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## Impeachment in Florida

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## IMPEACHMENT IN FLORIDA FREDERICK B. KARL AND MARGUERITE DAVIS

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## IMPEACHMENT IN FLORIDA

FREDERICK B. KARL\* AND MARGUERITE DAVIS\*\*

What was the practice before this in cases where the chief Magistrate rendered himself obnoxious? Why recourse was had to assassination in wch. he was not only deprived of his life but of the opportunity of vindicating his character. It wd. be the best way therefore to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused.<sup>1</sup>

Impeachment is the civilized alternative to assassination as a means of removing high-ranking public officials found guilty of misconduct in office. The United States Constitution provides that the President, Vice President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.<sup>2</sup> The Florida constitution of 1968 provides that the Governor, Lieutenant Governor, members of the Cabinet,<sup>3</sup> justices of the supreme court, judges of the district courts of appeal, and circuit judges shall be liable to impeachment for misdemeanor in office.<sup>4</sup> The earlier Florida constitutions contained similar impeachment provisions.<sup>5</sup>

Unlike executive and judicial officeholders, Florida legislators are not subject to impeachment. In this respect, they are like Congress-

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1. Dr. Benjamin Franklin, Federal Convention (July 20, 1787) (in debate on the question "Shall the Executive Be Removable on Impeachments"), summarized in 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 65 (3d ed. 1966).

2. U.S. CONST. art. II, § 4.

3. The Cabinet consists of the secretary of state, attorney general, comptroller, treasurer, commissioner of agriculture, and commissioner of education. FLA. CONST. art. IV, § 4(a). (See appendix for the Constitution Revision Commission's proposed revision of § 4(a).)

4. *Id.* art. III, § 17(a).

See appendix for the Constitution Revision Commission's proposed revision of § 17(a), which would include county judges among those subject to impeachment. This proposal is in the best interests of the judiciary because it would provide uniformity and remove these judges from the executive power of suspension provided in art. IV, § 7 of the constitution.

5. FLA. CONST. of 1885, art. III, § 29 (1962); FLA. CONST. of 1868, art. IV, § 29; FLA. CONST. of 1865, art. VI, §§ 16-18; FLA. CONST. of 1861, art. VI, §§ 16-18; FLA. CONST. of 1838, art. VI, §§ 20-22. The constitution of 1865, in art. IV, § 22, also provided for removal of officers "in such manner as may be provided by law when no mode of trial or removal is provided in this Constitution."

men, who are also immune from the impeachment process.<sup>6</sup> Each house of the legislature is the sole judge of the qualifications, elections, and returns of its members.<sup>7</sup> And each house may punish or expel a member under certain circumstances.<sup>8</sup> Other officers not subject to impeachment may be suspended from office by the Governor and thereafter reinstated or removed by the senate.<sup>9</sup>

The impeachment process provides the people with a degree of needed protection from their government and serves as an effective check on the ever-present temptation to misuse executive or judicial power. Every officer who is subject to impeachment holds his office subject to the authority of the legislature to investigate, charge, try, and remove him. The knowledge that the Florida House of Representatives has undertaken the investigation or consideration of impeachment in cases involving two governors, a lieutenant governor, two state treasurers, a commissioner of education, three supreme court justices, and four circuit judges should remove any doubt about the willingness of the legislature to respond to charges of misbehavior.<sup>10</sup> While the Florida Senate has never convicted a public official after impeachment by the house of representatives, the provisions for impeachment remain a critical part of the Florida constitution and a vital factor in the governmental scheme.

It is self-evident that the impeachment powers may be abused.

6. U.S. CONST. art. I, § 5, cls. 1-2.

7. FLA. CONST. art. III, § 2.

8. *Id.* § 4(d).

Rep. E. Bert Riddle was expelled from the house of representatives in 1961. FLA. H.R. JOUR. 2403 (Reg. Sess. 1961). In April, 1872, the senate expelled Senator Charles H. Pearce of the Eight Senatorial District. See Dodd, "Bishop" Pearce and the Reconstruction of Leon County, in APALACHEE 10 (1946).

For a discussion of legislative privileges and penalties, see A. MORRIS, THE FLORIDA HANDBOOK 1977-1978, at 172 (16th ed. 1977).

9. FLA. CONST. art. IV, § 7. On July 12, 1976, Governor Reubin Askew asked the Florida Supreme Court to answer questions relating to his constitutional duties in regard to the suspension of local elected officials under consolidated government in Jacksonville. Specifically, the Governor wished to know whether the mayor of Jacksonville should be regarded as a municipal officer or a county officer for purposes of art. IV, § 7 suspension and appointment, or whether the mayor could be suspended under both § 7(a) and § 7(c). Section 7(a) allows the Governor to remove county officials for "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony . . . ." Section 7(c), on the other hand, allows the Governor to remove municipal officials only if "indicted for crime." The court advised that the Governor's power to suspend arose from § 7(a), relating to county officials, and not from § 7(c), relating to municipal officials. *In re* Advisory Opinion to the Governor Request of July 12, 1976, 336 So. 2d 97 (Fla. 1976). The court relied on Act of June 27, 1971, ch. 71-333, § 2, 1971 Fla. Laws 1514 (codified at FLA. STAT. § 112.49 [1977]), which provides that an official of a consolidated government "shall be deemed to be a county officer . . . ."

10. See A. MORRIS, *supra* note 8, at 174-75. See also the discussions *infra* of specific investigations and considerations.

There is always the possibility that public emotions, political considerations, or personal corruption will inspire legislative impeachment activity. Indeed, there is some evidence that this was the case when attempts were made to oust Governor Harrison Reed in 1868 and 1872.<sup>11</sup> Justice Glenn Terrell, in a brief prepared for senate use in 1957, characterized some of the charges against Judge James T. Magbee of Tampa, filed in 1870, as "a little bit frivolous," one of them being that he charged the cost of his stamps, pipes, and smok-

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11. See J. WALLACE, *CARPETBAG RULE IN FLORIDA, THE INSIDE WORKINGS OF THE RECONSTRUCTION OF THE CIVIL GOVERNMENT IN FLORIDA AFTER THE CLOSE OF THE CIVIL WAR 158-59* (1888). Wallace, once a state senator from Leon County, wrote extensively on the political overtones of the impeachment attempts against Governor Reed. The following excerpt from his book illustrates the political corruption which he felt prompted these impeachment attempts:

We now come to the last and most desperate attempt to get rid of Governor Reed by impeachment. This time the farce was not conducted with even the faint semblance of fairness which was displayed in the last attempt. The ring being outgeneraled in their former attempts, were determined to conduct things on the *ex parte* and Star Chamber plan. The resolution of the investigation did not mention the name of Governor Reed, but State officials; and the less informed members of the Legislature did not know what was going on. During the investigation, Republican caucuses were held in the Assembly hall two and three times a week, and the state of the country and the Republican party were fully discussed. Cessna, the chairman of the Committee on Investigation, would be put forward to stir the blood of the colored brother by singing "John Brown's body lies mouldering in the clay," "Sherman's March through Georgia," etc. While singing these songs Cessna could imitate the plantation negro preacher in looks, voice and acts as no other carpet-bagger could, and in many instances could put to shame the best negro minstrel. These songs being considered old freedom songs, made Cessna very popular with most of the colored members. Nothing would be said in the caucus with reference to impeachment, but Purman would be on hand to denounce Reed and tell the colored brother "if God would take Reed out of the way it would be better for them and the Republican party." This argument, in connection with Cessna's songs, had great effect on many of the colored members and on the less informed whites as well. The most of the Democratic members at this session, as in the former session, were in favor of impeachment, not because they believed Reed's traducers were honest, but because they knew that every attempt at impeachment would strengthen them and imperil honest Republicanism.

On the 6th of February, Cessna's investigating committee made its report, which was loaded with numerous charges against Governor Reed. These charges sounded so very damaging that some of the Governor's most intimate friends were deceived by them and went to him and asked him to resign his office. The Governor said to them that if the Legislature would give an *[sic]* half hour he would refute successfully every charge they had reported against him, and he felt perfectly confident that he would be clearly exonerated, if he were allowed a hearing before the High Court of Impeachment, in case he should be impeached by the Assembly. John R. Scott, of Duval County, spoke in favor of Governor Reed, but afterwards, as was prearranged, voted for the report for the usual consideration. The report was unanimously adopted, and Governor Reed stood suspended.

*Id.* For a more recent assessment, see J. SHOFNER, *NOR IS IT OVER YET: FLORIDA IN THE ERA OF RECONSTRUCTION 1863-1877*, at 198-224 (1974).

ing tobacco to the senate.<sup>12</sup> At best, impeachment is a slow, cumbersome, and expensive procedure that is subject to abuse. Nevertheless, it remains an efficacious remedy by which the people, acting through their elected representatives, can remove important and politically powerful officials who violate the public trust.

This article consists of a review of the constitutional history of impeachment, the alternate methods of removing impeachable officers, the grounds for impeachment, the effects of impeachment, and the procedures involved in the investigation and trial of the officers, as well as a discussion of the role of the judicial branch in this process. Every Florida impeachment case is reviewed, as is every Florida Supreme Court decision bearing on impeachment. The article is designed as a comprehensive digest which the authors hope will prove useful to participants in future impeachment proceedings.

### I. HISTORY OF IMPEACHMENT AUTHORITY

Every constitution adopted in Florida has included an impeachment section, and the provisions relative to impeachment within those constitutions have been similar.<sup>13</sup>

When Florida was still a territory preparing for statehood, the constitution of 1838 was adopted. It provided that the Governor and all civil officers<sup>14</sup> were liable for impeachment for misdemeanor in office, that the house had exclusive authority to impeach, and that the senate would conduct the trial and either convict or acquit the impeached official.<sup>15</sup> The 1838 constitution and its impeachment provisions continued in effect until 1861.

On January 11, 1861, a new constitution was adopted. Its preface was the Ordinance of Secession.<sup>16</sup> The people of Florida were gov-

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12. Terrell, as Chief Justice of the Florida Supreme Court, presided at the senate trial of Circuit Judge George E. Holt, beginning July 8, 1957. Justice Terrell prepared and distributed to each senator a brief on impeachment which reviewed previous cases, discussed the grounds for impeachment, and described the role of the senate in the impeachment process. FLA. S. JOUR. 519-23 (Court of Impeachment 1957). When Justice E. Harris Drew presided at the senate trial of Circuit Judge Richard Kelly in September, 1963, he included the Terrell brief in a bound booklet that he provided for each senator.

13. See note 5 *supra*.

14. The early constitutional provisions were similar to those in the United States Constitution. The phrase "all civil Officers" appears in art. II, § 4 of the United States Constitution. The Florida constitution, however, omits the grounds of treason, bribery, and other high crimes and misdemeanors which appear in the United States Constitution. *Id.* The only ground stated in the Florida constitution is misdemeanor in office. FLA. CONST. art. III, § 17(a). See also provisions cited in note 5 *supra*.

15. FLA. CONST. of 1838, art. VI, §§ 20-22.

16. FLA. CONST. of 1861.

erned by this constitution throughout the Civil War, first as a sovereign nation and then as a Confederate state. The impeachment provisions were the same as those contained in the earlier document.<sup>17</sup> The 1861 constitution and secession ordinance were nullified by the convention of 1865.<sup>18</sup>

The 1865 constitution provided for a reorganized state government under President Andrew Johnson's plan for reconstruction.<sup>19</sup> Impeachment was provided for in article VI, sections 16-18. There was also a section which authorized the removal of officers "in such manner as might be provided by law, when no mode of trial or removal is provided in this Constitution."<sup>20</sup>

The carpetbag constitution of 1868<sup>21</sup> superseded the 1865 version and provided for a strong, centralized state government. It remained effective until 1885. From 1868 to 1885, the impeachment powers were used twice.<sup>22</sup> The 1868 document vested the sole power of impeachment in the assembly (house), and all cases were to be tried by the senate.<sup>23</sup> A two-thirds vote of assembly members present was necessary to impeach, and two-thirds of the senators present were required to concur to obtain a conviction. The only ground specified for impeachment was any misdemeanor in office. For the first time, however, the constitution provided for the impeachment of specific officers in addition to the Governor. These included the Lieutenant Governor, members of the Cabinet, justices of the supreme court, and judges of the circuit courts. All other officers appointed by the Governor with the consent of the senate could be removed on the recommendation of the Governor with the consent of the senate. Other civil officers were subject to trial for misdemeanors in office as the legislature provided by law. The 1868 document required the chief justice to preside at all trials by impeachment unless he was to be tried, in which case the Lieutenant Governor was to preside.

The constitution of 1885 generally continued the impeachment

17. *Id.* art. VI, §§ 16-18.

18. 25 FLA. STAT. ANN. 435 (Ordinances of Convention of 1865).

19. FLA. CONST. of 1865, art. XVII.

20. *Id.* art. IV, § 22.

21. Reciting a chronology of important events in Florida's history, Allen Morris, in *The Florida Handbook 1977-1978*, *supra* note 8, included:

1868 Faction-torn convention submitted new Constitution, given voter-approval in May, which granted equal suffrage to races. Military rule ended, with civil government formally resumed on July 4. State's political destinies were for the time being in hands of those either new to Florida or new to the right to vote.

*Id.* at 284.

22. The Magbee and Reed impeachments took place under the 1868 constitution. Both cases are discussed in text accompanying notes 73-79 *infra*.

23. FLA. CONST. of 1868, art. IV, § 29.

procedures found in the 1868 constitution. However, it referred to the lower house as the house of representatives and required the Governor to preside over the impeachment trial of the chief justice.<sup>24</sup> In 1962, the people adopted an amendment allowing the speaker of the house of representatives to appoint a committee to investigate alleged grounds for impeachment either during or between legislative sessions.<sup>25</sup> As originally adopted, the 1885 document contained no provision for suspending or disqualifying an impeached officer pending completion of the trial in the senate. Such a provision was added by amendment in 1898.<sup>26</sup>

The omission of a suspension provision from the original 1885 constitution is surprising in light of the controversy over this point generated by the impeachment of Governor Reed. In November, 1868, Reed sought an opinion from the Supreme Court of Florida as to whether the number of legislators required to constitute a legally valid legislature had assembled in response to a proclamation he had issued.<sup>27</sup> The Governor had called the legislature together for specified purposes, and the assembly had ventured outside of his call and voted articles of impeachment against him. Had the requisite number of members been assembled to make the legislative session valid, Reed would have been powerless even to seek the opinion of the justices. For, under the provisions of the 1868 constitution, he would have been automatically disqualified to act as governor and, in fact, under arrest.<sup>28</sup> The court advised that both houses must have a quorum present for there to be a valid legisla-

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24. FLA. CONST. of 1885, art. III, § 29.

25. The amendment was proposed by Fla. HJR 1730 (1961), 1961 Fla. Laws 1170, and adopted by the voters at the general election of November 6, 1962. The 1957 legislature found that the investigation, preparation of articles, and debate in the house of representatives involving Circuit Judge George Holt demanded much time and energy of the members. The journal entries reflect that committee members were excused from many sessions. Author Karl, then a member of the house, personally observed that the activity interfered with the business of the regular session. The proposal to allow an investigation between sessions was probably made in reaction to the Holt situation. The investigations conducted in 1974 and 1975, discussed below, proved the wisdom of this amendment.

26. The provision appeared in FLA. CONST. of 1885, art. III, § 34 (1898), and provided:

Immediately upon the impeachment of any officer by the House of Representatives, he shall be disqualified from performing any of the duties of his office until acquitted by the Senate, and the Governor in such case shall at once appoint an incumbent to fill such office pending the impeachment proceedings. In case of the impeachment of the Governor, the President of the Senate, or in case of death, resignation or inability of the President of the Senate, the Speaker of the House of Representatives shall act as Governor, pending the impeachment proceedings against the Governor.

*Id.*

27. *In re Executive Commun.* of the 9th of Nov., A.D. 1868, 12 Fla. 653 (1868).

28. FLA. CONST. of 1868, art. V, § 15; *id.* art. XVI, § 9.



ture. Since there was less than a quorum in the senate, there was no valid legislative session and the Governor was not impeached.<sup>29</sup>

The constitution of 1968 provides for impeachment in article III, section 17.<sup>30</sup> The Governor, Lieutenant Governor, members of the Cabinet, justices of the supreme court, judges of the district courts of appeal, and judges of the circuit courts are liable to impeachment for misdemeanor in office. The house is given the power to impeach, and the speaker of the house is allowed to appoint a committee at any time to investigate charges against any officer subject to impeachment.<sup>31</sup>

Under the current constitution, when an officer has been impeached by the house, he is disqualified from performing any official duties, and the Governor may appoint a person to perform those duties until the completion of the trial.<sup>32</sup> If the Governor is impeached, the Lieutenant Governor assumes the duties of the office of Governor pending the outcome of the trial.<sup>33</sup>

The house of representatives, by two-thirds vote, has the sole power to impeach an officer, and he cannot be convicted unless two-thirds of the senators present concur.<sup>34</sup> The clemency power of the

29. *In re Executive Commun. of the 9th of Nov.*, A.D. 1868, 12 Fla. 653 (1868).

30. In 1966 and 1967, a constitution revision commission prepared a draft of a revision of most of the articles. The legislature, in its regular session of 1967, made changes in the draft presented by the commission and caused the revised version to be placed on the ballot at the general election in November, 1968. The people adopted the revised constitution in 1968 by a vote of 645,233 for it and 518,940 against it. A. MORRIS, *supra* note 8, at 638. Article V, the judicial article, was not revised until 1972.

FLA. CONST. art. XI, § 2, provides for a commission to review and recommend revision of the constitution beginning in the tenth year after adoption. Pursuant to the opinion of a majority of the supreme court in *In re Advisory Opinion to the Governor*, 343 So. 2d 17 (Fla. 1977), the commission was appointed in June and July of 1977, only eight and one-half years after adoption of the constitution.

Attached to this article is an appendix containing the proposed revisions to articles III, IV, and V which related to the subjects discussed herein and which have been approved by the Constitution Revision Commission as of the publication deadline.

31. FLA. CONST. art. III, § 17(a).

32. *Id.* § 17(b).

33. *Id.* art. IV, § 3(b).

