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Court of Administrative Appeals: Alternative Available to Legislature, Following Defeat of 1970 Proposed Amendment of Judiciary Article of Florida Constitution

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COURT OF ADMINISTRATIVE APPEALS: ALTERNATIVES AVAILABLE TO LEGISLATURE, FOLLOWING DEFEAT OF 1970 PROPOSED AMENDMENT OF JUDICIARY ARTICLE OF FLORIDA CONSTITUTION*

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A proposed amendment of article V, the Judiciary Article of the Florida Constitution, was defeated by a narrow margin in the November 1970 general election.[1] The proposal included provisions authorizing the legislature to create a court of review of administrative action.[2]

A primary purpose of the proposed new court was to relieve the Florida supreme court of its jurisdiction to review Florida Industrial Commission decisions on workmen's compensation claims.[3] The proposal did not mention workmen's compensation, but instead authorized the legislature to define the new court's jurisdiction "to hear appeals from such administrative action as may be prescribed by law."[4] Evidently, the framers intended to provide for creation of a court that could be given jurisdiction beyond the area of workmen's compensation.

Three alternatives are available to the legislature if it wishes to carry out any or all of the purposes attempted by the unsuccessful 1970 proposal. The legislature may enact statutes within the existing constitutional frame-

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1. The vote on the proposal was 503,992 for and 526,328 against. The total of 1,030,320 votes cast on this matter is less than the total cast on any other statewide issue on the ballot on November 3, 1970. Each of the other six proposed constitutional amendments attracted at least 1,110,140 votes, while the election of the Governor and Lieutenant Governor attracted 1,730,813 votes, and the United States Senator 1,675,378. Election lists received from Mrs. Dorothy W. Glisson, Chief, Bureau of Elections, Office of the Secretary of State, Tallahassee, Nov. 17, 1970.

2. A proposed revision of article V, the Judiciary Article of the Florida Constitution, was approved by the legislature as Fla. S.J. Res. 36, 1969, for submission to the electors in Nov. 1970. The 1970 legislature withdrew Fla. S.J. Res. 36 (1969) and in its place adopted Fla. H.R.J. Res. 5512 (1970) for submission to the electors in November 1970 [hereinafter cited as proposed art. V]. (The differences between the 1969 and 1970 versions were very slight and in no way affect this article.) The primary thrust of the revision of article V would have been to overhaul the trial courts. Creation of a court of review of administrative action would have been a minor feature of the revision, and indeed was not even included in the original drafts, *e.g.*, FLA. H.R. JOUR. 621-23 (1969). It is first officially reported in the recommendation of a senate-house conference committee, *id.* at 1171-76, which was approved by the 1969 legislature as Fla. S.J. Res. 36.

3. JUDICIAL COUNCIL OF FLORIDA, FIFTEENTH ANNUAL REPORT: 1969, at 2 (1970); FOURTEENTH ANNUAL REPORT: 1968, at 2-3 (1969).

4. Proposed art. V, §6.

work; it may resubmit the 1970 proposed constitutional amendment to a future referendum; or it may modify the 1970 proposal for submission to an election. This article will explore each of these alternatives. Discussion of the third alternative will include a suggested modification of the 1970 proposal.

One minor suggestion is made at the outset: to change the name of the proposed new tribunal. The 1970 proposal called it the *Court of Review of Administrative Action*. In the interests of brevity and simplicity, the author prefers to call it the *Court of Administrative Appeals,* and the latter term will be used in this article.

LEGISLATION WITHIN THE EXISTING CONSTITUTION

Solving the Workmen's Compensation Caseload Problem

The Supreme Court of Florida disposed of a total of 1,210 cases in 1969, including 269 workmen's compensation cases.[5] The Judicial Council of Florida stated that such cases "consume a disproportionate part of the time of the Supreme Court" and that the caseload of that court has consequently "reached an emergency level."[6] The supreme court itself unanimously adopted a resolution asking the legislature for relief from workmen's compensation cases,[7] indicating a pressing need, for the sake of all concerned, to transfer this jurisdiction to some other tribunal. The present jurisdiction of the supreme court to review workmen's compensation cases is conferred by statute,[8] and a statute could transfer this jurisdiction to another tribunal.

