every office"	Governor	May declare office vacant	If judgment obtained against officer for breach of condition of official bond, or if officer fails to give a bond required by law
§114.02	Any administrative officer of the executive department	Governor	May declare office vacant and fill same as provided by law	Unauthorized absence from the state
§114.03	Secretary of state, attorney general, comptroller, treasurer, commissioner of education, commissioner of agriculture	Self-executing	Violation "deemed an abandonment and vacation of the office" Governor may fill the vacancy according to law	Absence from capital for more than 30 days without consent of Governor and majority of cabinet
§115.15	State, county, and municipal officials	Unspecified	Refusal to comply shall subject official to removal from office	Refusal to comply with 50 App. U.S.C.A. §308, as it relates to reemployment of public employees granted leave of absence under active military duty

FLA. STAT. (1969)	OFFICER (S) AFFECTED	AGENCY AUTHORIZED	ACTION AUTHORIZED	GROUNDS
§116.09	All sheriffs, circuit court clerks and ex officio clerks of boards of county commissioners	Governor	Officer shall be subject to suspension from office	Neglect or refusal to comply with §116.07, requiring that books of account and of record be kept in accordance with forms approved by auditor general
§119.02	Any official	Unspecified	Officer shall be subject to impeachment or removal	Violation of §119.01, which provides that all state, county, and municipal records shall at all times be open for a personal inspection of any citizen of Florida
§128.06	County commissioners and circuit court clerks	Governor	"Shall be cause for removal by the governor"	Failure or refusal to conform or comply with ch. 128, pertaining to county finances
§129.08	County commissioners and circuit court clerks	Governor and Senate (by implication)	Commissioner shall be guilty of malfeasance in office and subject to suspension and removal from office as now provided by law	Voting to incur any county debt exceeding expenditures allowed by law; voting to pay any illegal charge or unauthorized charge against the county
§129.09	Circuit court clerk acting as county auditor	Governor and Senate (by implication)	Suspension and removal from office (by implication)	Signing any warrant for payment of county funds proscribed in §129.08
§137.06	Any state or county officers	Governor	Suspension, as provided in FLA. CONST. art. IV, §7, or impeachment, if officer is subject to impeachment	Failure within 60 days to give a new bond as required by §137.05; such failure "shall be deemed and held to be a misfeasance within the meaning of the Constitution"
§142.03	Justices of the peace; county judges; clerks of criminal and circuit courts	Governor	Governor may, in his discretion suspend such officer from office	Failure or refusal to make monthly report of fine and forfeiture fund

§145.12 (2)	State and county officers who receive commissions or other remuneration	Governor	Officer "may be suspended by the governor in his discretion"	Failure to make itemized report of commissions and office expenses to board of county commissioners
§166.16 (1)	Municipal officers	Governor	Governor shall have the power to suspend from office	"When any grand jury shall present or return a true bill against any elected or appointed municipal official as a result of actions of such official arising directly or indirectly out of or pertaining to his official conduct or duties"
§166.16 (4)	Municipal officers	Governor	Governor "shall remove" official from office	"If . . . adjudged guilty of any of the charges contained in the indictment"
§167.61 (3)	Municipal officers	Governor	Officer "may be suspended from office by the governor"	Refusal to submit municipal books, records, property, etc., to auditor general for inspection or examination
§195.011 (4)	Tax assessors, tax collectors, circuit court clerks, sheriffs, county commissioners acting as Board of Equalization	Governor	Removal	Wilful failure to properly perform duties imposed by the constitution, tax laws and regulations; Department of Revenue shall investigate, recommend removal to Governor, and furnish evidence to Governor
§195.031	Substantially duplicates §195.011 (4)			
§199.351	Substantially duplicates §195.011 (4), with reference to duties pertaining to taxation of intangible personal property pursuant to ch. 199			
§215.10	Tax collectors and other officers having duties connected with assessment or collection of taxes	Governor	Governor may suspend, but not beyond adjournment of next session of senate	Failure or refusal to perform any duty or act, to make any return, or pay over any money required by law