34. In specifying the vote necessary for conviction in an impeachment trial by the senate, art. III, § 17(c), requires the concurrence of two-thirds of the senators present. In art. III, § 17(a), however, the required vote for impeachment by the house is stated simply as two-thirds, with no mention of whether the measure is of the total membership or of the members present. The 1885 and 1868 constitutions were specific on this point, permitting impeachment by a vote of two-thirds of the members present. FLA. CONST. of 1885, art. III, § 29; FLA. CONST. of 1868, art. IV, § 29. Article X, § 12(e) of the 1968 constitution seems to indicate that the two-thirds vote specified in art. III, § 17(a) means two-thirds of the members present: "§ 12 Rules of Construction. . . . (e) Vote or other action of a legislative house or other governmental body means the vote or action of a majority or other specified percentage of those members voting on the matter." [Emphasis added.]

Governor does not apply where impeachment results in conviction.<sup>35</sup>

Under article III, section 17(c), all impeachment cases are tried by the senate with the chief justice or another justice designated by him presiding. If the chief justice is the impeached officer, the Governor presides. The senate may sit for the trial of an impeachment case whether or not the house of representatives is in session.<sup>36</sup> It may determine the time for the trial of any impeachment, but the trial must not be more than six months after the impeachment.<sup>37</sup> When sitting as a court of impeachment, the authority of the senate is restricted to the trial and administrative matters related to the trial.<sup>38</sup> It cannot consider other matters.

## II. EFFECTS OF IMPEACHMENT

An officer impeached by the house of representatives is disqualified from performing any official duties of his office until he is acquitted by the senate.<sup>39</sup> To constitute an effective impeachment and suspension from office under the constitution, the articles of impeachment must be presented to the senate, and a constitutional quorum of the senate must receive them.<sup>40</sup> Chief Justice Randall wrote in 1868 that an impeachment is not merely the adoption of a resolution containing articles of impeachment, but also is the actual announcement and declaration of impeachment by the house, through its committee, to the senate that it does thereby impeach the officer accused.<sup>41</sup> Justice Randall likened the process of impeachment to proceedings by indictment in that an indictment is of no effect until "presented to the court in actual, open, and legal session, and received and filed therein."<sup>42</sup> Thus, he reasoned:

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35. FLA. CONST. art. IV, § 8(a).

36. The senate may also convene by act of its president or by a majority of its membership to consider removing or reinstating officers suspended by the Governor who are not subject to impeachment. *Id.* § 7(b).

37. The constitution does not say what the status of the impeached officer would be if the senate failed to begin the trial within the six-month period. Such a provision has been in Florida's constitution since 1885, and the senate has not acted in a manner which could cause dispute over the consequences of delay.

The 1868 constitution gave the impeached officer the right to demand trial within one year, but that was never tested. In *In re Executive Commun.* Filed the 17th Day of April, A.D. 1872, 14 Fla. 289, 292 (1872), the court, in determining the effect of the senate adjournment on Governor Reed's impeachment, said, "[F]or whatever may be the effect of the expiration of one year from the impeachment and demand for trial, that time has not elapsed, and for that reason the construction of that clause of the constitution is not here involved."

38. Advisory Opinion to the Governor, 156 So. 2d 3 (Fla. 1963).

39. FLA. CONST. art. III, § 17(b).

40. *In re Executive Commun.* of the 9th of Nov., A.D. 1868, 12 Fla. 653 (1868).

41. *Id.* at 677.

42. *Id.* at 678.

In the light of the abundant precedents and authorities on the subject, under constitutional provisions precisely like our own in that respect, we cannot . . . so far deviate from established principles, rules, and beaten paths as to recognize a declaratory resolution of the Assembly as constituting an effective impeachment, until the declaration of impeachment or the accusation be made to and at the bar of the only tribunal authorized by the Constitution to receive and act upon it.<sup>43</sup>

During the regular session of 1872, in its second attempt, the assembly succeeded in impeaching Governor Reed.<sup>44</sup> The senate, sitting as a court of impeachment, adjourned without conducting his trial. Because the Lieutenant Governor had assumed the duties of the office of governor upon Reed's impeachment by the assembly, the Governor asked the supreme court whether the senate's adjournment constituted his acquittal for purposes of article 16, section 9 of the 1868 constitution. If so, then he would no longer have been disqualified from exercising the powers of the office of Governor. The court advised that the adjournment neither reinstated the Governor nor lifted his disqualification.<sup>45</sup> Relative to what is meant by acquittal by the senate, the court said:

What is the true intent and meaning of the word acquittal as here used in the constitution? The court does not differ as to the proper definition of this term. It is our unanimous opinion that it is not restricted to an actual judgment of acquittal after vote, upon full evidence failing to convict, by a requisite two-thirds of the members of an organized Senate. We think its true signification embraces any affirmative final action by a legal Senate other than a conviction, by which it dismisses or discontinues the prosecution. Any final disposition of the impeachment matter by the Senate, the Chief Justice presiding, other than a conviction, is therefore an acquittal *for the purpose of removing the disqualification from performing the duties of the office*. Whether it is effective for any other purpose, is not here involved.<sup>46</sup>

The senate had not acted on any motion to discharge Reed or acquitted him; it had simply adjourned. Thus, the court concluded that the Governor's case was still pending.

One additional effect of impeachment is worth noting. Although

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43. *Id.*

44. FLA. ASS. JOUR. 263 (Reg. Sess. 1872).

45. *In re Executive Commun.* Filed the 17th Day of April, A.D. 1872, 14 Fla. 289 (1872).

46. *Id.* at 292-93.

apparently neither statute nor constitution nor judicial precedent provides for suspension of payment of compensation upon impeachment, the general practice has been to disallow compensation from the date the articles of impeachment are presented to the senate.<sup>47</sup> However, if the impeached official is acquitted, he is given back pay for the period of his suspension.<sup>48</sup>

### III. GROUNDS FOR IMPEACHMENT

Every version of the Florida constitution has provided for impeachment for the commission of "misdemeanor in office."<sup>49</sup> These seemingly simple words have bred controversy in every impeachment case. They render uncertain the very scope of impeachment,

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47. See 1957 FLA. OP. ATT'Y GEN. 057-137.

The Florida House of Representatives is presently proceeding against Judge Samuel Smith, Circuit Judge of the Third Judicial Circuit. Questions have arisen as to whether Judge Smith, who has been determined to be indigent, is entitled to counsel provided by the house of representatives in matters directly related to proceedings before a committee on impeachment, and whether the house of representatives runs the risk of inadvertently granting immunity to an officer subject to impeachment who may also be the subject of state criminal prosecution by compelling his attendance by subpoena or by compelling the production of books, papers, or other documents by subpoena duces tecum in the absence of appointed counsel.

These questions were addressed to the attorney general of Florida by Representatives Donald Tucker and William J. Rish. By letter dated March 16, 1978, #078-48, the attorney general responded that nothing in the federal or Florida constitutions, Florida Statutes, or decisional law required the authorization of state funds to provide counsel to an officer under impeachment investigation by the house of representatives; that this view is reinforced by the fact that the role of the house of representatives is of a preliminary and investigative nature; and that the right to assistance or appearance of counsel is distinguishable from the right to have counsel provided at government expense. As to the question of immunity from prosecution, the attorney general cited to his earlier opinion, 1973 FLA. OP. ATT'Y GEN. 073-150, and explained:

"[O]nly the state, *acting through its prosecuting attorney*, can immunize a witness under said statute." In AGO 075-219, I considered the question of whether a legislative committee could grant immunity from criminal prosecution. I concluded in AGO 075-219, and here reiterate, that "[a]n examination of Florida Statutes fails to disclose any statute authorizing a legislative committee to grant immunity from prosecution to a witness appearing before it, and *in the absence of such a statute, no legal power to grant immunity exists.*" (e.s.) In accord is AGO 060-168, construing former §932.29, F.S., the predecessor of current §914.04, F.S. As to your suggestion that immunity might "inadvertently" be granted, I would emphasize that, since it is clear that a legislative committee is not empowered to grant immunity from criminal prosecution, any objection to testifying or producing documents interposed by the officer, grounded on a claim of self-incrimination, *must* be rejected. See *Kastigar v. United States*, 406 U.S. 441, 31 L.Ed.2d 212 (1972).

1978 FLA. OP. ATT'Y GEN. 078-48, at 10.

48. This is evidenced by the cases of Judge Kelly and Judge Holt, discussed *infra*. Letter from Ray Green, Comptroller of Florida, to Judge Richard Kelly (Sept. 27, 1963) (on file with Florida Judicial Administrative Commission).

49. See FLA. CONST. art. III, § 17; note 5 *supra*.

and they give great import to the definition of the word "misdemeanor." As used in impeachment matters, "misdemeanor" has come to have a much broader meaning than the traditional "misdemeanor" defined and applied in criminal procedure at common law.<sup>50</sup>

This historic debate over what constitutes an impeachable offense is not peculiar to Florida. The same issue would logically be involved in every impeachment proceeding under the United States Constitution, which has always provided that the President, Vice President, and all civil officers "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."<sup>51</sup> Justice Joseph Story argued in his *Commentaries on the Constitution of the United States* that the Constitution authorized impeachment only for those acts contemplated by the English parliamentary law as it existed in 1787. Otherwise, he insisted, the issue would be left to the arbitrary discretion of the Senate. In Story's view:

Resort . . . must be had either to parliamentary practice, and the common law, in order to ascertain, what are high crimes and misdemeanours; or the whole subject must be left to the arbitrary discretion of the senate, for the time being. The latter is so incompatible with the genius of our institutions, that no lawyer or statesman would be inclined to countenance so absolute a despotism of opinion and practice, which might make that a crime at one time, or in one person, which would be deemed innocent at another time, or in another person. The only safe guide in such cases must be the common law, which is the guardian at once of private rights and public liberties. And however much it may fall in with the political theories of certain statesmen and jurists, to deny the existence of a common law belonging to, and applicable to the nation in ordinary cases, no one has as yet been bold enough to assert, that the power of impeachment is limited to offences positively defined in the statute book of the Union, as impeachable high crimes and misdemeanours.<sup>52</sup>

Even so, in April, 1970, when then Congressman Gerald R. Ford proposed the impeachment of Justice William O. Douglas of the United States Supreme Court, he maintained that an impeachable offense is simply what the House, with the concurrence of the Sen-

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50. *In re* Investigation of Circuit Judge, 93 So. 2d 601 (Fla. 1957).

51. U.S. CONST. art. II, § 4. For a discussion of the meaning of the constitutional language, see R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* (1973).

52. 2 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 795 (1833).

ate, considers it to be.<sup>53</sup>

In a 1936 article entitled *The Law of Impeachment*, Judge George H. Ethridge of the Supreme Court of Mississippi discussed what he termed the judicial versus the political theory of impeachment.<sup>54</sup> Relative to the judicial theory, he said that the law defines offenses for impeachment and proceeds on notice with all due process rights accorded. In contrast, the political theory contemplates a proceeding in which a person may be tried for anything that is offensive to the ideals of the triers—anything which, in their judgment, evidences unfitness for holding office, whether connected with official conduct or not and whether or not specified in constitution or statute. According to Ethridge, the judicial theory assures the rule of reason. Passion is suppressed. Justice is the goal. The political theory, on the other hand, allows passion to rule. Reason is suppressed. Political victory is the goal.

In practice in Florida, the committee appointed by the speaker of the house to investigate charges made against an impeachable officer is the first to face the question of whether the charges, if true, constitute an impeachable offense.<sup>55</sup> The committee need not determine the guilt or innocence of the officer involved but should find probable cause before reporting in favor of impeachment.<sup>56</sup> The recommendation of the committee to the full house of representatives brings on the next and first major test of whether the alleged facts qualify as an impeachable offense.<sup>57</sup> If it finds probable cause, the committee drafts articles of impeachment for consideration by the house.<sup>58</sup>

53. What, then is an impeachable offense?

The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office.

116 CONG. REC. 11913 (1970).

54. 8 MISS. L.J. 283 (1936).

55. See FLA. CONST. art. III, § 17(a).

56. See Fla. H.R., Select Committee on Impeachment, 1 transcript of proceedings at 3-6 (Feb. 25, 1975) (on file with House Judiciary Committee, State Legislative Library, and State Archives).

57. If the committee concludes that there is no probable cause or that the action of the official does not amount to an impeachable offense, the question before the house is whether to investigate further, appoint a new committee, or adopt the committee recommendation and close the case. In the 1951 session, articles of impeachment were introduced against Governor Fuller Warren. The committee decided that the grounds were legally insufficient for impeachment. The house agreed. FLA. H.R. JOUR. 1478-80 (Reg. Sess. 1951). See also note 71 *infra*.

58. For example, the special committee of the house appointed to investigate Treasurer and Insurance Commissioner Thomas O'Malley in 1975 acknowledged its responsibility to report to the full house and included proposed articles of impeachment in its report. FLA. H.R.

If the constitutionally required two-thirds vote favoring impeachment is attained, it may be concluded that the house believes that the articles describe an impeachable offense or offenses. If the vote falls short of the requirement, the conclusion is not so clear. Some members may believe that the facts charged, even if proven, do not constitute an impeachable offense. Others may feel that such facts would be grounds for impeachment but that sufficient proof has not been presented. No member is required to explain his vote, although some do.<sup>59</sup>

Historically when articles of impeachment have been presented by the house managers to the senate, the impeached officer has challenged their legal sufficiency by a motion.<sup>60</sup> This tradition directly confronts the members with the question of whether the

JOUR. 1052 (Reg. Sess. 1975). See also FLA. H.R. JOUR. 617 (Reg. Sess. 1973) (report of the committee investigating Lieutenant Governor Tom Adams).

59. E.g., Letter from Rep. F. Charles Usina to Speaker Doyle E. Conner, reprinted in FLA. H.R. JOUR. 1726 (Reg. Sess. 1957); *Explanation of Vote on House Resolution No. 1942* by Reps. Thomas M. Carney and Frederick B. Karl, FLA. H.R. JOUR. 1728 (Reg. Sess. 1957).

60. E.g., FLA. S. JOUR. 15 (Court of Impeachment 1963); FLA. S. JOUR. 11 (Court of Impeachment 1957). An example of such a motion follows:

MOTION TO STRIKE AND DISMISS ARTICLE  
OF IMPEACHMENT

COMES NOW GEORGE E. HOLT, the respondent herein, appearing in propria persona and by counsel undersigned, and respectfully moves the honorable Senate of the State of Florida, sitting as a court of impeachment, to enter an order striking the article of impeachment, dismissing the proceedings, and discharging the respondent upon the following grounds:

1. The single article of impeachment fails to charge misdemeanor in office within the purview and meaning of Article 3, Section 29, of the Constitution of Florida in that it fails to charge this respondent with the violation of any duty imposed by law.

2. The article of impeachment aforesaid fails to charge respondent with an impeachable offense under the laws and the Constitution of Florida.

3. The article of impeachment aforesaid is so vague, ambiguous, indefinite and uncertain in terms, and constructed in such general, loose, and uninformative allegations and unsupported conclusions of the pleader as to embarrass, impede and prejudice the respondent in the preparation of a proper defense thereto, and therefore deprives respondent of fundamental rights secured to him under Sections 11 and 12 of the Declaration of Rights of the Florida Constitution and as guaranteed to him by the 14th Amendment to the Constitution of the United States.

4. The purported specifications, (a) to (f), and each and all of them, designated as the basis for impeachment, fail to show or allege a violation of a duty imposed on this respondent as a Circuit Judge, either under the common law or any statutory or constitutional law of the State of Florida.

5. To remove this respondent from the office to which he was appointed in the year 1941 and to which he has been re-elected by the voters on two successive occasions upon the basis of the vague and unsupported conclusions set forth in the article would violate Section 12 of the Declaration of Rights of the Constitution of Florida and would deprive respondent of his right to office without due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

charges, if proven, constitute an impeachable offense. Again, in passing on subsequent motions and finally voting for either conviction or acquittal, the senate is forced to decide the sufficiency of the grounds.

At each step along the way, the legislators are provided with advice from committee counsel or counsel for the house managers as well as counsel for the officer under attack.<sup>61</sup> Oral arguments are presented by both sides—except during house debate, in which only members speak—and the person presiding at the trial in the senate announces his understanding of the law.<sup>62</sup> This discussion by the chief justice or other presiding person serves merely to guide the senate and is not binding.

Review of the legislative history of impeachment in Florida and the articles of impeachment proposed in individual cases discloses a variety of grounds for impeachment, as may be seen from the analysis later in this article of the grounds determined by the house of representatives to be impeachable offenses in each of the cases which has come before it.

The Supreme Court of Florida has addressed the question of grounds for impeachment only a few times.<sup>63</sup> In 1974, in *Forbes v. Earle*, the court, through Justice Ben Overton, stated that “[t]he determination of what is an impeachable offense is the responsibility of the legislature.”<sup>64</sup> As for the power of the speaker of the house to appoint committees to investigate charges against impeachable officers,<sup>65</sup> the court observed that “[a] reasonable reading of the provision clearly does not contemplate a broad brush investigation of the class of officers subject to impeachment.”<sup>66</sup> Thus, while the impeachment power is peculiarly a legislative power, it is not without constraint or limitation.

Perhaps the most helpful opinion of the supreme court on the subject of grounds for impeachment is *In re Investigation of A Circuit Judge*, authored by Chief Justice Terrell in 1957.<sup>67</sup> In that opinion, the court first announced the proposition that the house of representatives, because it possesses the sole power of impeach-

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61. See, e.g., FLA. S. JOUR. 17-34 (Court of Impeachment 1963); FLA. S. JOUR. 37-40 (Court of Impeachment 1957).

62. See, e.g., FLA. S. JOUR. 510, 519-23 (Court of Impeachment 1957).

63. For further discussion of judicial review, see JUDICIAL REVIEW OF IMPEACHMENT PROCEEDINGS *infra*.

64. 298 So. 2d 1, 5 (Fla. 1974) (footnote omitted). Justice Overton did, however, suggest that a violation of judicial ethical canons may not be an impeachable offense. *Id.* at 3 n.4.

65. FLA. CONST. art. III, § 17(a).

66. 298 So. 2d at 5.