The *district courts of appeal (DCA's) could be given this jurisdiction.* Indeed, they exercised it during the first three years of their existence, until it was transferred to the supreme court in 1959.[9] If the additional caseload became burdensome a statute could provide the DCA's with additional judges. DCA decisions on workmen's compensation cases would be reviewable

5. JUDICIAL COUNCIL OF FLORIDA, FIFTEENTH ANNUAL REPORT: 1969, at 13 (1970).

6. *Id.* at 2; JUDICIAL COUNCIL OF FLORIDA, FOURTEENTH ANNUAL REPORT: 1968, at 2 (1969); THIRTEENTH ANNUAL REPORT: 1967, at 3 (1968); TWELFTH ANNUAL REPORT: 1966-1967, at 7 (1967).

7. Letter from A. D. Core, Executive Director, Judicial Council of Florida, to L. Harold Levinson, Sept. 4, 1970. The same letter continues: "[T]he Supreme Court hears Workmen's Compensation cases for an average of two days out of each court-hearing week. Perhaps that might be compared to the average of one day available to all of the cases that concern commerce in the State. . . . It appears to me that Bench time devoted to this class of case is just as important as the quantity of cases handled, if not more so."

8. Supreme court jurisdiction is provided by FLA. STAT. §440.27 (1969), under authority of FLA. CONST. art. V, §4(2). *See generally* Burton, *Appellate Review of Workmen's Compensation Cases,* in FLORIDA CIVIL PRACTICE AFTER TRIAL ch. 24 (Fla. Bar Continuing Legal Educ. Practice Manual No. 6 (1966)).

9. The Judicial Council of Florida reports that workmen's compensation cases "were temporarily placed in the Supreme Court in 1959, as a relief to the then newly-created District Courts of Appeal." JUDICIAL COUNCIL OF FLORIDA, TWELFTH ANNUAL REPORT: 1966-1967, at 7 (1967). The Executive Director of the Judicial Council does not foresee a transfer of workmen's compensation jurisdiction back to the DCA's, because of their steadily increasing caseload. Letter from A. D. Core, Executive Director, Judicial Council of Florida, to L. Harold Levinson, Nov. 18, 1970.

by the supreme court if existing constitutional criteria for invoking supreme court review of DCA decisions in general were satisfied.[10]

Another possibility is that *the legislature could create a new court* to exercise jurisdiction over workmen's compensation cases. The existing constitution appears to contain the necessary authorization by declaring that the judicial power of the State of Florida is vested in certain enumerated courts "and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish."[11]

However, the constitution does not clearly indicate which court would have jurisdiction to review the decisions of a legislatively created compensation court. If the new court were regarded as a trial court its decisions would be reviewable by the DCA's under their general authority to entertain appeals from trial courts, subject to the special rules providing direct appeal from trial courts to the supreme court in certain situations.[12]

If, however, the new court were regarded as an appellate court, neither the DCA's nor the supreme court would have express jurisdiction to review its decisions. Speculation would result concerning whether the supreme court would undertake review of the new court's decisions by common law certiorari,[13] whether the DCA's would review by common law certiorari, or whether the new court's decisions would be immune from review by any Florida court.

The legislature would not be authorized to endow judges of a legislatively created court with the same tenure and attributes that apply to members of the major courts mentioned in the constitution.[14] Judges of the new court would be limited to four-year terms,[15] would not be subject to impeachment,[16] but would instead be subject to suspension by the Governor and removal or reinstatement by the senate.[17]

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10. FLA. CONST. art. V, §4(2).

11. FLA. CONST. art. V, §1.

12. FLA. CONST. art. V, §4(2).

13. In Dresner v. City of Tallahassee, 164 So. 2d 208, 210 (Fla. 1964), the supreme court confirmed the existence of common law certiorari: "[W]hich issues in the sound discretion of a superior court directed to an inferior court in order to determine from the face of the record whether the lower court has exceeded its jurisdiction or has otherwise deviated from the essential requirements of the law." In *Dresner* the supreme court held that circuit court decisions in the exercise of appellate jurisdiction over municipal courts were subject to common law certiorari review by the DCA's and not by the supreme court. In *Dresner* it was obvious that the DCA was "superior" to the circuit court. However, the DCA would not be so obviously superior to a legislatively created appellate court. Without a showing of superiority, evidently the DCA would be unauthorized to exercise common law certiorari jurisdiction. It could then be argued that the supreme court should assume jurisdiction, as the only superior court in the state.