FLA. STAT. (1969)	OFFICER (S) AFFECTED	AGENCY AUTHORIZED	ACTION AUTHORIZED	GROUNDS
§240.011 (2)	Board of Regents	Unspecified. Concurrence of majority of members of state board of education required	Members may be removed	"[F]or cause"
§240.031	Board of Regents	State Board of Education	Board may remove	"[F]or cause"
§242.331 (1)	Trustees for the Florida School for the Deaf and Blind	Governor	Governor may remove	"[F]or cause"
§242.51 (1)	Advisory Council of the Florida State Fire College	Governor	Governor may remove	"[F]or cause"
§310.01	Board of Pilot Commissioners	Governor	Removal	Unspecified
§348.203 (4)	Members of Brevard County Expressway Authority	Governor	Remove from office	"[F]or misconduct, malfeasance, misfeasance or nonfeasance in office"
§349.03 (2)	Members of Jacksonville Expressway Authority	Appointing authority, Governor, or mayor of Jacksonville	Remove from office	"[F]or misconduct, malfeasance, misfeasance, or nonfeasance in office"
§350.03	Commissioners of the Florida Public Service Commission	Governor	Remove or suspend	"The governor shall have the same power to remove, suspend . . . as in other offices"

§354.05	Special officers for carriers	Governor	Officers "shall be removed by governor at any time"	"[I]n the manner and for the causes provided by law"
§370.16 (28)	County oyster rehabilitation commissioners	Governor	Remove from office	Failure or neglect to diligently perform the duties of such office
§370.16 (33)	District oyster conservation commissioners	Governor	Removal	Failure or neglect to diligently perform the duties of such office; see §370.16 (28)
§378.14 (2)	Officers of flood control districts	Governor	Governor shall have authority to remove	"[I]n the manner and for cause defined by the laws of this state applicable to situations which may arise in said district"
§391.02	Florida Crippled Children's Council	Governor	Governor may remove	"[F]or cause"
§391.03 (2)	Florida Crippled Children's Council	Governor	Governor shall remove	Failure to resign upon becoming a candidate for any public office
§392.01 (1)	State Tuberculosis Board	Governor	Governor may remove	"[F]or cause"
§460.03	Florida State Board of Chiropractic Examiners	Governor	Governor may suspend	"[F]or a misfeasance, malfeasance, gross inefficiency or misconduct, or upon any of the constitutional grounds upon which officers may be suspended by the governor of this state"
§467.01 (3)	Florida State Board of Architecture	Governor	Governor may remove	Inefficiency or neglect of duty
§471.08 (4)	Florida State Board of Engineer Examiners	Governor	Governor may remove	"[F]or misconduct, incapacity, neglect of duty, or upon conviction of a crime involving moral turpitude"
§476.17 (4)	Florida Barbers' Sanitary Commission	Governor	Governor may remove any member	"[F]or cause"

FLA. STAT. (1969)	OFFICER (S) AFFECTED	AGENCY AUTHORIZED	ACTION AUTHORIZED	GROUNDS
§523.08	Inspectors, inspectors at large, and supervising inspector of naval stores	Governor	Inspectors, etc. "shall be subject to removal by the governor at any time"	"[F]or cause"; it shall be a cause for removal for any inspector, etc. to become a producer, dealer, etc. in naval stores or to be employed by or connected in business with such producer, dealer, etc.
§550.021	State Racing Commission	Unspecified	Removal	Commission member who refuses to permit state or county officers or official investigative bodies to inspect commission records "shall be deemed guilty of malfeasance and shall be subject to removal from office"
§554.02 (2)	Inter-American Center Authority	Governor	Suspension	"[M]ay be suspended by the governor for cause as provided in the constitution of the state"
§561.05 (1)	Director of State Beverage Department	Governor	Removal	"[M]ay be removed at any time by the governor at the discretion of the governor"
§561.25	Officers and employees of Beverage Division, sheriffs, and other state, county, and municipal officers with state police power granted by the legislature	"Automatic"	"Shall, upon conviction, be automatically removed or suspended from office"	Conviction of a violation of §561.25, which prohibits specified officers from engaging in sale of alcoholic beverages, etc.

§839.04	County judges, circuit court clerks, sheriffs, tax assessors, tax collectors and their deputies, county commissioners, school board members, superintendent of schools and any other county officers	Unspecified	"[S]hall be removed from office"	Buying at discount, or speculating in jurors' or witnesses' certificates or any county warrants
§839.05	Mayors, marshals, treasurers, clerks, tax collectors, or other officers of any incorporated city or town, or any deputy of such officers	Unspecified	"[S]hall be removed from office"	Buying at discount, or speculating in municipal script or other evidence of indebtedness
§839.06	Tax Collectors	Unspecified	"[S]hall . . . be removed from office"	Purchasing or receiving in exchange, at discount, any comptroller's warrants, county orders, jurors' certificates, or school district orders
§839.23	"Any official who takes bail or accepts sureties"	Governor	"[M]ay be removed from office"	Convicted of knowingly taking insufficient bail, etc.

TABLE OF HEADINGS AND SUBHEADINGS