67. 93 So. 2d 601 (Fla. 1957).



ment, has the sole power to determine whether the charges brought amount to a misdemeanor in office within the meaning of the constitution. The court examined the phrase "misdemeanor in office" and stated that it

may include any act involving moral turpitude which is contrary to justice, honesty, principles, or good morals, if performed by virtue or authority of office. "Misdemeanor in office" is synonymous with misconduct in office and is broad enough to embrace any wilful malfeasance, misfeasance, or nonfeasance in office. It may not necessarily imply corruption or criminal intent . . . . In *Words and Phrases*, citing *Yoe v. Hoffman*, *supra*, it was said that the phrase "Misdemeanor In Office," when referring to impeachment should be applied in the parliamentary sense and when so applied it means misconduct in office. Something which amounts to a breach of the conditions tacitly annexed to the office, and includes any wrongful official act or omission to perform an official duty.<sup>68</sup>

Finally, in deciding not to determine whether the charges in the particular case constituted "misdemeanor in office," the court said that "that will be determined by the House of Representatives if impeachment proceedings are brought."<sup>69</sup>

Thus, an act must amount to "a breach of the conditions tacitly annexed to the office" to result in impeachment. These words are not, however, limited to wrongful official acts or omitted performance of an official duty. Indeed, in his brief to the senate in the Holt impeachment trial, Justice Terrell himself embraced a much broader view of grounds for impeachment. According to Terrell's brief:

The law writers generally hold that while the offense must be committed during incumbency in office, it need not be committed under color of office. An act or a course of misbehavior which renders scandalous the personal life of a public officer, shakes the confidence of the people in his administration of public affairs and impairs his official usefulness, although it may not directly affect his official integrity, may be characterized as a high crime or misdemeanor . . . .<sup>70</sup>

Thus, neither legislative nor judicial precedent puts to rest the

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68. *Id.* at 606.

69. *Id.* at 607.

70. FLA. S. JOUR. 520 (Court of Impeachment 1957).

question of what constitutes an impeachable offense.<sup>71</sup> Likewise, there are no limiting provisions in the constitution which shed light on the question. We can expect that, as future house committees are appointed to investigate charges against an impeachable officer, the attorneys involved will study the question again and inundate house and senate members with arguments and briefs supporting their respective views on grounds for impeachment.<sup>72</sup> The legislature will have to decide on a case-by-case basis whether the alleged conduct of the officer involved is sufficient to warrant impeachment. In the end, each member will undoubtedly follow his or her own conscience about the sufficiency of the charges in any particular case.

The following is a listing of all the articles of impeachment which have been presented to the Florida House of Representatives. For the most part, these articles were all adopted by the house. Although no convictions have resulted, in some instances probable convictions have been avoided only by resort to resignation. The various impeachment articles illustrate the vast variety of activities which have been considered impeachable offenses in Florida.

### *Judge James T. Magbee*

The first impeachment proceeding in Florida occurred in 1870 and involved Circuit Judge James T. Magbee, against whom five articles of impeachment were voted:

Article I—He caused one Henderson to come before his court and fined Henderson \$100 under the pretext of contempt for writing and publishing an article criticizing a speech delivered by Magbee. He unlawfully detained and imprisoned Henderson until the fine was

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71. The house missed an excellent opportunity to establish precedent on the legal sufficiency of articles of impeachment in 1951, in connection with the proposed impeachment of Governor Fuller Warren. Articles were introduced and referred to a special committee to determine their legal sufficiency. The committee, chaired by Rep. Woodrow Melvin, reported on each article, stating that it failed to charge misdemeanor in office. FLA. H.R. JOUR. 1479 (Reg. Sess. 1951). The full house accepted the committee report and postponed indefinitely further consideration of the resolution containing the charges. *Id.* at 1480. Then, on the motion of Rep. Thomas D. Beasley, the house voted to expunge from the record everything except the title to the resolution, thereby leaving the entire incident without precedential value. *Id.*

For information purposes, we note the Fuller Warren impeachment articles are located in the *Fuller Warren Papers* location U35, Robert M. Strozier Library, Florida State University.

Both the house and senate would be well advised to include in their respective libraries the legislative publications from the Watergate era involving the Nixon impeachment: HOUSE COMM. ON THE JUDICIARY, 93D CONG., 1ST SESS., IMPEACHMENT, SELECTED MATERIALS (Comm. Print 1973) [hereinafter cited as IMPEACHMENT, SELECTED MATERIALS].

72. See, e.g., Fla. H.R. Select Committee on Impeachment, 1 transcript of proceedings (Feb. 25, 1975) (on file with House Judiciary Committee, State Legislative Library, and State Archives).

paid when in fact Henderson's article was published when Magbee's court was not in session and Henderson was not in contempt.

Article II—He unlawfully removed two grand jurors from the panel regularly drawn and caused the names of two petit jurors drawn on the regular panel of petit jurors to be placed on the panel of grand jurors in their stead, thereby committing a misdemeanor.

Article III—Prior to the drawing of grand and petit jurors for the fall term of 1869, he unlawfully attempted to induce and influence the Clerk of the Circuit Court to commit fraud in drawing the grand and petit jurors for the fall term in that he asked the clerk not to place the names of certain jurors, if drawn, upon the jury list and, instead, to place the names of certain other persons on the list, whether drawn or not, thereby committing a misdemeanor.

Article IV—He purchased pipes, tobacco, envelopes, stamps, and other articles for his own private use and unlawfully caused these articles to be charged as "stationery" against the State.

Article V—He persuaded Irene Jenkins, charged with adultery, that a plea of guilty would induce a mitigation of the penalty, whereupon she entered a plea of guilty. Magbee, disregarding his promise, imposed cruel and unusual punishment, to wit, twenty-one months' imprisonment at hard labor, while at the same time, Louis M. Jenkins, charged with the same offense, plead guilty and was fined only \$75. By such acts he manifested a cruel and wicked disposition of heart and an incompetency for the position of judge.<sup>73</sup>

While his case was pending, Magbee resigned his office.<sup>74</sup> On January 11, 1871, the Court of Impeachment reconvened, at which time the managers from the assembly appeared and moved that the case be dismissed. The resolution to adopt the managers' motion was approved, and the chief justice discharged Magbee from the custody of the High Court and adjourned sine die.<sup>75</sup>

### *Governor Harrison Reed*

The house twice attempted to impeach Governor Harrison Reed. The first attempt failed for lack of a quorum of the senate in 1868.<sup>76</sup> However, in 1872, the assembly succeeded in passing the following articles of impeachment against Governor Reed:

Article I—He signed state bonds in the amount of \$528,000 in

73. FLA. ASS. JOUR. 353-55 (Reg. Sess. 1870).

74. K. GRISMER, TAMPA: A HISTORY OF THE CITY OF TAMPA AND THE TAMPA BAY REGION OF FLORIDA 156 (1950).

75. FLA. S. JOUR. 55-57 (Reg. Sess. 1871).

76. See note 29 *supra* and accompanying text.

excess of the amount authorized to be issued by an act of the legislature with intent to violate that act.

Article II—He fraudulently conspired to issue state bonds in the amount of \$1,000,000 for the purchase of stock of the Florida, Atlantic, and Gulf Central Railroad Company for the use and benefit of private persons, in collusion with such persons, and for his own pecuniary advantage.

Article III—He signed his official signature as Governor to those bonds in the amount of \$1,000,000.

Article IV—He caused to be issued and signed his name to state bonds in the amount of \$4,000,000 for the use and benefit of the Jacksonville, Pensacola & Mobile Railroad Company, having full notice of the fraudulent title of that company to the property of the Pensacola and Georgia and Tallahassee Railroads.

(Articles V and VI were stricken).

Article VII—He fraudulently conspired with one Milton S. Littlefield and others to embezzle monies received from the hypothecation of state bonds and embezzled \$22,000 from those monies.

Article VIII—He received \$3,500 from Littlefield to influence his official action in sustaining the claim of the Jacksonville, Pensacola & Mobile Railroad Company to the title of property of the Pensacola & Georgia and Tallahassee and Florida, Atlantic and Gulf Central Railroads.

Article IX—He conspired with one Charles Pond and one E.B. Buckley to defraud the state of \$15,000 of state bonds and did so defraud the state.

Article X—He received from one I.K. Roberts, on behalf of Florida Railroad Company, a draft for \$1,140 which was paid to him in United States currency and tendered script of the state in lieu of that currency to the state treasurer.

Article XI—He conspired to influence a justice of the peace in the exercise of his judicial action on a case pending before him.

Article XII—He conspired with one Aaron Barnett to prostitute his official influence, in receiving \$10,000 from Barnett for his official sanction and signature to a contract of conveyance of internal improvement lands to Barnett.

Article XIII—He unlawfully appropriated monies (\$6,948.63) belonging to the state, placed in his possession by one Westcott, and received by him as trustee, viz., he substituted for those monies certain securities of the state purchased by him at a large discount.

Article XIV—He embezzled state money (\$1,897.24) in the possession of the secretary of state for his own use, benefit, and purposes.

Article XV—He unlawfully appropriated \$11,000 of the contingent fund appropriated by the legislature for his own personal use and benefit.

Article XVI—He wrongfully and maliciously falsified his official acts and doings to one T.W. Brevard for the purpose of affecting the interests of certain persons to the detriment of the public interest.<sup>77</sup>

The senate organized as a court but adjourned without trial during the regular session. Acting Governor Samuel T. Day issued a proclamation convening the legislature in extraordinary session. During that session, Reed filed a motion for acquittal and discharge through an ally in the senate. This motion was passed, and the chief justice declared that as a legal consequence of the adoption of the motion, Reed was discharged from custody. Several senators introduced a protest against the discharge and spread it upon the journal.<sup>78</sup> Governor Reed served out the rest of his term and later served in the Florida House of Representatives.<sup>79</sup>

#### *Treasurer Clarence B. Collins*

State Treasurer Clarence B. Collins was impeached in 1897 for the following offenses:

Article I—He provided a \$15,000 loan to Merchants National Bank of Ocala out of the general funds and public revenues of the State of Florida.

Article II—He made the \$15,000 loan to Merchants National Bank knowing that the bank was insolvent.

Article III—He provided a \$15,000 deposit out of general funds and public revenues as a special time deposit in the National Bank of the State of Florida at Jacksonville.

Article IV—He provided a \$15,000 loan out of the general funds and public revenues to the Marion County, Florida, school board.

Article V—He loaned \$3,000 from the general fund and public revenues to the Board of Public Instruction of Citrus County.

Article VI—He paid \$15,000 of public funds to R.B. McConnell without warrant of law.

Article VII—He provided \$10,000 from the general fund and public revenues to invest in enterprises not for the use and purposes of the State of Florida and not authorized by law.

Article VIII—He deposited \$254,124.32 out of the general fund

77. FLA. ASS. JOUR. 257-63, 303-05 (Reg. Sess. 1872).

78. FLA. S. JOUR. 68, 73 (Extraord. Sess. 1872). See also note 11 *supra*.

79. A. MORRIS, *supra* note 8, at 119.

and public revenue in various banks, with totally inadequate security.

Article IX—He exhibited a trial balance sheet at the close of business for April 30, 1897, in the amount of \$343,127.39 when only \$341,387.39 was on hand.

Article X—On May 8, 1897, he was unlawfully short in his accounts as treasurer in the amount of \$50,981.37.

Article XI—He made and caused to be made fictitious and irregular entries on the books belonging to the treasurer's office pertaining to the general fund and public revenues.

Article XII—With intent to deceive, he reported to the Governor that there was no money of the general fund and public revenues in the Merchants National Bank of Ocala when in fact there was \$32,927.01.<sup>80</sup>

Pursuant to authorization by the house,<sup>81</sup> the managers supplemented the twelve original articles of impeachment against Collins with the following nine additional articles:

Article I—He converted \$15,710.96 of the tax redemption fund for the quarter ending June 30, 1896, to his own use and did not pay any portion thereof into the state treasury until April, 1897, when he paid \$11,321.58, leaving a deficit of \$4,389.38.

Article II—He converted \$10,863.16 of the state tax redemption fund for the quarter ending September 30, 1896, to his own use.

Article III—He converted \$6,817.16 of the state tax redemption fund for the quarter ending December 31, 1896, to his own use.

Article IV—Without authority of law, and contrary to the statutes, he loaned \$32,927.01 out of the general fund and public revenues to Merchants National Bank of Ocala.

Article V—Without authority of law, and contrary to the statutes, he loaned \$39,962.11 to the Capital City Bank of Tallahassee from the general fund and public revenues.

Article VI—Without authority of law, and contrary to the statutes, he loaned \$15,800.84 to the National Bank of the State of Florida from the general fund and public revenues.

Article VII—Without authority of law, and contrary to the statutes, he loaned First National Bank of Pensacola the sum of \$6,106.07 from the general fund and public revenues.

Article VIII—Without authority of law, and contrary to the statutes, he loaned \$11,094.17 to the First National Bank of Tallahassee from the general fund and public revenues.

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80. FLA. H.R. JOUR. 805-11 (Reg. Sess. 1897).

81. *Id.* at 883-84.

Article IX—He unlawfully, willfully, and falsely, with intent to deceive, reported to the Governor that the state tax redemption fund for April, 1897, amounted to \$6,557.30 and that \$3,000 of that sum had been paid in a Citrus County school warrant. This report was false in that \$3,000 was not paid to him in the shape of a warrant but was paid in currency and other current funds.<sup>82</sup>

Having been advised by the Governor that Collins had resigned, the house, on June 4, 1897, adopted a resolution withdrawing the articles of impeachment and notifying the senate of the action.<sup>83</sup> Collins held no other statewide, elective public office after his resignation.

### *Governor Fuller Warren*

In 1951 a resolution was introduced to impeach Governor Fuller Warren. A special committee appointed to review the charges found that none of them stated a misdemeanor in office and recommended that they not pass. The house agreed, and further consideration of the matter was indefinitely postponed. All the articles, with the exception of the title, were thereafter expunged from the record, thereby making them unavailable for review.<sup>84</sup>

Warren served out the rest of his term. He ran for the Democratic gubernatorial nomination in 1956 but was soundly defeated.<sup>85</sup>

### *Judge George E. Holt*

Circuit Judge George E. Holt of Dade County was impeached in 1957 for allegedly bringing disrepute and scandal to his court by accepting gifts from attorneys practicing before his court, permitting personal relationships with individuals to improperly influence his judicial appointments and allowances of fees to such appointees, borrowing money from an attorney practicing before his court, awarding excessive and unnecessary fees, and flagrantly violating the Judicial Code of Ethics.<sup>86</sup> Judge Holt was subsequently acquitted.<sup>87</sup> He later left the bench without ever serving in any higher judicial office in Florida.

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82. FLA. S. JOUR. 933-38 (Reg. Sess. 1897).

83. FLA. H.R. JOUR. 1309 (Reg. Sess. 1897).

84. FLA. H.R. JOUR. 1465, 1478-80 (Reg. Sess. 1951). See note 71 *supra*.

85. See A. MORRIS, *supra* note 8, at 496.

86. FLA. H.R. JOUR. 1689 (Reg. Sess. 1957).

87. FLA. S. JOUR. 515 (Court of Impeachment 1957).

*Judge Vincent Giblin*

During the same session the house sought to impeach Circuit Judge Vincent Giblin of Dade County on the following grounds:

Article I—He lent the dignity, name, and standing of his office to a political candidate in the November, 1956, general election and made a political speech endorsing the candidacy of L.C. Proby for circuit judge.

Article II—He became patently intoxicated at a Miami Beach Bar Association function to the point of “passing out.”

Article III—He lent his name and the dignity of his office to a commercially operated radio station by personal appearances before the broadcasting microphones on a question-and-answer program.

Article IV—He uttered and caused to be published and disseminated, intemperate, inflammatory, and scandalous accusations and charges against judges of the Circuit Court of the Eleventh Judicial Circuit.

Article V—He publicly announced and published that he would refuse to wear the officially required robe of his office because, he claimed, the robe had been defiled and dishonored by other judges of the same court, thereby ridiculing and degrading his associates.

Article VI—In the company of a radio commentator, he went to the home of an incompetent ward of the circuit court, knowing that an associate judge had jurisdiction over the incompetent, to conduct a private interview with the ward without regard for the upsetting effect on the ward. Thereafter, he publicly charged that the incompetent was being held a “virtual prisoner of the Court” and that the order of the judge appointing the guardian was void. He thereby impugned, ridiculed, and degraded an associate judge.

Article VII—His continuous conduct, consisting of public appearances and utterances and other improper acts, has tended to impair and discredit the dignity, standing, and influence of the supreme court, the Circuit Court of the Eleventh Judicial Circuit, and the individual justices and judges, and to impede, embarrass, and prejudice the due administration of law and justice in and by said courts.

Article VIII—About April, 1957, he accepted gifts from others whose interests were likely to be submitted to him for judgment.

Article IX—As a candidate for the Supreme Court of Florida during the primary elections of 1952, he accepted contributions from corporations, contrary to the election laws of the State of Florida.<sup>88</sup>

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88. FLA. H.R. JOUR. 1831-34 (Reg. Sess. 1957).



The original vote on the adoption of these articles failed.<sup>89</sup> However, a subsequent motion to reconsider the vote carried.<sup>90</sup> Thereafter, a motion to temporarily defer consideration of the resolution of impeachment was agreed to, and the matter was never reconsidered. Judge Giblin never achieved his ambition of serving on the Florida Supreme Court.

### *Judge Richard Kelly*

In 1963 articles of impeachment containing the following charges were voted against Circuit Judge Richard Kelly:

Article I—In a certain case in which privileged affidavits and suggestions of his disqualification had been filed, he issued to the attorneys a rule to show cause why they should not be held in contempt for statements made in the affidavits. He then prepared an opinion in advance of the show cause hearing finding these attorneys to be in contempt.

He issued an order, containing no reference to any case before the court, commanding one of the above attorneys to appear before him.

He violated the Judicial Code of Ethics by ordering the court clerk to appear before him and then subjecting the clerk to threatening and oppressive statements.

Article II—He used his office to disparage the reputation of attorneys, elected and appointed officials, and legislative representatives before a partisan political group; and he participated in the preparation of a petition assailing nineteen attorneys of Pasco County as undemocratic and un-American.

(Articles III and IV were stricken.)

Article V—He allowed, aided, or condoned the alteration of public records in a particular case. In another case, he unlawfully and unjustly held an attorney in contempt of court and fined him \$200 and did, on the next day, rescind the order and request permission to destroy the record of the contempt matter.

Article VI—Without notification to the prosecutor, he granted a writ of habeas corpus.

Article VII—He unnecessarily interjected his personality into the trial of cases before him by berating and harassing witnesses, attorneys, and court reporters; failed to properly prepare for trial by informing himself of the law and proceedings governing cases; indulged in partisan politics; discussed litigation pending before him with the parties without presence of their attorneys of record; con-

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89. *Id.* at 1834.

90. *Id.* at 1932.

ducted and mismanaged his office to cause confusion by willfully and deliberately alienating the attorneys of his circuit; violated the Judicial Code of Ethics and committed other misdemeanors and misconduct in office.