14. Justices of the supreme court and judges of the DCA's and circuit courts are specifically mentioned in constitutional provisions dealing with: impeachment (FLA. CONST., art. III, §17(a); term of office (FLA. CONST. art. V, §16); retirement, suspension, and removal (FLA. CONST. art. V, §17A)).

15. FLA. CONST., art. III, §13: "No office shall be created the term of which shall exceed four years except as provided herein."

16. Impeachment applies only to the officers enumerated in FLA. CONST. art. III, §17(a).

17. FLA. CONST. art. IV, §7 is applicable to "any state officer not subject to impeachment."

As yet another possibility, *the legislature could create a new commission* to review workmen's compensation decisions. This solution was repeatedly recommended by the Judicial Council during the years before the attempted revision of the judiciary article of the constitution.[18] Legislative bills containing this solution were introduced, but none were enacted.[19]

The bills endorsed by the Judicial Council provided for creation of a "commission" to be known as the "Compensation Appellate Court."[20] The Florida Industrial Commission was to be relieved of its existing jurisdiction to review decisions of industrial claims judges, and these decisions were to be reviewable directly by the Compensation Appellate Court,[21] subject to certiorari review by the supreme court in limited situations.[22]

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18. JUDICIAL COUNCIL OF FLORIDA, THIRTEENTH ANNUAL REPORT: 1967, at 3-9 (1968); JUDICIAL COUNCIL OF FLORIDA, FOURTEENTH ANNUAL REPORT: 1968, at 6-12 (1969).

19. JUDICIAL COUNCIL OF FLORIDA, FIFTEENTH ANNUAL REPORT: 1969, at 2 (1970).

20. Fla. S. 930, §1 (1969). Fla. S. 960, §1 (1967).

21. A letter from J. Franklin Garner, Chief, Bureau of Workmen's Compensation, to Bradley J. Davis, June 26, 1970, presents the following preview of the 1969 annual report of the Florida Industrial Commission:

Claims received (including 89,783 disabling and 383 fatal)	270,359
Controverted claims (including 9,058 reviewed, adjusted or settled by conference and 13,198 disposed of by orders or awards by judges of industrial claims)	22,256
Disposed of by full commission	590

Thus, if jurisdiction to review decisions of judges of industrial claims were shifted from the industrial commission to the compensation appellate court, the latter would acquire a caseload (at 1969 levels) of 590 cases.

22. The Judicial Council of Florida reports that the supreme court disposed of 269 petitions for certiorari in industrial commission cases during 1969. *See* note 5 *supra*. However, a letter from J. Franklin Garner, Chief, Bureau of Workmen's Compensation, to L. Harold Levinson, Aug. 17, 1970, reports that only 237 petitions were disposed of by the supreme court during the same year, analyzed as follows:

Affirmed	187
Reversed	33
Modified	2
Dismissed	8
Certiorari withdrawn	7

The difference between the 269 cases reported by the Judicial Council and the 237 reported by the Bureau of Workmen's Compensation may be attributable to cases disposed of by the supreme court without opinion. Similar differences exist in figures reported for prior years.

Proponents of the bills creating the compensation appellate court evidently anticipated that if jurisdiction to review decisions of judges of industrial claims were shifted from the industrial commission to the compensation appellate court, the result would be a reduction in the workload of the *supreme court.*

This result could be brought about by the parties and their counsel to the extent they sought supreme court review less frequently from the new compensation appellate court than from the old industrial commission.