Article VIII—He intentionally, calculatedly, shrewdly, and ruthlessly embarked on a continuous course of conduct to intimidate and embarrass members of the Pasco County Bar Association and officials of Pasco County.<sup>91</sup>

Judge Kelly was acquitted of these charges.<sup>92</sup> He remained on the bench until 1974, when he was elected to Congress from the Fifth Congressional District.

#### *Lieutenant Governor Tom Adams*

In 1973 the house attempted to vote the following articles of impeachment against Lieutenant Governor Tom Adams:

Article I—He brought his office into scandal and disrepute by failing to perform his official duties and diverting public funds to other than a proper public purpose in that he willfully assisted in or procured payment of certain fraudulent travel expenses.

Article II—He unlawfully caused or permitted public funds to be diverted to other than a proper public purpose by permitting receipts of taxes levied for public purposes to be disbursed for his own private purpose in that one Roger Getford, when officially on duty as an employee of the Department of Commerce, absented himself on several occasions without official leave from duty with the department for the private purpose of Tom Adams with the knowledge, consent, or at the direction of Tom Adams.

Article III—He permitted receipts of taxes levied and appropriated for public purposes of the Department of Commerce to be expended for the private purpose of one Getford in that he willfully aided, procured, or advised the preparation of certain travel vouchers which were fraudulent or false as to a material matter.

Article IV—He caused or permitted public funds to be expended and disbursed for the private purpose of one Getford by permitting Getford, when officially on duty as an employee of the Department of Commerce, to absent himself without official leave and by permitting him to travel to and from Jacksonville on a date certain at state expense for Getford's own private purpose.

Article V—He permitted public funds to be diverted for a private purpose in that, with Adams' knowledge, consent, or at his direc-

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91. FLA. H.R. JOUR. 2634-37 (Reg. Sess. 1963).

92. FLA. S. JOUR. 403 (Court of Impeachment 1963).

tion, Julia Johnson, when officially on duty as an employee of the Department of Commerce, did absent herself without official leave from duty from the department for Adams' private purpose.

Article VI—Contrary to law, he caused or permitted receipts of taxes levied and appropriated for the public purpose of the Department of Commerce to be expended for other than a proper public purpose in that certain employees of the department were improperly assigned on an overlap basis in certain positions with his knowledge, consent, or at his direction.

Article VII—He diverted public funds for the private purpose of one C.L. Hardin in that he assisted in, procured, or advised the preparation of certain fraudulent travel vouchers.

Article VIII—He knowingly and unlawfully caused or permitted to be diverted public funds for Hardin's private purpose in that he permitted Hardin, when officially on duty with the department, to absent himself without official leave from duty, *i.e.*, allowed Hardin to travel on state time at public expense for the purpose of seeking private employment.

Article IX—He unlawfully caused public funds to be diverted for his own private purpose in that certain employees of the department, when officially on duty, did absent themselves without official leave from duty to accomplish the private purpose of Adams, *i.e.*, rendering services in the nature of perquisites without lawful approval and accounting.

Article X—(was the same as Article II, though designating different times and different private tasks)

Article XI—He unlawfully and knowingly caused or permitted public funds to be diverted for a private purpose in that, with his knowledge, consent, or at his direction, a certain employee of the department was improperly and unlawfully assigned to and compensated in a position for which he was not qualified and had never performed any of the duties.

Article XII—He unlawfully permitted public funds to be disbursed for the private purpose of Getford in that he approved annual leave with pay for Getford as to a period of time when Getford had no earned, accrued, and unused annual leave.

Article XIII—(was the same as Article IV with different dates and places designated)

Article XIV—He knowingly and unlawfully caused or permitted public funds to be diverted for private purposes, *i.e.*, certain employees of the department were relieved from the performance of all or a part of their regular duties and were compensated from public funds.

Articles XV-XVIII—(were the same as Article IV but specified different private purposes and dates)

Article XIX—He unlawfully and willfully aided or assisted in, procured, or advised preparation of certain fraudulent or false travel vouchers for Getford, thereby diverting public funds for a private purpose.

Articles XX-XXII—(were the same as Article IV but specified different private purposes and dates)<sup>93</sup>

The house failed to adopt House Resolution 2022, the articles of impeachment against Adams.<sup>94</sup> However, House Resolution 2037, officially censuring Adams, was adopted. This resolution essentially adopted the charges in the impeachment articles.<sup>95</sup> Although he was stripped by Governor Reubin Askew of most of his authority, Adams completed his term as Lieutenant Governor. He challenged Askew for the Democratic nomination for Governor in 1974 but was defeated.<sup>96</sup>

#### *Commissioner of Education Floyd Christian*

In April, 1974, a select committee of the house was appointed to investigate Floyd T. Christian, commissioner of education. Christian, however, resigned his office shortly thereafter.<sup>97</sup>

#### *Insurance Commissioner Thomas D. O'Malley*

Because of alleged official misconduct in office, Thomas D. O'Malley, the State insurance commissioner and treasurer, was impeached on the following grounds in 1975:

Article I—He instructed E.A. Faircloth, an employee of his department, to solicit a financial contribution from J.F. Bryan III, chairman of the board and president of Independent Life and Accident Insurance Company. Faircloth then asked for the contribution, and Bryan instructed an employee of his company to seek contributions from other company employees. The employee collected between \$800 and \$1,000 and personally delivered the funds to Fair-

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93. FLA. H.R. JOUR. 617-27 (Reg. Sess. 1973).

94. *Id.* at 627.

95. *Id.* at 628-33.

96. See A. MORRIS, *supra* note 8, at 497. Askew removed Adams as Department of Commerce head after his censure. See Miami Herald, Dec. 21, 1973, § D, at 7, col. 2.

97. FLA. H.R. JOUR. 359, 458 (Reg. Sess. 1974).

Christian pleaded *nolo contendere* to State charges of receiving unlawful compensation and of perjury, and pleaded guilty to federal charges of income tax evasion. He served approximately six months in federal prison. See Miami Herald, Sept. 17, 1975, § 2B, at 1, col. 1. See also note 195 *infra*.

cloth in Miami. Faircloth in turn delivered the money to O'Malley. At the time the contribution was sought, Bryan's company had a request pending before the insurance commissioner to allow Independent Life to exceed the ten percent limitation on investment in real estate.

Article II—He falsely swore on his Statement of Elected Official that it was a true, accurate, and total listing of all contributions to him in excess of \$25. The report did not reflect the \$800 to \$1,000 contribution he had received from Faircloth.

Article III—In regard to the charges of Article I, he further, on or about February 18, 1972, approved the special consent investment for Independent Life, and he accepted the aforementioned contribution as a gift or favor that reasonably tended to improperly influence him in the discharge of his official duties.

Article IV—He accepted unlawful compensation in that on December 31, 1970, he entered into a contract with Rich Ciravola and Bennett Feldman whereby Ciravola and Feldman agreed to purchase his seventy percent interest in the law firm then known as O'Malley and Ciravola for \$239,999 to be paid over the course of eight years with interest at four percent per annum on the unpaid balance. During this time, acting as receiver for certain insurance companies, he retained the law firm of Ciravola and Feldman to represent him in his capacity as insurance commissioner, which resulted in payments of \$34,222.63 to the law firm by the insurance companies in liquidation, being compensation not authorized by statute.

Article V—He unlawfully used his official position to secure special privileges for himself and others (substantially the same factual statement as Article IV).

Article VI—He had personal investments in an enterprise creating a substantial conflict between his private interests and the public interest (substantially the same factual statement as Article IV).

Article VII—He received and accepted unlawful compensation for the past, present, and future performance, nonperformance or violation of an act, rule or regulation that was incumbent upon him to administer in that he received payments of \$70,175 (1971-1974), being compensation not authorized by law. He withheld approval of Peninsular Life Insurance Company's plan for the proposed formation of the McMillen Corporation until the company retained Feldman as counsel for \$10,000 plus expenses.

Article VIII—He used his official position to secure special privileges or exemptions for himself or others in that he accepted a gift of a one-eighth proprietary interest in a parcel of land—the Fort Walton Square Shopping Center—and while part-owner of that

shopping center, he approved a special consent investment (a second lien, "wraparound" mortgage) which was pledged as security on the shopping center.

Article IX—Under the facts set forth in Article VIII, while part-owner and contracting party, he granted the special consent for the "wraparound" mortgage, thereby granting financial savings of the interest to himself and others, said act providing compensation not authorized by law.

Article X—He falsely swore on his Statement of Elected Official that the same was a true, accurate, and total listing of all contributions to him in excess of \$25. The report did not reflect the gift of the one-eighth proprietary interest in the parcel of land described as Fort Walton Square Shopping Center.

Article XI—The conduct described in Articles I-X constitutes a misdemeanor in office.<sup>98</sup>

Upon O'Malley's resignation from office, the articles of impeachment were dismissed.<sup>99</sup> O'Malley suffered serious health problems and has not sought public office since.

### *Supreme Court Justices*

In 1975 a select committee of the house of representatives was appointed to investigate several supreme court justices. The committee voted against the impeachment of supreme court Justice Joseph Boyd,<sup>100</sup> and Justices Hal Dekle and David McCain resigned from the supreme court.<sup>101</sup>

98. FLA. S. JOUR. 734-37 (Reg. Sess. 1975).

99. FLA. S. JOUR. 15-16 (Org. Sess.—Court of Impeachment 1975).

The chief justice granted the dismissal of the articles and adjourned the Court of Impeachment on July 29, 1975, while the senate was not in session. He explained:

Therefore, under the circumstances, the convening of the Court of Impeachment on September 16, 1975, would be a fruitless and useless procedure incurring additional and unnecessary expense to the State of Florida. Many Senators have concurred in the view that some method should be followed whereby these proceedings could be dismissed without the further convening of the Senate as a Court of Impeachment. The undersigned, as presiding officer under the provisions of Fla. Const., art. III, § 17(c), F.S.A., finds, from the above that the trial of Commissioner O'Malley by the Court of Impeachment could not take place without the appearance and advocacy of the Board of Managers of the House of Representatives charged with the prosecution. Therefore, the impeachment proceedings are ineffective and should be dismissed.

*Id.* at 16.

100. FLA. H.R. JOUR. 400 (Reg. Sess. 1975).

101. The inquiries of Justices Boyd and Dekle concerned their alleged improper ex parte receipt and use of a "secret" memorandum from an attorney involved in a case before the court. See *In re Boyd*, 308 So. 2d 13 (Fla. 1975); *In re Dekle*, 308 So. 2d 5 (Fla. 1975).

The charges against Justice McCain stemmed from alleged improper personal involvement

#### IV. IMPEACHMENT FOR ACTS PRIOR TO PRESENT TERM OF OFFICE

In the impeachment proceedings against Treasurer and Insurance Commissioner Thomas O'Malley, conducted in 1975, the Florida House of Representatives squarely faced the issue of whether officials may be impeached for acts committed prior to the present term of office. House debate and the vote on the issue firmly established that, in that body's view, officials may be impeached, removed from office, and prevented from holding office in the future for misconduct occurring prior to their current term.<sup>102</sup> However, Florida courts have not been confronted with this question, and the senate has not directly passed upon it.

In cases involving the suspension and removal of nonimpeachable officials, the Florida Supreme Court has been consistent in its view that such officers cannot be suspended by the Governor nor removed by the senate for acts committed prior to their present term.<sup>103</sup> A recognized exception has been for misconduct of a continuing nature that extended into the current term.<sup>104</sup>

At the time the senate considered the first suspensions under the 1968 constitution, it considered itself bound by these judicial precedents and reinstated various officers on that basis.<sup>105</sup> Thereafter, and as a result of dissatisfaction with those precedents, the legislature enacted section 112.42, Florida Statutes, allowing the Governor to suspend an officer for misconduct occurring during his present term or during the next preceding four years.<sup>106</sup> The power of the

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in several cases. See Fla. H.R. Select Committee on Impeachment, I transcript of proceedings (Feb. 25, 1975) (on file with House Judiciary Committee, State Legislative Library, and State Archives).

102. See FLA. H.R. JOUR. 1196 (Reg. Sess. 1975) (remarks of Reps. Steinberg and Redman).

103. *State ex rel. Hawthorne v. Wisheart*, 28 So. 2d 589 (Fla. 1946); *Rosenfelder v. Huttoe*, 24 So. 2d 108 (Fla. 1945); *State ex rel. Hardee v. Allen*, 172 So. 222 (Fla. 1937); *In re Advisory Opinion to the Governor*, 60 So. 337 (Fla. 1912); cf. *State ex rel. Turner v. Earle*, 295 So. 2d 609 (Fla. 1974) (holding circuit judge could not be removed from office by J. Q.C. for misconduct occurring prior to tenure as circuit judge); *In re Advisory Opinion to the Governor*, 12 So. 114 (Fla. 1893) (holding that suspension from office does not disqualify one from holding same or other office in future).

In *Rosenfelder v. Huttoe*, 24 So. 2d at 110, Justice Terrell emphasized: "No rule is better settled under our democratic theory than this; when one is re-elected or reappointed to an office or position he is not subject to removal for offenses previously committed."

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

105. On February 17, 1969, the senate assembled in the first special session authorized by FLA. CONST. art. IV, § 7(b), for the purpose of considering all orders of executive suspension then pending. The Select Committee on Executive Suspensions, in a general report, advised the senate that well-established law in Florida prohibited the suspension or removal of a public officer for misconduct in a prior term of office. The senate applied the principle in reinstating several suspended officers. FLA. S. JOUR. 7, 20, 21 (Spec. Sess. 1969).

106. Act of July 2, 1969, ch. 69-227, § 3, 1969 Fla. Laws 1020, as amended by Act of June

legislature to relax the judicial interpretation of the constitution has not yet been tested.<sup>107</sup> However, Justice B.K. Roberts, joined by Justice James C. Adkins, dissenting in *In Re Advisory Opinion to the Governor Request of July 12, 1976*, spoke to the constitutionality of section 112.42.<sup>108</sup> They noted the overwhelming weight of authority for the proposition that once one is reelected or reappointed to an office, he cannot be removed for offenses occurring in a prior term.<sup>109</sup>

Earlier, the court held in *State ex rel. Turner v. Earle* that the Judicial Qualifications Commission (J.Q.C.) could not recommend the disciplining of a circuit judge for acts committed before he became a circuit judge and while he held a different judgeship not within the jurisdiction of the J.Q.C.<sup>110</sup> Following that decision, the

27, 1971, ch. 71-333, § 1, 1971 Fla. Laws 1514 (codified at FLA. STAT. § 112.42 [1977]).

107. The supreme court observed in *State ex rel. Turner v. Earle*, 295 So. 2d 609 (Fla. 1974):

Although not applicable to the instant cause we note that in the 1969 session the Legislature promulgated Chapter 69-277, Laws of Florida, (amended by Chapter 71-333, Laws of Florida), Section 112.42, Florida Statutes, F.S.A., relating to the governor's power to suspend. This section provides: "112.42 Period during which grounds may have occurred.—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 constitutional question as to whether the Legislature can enlarge the suspension power of the Governor as conveyed by Article IV, Section 7, Florida Constitution has not as yet been raised. The constitutionality of this statute which obviously relates only to the Governor's authority to suspend has not been measured against Article IV, Section 7, Florida Constitution, F.S.A. . . .

*Id.* at 617 n.7. *But see In re Advisory Opinion to the Governor Request of July 12, 1976*, 336 So. 2d 97, 99 (Fla. 1976), in which the court had an opportunity to determine the constitutionality of § 112.42 but decided that "such a determination should not be made in an advisory opinion but should be resolved in regular trial and appellate proceedings where appropriate factual issues can be developed."

108. 336 So. 2d 97.

109. *Id.* at 102.

110. 295 So. 2d 609 (Fla. 1974). The court explained:

Recognizing that there are divergent views, we find that the rule supported by the great weight of authority and specifically adopted by this Court in construing statutory and constitutional provisions authorizing the removal of public officers guilty of misconduct when such provisions do not refer to the term of office in which the misconduct occurred is that a public officer may not be removed from office for misconduct which he committed in another public office or in a prior term of office in the absence of disqualifications to hold office in the future because of such misconduct . . .

*Id.* at 613. *But see In re Kelly*, 238 So. 2d 565 (Fla. 1970), which the *Turner* court affirmed and distinguished as follows:

Furthermore, we must note that the question involved sub judice was not before this Court in *In Re Kelly*, 238 So. 2d 565 (Fla. 1970). This opinion does not recede from and is not to be confused with the decision in *In Re Kelly*, *supra*. In the *Kelly* case, the investigation did extend backwards for a long period of time and into another term of Judge Kelly but it must be remembered that at all times com-



1974 legislature proposed an amendment to article V, section 12 of the constitution which permitted the J.Q.C. to consider judicial conduct "during term of office or otherwise occurring on or after November 1, 1966."<sup>111</sup> The amendment was approved by the voters in November, 1974.

With the legislature reacting so quickly to the decisions forbidding disciplinary bodies from considering conduct occurring prior to the current term of office, it was not surprising that the supreme

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plained of Judge Kelly was a *circuit judge* and *within the jurisdiction* of the Qualifications Commission. *Therein lies the difference in the two cases.* Turner's alleged misconduct occurred when he was not within the jurisdiction of the Qualifications Commission as a *matter of law and fact.* Kelly's misconduct occurred when he was *within the jurisdiction* of the Qualifications Commission as a *matter of law and fact.* *Therein lies the difference between the two cases and calls for a different rule of law.*

295 So. 2d at 618.

The Supreme Court of Florida, in a recent decision, considered whether Judge David L. Taunton, County Judge, Gulf County, should be removed on recommendation by the Judicial Qualifications Commission. *Inquiry Concerning a Judge*, J.Q.C. No. 77-16 (Fla. March 16, 1978). Judge Taunton argued that he could not be removed from office unless there was clear and convincing evidence that he was guilty of serious and grievous wrong and that he committed it with a corrupt motive. The supreme court explained that the rule cited by Taunton was the established and controlling rule when Judge Taunton failed to comply with the Code of Judicial Conduct but that the people of Florida in November, 1976, adopted an amendment to FLA. CONST. art. V, § 12(f), which added the following sentence: "Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office," and that this amendment invalidated the prior rule as of the effective date of the amendment. The court recognized that a judicial officer may now be removed from office if his conduct demonstrates a present unfitness to hold office, even if he had good motive; however, as to Judge Taunton the supreme court concluded:

We agree with respondent that the record is devoid of evidence of corruption or corrupt motive on his part. We note that all of the activities for which he is to be disciplined took place before the effective date of the amendment to Article V, Section 12(f), Florida Constitution, and at a time when such activities, without corrupt motive, would not warrant his removal from office. We are, therefore, confronted with the question of whether the 1976 constitutional amendment may be applied retroactively to transform his improper, but non-corrupt, conduct into grounds for removal after the fact.

Due process, guaranteed by Article I, Section 9, Florida Constitution, contemplates notice that an act is a removable offense at the time it is committed. Any other conclusion would expose judicial officers to the unfair and untenable situation in which even innocent acts of today could someday be declared improper and subject them to punishment or removal from office. We cannot approve a rule that would permit a review of every judge's past conduct each time a change in the law occurs to determine whether innocent conduct of the past has been converted into grounds for discipline under the new law. Judicial officers are justified in relying on the current rule and in conducting themselves accordingly. We, therefore, hold that the amendment to Article V, Section 12(f), has only prospective application.

*Inquiry Concerning a Judge*, slip op. at 12-13.

111. Fla. HJR 3911 (1974), 1974 Fla. Laws 1312.

court held in 1975 that the J.Q.C. had the authority to recommend the disciplining of a supreme court justice for misconduct which had occurred prior to his present term.<sup>112</sup> Significantly, in rejecting his contention that he could not be disciplined for acts done before that term, the court cited one of its earlier decisions, *In Re Kelly*.<sup>113</sup> But the court did not mention the 1974 constitutional amendment, which specifically authorized consideration of conduct going back to November, 1966.<sup>114</sup> It was apparently this consistent legislative, judicial, and voter activity which led the chairman of the impeachment committee in the O'Malley case to conclude that an intervening election was not a bar to impeachment.<sup>115</sup>

Although the nonjudicial indicators point to the conclusion that neither reelection nor reappointment prevents impeachment, the question is still very much debatable. In the absence of a judicial or senatorial interpretation or an amendment to the constitution, the issue can be expected to arise whenever the conduct being considered as grounds for impeachment has occurred prior to the officer's next term.

The United States House of Representatives faced this issue in 1873, and the report of the Committee on the Judiciary at that time has often been cited as precedent for the view that an officer may not be impeached for conduct occurring before his current term.<sup>116</sup>

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112. *In re Boyd*, 308 So. 2d 13 (Fla. 1975).

113. 238 So. 2d 565 (Fla. 1970). See note 110 *supra*.

114. 308 So. 2d at 22.

115. FLA. H.R. JOUR. 1196 (Reg. Sess. 1975). In that debate Rep. Redman, the committee chairman, also observed that because impeachment could lead to disqualification from holding office in the future, it was distinguishable from other types of discipline and therefore not governed by the precedent in those cases.

116. The report appears in full in *IMPEACHMENT, SELECTED MATERIALS*, *supra* note 71. It states, in part:

It will be seen from a few illustrations that it hardly could have been the intent of the Constitution that an officer could be impeached for a crime committed by him before his entry into the office from which he is to be removed because, if this were so, there is no constitutional, and, thus far, no legal limitation as to the time during which he may be held so amenable to such impeachment.

One may have committed a high misdemeanor in his early youth, repented it, outlived it, or may have been pardoned, and, in the language of the law, by that pardon "made as white as snow," and yet, without limitation, years afterwards may be impeached for that crime and deprived of an office by him afterward held, which he has filled to the entire satisfaction of all good men. Indeed, impeachment may in this way be used as a means of removing from the possibility of election a popular candidate whom the people desire to elect to the highest office within their gift, if an opposed House of Representatives chose to impeach for a high misdemeanor of many years' standing and present that to the Senate, who, upon finding the fact, are bound to give judgment, or, if not bound, might be willing to give judgment of disqualification from office forever, from the effect of which judgment no power under the Constitution could relieve; for cases of impeachment are expressly ex-

Vice President Schuyler Colfax had interested himself in a corporation known as Credit Mobilier of America. Credit Mobilier stock was allegedly sold to Colfax at a price below market value in an attempt to influence his performance as a member and as Speaker of the House. All the transactions were completed while he was a Congressman, but the inquiry came after he became Vice President.<sup>117</sup>

Colfax's case was referred to the Judiciary Committee by House resolution, and the report was the committee's response.<sup>118</sup> The committee concluded that because the questionable acts happened before Colfax assumed his present office, they did not warrant impeachment. The committee's position was clear and unambiguous. But it did not put the issue to rest in the Congress. The same issue was again raised and debated in committee when the impeachment of President Richard Nixon was considered a century later.<sup>119</sup>

The question of whether impeachment is a remedial or a punitive process lies at the base of the prior conduct controversy. If it is viewed as punitive, that is, as criminal in nature, an officer should be answerable whenever his misconduct is discovered. His past actions have tainted him, and the assumption of a new office or the beginning of a new term should be irrelevant. However, if impeachment is remedial, that is, designed to terminate an officer's tenure because he has conducted himself improperly while in that office, the inquiry and impeachment action should be concerned only with those acts committed during the current term.

The remedial theory appears to have been contemplated by the drafters of the Florida constitution. First, the stated ground is "misdemeanor in office," the terms of which seem to exclude from consideration any misdemeanor committed before assumption of office.<sup>120</sup> The same constitutional provision renders an official answerable for his criminal acts even though tried by the senate upon

cepted, and no law could avail, nor even the unanimous election of the whole people could give absolution.

*Id.* at 601-15.

117. The case is discussed in detail in the 1873 Judiciary Committee report.

118. The resolution passed on February 20, 1873, and provided:

Resolved, that the testimony taken by the committee of this House of which Mr. Poland, of Vermont, is chairman, be referred to the Committee on the Judiciary, with instructions to inquire whether anything in such testimony warrants articles of impeachment of any officer of the United States not a member of this House, or makes it proper that further investigation should be ordered in his case . . . .

IMPEACHMENT, SELECTED MATERIALS, *supra* note 71, at 601.

119. HOUSE COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, H.R. REP. NO. 1305, 93d Cong., 2d Sess. 55-60, 146-56, 303-06 (1974).

120. FLA. CONST. art. III, § 17.

impeachment. Thus, if impeachment were intended to be punitive, the officer would be placed in jeopardy twice for the same offense, a violation of both the state and federal constitutions.<sup>121</sup> Second, article VI, section 4 of the state constitution provides grounds for the disqualification of persons from holding office.<sup>122</sup> If certain prior conduct does not disqualify the person under article VI, section 4 from holding the office, the constitutional draftsmen could hardly have intended that it be grounds for removal once the office is attained. Third, although an officer convicted upon impeachment may be prevented (in the discretion of the senate) from holding public office in the future,<sup>123</sup> an officer not subject to impeachment who is suspended by the Governor and removed from office by the senate may be elected or appointed to the same or another office in the future.<sup>124</sup> Thus, an official suspended and then removed from office who later assumed an office which is subject to impeachment would take the office with constitutional permission and should not be liable to impeachment for the same offense for which he had previously been suspended. Finally, the fact that an impeachment is tried by the senate and not by a jury is further evidence that the drafters intended it to be something other than a criminal proceeding.<sup>125</sup>

The wisdom of this apparent constitutional intent is certainly debatable. The arguments in favor of that position are supported by reason and logic. If the house of representatives may search an official's past for conduct that qualifies as an impeachable offense and, no matter when it occurred or how well it was known by his constituency, such conduct may be the basis for his impeachment, our highest offices could be filled only by those having the continuous approval of two-thirds of the legislature. It would not matter that the people had elected the person or the Governor had appointed him with full knowledge of those past acts. Nor would it matter that, at the time of his taking office, the person possessed all the constitutional qualifications for the office. If there were any offenses in his background that, in the conscience and discretion of two-thirds of the representatives and senators, could qualify as grounds for impeachment, he could be removed from office and

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121. U.S. CONST. amend. V; FLA. CONST. art. I, § 9.

122. FLA. CONST. art. VI, § 4 provides: "No person convicted of a felony, or adjudicated in this or other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability."

123. *Id.* art. III, § 17(c).

124. See *State ex rel. Turner v. Earle*, 295 So. 2d 609 (Fla. 1974).

125. FLA. CONST. art. I, § 16.

prevented from holding office in the future.<sup>126</sup>

It is also apparent that changing times may convert a past act, considered innocent when committed, into an impeachable offense. Or, as discussed in the 1873 Judiciary Committee report concerning the Credit Mobilier incident, legislative bodies may base impeachment upon activities that were considered improper in times past but are no longer considered so.<sup>127</sup> Changing laws and changing social mores may capture an impeachable officer in a vise of events.

The well-settled judicial rule in Florida that when one is reelected or reappointed to an office or position, he is not subject to removal for offenses previously committed, is premised on the belief that the voters or appointing authority may select the candidate of their choice and that the legislature may not second-guess that choice or substitute legislative wisdom for citizen wisdom.<sup>128</sup> It is argued that reelection or reappointment has a cleansing effect and that the officer who is so cleansed cannot be removed from his new office without violating the will of the people or the constitutional prerogative

126. The committee discussed the problem in the 1873 report:

But the answer seems to us an obvious one that the Constitution has given to the House of Representatives no constitutional power over such considerations of "justice and sound policy" as a qualification in representation. On the contrary, the Constitution has given this power to another and higher tribunal, to wit, the constituency of the member. Every intendment of our form of government would seem to point to that. This is a Government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them; and we, therefore, find in the people's Constitution and frame of government they have, in the very first article and second section, determined that "the House of Representatives shall be composed of members chosen every second year by the people of the States," not by Representatives chosen for them at the will and caprice of members of Congress from other States according to the notions of the "necessities of self-preservation and self-purification" which might suggest themselves of the reason or caprice of the members from other States in any process of purgation of purification which two-thirds of the members of either House may "deem necessary" to prevent bringing "the body into contempt and disgrace."

IMPEACHMENT, SELECTED MATERIALS, *supra* note 71, at 609.

127. Not many years ago, the House of Representatives witnessed a motion for expulsion of the "old man eloquent," once a President [*sic*] of the United States, as "tainted with crime," because he presented a petition for the abolition of slavery. Nay, more a movement for expulsion, changed to a vote of censure, passed by 125 to 60, against Joshua R. Giddings, of Ohio, as a tainted man, unfit for association with his fellow-members, because he presented a series of resolutions declaring that some African negroes, who, having endured the horrors of the middle passage in a slave-ship, had the natural and inherent right to rise upon their captors and oppressors at sea, and regain their liberty taken from them by fraud and force.

*Id.* at 612.

128. *Rosenfelder v. Huttoe*, 24 So. 2d 108 (Fla. 1945), *cited with approval in State ex rel. Turner v. Earle*, 295 So. 2d 609, 615 (Fla. 1974).

of the appointing authority.<sup>129</sup>

The opposing argument has logical merit and considerable popular appeal. Why, it is asked, should a person be permitted to commit an impeachable offense, conceal the facts, secure reappointment or reelection, possibly without opposition, and then take his new term without fear of removal? The answer is not easy. An impeachable act committed at the end of a prior term, perhaps after the election process is complete, would be excluded from consideration in the present term. A previously committed impeachable offense which impairs the ability of the official in the performance of his present duties should not be ignored, it is argued. And the Florida Legislature apparently agrees with these arguments. The decision in *State ex rel. Turner v. Earle*,<sup>130</sup> as seen earlier, resulted in legislative pro-

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129. In 1974, Justice Joseph Boyd of the Florida Supreme Court was an opposed candidate for reelection to a new six-year term on the court. He made public certain charges that had been leveled against him with the J.Q.C. as well as rumors of wrongdoing on his part. In the contested nonpartisan election, Justice Boyd was overwhelmingly reelected, winning 66 of 67 counties. This reelection notwithstanding, Justice Boyd was investigated by the House Select Committee on Impeachment in 1975. The investigation was based on the very facts that had been placed before the voters the previous year. No impeachment action was recommended by the committee. Therefore, neither house was forced to confront the issue.

130. 295 So. 2d 609. Circuit Judge Jack Turner sought to prohibit the J.Q.C. from proceeding against him for acts committed while he was a judge of the Criminal Court of Record and prior to the time he was elected as circuit judge. The Florida Supreme Court accepted jurisdiction under its rulemaking authority. FLA. CONST. art. V, § 12(c) (1968, amended 1973). The primary question the court addressed was whether the J.Q.C. had jurisdiction to investigate and, if appropriate, to recommend discipline of an incumbent circuit judge for alleged misconduct committed prior to the time he became circuit judge and while he held another office not within the jurisdiction of the J.Q.C.

Turner was elected to a six-year term on the circuit court beginning in January, 1973. He was commissioned on November 8, 1973. Before becoming a circuit judge, Turner had been elected and commissioned for a term of four years as judge of the Criminal Court of Record, commencing in January, 1969. He served in that position until January, 1973. A grand jury returned an indictment against Turner on April 6, 1973, charging that he had conspired to commit bribery from August 14, 1972, through October 13, 1972. The J.Q.C. then initiated proceedings against Turner, charging him with conduct unbecoming an officer, based on the aforescribed conduct. Turner was later tried before a jury and acquitted. Upon learning that the J.Q.C. intended to file a second request for his suspension, Turner sought relief from the Florida Supreme Court. The court summarized its holdings as follows:

(1) Prohibition is not an appropriate remedy to challenge proceedings by the Judicial Qualifications Commission, but this Court has jurisdiction in this cause under its rule making power and the all writs provisions of the Constitution.

(2) Consistent with the overwhelming weight of authority in the nation as hereinabove set forth, we hold that a public official cannot be disciplined or removed from the office of Circuit Judge upon which he entered January 2, 1973, for misconduct alleged to have occurred in 1972 while such public officer held the office of Judge of the Criminal Court of Record, and [sic] office not within the jurisdiction of the Judicial Qualifications Commission at anytime during the year of 1972. This holding is not intended in any manner or wise to recede from the *Kelly* case, supra, which was anchored to an entirely different set of facts as hereinabove mentioned

posal of a constitutional amendment effectively nullifying the decision.<sup>131</sup> Similarly, a corrective statute was passed in response to the executive suspension cases reviewed by the legislature in 1969.<sup>132</sup>

A reasonable alternative to the two extreme positions described above would be to permit consideration of conduct of specified types, whether occurring in the present term or in some reasonable period prior to the present term. Such a provision is needed not only in impeachment cases but also in cases of suspension and removal of officers not subject to impeachment, and in cases of expulsion from the legislature as well. All these procedures, as well as those of the J.Q.C., should be governed by a standard constitutional provision that, like article V, section 12(a) of the Florida constitution, would fix a specific date after which all conduct could be considered, or that, like section 112.42 of the Florida Statutes, would specify a time period prior to the present term for which conduct could be considered.

As long as the question remains as to whether an officer may be impeached for conduct occurring prior to the present term, the possibility of a harmful confrontation between the legislature and the judiciary remains as well.<sup>133</sup> Such a confrontation could be avoided

and set forth. Significantly but not controlling, Judge Turner was acquitted by a jury of the charges complained of by the Judicial Qualifications Commission.

(3) The Judicial Qualifications Commission may investigate the alleged misconduct of the Relator, Judge Jack M. Turner, within a reasonable time backwards but not exceeding two years behind the date upon which he assumed new duties having been elected *Circuit Judge* in the 1972 elections, but any misconduct established during 1972 cannot, standing alone, serve as a basis for his discipline as a Circuit Judge but can be used only insofar as such investigation develops evidence germane to charges allegedly occurring in the current term of office.

295 So. 2d at 619.

131. Fla. HJR 3911 (1974), 1974 Fla. Laws 1312.

132. Act of July 2, 1969, ch. 69-277, § 3, 1969 Fla. Laws 1020, *as amended* by Act of June 27, 1971, ch. 71-333, § 1, 1971 Fla. Laws 1514 (codified at FLA. STAT. § 112.42 [1977]). In addition to the case involving the Taylor County Commissioners, FLA. S. JOUR. 18-29 (Spec. Sess. 1969), the senate in 1969 considered the case of State attorney William R. Slaughter who, while under investigation by the Governor in the spring of 1968, received an uncontested party nomination to a new term of office and was unopposed by anyone from the other party. With reelection assured, he then resigned from office. When he attempted to take his new term the following January, Governor Claude Kirk withheld his commission and entered a suspension order. Again the senate felt itself bound by judicial precedent and ordered reinstatement. FLA. S. JOUR. 12-14 (Spec. Sess. 1969).

133. During the impeachment proceedings against Thomas O'Malley, Rep. Paul Steinberg voiced concern as to whether the house had the right to hear matters that took place prior to O'Malley's election to his present term, especially since those matters were brought out before his reelection by indictments of the grand jury, by the campaign participants, and by the newspapers. FLA. H.R. JOUR. 1196 (Reg. Sess. 1975). To this inquiry Rep. James Redman responded:

Well, let me tell you how: Our Committee—we've had Staff research this and its

by the incorporation into the constitution of an appropriate provision similar to the ones discussed above.

## V. JUDICIAL REVIEW OF IMPEACHMENT PROCEEDINGS

In an early advisory opinion to the Governor, the Supreme Court of Florida announced that the senate, when trying an impeachment case, is unquestionably a court with original and final jurisdiction to determine questions of both law and fact.<sup>134</sup> "Its judgments," the court said, "can become the subject of reversal or review in no other court known to the Constitution and the laws."<sup>135</sup>

Article II, section 3 of the Florida constitution provides that "[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers *appertaining to* either of the other branches unless expressly provided herein."<sup>136</sup> Insofar as article III, section 17 can be said to make impeachment a power "appertaining to" the legislature, article II, section 3 seems to prohibit any intrusion into the impeachment process by the judiciary. Furthermore, application of the principle of *expressio unius est exclusio alterius* to article III, section 17 leads to the conclusion that impeachment is exclusively a legislative function.<sup>137</sup> Other evidence to buttress

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*[sic]* their opinion, and the opinion of others, I might add, that are experts in the field, that due to our Constitution that says that a member, the Governor, a member of the Cabinet, or member of the Supreme Court, the District Court of Appeal, the Circuit Judges, being that they could be qualified, disqualified from holding office in the future, that we could go back.

Now, we arrived at that determination and Representative Rish's Committee, who came along after our initial appointment but before we really got cranked up so much this time, their Committee arrived at the same determination. It made us feel like we were on sounder ground when another Committee of the House arrived at the same conclusion we did independent of each other and without too much doubt.