In addition, the bills attempted to relieve the supreme court by limiting the situations in which certiorari review could be obtained. Thus, Fla. S. 930, §4(3) (1969), provided

The existing constitution authorizes the legislature to establish commissions exercising judicial power[23] and further authorizes the legislature to make the decisions of these commissions reviewable by either the supreme court, the DCA's, or the circuit courts.[24] Apparently the proponents of the bills called the new tribunal a commission in order to leave no doubt that its decisions would be reviewable.

Having solved the problem of reviewability by calling the new tribunal a commission, it is not clear why the authors of these bills added that the commission be known as a court. Perhaps the sponsors anticipated that a court would enjoy greater prestige than a commission among the public as well as the bench and bar.

The bills described the members of the new tribunal as "judges."[25] There were annual variations regarding the qualifications and method of appointment and removal of these judges. The bill introduced in 1969[26] required candidates for appointment to have been members of the Florida Bar for at least five years. They were to serve four-year terms, appointed by the Governor with the approval of three members of the cabinet. They were to be eligible for reappointment and subject to removal by the aforementioned authorities for misfeasance, malfeasance, unreasonable neglect of duty, incompetence, or habitual drunkeness. Furthermore, the chief justice of the supreme court could assign a judge of any trial or appellate court to temporary service on the Compensation Appellate Court, but of course judges of the latter could not be assigned to serve on any other tribunal.

Thus, the appointment and tenure of judges of the proposed new tribunal, as proposed in the 1969 bill, differed sharply from corresponding provisions regarding judges of Florida appellate courts mentioned in the constitution. Some difference was inevitable, since the legislature cannot confer upon a statutory office all the attributes that the constitution confers upon judges of the constitutional courts.[27] However, the differences are even greater than was constitutionally necessary. For example, there is no constitutional reason why judges of the new court may not be required to have been members of the Florida Bar for ten years (the same period required of supreme court justices and DCA judges) rather than the five years provided in the 1969 bill.[28]

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that orders of the compensation appellate court "shall be final subject only to review by the supreme court, by certiorari only where the decision sought to be reviewed is in direct conflict with prior decision of the supreme court of Florida, or where certified by four (4) justices of the supreme court or two (2) members of the compensation appellate court, as involving a question of great public interest, or where there is a departure from the essential requirements of law."

23. FLA. CONST. art. V, §1.

24. Supreme Court review of commission decisions is authorized by FLA. CONST., art. V, §4(2); DCA review by art. V, §5(3); circuit court review by art. V, §6(3).

25. Fla. S. 930, §2 (1969); Fla. S. 960, §2 (1967).

26. Fla. S. 930, §§2, 9 (1969).

27. *See* notes 14-17 *supra* and accompanying text.

28. Fla. S. 930, §2 (1969).

Beyond Workmen's Compensation

Jurisdiction to review administrative action is now allocated among the supreme court, the DCA's, and the circuit courts.[29] Jurisdiction, forms of action, and standards of review are varied and complex. Two experienced practitioners have observed "there is no field of law in Florida in which there is so much uncertainty and such inadequacy of rules and statutes as in the field of judicial review of orders or actions of administrative officers, boards and commissions."[30]

If the legislature undertakes a statutory solution of the workmen's compensation review problem, it may concurrently attempt to solve some of the other problems in the area of judicial review of administrative action. For example, if the legislature creates a new court or commission to review workmen's compensation decisions, the same tribunal may also be given jurisdiction to review other types of administrative action in order to round out the workload of the new tribunal while relieving other courts of part of their existing caseload.[31] The legislature may be highly selective in transferring jurisdiction to the new tribunal or it may transfer all judicial review of administrative action by state agencies, even of local government agencies. In the event of a massive transfer of jurisdiction, the new tribunal would become a court (or commission) of administrative appeals.

Attempts to create courts of administrative appeals in the United States have been unsuccessful[32] despite the favorable experience with such courts

29. A tabulation is presented in Hall & Canada, *Administrative Law,* in FLORIDA CIVIL PRACTICE AFTER TRIAL §§22.7-.9 (Fla. Bar Continuing Legal Educ. Practice Manual No. 6 (1966)).

30. *Id.* §22.1.