*Id.* See also *id.* (remarks of Rep. Eric Crabtree). Note, however, that until the senate concurs in this matter with the house, this decision of the house cannot serve as precedent for the legislature.

134. *In re Executive Commun.* Filed the 17th Day of April, A.D. 1872, 14 Fla. 289 (1872). Governor Reed was under suspension by reason of articles of impeachment having been voted against him by the assembly. The court held that the senate's adjournment without disposition of the impeachment articles did not terminate his suspension. Therefore, he was not entitled to seek the opinion of the court.

135. *Id.* at 295.

136. [Emphasis added.]

137. In *Weinberger v. Board of Pub. Instruction*, 112 So. 253 (Fla. 1927), the court expressly declared:

The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the



this conclusion can be found in the executive article, which denies the Governor the power to grant clemency in cases where impeachment results in conviction.<sup>138</sup>

Because no one has ever been convicted after impeachment, the Florida Supreme Court has never had an opportunity to overturn such a conviction. However, when Justice David McCain was under investigation by a house select committee on impeachment in 1975, he asked the supreme court to exercise its "all writs" power to review procedures or set guidelines for the committee that would guarantee his due process rights. The court summarily declined the invitation.<sup>139</sup> As noted above, the court has rendered advisory opinions on and made observations in dicta about impeachment, but direct judicial precedent on the question of the court's power to review any part of impeachment proceedings is nonexistent.<sup>140</sup>

doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it.

*Id.* at 256.

138. FLA. CONST. art. IV, § 8(a).

139. McCain v. Select Comm. on Impeachment, Fla. House of Representatives, 313 So. 2d 722 (Fla. 1975).

140. For an opinion construing the role of the judiciary in matters relating to impeachment restrictively, see *In re Executive Commun.* Filed the 17th Day of April, A.D. 1872, 14 Fla. 289 (1872), in which the court stated:

It is proper to inquire here whether we have any legal right or power to determine what the effect of this action is under the circumstances. If we have not; if it shall be, as we conceive it is, the exclusive and sole province of the Senate to determine that question; if by so doing we usurp a jurisdiction not vested in this court by the State Constitution and wrest a case now pending from a court of exclusive jurisdiction over the trial of the subject, and presume to review its action and discharge what we may conceive to be its duty, it is plain that such action is improper.

. . . The Senate, when thus organized, is unquestionably a court—because it is a body invested with judicial functions; because it determines issues both of law and fact; because it announces the law in the form of judgment, and through that instrumentality adjudges the penalties named by the Constitution. Not only is it a court, but it is a court of exclusive original and final jurisdiction. Its judgments can become the subject of reversal or review in no other court known to the Constitution and the laws. This simple exercise of judicial functions, the application of law to facts and announcing its conclusions, are not extraordinary or transcendent powers. Nor is the simple fact that its jurisdiction is both original and final a circumstance which alone would justify us in ascribing to it any extraordinary degree of importance, because the general reason why a court has both original and final jurisdiction is the small degree of importance of the matter involved. Not only is this tribunal a court, but it is a court of great importance. Its jurisdiction is not indeed very extensive as to the number of the subjects-matter which may come under its control, but the sphere in which it acts, while limited to but one class of cases, is most high and transcendent. This is so because of the subject-matter of its jurisdiction, the degree and extent of the punishment it imposes, and the exclusive power which it has of regulating its practice arising upon any matter pending before it. All other persons in whom judicial power is vested under the Constitution derive their exist-

A fair consideration of the cases involving executive suspension and removal, a process also thought by many to be beyond judicial review, leads to the conclusion that the court is not at all reluctant to participate in procedures assigned to other branches.<sup>141</sup>

Similarly, the court recently chose to exercise at least a minimal review of the exercise of the clemency power by the executive branch. The court accepted jurisdiction when asked to examine rules established by the Governor and Cabinet for reviewing cases in which the death penalty has been imposed. However, the court limited its consideration to whether the clemency power was being exercised according to the constitutional grant of authority and whether constitutionally impermissible conditions were being imposed. Finding no fault in the procedures in these respects, the court held that clemency is a matter of grace exclusively within the executive branch and declined to review the rules.<sup>142</sup> Although exercising

ence from a delegated power to the Governor or Governor and Senate. These persons represent the people directly through the exercise of the elective franchise. . . . Under these circumstances, we submit that we should and must be very careful how we act in such matters. This jurisdiction is too high and transcendent to be invaded.

Our power in the matter of this impeachment is limited and circumscribed by the fact that it is a matter beyond our jurisdiction entirely. After an impeachment perfected according to the Constitution, the whole matter is with the Senate, and it has the exclusive right of determining all questions which may arise in the case.

*Id.* at 294-96, 300. However, the court further explained: "If its action is unconstitutional, we have the right and power to declare its nullity and, in a proper case before us, to enforce the right of any party of which it proposed to deprive him." *Id.* at 300.

141. See Barr & Karl, *Executive Suspension and Removal of Public Officers Under the 1968 Florida Constitution*, 23 U. FLA. L. REV. 635, 646 (1971).

An interesting case decided after publication of the cited article is *State ex rel. Meyerson v. Askew*, 269 So. 2d 671 (Fla. 1972). The senate voted to remove Meyerson, a constable in Dade County who had been suspended by the Governor. The court reinstated him. The court ignored the opinion in *State ex rel. Hardie v. Coleman*, 155 So. 129, 134 (Fla. 1934), which held: "The matter of reviewing the charges and the evidence to support them is solely in the discretion of the Senate; and, in doing this, it may adopt such rules of procedure as it sees fit. Its judgment in this is final, and will not be reviewed by the courts." The procedure used by the court in *Meyerson* was as remarkable as its failure to follow precedent. Meyerson, following his removal by the senate, petitioned the court for writs of quo warranto and mandamus and other extraordinary relief. The attorney general moved for a dismissal of the petition. Without considering either the testimony taken by the committee or the debate on the senate floor preceding the vote on removal, the court denied the motion and granted the relief requested in quo warranto. The court evidently misconceived the purpose of the committee report and did not understand that the senate had voted to uphold the Governor's suspension order only after examination of the full committee transcript and presentation by the committee of oral and written reports. *Meyerson* should dispel any doubt about the court's willingness to intrude into suspension-removal matters.

142. *Sullivan v. Askew*, 348 So. 2d 312 (Fla.), cert. denied, 98 S. Ct. 232 (1977); cf. *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684 (Fla. 1972) (holding that judiciary cannot compel legislature to exercise a purely legislative prerogative—establishing guidelines for public employee collective bargaining—but that continued inaction would lead

considerable judicial restraint, the court nevertheless refused simply to deny jurisdiction and remain completely uninvolved. Instead, it reserved for the judiciary the final word on whether the executive is following the constitutional mandates and remaining within constitutional limitations.

Certainly the court would be equally prepared to prevent any departure from the literal grant of the impeachment power.<sup>143</sup> The court could rightfully relieve a convicted official of a greater penalty than that which is specifically authorized by the constitution. However, two-thirds of the members of either house of the legislature would probably not attempt such a deviation from the specific constitutional provisions.

Other questions more likely to be presented to the court in the future include the legal sufficiency of the grounds charged, the reliance on acts committed prior to the officer's current term, and the application of due process principles.<sup>144</sup> Perhaps these questions will be settled relative to the respective powers and duties of the executive and judicial branches, as in the Nixon tapes controversy.<sup>145</sup> In

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the court to fashion such guidelines by judicial decree).

143. For example, the court could prevent the senate from trying an official who had not been impeached by the house or who had been impeached but not by the required two-thirds vote. Similarly, an attempt to impeach or try an officer other than those mentioned in the impeachment section of the constitution could be halted by the court.

144. Also, the question of whether article I, §§ 9 and 16 of the Florida constitution apply to impeachment proceedings in exactly the same way as they apply to criminal proceedings will surely arise in the future. In his brief for the senate in the Holt impeachment trial, Chief Justice Terrell told the members:

The respondent [official] is entitled (1) to be informed of the nature of the charges against him; (2) he is entitled to the aid of counsel; (3) to be confronted with the witnesses against him; (4) to compulsory process of witnesses; (5) he cannot be compelled to be a witness against himself; (6) the rules of evidence observed in court trials are generally applicable; (7) a reasonable doubt of guilt must result in acquittal; (8) there must be showing of wrong intent, while one may be presumed to intend the necessary results of his voluntary acts, it is only a presumption and may not at all times be inferable from the act; (9) precedents have due weight and every other constitutional guaranty is accorded respondent.

FLA. S. JOUR. 522 (Court of Impeachment 1957).

145. President Nixon was named as an unindicted co-conspirator by a grand jury of the United States District court for the District of Columbia. The grand jury indicted seven named persons for offenses including conspiracy to defraud the United States and conspiracy to obstruct justice. Upon motion of the special prosecutor, a subpoena duces tecum was issued to Nixon which required that he produce certain tapes, memoranda, papers, transcripts, and other writings relating to certain precisely identified meetings between Nixon and others. Nixon sought to quash the subpoena, claiming privilege. The district court denied the motion to quash, determined that the judiciary is the final arbiter of a claim of executive privilege, and concluded that the special prosecutor had made a prima facie demonstration of need sufficiently compelling to warrant judicial examination in chambers. The special prosecutor filed a petition for writ of certiorari before the Supreme Court of the United States, and Nixon cross-petitioned. Both petitions were granted.

any event, there can be little doubt that, just as in cases of suspension or removal, an officer whose impeachment violates the minimum requirements of due process or any other of his constitutional rights will be afforded relief in either state or federal court.<sup>146</sup>

## VI. IMPEACHMENT PROCEDURE: THE HOUSE OF REPRESENTATIVES

An officer is not impeached until the house of representatives, by two-thirds vote, adopts articles of impeachment.<sup>147</sup> But every step in the procedure leading up to the vote is critical.

The constitution is silent about the specific procedures which must be used in impeachment matters. Each house, however, is

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Questions considered by the Supreme Court included whether the separation of powers doctrine precludes judicial review of a President's claim of privilege and whether the Court should hold as a matter of constitutional law that the privilege prevailed over the subpoena duces tecum. The privilege asserted by Nixon was not based on any claim that either military or diplomatic secrets were involved. Holding that the legitimate needs of the judicial system outweighed the assertion of presidential privilege in this case, the Supreme Court explained that:

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

United States v. Nixon, 418 U.S. 683, 712-13 (1974).

For a discussion of the interaction of governmental branches and problems created by the simultaneous investigative activities of the special prosecutor and the House Impeachment Committee, see L. JAWORSKI, *THE RIGHT AND THE POWER* (1976).

146. The court may also be asked to dismiss impeachment charges if the senate fails to convene as a court within six months of the impeachment as required by FLA. CONST. art. III, § 17(c).

For an example of federal court involvement in suspension-removal matters, see *Fair v. Kirk*, 317 F. Supp. 12 (N.D. Fla. 1970), in which the court approved the Florida suspension-removal procedures. The federal court did not hesitate to take jurisdiction and left no doubt as to its authority to decide whether a public official's constitutional rights had been violated. In addition, see *McCarley v. Sanders*, 309 F. Supp. 8 (N.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.

147. FLA. CONST. art. III, § 17(a).

granted general power to determine rules of procedure.<sup>148</sup> Attendance of witnesses and production of documents may be compelled by the house when in session. And such powers may be delegated by law to a committee when the legislature is not in session.<sup>149</sup> The house of representatives has adopted rules in each session, and all impeachment proceedings have been conducted according to the rules in force at the time of the impeachment proceedings. All sessions of the house and of its committees are open to the public.<sup>150</sup>

The impeachment process may begin in a variety of ways. A member may simply offer articles of impeachment and move the house to adopt them. A member may request an investigation of an impeachable official. A committee of substance may suggest an investigation. Or the speaker of the house may appoint a member or a committee to investigate allegations of misconduct that have been either formally or informally brought to his attention.<sup>151</sup> In recent times, the speaker has appointed committees and referred specific investigations to them.<sup>152</sup>

Because the house has sole and exclusive authority to impeach,<sup>153</sup> and because articles of impeachment serve as a charging document, the house's role is similar to that of a grand jury.<sup>154</sup> Thus, the house determines whether probable cause exists to believe the accused official has committed an impeachable offense.<sup>155</sup> It follows that the role of the committee is to conduct the investigation and recommend to the house the existence or absence of probable cause.

In its investigation the committee may use its subpoena powers and may recommend punishment for failure of a witness to respond or for other contemptuous action.<sup>156</sup> The officer being investigated

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148. *Id.* § 4(a).

149. *Id.* § 5.

150. *Id.* § 4(b).

151. *Id.* § 17(a); FLA. H.R. JOUR. 1724 (1957).

152. Rep. James Redman served as chairman of the committees which investigated charges against Lieutenant Governor Tom Adams, Education Commissioner Floyd T. Christian, Treasurer and Insurance Commissioner Thomas O'Malley, and Comptroller Fred O. Dickinson. Rep. Billy Joe Rish was appointed chairman of the Select Committee on Impeachment to investigate charges against Justices Joseph Boyd, Hal Dekle, and David McCain.

153. FLA. CONST. art. III, § 17(a).

154. *In re Executive Commn.* of the 9th of Nov., A.D. 1868, 12 Fla. 653 (1868) (opinion of Chief Justice Randall); Fla. H.R., Select Committee on Impeachment, I transcript of proceedings at 3 (Feb. 25, 1975) (on file with House Judiciary Committee, State Legislative Library, and State Archives); FLA. H.R. JOUR. 1194 (Reg. Sess. 1975) (remarks of Rep. Redman).

155. FLA. H.R. JOUR. 1194 (Reg. Sess. 1975).

156. See sources cited note 154 *supra*.

On April 8, 1975, Rep. Billy Joe Rish, as chairman of a select committee on impeachment that was investigating certain supreme court justices, requested amendments to the house

may be compelled to respond to a subpoena, but he should not be.<sup>157</sup> The better practice is to invite the person being investigated to present any testimony or other evidence he wishes the committee to consider. The official may invoke his constitutional right to remain silent and may similarly protect his private documents.<sup>158</sup> But his official records are public documents available to the committee.<sup>159</sup>

Requiring an official to testify before the house investigating committee may render him immune from impeachment and could conceivably grant him immunity from criminal prosecution.<sup>160</sup> Undoubtedly a respondent official in an impeachment proceeding would assert immunity from impeachment if required to testify before a grand jury as to impeachable acts.<sup>161</sup>

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rules which authorized the use of depositions, interrogatories, and subpoenas for the production of documents. The amendments established a procedure for the resolution of conflicts arising during the taking of depositions, with a right of appeal to the speaker of the house in the event of dissatisfaction with the committee chairman's decision. FLA. H.R. JOUR. 10-11 (Reg. Sess. 1975). Rep. Richard Hodes, a medical doctor as well as a legislator, offered the following additional amendment to the rules:

Physical and Mental Examination

(a) Order for Examination. When the mental or physical condition of a person subject to an impeachment inquiry is raised by a member as a possible basis for disability in office, the Chairman, with the concurrence of the Speaker, may order the person subject to the inquiry to submit to a physical and/or mental examination by a physician or physicians. The order may be made only on motion by a member of the committee and for good cause shown and upon notice to the person to be examined. If the person to be examined objects to the order, the Chairman of the committee conducting the impeachment inquiry shall take the matter before the full House which must approve the order by a two-thirds vote before it may become effective.

(b) Report. If requested by the person examined, the committee causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician or physicians setting out the findings, including results of all tests made, diagnoses and conclusions, with similar reports of all earlier examinations of the same condition.

*Id.* at 11. The Hodes amendment was withdrawn, but the other proposals were adopted. *Id.* at 11, 108, 265. As to the matter contained in Rep. Hodes's original recommendation which he withdrew, see the report of Rep. Rish's select committee, which recommended that the J.Q.C. require a mental and physical examination of a justice. *Id.* at 400.

157. FLA. CONST. art. III, § 5. An officer has an incentive to respond to a subpoena insofar as his failure to do so may be construed as contemptuous conduct which in itself may constitute grounds for impeachment.

158. *Id.* art. I, § 9.

159. FLA. STAT. §§ 119.01-.12 (1977).

160. See *State ex rel. Vining v. Florida Real Estate Comm'n*, 281 So. 2d 487 (Fla. 1973) (holding that statutory requirement of a response under threat of license revocation or suspension by licensed real estate broker charged with violations of Real Estate License Law compelled the broker to be a witness against himself as forbidden by state and federal constitutions).

161. See FLA. STAT. § 914.04 (1977). Claims to immunity by impeachable officers would place the power of the judiciary to review impeachment proceedings squarely in issue.

A committee report finding no probable cause for impeachment may be accepted by the house and the case may be closed, but the house has the power to reject the report and require further investigation or other appropriate action.<sup>162</sup>

Upon presentation to the house, articles of impeachment are debated under the rules of the house just as any other proposal would be. The chairman of the investigating committee, any member of the committee, or any other house member may speak in favor of or in opposition to the proposal to impeach. Evidence received by the committee may be summarized or exhibited during debate. In the absence of unanimous consent, only members are permitted to participate in the proceedings.<sup>163</sup>

The full house can act on impeachment only when both houses of the legislature are in session.<sup>164</sup> This requirement may result in a substantial delay between the completion of the investigation and the next legislative session. Having such sensitive matters unresolved for any appreciable period can easily disrupt a legislative session.<sup>165</sup>

Members of the house of representatives, although performing investigatory and accusatory functions, remain representatives of their respective constituencies and are, therefore, approachable by those whom they represent. When an official is under investigation by a committee, or when debate on the question of impeachment is anticipated, it is common for interested citizens, lobbyists, attorneys, news media representatives, and others to contact the members to discuss the evidence as well as the guilt or innocence of the respondent official. Because all meetings are open, the proceedings are reported by all news media. At least in this respect, house impeachment proceedings are the antithesis of the secret grand jury procedure.

After disposition of amendments and motions, a vote of the mem-

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162. FLA. CONST. art. III, § 17(a).

163. At each organizational session, the house adopts rules which involve these subjects. See journals of house organizational sessions held in November of even-numbered years. Customarily, only the changes in rules of the preceding session are published in the journal. A complete compilation of house rules is published periodically for use by the members and other interested persons. Copies of previously published rules are on file in the office of the clerk of the house of representatives.

164. *In re Executive Commun.* of the 9th of Nov., A.D. 1868, 12 Fla. 653 (1868); FLA. CONST. art. III, §§ 1, 4(a). (See appendix for Constitution Revision Commission's proposed revision of art. III, § 17(a), which would permit the house to convene for impeachment purposes whether or not the senate is in session.)