31. The total caseload involving judicial review of administrative action in Florida is suggested by the following statistics for 1969. The supreme court disposed of a total of 1,210 cases. Apart from the 269 workmen's compensation cases, the only other cases reaching the supreme court directly from administrative agencies included 12 cases on certiorari to the public service commission, 64 mandamus cases, and an undetermined portion of 15 prohibition cases. JUDICIAL COUNCIL OF FLORIDA, FIFTEENTH ANNUAL REPORT: 1969, at 13-14 (1970).

During the same year the four DCA's disposed of 3,497 cases, including 46 cases on certiorari to administrative agencies plus an undetermined portion of 147 proceedings for original writs. Presumably, a substantial number of the 147 original writ proceedings involved habeas corpus matters unconnected with administrative agencies. It may therefore be assumed that not many of the 147 original writs involved review of administrative action. More precise statistics are unavailable. *Id.* at 15.

The circuit courts disposed of 112,950 cases during 1969, including 72 cases reported as "review of administrative orders" plus an undetermined but presumably small portion of their 5,982 "other cases." *Id.* at 19-21.

32. Administrative action is reviewed by state courts of general jurisdiction, usually at the trial level. 2 F. COOPER, STATE ADMINISTRATIVE LAW 603-14 (1965). An attempt to establish an administrative court in Ohio that was analyzed in Cummins, *Ombudsman in Ohio,* 30 OHIO ST. L. J. 1, 3 (1969); Fulda, *A Proposed "Administrative Court" for Ohio,* 22 OHIO ST. L. J. 734 (1961), proved unsuccessful. Proposals for creation of federal administrative courts are discussed in F. BLACHLY & M. OATMAN, FEDERAL REGULATORY ACTION AND CONTROL 264-67, 349-56 (1940); Auerbach, *Some Thoughts on the Hector Memorandum,* 1960 WIS. L. REV. 183; Cary, *Why I Oppose the Divorce of the Judicial Function from the*

in other countries.[33] Creation of such a court in Florida would clarify questions of jurisdiction and would facilitate the simplification of forms of action and standards of review. The court would be likely to develop expertise in general administrative law as well as in the specific administrative problems submitted to it.[34]

If, instead of creating a new tribunal, the legislature solves the workmen's

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Federal Regulatory Agencies, 51 A.B.A.J. 33 (1965); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L. J. 931 (1960); Kintner, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector*, 69 YALE L. J. 965 (1960); Lorch, *Toward Administrative Judges*, 30 PUB. ADMIN. REV. 50 (1970); Minor, *The Administrative Court: Variations on a Theme*, 19 OHIO ST. L. J. 380 (1968).

33. The most widely admired court of administrative appeals is the French Council of State. Recent accounts include: L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW (1967); C. FREEDEMAN, THE CONSEIL D'ETAT IN MODERN FRANCE (1961); W. GELLHORN, WHEN AMERICANS COMPLAIN 36-39 (1966); C. HAMSON, EXECUTIVE DISCRETION AND JUDICIAL CONTROL (1954); M. Fromont, *La Protection Juridictionnelle du Particulier contre le Pouvoir Exécutif en France*, in 1 MAX-PLANCK INSTITUT, JUDICIAL PROTECTION AGAINST THE EXECUTIVE 221 (1969) (reports on other countries are also presented in the same work).

Anglo-American praise of the French Council of State has been tempered by apprehension about its complete independence from the French system of general-purpose courts. France has two supreme courts: the Council of State is supreme in administrative litigation, while the Court of Cassation is supreme in all other cases, criminal as well as civil. Each supreme court reviews the decisions of its own system of subordinate tribunals. The classical criticism of this dual system was expressed by Professor A. V. Dicey, who stated, for example: "[T]he fact that [in England] the ordinary law courts can deal with any actual and provable breach of the law committed by any servant of the Crown still preserves that rule of law which is fatal to the existence of true [French-style] *droit administratif*." Dicey, *The Development of Administrative Law in England*, 31 L.Q.R. 148, 152 (1915). *See also* A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 339-45 (10th ed. Wade 1959); Dicey, Droit Administratif *in Modern French Law*, 17 L.Q.R. 302, 304 (1901). Dicey's criticism is discussed in B. SCHWARTZ, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 306-14 (1954).