165. See note 25 *supra*. The 1957 *Journal of the House of Representatives* reveals that the house was preoccupied and distracted by the Holt investigation and debate.

bers is taken. A two-thirds vote is necessary to impeach.<sup>166</sup> Normally a failure to achieve the required two-thirds ends the matter. There have, however, been exceptions. In 1963, the vote to impeach Judge Kelly was 72 for and 47 against—less than the requisite two-thirds. On a motion to reconsider on the following day, the vote changed to 88 for and 29 against, and Judge Kelly was impeached.<sup>167</sup> In addition, on May 17, 1973, when the vote to impeach Lieutenant Governor Tom Adams failed to achieve the necessary two-thirds vote, a resolution of censure, based on the same articles, was soon adopted.<sup>168</sup>

When an official has been impeached by the house, the articles are formally presented to the senate.<sup>169</sup> Traditionally the house of representatives appoints managers to represent it in presenting to the senate evidence of the official's guilt.<sup>170</sup> This is consistent with both Florida and congressional precedent. The managers may be authorized to employ counsel to assist them, and such counsel may be compensated for their professional services.<sup>171</sup>

## VII. IMPEACHMENT PROCEDURE: THE SENATE

The senate may schedule the trial of an impeached official for any time within six months after impeachment.<sup>172</sup> While the senate's authority in such an impeachment session is restricted to the trial and related administrative matters,<sup>173</sup> it is considered to be in session for purposes of employing staff and paying members.<sup>174</sup> Rules for procedure are adopted by the senate,<sup>175</sup> and the chief justice, or another justice designated by him, presides—except in a trial of the chief justice, in which case the Governor presides.<sup>176</sup>

A Governor has never presided in an impeachment trial in Florida. Indeed, if he should be so required, the operation of state government would be seriously hampered. The requirement that the trial begin within six months after impeachment could work a se-

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166. FLA. CONST. art. III, § 17(a). See note 34 *supra* for discussion of possible questions involving the number of members by which the two-thirds standard is measured.

167. FLA. H.R. JOUR. 2628-29, 2634-37 (Reg. Sess. 1963).

168. FLA. H.R. JOUR. 627, 633 (Reg. Sess. 1973).

169. See, e.g., FLA. H.R. JOUR. 1064 (Reg. Sess. 1975); FLA. H.R. JOUR. 2637-38 (Reg. Sess. 1963); see text accompanying notes 40-43 *supra*.

170. See, e.g., FLA. H.R. JOUR. 1064 (Reg. Sess. 1975); FLA. H.R. JOUR. 2637-38 (Reg. Sess. 1963).

171. 1957 FLA. OP. ATT'Y GEN. 057-212.

172. FLA. CONST. art. III, § 17(c).

173. See note 38 *supra*.

174. 1963 FLA. OP. ATT'Y GEN. 063-88.

175. FLA. CONST. art. III, § 4(a).

176. *Id.* § 17(c).



vere hardship on a presiding chief executive. In a particularly complex case he could be kept from his other constitutional duties for months, possibly at a time when he is sorely needed elsewhere.

A chief justice has never presided at the trial of another supreme court justice in Florida. And requiring the chief justice or a justice designated by him to preside in the impeachment trial of one of the other members of the supreme court is indeed impractical. Although the presiding officer of the senate trial does not have a vote, he is nevertheless required to rule on questions of law and to provide guidance and leadership for the senators in the usually sensitive and tense proceedings. To be required to preside at the trial of a colleague would place the presiding justice in an untenable position. Questions concerning his objectivity would almost inevitably arise. It has been suggested to the current Constitution Revision Commission that the constitution be amended to provide that the Lieutenant Governor or a designated district court of appeal judge preside at the impeachment trial of a justice of the supreme court.<sup>177</sup>

As a court of impeachment, the senate may compel attendance of witnesses and production of documents and other evidence. In addition, the senate may punish (by fine not exceeding \$1,000 or imprisonment not exceeding ninety days, or both) any nonmember who is guilty of disorderly or contemptuous conduct in its presence or who refuses to obey its lawful summons or to answer lawful questions.<sup>178</sup>

Although the senate has rules of procedure for its routine legislative functions, historically it has adopted a complete set of procedural rules on impeachment each time it has organized as a court.<sup>179</sup>

When sitting as a court of impeachment, the senate plays a unique role. It is both judge and jury in a proceeding labeled a trial. It determines questions of law and fact. It is a court of both original

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177. Remarks of Frederick B. Karl to Constitution Revision Commission, Jacksonville, Florida (Aug. 24, 1977). See appendix for the commission's proposed revision of art. III, § 17(c). The Lieutenant Governor had similar responsibilities under the 1868 constitution. FLA. CONST. of 1868, art. IV, § 29.

Having recognized the difficulty involved in requiring justices to judge their colleagues, and having observed the confusion and criticism that followed the 1975 proceedings of the J.Q.C. involving justices of the supreme court, the legislature proposed an amendment to art. V, § 12 of the constitution, providing that all justices be disqualified from proceedings initiated by the J.Q.C. involving one of their fellow justices. In such a case the amendment provided that the court would consist of the most senior chief judges of each judicial circuit. Fla. HJR 1709 (1975), 1975 Fla. Laws 1123. This amendment was adopted by the voters in November, 1976.

178. FLA. CONST. art. III, § 5.

179. See, e.g., FLA. S. JOUR. 7-10 (Court of Impeachment 1963); FLA. S. JOUR. 7-9 (Court of Impeachment 1957); FLA. S. JOUR. 959-67 (Reg. Sess. 1897).

and final jurisdiction. It performs judicial functions, including, within constitutional limitations, determination of sentence.<sup>180</sup> These quasi-judicial functions notwithstanding, the members are still senators and, as such, are representatives of their respective districts. They are selected by their constituents to perform the usual duties of a legislator but also are constitutionally obligated to devote the time and energy necessary to try every case in which the house of representatives votes articles of impeachment.

Symbolic recognition has been accorded this dual senatorial role. The senators, as senators, are on their oath or affirmation.<sup>181</sup> But they are asked to take an oath or make an affirmation separate from their original oath as senators.<sup>182</sup> This second oath refers specifically to the impeachment trial, binding the individual senator to the pursuit of impartial justice.

This pursuit, however, is complicated by the senator's dual role. Problems arise in every impeachment trial which reveal the inherent difficulty in transforming elected representatives of the people into temporary judges. Most often these problems involve ex parte communications and the use by senators of materials extraneous to the actual impeachment trial in deciding whether to vote for conviction. These are serious offenses in the performance of ordinary judicial duties.<sup>183</sup> But an impeachment trial can hardly be described as an ordinary judicial duty.

The people of Florida are guaranteed the right to instruct their representatives, and the senators are their representatives.<sup>184</sup> Senators, therefore, regularly receive telephone calls, letters, and other communications from various sources. Unless the senate opts to close an impeachment trial or any part of it, the proceedings are reported in newspapers and on radio and television. The senators are not sequestered as are petit juries in trials of major criminal cases. Consequently, they may read accounts and interpretations of the proceedings, editorial reactions, and, possibly, published suggestions about which way they should vote. Direct pressure, in

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180. FLA. CONST. art. III, § 17. See also brief of Justice Terrell described in note 12 *supra*.

181. FLA. CONST. art. III, § 17(c).

182. See, e.g., FLA. S. JOUR. (Court of Impeachment 1963):

I do solemnly swear that in all things appertaining to the trial of the impeachment of the Honorable Richard Kelly, Circuit Judge of the Sixth Judicial Circuit of Florida, now pending, I will do impartial justice according to the Constitution and Laws of the State of Florida; so help me God.

*Id.* at 10.

183. *In re Boyd*, 308 So. 2d 13 (Fla. 1975); *In re Dekle*, 308 So. 2d 5 (Fla. 1975). Both *Boyd* and *Dekle* were concerned with inquiries before the J.Q.C.

184. FLA. CONST. art. I, § 5.

various forms, may be applied by colleagues and by others as well.<sup>185</sup> Thus, it is conceivable that a judicial officer could be impeached by the house for the improper use of ex parte materials or information and be tried by senators who are not bound by the same rules of conduct in their trial practice.<sup>186</sup>

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185. It is virtually impossible for senators to begin an impeachment trial free of knowledge about the case. Throughout the proceedings in the house, from the beginning of committee investigations through the vote on adoption of articles of impeachment, media coverage is extensive. All house proceedings are open, and senators are free to observe them at will. In addition, the investigation and possible impeachment of any official is invariably a topic of conversation among other public officials, including senators, who are likely to be friends or acquaintances of the official being investigated. If impeachment appears to be a real possibility, the leaders of the senate find it necessary to make plans for the possible trial and are drawn into discussions of procedure and substance.

Each senator establishes his own course of conduct on this issue. In 1975, during the investigatory hearing by the house committee responsible for the cases of Justices Boyd, Dekle, and McCain, Senator Jim Williams, now Lieutenant Governor, frequently refused to become involved in any conversation about the conduct of the justices. He regularly excused himself when it appeared that the impeachment proceedings would be discussed, explaining that he felt he should take his seat in the Court of Impeachment free of prior information or points of view about the cases. Other senators acted similarly, but some discussed the cases frequently and openly.

No official record exists that documents the ex parte communications received by Florida senators in cases that have been tried. Nor has there been any investigation of pressures that were applied to them. It can safely be assumed, however, that friends, supporters, and antagonists of the impeached official feel moved to convey their thoughts and desires about the case to the senators in pending impeachment cases, just as they do with suspension-removal cases and pending legislation.

That such pressure is an historic problem confronting and confounding courts of impeachment through the years is demonstrated by the following excerpt concerning the impeachment trial of President Andrew Johnson from J. KENNEDY, *PROFILES IN COURAGE* (1961):

Ross and his fellow doubtful Republicans were daily pestered, spied upon and subjected to every form of pressure. Their residences were carefully watched, their social circles suspiciously scrutinized, and their every move and companions secretly marked in special notebooks. They were warned in the party press, harangued by their constituents, and sent dire warnings threatening political ostracism and even assassination. Stanton himself, from his barricaded headquarters in the War Department, worked day and night to bring to bear upon the doubtful Senators all the weight of his impressive military associations. The *Philadelphia Press* reported "a fearful avalanche of telegrams from every section of the country," a great surge of public opinion from the "common people" who had given their money and lives to the country and would not "willingly or unavenged see their great sacrifice made naught."

The *New York Tribune* reported that Edmund Ross in particular was "mercilessly dragged this way and that by both sides, hunted like a fox night and day and badgered by his own colleague, like the bridge at Arcola now trod upon by one Army and now trampled by the other."

*Id.* at 135-36, reprinted by permission of Harper & Row. (Ross's vote for acquittal of President Johnson cost him his political career. *Id.* at 141.)

186. Justice E. Harris Drew, presiding at the senate trial of Judge Richard Kelly, admonished the senators and others to avoid discussion of the merits of the case. *FLA. S. JOUR.* 14-15 (Court of Impeachment 1963). However, no rule governs, and the senate alone has the power to punish for any infraction of a rule or an instruction of the presiding officer. See *FLA. CONST.* art. III, § 4(d).

The constitution contains specific authority for the senate to close its impeachment proceedings.<sup>187</sup> Each set of impeachment rules of procedure has included a rule allowing closure.<sup>188</sup> Closure has been invoked as recently as 1963.<sup>189</sup> It has been demonstrated in cases of executive suspension and removal that closure and executive sessions are not necessary. Senate committees, as well as the full senate, can function efficiently and without prejudice to the respondent in full view of the public.<sup>190</sup> Thus, it is improbable that the senate would see fit to close any part of its impeachment proceedings in the future, even though the authority to do so still exists.<sup>191</sup>

### VIII. IMPEACHMENT ALTERNATIVES

Impeachment is not an exclusive punishment for official misconduct. Except for supreme court justices and district court of appeal judges, officials subject to impeachment are elected officials answerable to the voters for their conduct in office. The 1976 amendments to article V of the constitution provided a merit retention system for the justices and appellate judges which requires periodic approval of the electors.<sup>192</sup> Under the new system, the failure of a justice or appellate judge to receive the approval of a majority of the electors would create a vacancy in the office. Thus, the voters still have a method of removing any of the impeachable officers when they disapprove of the officer's conduct.

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187. FLA. CONST. art. III, § 4(a).

188. *See, e.g.*, Rule 19, FLA. S. JOUR. 8 (Court of Impeachment 1957). The 1957 rule did not enumerate the circumstances under which closure could be invoked. Rather, it left that determination to the senators' discretion.

189. FLA. S. JOUR. 34, 64 (Court of Impeachment 1963).

Although in this example the senate authorized the reporting and publication of what occurred during the closed session, it was not required to do so. Furthermore, it should be noted that the journal report did not include the debate, discussion, or any proffer of testimony which may have been made but, rather, included only a statement of the motion and the vote thereon.

190. Since 1969, all suspension cases heard by the senate select committee or special master, *see* FLA. STAT. § 112.47 (1977), have been conducted in open meetings. All sessions of the senate have been open for all cases. A motion to conduct the consideration in open session has been made each time the deliberations have begun.

191. *Cf.* FLA. CONST. art. II, § 8 (1968, amended 1976) (evidencing the public's desire to have governmental processes held in open session).

192. FLA. CONST. art. V, § 10 (1968, amended 1976) (proposed by Fla. CS for SJRs 49, 81 [1976], 1976 Fla. Laws 930). Under the system, justices and judges do not run against other candidates but against their own records. When a justice or judge qualifies for retention, the voters are asked on the general election ballot whether he should be retained in office. If a majority vote to retain, he is retained for a new six-year term. If a majority vote not to retain, a vacancy exists. Such a vacancy is filled by gubernatorial appointment. The Governor's selection is made from a list given him by the judicial nominating commission. (See appendix for Constitution Revision Commission's proposed revision of art. V, § 10.)

But removal by action at the polls can take place only at the end of a term. There may be a need to act sooner. In addition to the impeachment process, there are other procedures by which errant public officials may be removed from office or otherwise punished.

### A. *Criminal Sanctions*

Criminal sanctions are altogether independent of impeachment proceedings. Criminal laws apply to impeachable public officials, and conviction or acquittal after impeachment does not affect their criminal responsibility.<sup>193</sup> Conviction of a felony disqualifies a person from holding office.<sup>194</sup> In addition, any public officer convicted of a felony involving a breach of the public trust not only loses his office but also is subject to forfeiture of rights and privileges under a public retirement plan or pension system.<sup>195</sup> The impeachment provisions do not prevent or delay criminal action against an official. He may be indicted either before or during impeachment proceedings, and he may be indicted before he resigns from his office.<sup>196</sup>

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193. FLA. CONST. art. III, § 17(c).

194. *Id.* art. VI, § 4. FLA. STAT. § 114.01(1)(j) (1977), implements this constitutional provision by providing: "A vacancy in office shall occur: . . . (j) Upon the conviction of the officer of a felony as defined in s. 10, Art. X of the State Constitution." *But see In re Advisory Opinion to the Governor*, 78 So. 673 (Fla. 1918), which held that, for purposes of suspension from office by way of felony conviction, the office is not deemed vacant until supersedeas has been terminated.

195. FLA. CONST. art. II, § 8(d); FLA. STAT. § 121.091(5)(f) (1977). Section 121.091(5)(f) was amended by the legislature in 1975 by the Act of June 6, 1975, ch. 75-86, § 1, 1975 Fla. Laws 184, to include the language "or any other felony specified in chapter 838" because of the problems which arose out of the case of Education Commissioner Floyd T. Christian. Christian plead *nolo contendere* to the charge of receiving unlawful compensation contrary to FLA. STAT. § 838.06 (1973) (Act of June 25, 1973, ch. 73-334, § 32, 1973 Fla. Laws 906) (repealed 1974). He claimed that a violation of § 838.06 did not come within the prohibitory language of § 121.091(5)(f) (1973 version), relating to termination of benefits. The trial court agreed and granted his request not to have his retirement benefits terminated. The First District Court of Appeal affirmed. *Williams v. Christian*, 335 So. 2d 358 (Fla. 1st Dist. Ct. App.), *cert. denied*, 338 So. 2d 843 (Fla. 1976). The First District Court of Appeal determined that violation of § 838.06 did not constitute bribery within the meaning of § 121.091(5)(f) (1973 version) (Florida Retirement System Act, ch. 70-112, § 9, 1970 Fla. Laws 398) (current version at FLA. STAT. § 121.091(5)(f) [1977]), and stated:

The legislature, in providing for forfeiture of pension benefits in Section 121.091(5)(f) in 1973, clearly intended that "bribery" would be applied in those cases where a "corrupt motive" and an "intent to influence an official act" were alleged and proved. The state had charged Christian in the instant case with such conduct. It agreed to plea bargain and in such bargain nolle prossed the bribery charge against Christian. Section 838.06, F.S. (1973), does not clearly require a forfeiture of Christian's retirement benefits. This construction is buttressed by the affidavit of T. Edward Austin, one of Florida's most distinguished state attorneys, as well as by the subsequent legislative amendments to the two statutes here involved.

335 So. 2d at 361.

196. *State ex rel. Christian v. Rudd*, 302 So. 2d 821 (Fla. 1st Dist. Ct. App. 1974),

### B. Incapacity

The Governor may be prevented from performing the duties of his office during any term of incapacity. His incapacity may be determined by the supreme court after a written suggestion is filed by four Cabinet members.<sup>197</sup> Thus, the impeachment process is preserved for instances of misconduct.

### C. Ethics Commission

The Ethics Commission, established in article II, section 8 of the 1968 constitution, as amended in 1976, has constitutional authority to conduct investigations and make public reports on all complaints received concerning breaches of the public trust by public officers and employees, except those subject to discipline by the Judicial Qualifications Commission. The scope of the authority of the Ethics Commission remains uncertain. Although the Ethics Commission has no power to remove an official, an adverse report may form the basis of a suspension by the Governor or discipline by the legislature of one of its members. Such a report is not binding. However, it may influence an officer's decision about whether to remain in office. It may also affect his chances for survival at the next election.<sup>198</sup>

### D. Judicial Qualifications Commission

Judicial officers who are subject to impeachment are also subject to suspension and removal by the supreme court upon the recommendation of two-thirds of the members of the Judicial Qualifications Commission.<sup>199</sup> The grounds for such discipline include con-

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*approved*, 310 So. 2d 295 (Fla. 1975). *But see In re Investigation of a Circuit Judge*, 93 So. 2d 601 (Fla. 1957), in which the court held that the Florida Bar could not discipline a judge until after conviction on impeachment or the end of his judicial tenure.

197. FLA. CONST. art. IV, § 3(b).

198. In 1977, the Florida Ethics Commission reported to the senate that Senator Ralph Poston had breached the public trust by using his office for his own personal pecuniary gain. The senate president suspended him from performing the duties of committee chairman and ordered an investigation by a senate committee. In the fall of 1977, the commission also prepared a report on five senators who failed to file disclosure statements. The filing of the reports with the senate was stayed by the First District Court of Appeal, *Plante v. Florida Comm'n on Ethics*, 354 So. 2d 87 (Fla. 1st Dist. Ct. App. 1977).

The senate committee, chaired by Senator Mattox Hair, recommended that Poston be publicly reprimanded and fined \$500. On December 13, 1977, the senate convened in special session and approved the committee's recommendation. FLA. S. JOUR. 3 (Spec. Sess. 1977). Briefs and recommendations of the principals involved in this matter are available in the Florida Supreme Court library and the State Archives.

199. FLA. CONST. art. V, § 12(f). (See appendix for Constitution Revision Commission's proposed revision of § 12.)

In *Forbes v. Earle*, 298 So. 2d 1 (Fla. 1974), the court observed:

duct unbecoming a member of the judiciary, demonstrating a present unfitness to hold office. The commission may also recommend, and the court may require, involuntary retirement based on a judge's permanent disability that interferes with the performing of his duties.<sup>200</sup> Like the recommendations of the Ethics Commission, those of the Judicial Qualifications Commission are public records but are not binding.<sup>201</sup>

The commission is composed of two judges of district courts of appeal, two circuit court judges, two county court judges, two members of the bar, and five citizens who have never held judicial office or been a member of the bar. The judges on the commission are selected by the judges of their respective courts statewide, the bar members by the governing body of the bar, and the nonbar members by the Governor. No member except a judge is eligible for state judicial office as long as he is a member of the commission or for two years thereafter. Furthermore, no member is allowed to hold office in a political party, participate in any campaign for judicial office, or hold public office. However, a member who is a judge may participate in his own campaign for judicial office and hold that office.<sup>202</sup>

### E. Bar Discipline

Although an impeachable officer may not be removed from office because of disciplinary action by The Florida Bar, such action may disqualify him from holding judicial office or the office of attorney general. An attorney-officer, including a judicial officer, may be disciplined by the bar after removal from office or resignation.<sup>203</sup>

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The impeachment process has been cumbersome and costly, and this brought forth judicial discipline and removal commissions such as our Judicial Qualifications Commission. These commissions have been operating less than 15 years and were developed in order to provide an effective disciplinary and administrative authority which would improve not only the manner of disciplining judicial officers but also would aid in the administrative operation of the court system.

The Commission provides an alternative means of discipline of judicial officers for "misdemeanors in office" as prescribed in the impeachment article.

*Id.* at 3 (footnote omitted).

200. FLA. CONST. art. V, § 12(f).

201. J.Q.C. charges and further proceedings do not become public until the commission makes a finding of probable cause and files formal charges. FLA. CONST. art. V, § 12(d).

See note 207 *infra* for a situation where impeachment proceedings were instituted against certain justices after the supreme court refused to follow the J.Q.C. recommendation of removal from office.

202. FLA. CONST. art. V, § 12(a)-(b).

203. Florida Bar v. McCain, 330 So. 2d 712 (Fla. 1976).

### F. Executive Suspension

It has long been the rule that the Governor may not suspend or remove from office any officer subject to impeachment.<sup>204</sup> In 1956, however, the court held that the Governor could declare the office of a missing circuit judge vacant and appoint a successor.<sup>205</sup> The judge had disappeared under circumstances suggesting foul play. At that time, the Judicial Qualifications Commission did not exist. Today, the commission would undoubtedly be asked to make recommendations concerning such a situation. Conceivably, however, the Governor could rely on the 1956 opinion and, under similar circumstances, declare a vacancy in any office.<sup>206</sup>

## IX. CONCLUSION

Given the right of the people to turn impeachable officers out of office by their votes, the existence of seemingly effective alternatives for removing from office those who are unfit to serve, and the fact that no impeached official has ever been convicted by the senate, one may well question the necessity or advisability of retaining impeachment provisions in the Florida constitution.

The simple answer is that impeachment remains the ultimate remedy for misconduct in high office. Impeachment was included in the initial draft of the United States Constitution. The people of Florida have retained impeachment in their constitution since before statehood. Thus, it is a remedy with a history. It is well understood by most Americans—and probably by most Floridians as well.

The grounds for impeachment are broadly framed and designed to reach conduct that may not be grounds for discipline under any other procedure. The penalty imposed may be more than just removal from office. It may include a disqualification to hold any other office of honor, trust, or profit. Moreover, the impeachment remedy may be used if and when one of the alternative methods of discipline does not achieve a result satisfactory to the public.<sup>207</sup>

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204. *In re* Advisory Opinion to the Governor, 52 So. 2d 646 (Fla. 1951); Opinion of the Justices, 65 So. 224 (Fla. 1914).

205. Advisory Opinion to the Governor, 88 So. 2d 756 (Fla. 1956).

206. Also, FLA. STAT. § 114.01(2) (1977) allows the Governor to declare an office vacant by executive order. The grounds for the Governor's determination of such a vacancy appear in FLA. STAT. § 114.01(1) (1977). They include "the officer's unexplained absence for 60 consecutive days." *Id.* § 114.01(1)(f).

207. In 1975, the impeachment process was begun against three justices of the Florida Supreme Court after the court declined to follow the recommendation of the J.Q.C. that two of them be removed from office. See *In re* Boyd, 308 So. 2d 13 (Fla. 1975); *In re* Dekle, 308 So. 2d 5 (Fla. 1975). As a result of these impeachment activities, two of the justices resigned.



Appropriately, impeachment has been used only sparingly in Florida. But when used, it has been effective. Although no convictions have been obtained, the cathartic effects of the proceedings—effects which have an impact on the public as well as the government—remain manifest. And senate convictions may not be that important when, as history suggests, an impeached official may likely resign rather than face the possibility of a conviction. Furthermore, impeachment activity, regardless of its immediate result, may affect an official's chances in later elections for either the same or a different office.<sup>208</sup>

Thus, impeachment remains an essential means of protecting the people from the incapacity, negligence, or perfidy of public officials who sit in the highest echelons of government and who are vested with the sacred public trust. Its very existence encourages good government.<sup>209</sup>

Alexander Hamilton, in *The Federalist No. 65*, described the nature of impeachment and the rationale for vesting the trial of impeachments in the Senate. Hamilton acknowledged the imperfections of the impeachment process and the real danger of having the entire procedure dominated by political decisions which are based on the inflamed passions of the community. However, he also recognized the importance, necessity, and effectiveness of impeachment

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On April 8, 1975, Speaker of the House Donald Tucker announced his previous appointment, under the authority of FLA. CONST. art. III, § 17(a), of a select committee on impeachment. FLA. H.R. JOUR. 1 (Reg. Sess. 1975). The committee conducted an investigation and hearings as to the allegations against Justices Boyd, Dekle, and McCain. No action was recommended against Justice Boyd. Justice Dekle resigned during the proceedings. On September 28, 1975, Rep. Rish announced Justice McCain's resignation. FLA. H.R. JOUR. 340 (Reg. Sess. 1975).

208. Both Fuller Warren and Tom Adams, after surviving unsuccessful impeachment attempts, lost in Democratic gubernatorial primaries. See text accompanying notes 85 and 96 *supra*. To be sure, many factors probably contributed to their defeats. It is reasonable, however, to assume that the adverse publicity surrounding the respective impeachment inquiries had some impact on the election results.

209. Texas has a procedure known as "address," which allows removal of judges by the Governor on address of two-thirds of each house of the legislature.

The Judges of the Supreme Court, Court of Appeals and District Courts, shall be removed by the Governor on the address of two-thirds of each House of the Legislature, for willful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause which shall not be sufficient ground for impeachment; provided, however, that the cause or causes for which such removal shall be required, shall be stated at length in such address and entered on the journals of each House; and provided further, that the cause or causes shall be notified to the judge so intended to be removed, and he shall be admitted to a hearing in his own defense before any vote for such address shall pass, and in all such cases, the vote shall be taken by yeas and nays and entered on the journals of each House respectively.

TEX. CONST. art. XV, § 8 (emphasis added). This procedure was used recently against Donald B. Yarbrough, Associate Justice of the Supreme Court of Texas. Tex. SCR 1, 3 (1977).

in the vindication for society of injuries caused by corrupt public officials. Hamilton concluded that the power to try impeachments was appropriately vested in the Senate and that the Senate is the most fit depository for this authority:

A well-constituted court for the trial of impeachments, is an object more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself. The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical to the accused. In many cases, it will connect itself with the pre-existing factions, and will enlist all their animosities, partialities, influence and interest on one side or on the other; and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties, than by the real demonstrations of innocence or guilt.

The delicacy and magnitude of a trust which so deeply concerns the political reputation and existence of every man engaged in the administration of public affairs, speak for themselves. The difficulty of placing it rightly, in a government resting entirely on the basis of periodical elections, will as readily be perceived, when it is considered that the most conspicuous characters in it will, from that circumstance, be too often the leaders or the tools of the most cunning or the most numerous faction, and on this account can hardly be expected to possess the requisite neutrality towards those whose conduct may be the subject of scrutiny.

The convention, it appears, thought the Senate the most fit depository of this important trust. Those who can best discern the intrinsic difficulty of the thing, will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it.

What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public policemen? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? It is not disputed that the power of originating the inquiry, or, in other words, of preferring the impeachment, ought to be lodged in the hands of one branch of the legislative body. Will not the reasons which indicate the propriety of this arrangement strongly plead for an admission of the other branch of that body to a share of the inquiry?

. . . .

Where else than in the Senate could have been found a tribunal sufficiently dignified or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*

. . . .

But though one or the other of the substitutes which have been examined, or some other that might be devised, should be thought preferable to the plan, in this respect, reported by the convention, it will not follow that the Constitution ought for this reason to be rejected. If mankind were to resolve to agree in no institution of government, until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert . . . .<sup>210</sup>

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210. THE FEDERALIST No. 65 (A. Hamilton), reprinted in 43 GREAT BOOKS OF THE WESTERN WORLD 198-200 (R. Hutchins ed. 1852).

## X. APPENDIX

The following is a list of those proposed revisions to articles III, IV, and V of the Florida constitution which relate to the subjects discussed in this article and which have been approved by the Constitution Revision Commission as of the publication deadline. See note 30 *supra*.

New language within a section is underscored and language that has been deleted is struck through.

## Article III

## SECTION 4. Quorum and procedure.—

(d) By a majority vote of its membership each house may punish discipline a member for contempt or disorderly conduct and, by a two-thirds vote of its membership, may expel a member. Upon the call of the presiding officer, either house shall convene for such purposes without the other house being in session.

## SECTION 17. Impeachment.—

(a) The governor, lieutenant governor, members of the cabinet statewide elected constitutional officers, justices of the supreme court, judges of district courts of appeal, and judges of circuit courts and judges of county courts shall be liable to impeachment for misdemeanor in office. The house of representatives by two-thirds vote of the membership shall have the power to impeach an officer and upon the call of the speaker shall convene for this purpose whether the senate is in session or not. The speaker of the house of representatives shall have power at any time to appoint a committee to investigate charges against any officer subject to impeachment.

(b) (No change.)

(c) All impeachments by the house of representatives shall be tried by the senate. The chief justice of the supreme court, or another justice designated by him, shall preside at the trial, except in a trial of the chief justice or another justice, in which case the presiding officer shall be a judicial officer other than a justice, as provided by law governor shall preside. The senate shall determine the time for the trial of any impeachment and may sit for the trial whether the house of representatives be in session or not. The time fixed for trial shall not be more than six months after the impeachment. During an impeachment trial senators shall be upon their oath or affirmation. No officer shall be convicted without the concurrence of two-thirds of the membership members of the senate present. Judgment of conviction in cases of impeachment shall remove the offender from office and, in the discretion of the senate, may include disqualification to hold any office of honor, trust or profit. Conviction or acquittal shall not affect the civil or criminal responsibility of the officer.

## Article IV

~~SECTION 4. - Cabinet.~~

~~(a) There shall be a cabinet composed of a secretary of state, an attorney general, a comptroller, a treasurer, a commissioner of agriculture and a commissioner of education. In addition to the powers and duties specified herein, they shall exercise such powers and perform such duties as may be prescribed by law.~~

~~(b) The secretary of state shall keep the records of the official acts of the legislative and executive departments.~~

~~(c) The attorney general shall be the chief state legal officer.~~

~~(d) The comptroller shall serve as the chief fiscal officer of the state, and shall settle and approve accounts against the state.~~

~~(e) The treasurer shall keep all state funds and securities. He shall disburse state funds only upon the order of the comptroller, countersigned by the governor. The governor shall countersign as a ministerial duty subject to original mandamus.~~

~~(f) The commissioner of agriculture shall have supervision of matters pertaining to agriculture except as otherwise provided by law.~~

~~(g) The commissioner of education shall supervise the public education system in the manner prescribed by law.~~

SCHEDULE. (1) Unless otherwise provided herein, all powers, duties, and functions of cabinet officers provided for in the 1968 constitution and by law shall be transferred to agencies prescribed by law and the heads of such agencies shall be appointed by the governor and confirmed by the senate. They shall serve at the pleasure of the governor. Provided, however, all powers, duties, and functions of the cabinet officers relating to power plant siting, dredge and fill permits, rules and orders of water management districts and developments of regional impact shall be transferred to a board appointed by the governor, and confirmed by the senate.

(2) Officers who were appointed by the governor and approved by three members of the cabinet, or who were appointed by the governor and cabinet shall be appointed by the governor and shall be subject to confirmation by the senate.

(3) In the event the revision to Article IV, Section 4 pertaining to the cabinet is adopted and the revision of Article IX, Section 2 providing for a state board of education is not adopted, Article IX, Section 2 of the 1968 Constitution shall become a statute subject to modification or repeal as are other statutes.

(4) The responsibility for settling and approving accounts of the state shall be assigned by law to an officer who is not the chief fiscal officer responsible for disbursing state funds and keeping securities.

(5) Except as otherwise provided in this article, revisions to Sections 4, 5, 6, and 8 of Article IV and this schedule shall be effective on January 4, 1983.

#### SECTION 7. Suspensions; filling office during suspensions.—

(a) By executive order stating the grounds and filed with the secretary of state, the governor may suspend from office any state officer not subject to impeachment, any officer of the militia not in the active service of the United States, or in the active service of the United States, or any ~~county~~ officer, of a special district or a school district authorized by law to levy ad valorem taxes, or any municipal or county officer holding an elective office, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor.

(b) The senate may, in proceedings prescribed by law, remove from office or reinstate the suspended official and for such purpose the senate may be convened in special session by its president or by a majority of its membership.

(c) Any state officer subject to impeachment, if indicted or informed against for a felony, may disqualify himself from performing any official duties until acquitted or until the indictment or information is dismissed, by filing an irrevocable notice of disqualification with the secretary of state. The lieutenant governor and any statewide elected constitutional officer, if indicted for a felony, may be disqualified from performing any official duties by the governor until acquitted or until the indictment is dismissed. The governor may, by appointment, fill the office during the period of any disqualification. If the governor disqualifies himself, the lieutenant governor shall act as governor during the period of disqualification. ~~By order of the governor any elected municipal officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless those powers are vested elsewhere by law or the municipal charter.~~

#### Article V

#### SECTION 10. Retention; election and terms.—

~~(a)~~ Any justice of the supreme court or any judge of a district court of appeal, circuit court, or county court may qualify for retention by a vote of the electors in the general election next preceding the expiration of his term in the manner prescribed by law. If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge. When a justice of the supreme court or a judge of a district court of appeal, circuit court, or county court so qualifies, the ballot shall read substantially as follows: "Shall Justice (or Judge) (name of justice or judge) . . . of the (name of the court) be retained in office?" If a majority of the qualified electors voting on the question of retention within the territorial jurisdiction of the court vote to retain, the

justice or judge shall be retained for a term of six years commencing on the first Tuesday after the first Monday in January following the general election. If a majority of the qualified electors voting on the question of retention within the territorial jurisdiction of the court vote to not retain, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.

~~(b) Circuit judges and judges of county courts shall be elected by vote of the qualified electors within the territorial jurisdiction of their respective courts. The terms of circuit judges shall be for six years. The terms of judges of county courts shall be for four years.~~

#### SECTION 11. Vacancies.—

(a) The governor shall fill each vacancy on the supreme court, ~~or~~ on a district court of appeal, on a circuit court, or on a county court by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next general election occurring at least one year after the date of appointment, one of not fewer than three persons nominated by the appropriate judicial nominating commission.

~~(b) The governor shall fill each vacancy on a circuit court or on a county court by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election; one of not fewer than three persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.~~

~~(c)~~ (b) The nominations shall be made within thirty days from the occurrence of a vacancy or, if sooner, from the acceptance of a resignation by the governor unless the period is extended by the governor for a time not to exceed thirty days. The governor shall make the appointment within sixty days after the nominations have been certified to him.

#### SECTION 12. Discipline; removal and retirement.—

(a) (No change.)

(b) The members of the judicial qualifications commission shall serve staggered terms, not to exceed six years, as prescribed by general law. No member appointed by the governing body of the bar of Florida shall be eligible to serve consecutive terms. No member of the commission except a justice or judge shall be eligible for state judicial office so long as he is a member of the commission and for a period of two years thereafter. No member of the commission shall hold office in a political party or participate in any campaign for judicial office or hold public office; provided that a judge may participate in his own campaign for judicial office and hold that office. The commission shall elect one of its members as its chairman.

(c) (No change.)

(d) The commission shall adopt rules regulating its proceedings, the filling of vacancies by the appointing authorities, the disqualification of members, and the temporary replacement of disqualified or incapacitated members. The commission's rules, or any part thereof, may be repealed by general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring. Until formal charges against a justice or judge are filed by the commission with the clerk of the supreme court of Florida all proceedings by or before the commission shall be confidential; provided, however, upon a finding of probable cause and the filing by the commission with said clerk of such formal charges against a justice or judge such charges and all further proceedings before the commission shall be public.