The Anglo-American tradition of locating judicial review of administrative action inside rather than outside the general-purpose court system adds weight to the argument that any court of administrative appeals established in Florida should be subject to the review of the supreme court. *See* notes 12-13 *supra*.

34. On the development and utility of general principles of public law see Levinson, *Toward Principles of Public Law*, 19 J. PUB. L. 327 (1970).

While gaining expertise, the new court would probably recognize its own competence to review the merits of some types of administrative decision presently beyond review because of their "discretionary" nature.

Recent criticisms of judicial reluctance to review "discretionary" administrative decisions include: K. DAVIS, DISCRETIONARY JUSTICE (1969); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 569-94 (1965); Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968); Note, *Political Questions — Classical or Discretionary Applications of Judicial Review?*, 4 SUFFOLK U.L. REV. 127 (1969). *Compare* State *ex rel.* Dade County v. Dickinson, 230 So. 2d 130 (Fla. 1969) (court refused to issue mandamus since "the Comptroller has no clear, legal duty at this time to approve the County's tentative budget"), *with* Dickinson v. State *ex rel.* Bryant, 228 So. 2d 36 (Fla. 1969) (court approved the issue of mandamus to require the Comptroller to issue a cemetery license to an applicant who had satisfied all legal requirements). The difference in the two cases may be that the court felt less confident in tackling the merits of the budgetary problem than of the licensing problem.

compensation caseload problem by transferring this jurisdiction from the supreme court to the DCA's, there will be less opportunity to make massive adjustments to the review of other types of administrative action. However, the occasion may well be utilized to overhaul the Administrative Procedure Act,[35] realign jurisdiction to review in some selected areas, and attempt some clarification of forms of action and standards of review.

THE 1970 PROPOSAL TO AMEND THE JUDICIARY ARTICLE

Section 6 of the proposed amendment of the judiciary article, defeated in the November 1970 election, stated:

> *Court of review of administrative action.*—There may be established by law a court of review of administrative action composed of not less than three judges. It shall have appellate jurisdiction to hear appeals from such administrative action as may be prescribed by law. Three judges shall consider each case, and the concurrence of two shall be necessary to a decision. The judges of the court shall be subject to impeachment.

In addition to section 6, other sections of the 1970 proposal contained references to various aspects of the new court.[36] The following analysis will discuss section 6, together with pertinent portions of other sections of the 1970 proposal.

The Need for Legislative Implementation

By stating that the new court "may be established by law," the proposal gave the legislature absolute discretion to decide whether to adopt an implementing statute. Moreover, the legislature might, in any implementing statute, attach qualifications and definitions of constitutional terms.[37]

While the 1970 proposal was pending, two opposing approaches toward implementation were suggested for consideration in the event the proposed constitutional amendment was adopted. The Judicial Council of Florida suggested limiting the new court's jurisdiction to workmen's compensation and unemployment cases.[38] Since the annual caseload of unemployment compensation cases recently consisted of only six cases[39] the effect of transferring this type of jurisdiction would be negligible, and the Judicial Council's suggestion would turn the new court essentially into a compensation appellate court

35. FLA. STAT. ch. 120 (1969).

36. Proposed art. V, §4(b)(3) (review by supreme court); §12 (eligibility of judges); §14(a) (method of selection of judges); §14(b) (term of office of judges); §15 (discipline, retirement, removal); §16 (prohibited activities); §17 (salaries).

37. *E.g.*, State v. Ocean Highway & Port Authority, 217 So. 2d 103 (Fla. 1968); Jasper v. Mease Manor, Inc., 208 So. 2d 821 (Fla. 1968).

38. JUDICIAL COUNCIL OF FLORIDA, FIFTEENTH ANNUAL REPORT: 1969, at 2-3 (1970); A summary appears in 44 FLA. B. J. 351 (1970).

39. FLORIDA INDUSTRIAL COMMISSION, THIRTY-THIRD ANNUAL REPORT: 1968, at 17 (1968). Unemployment compensation cases are reviewed by the district courts of appeal.

similar to that proposed by legislative bills in prior years.[40] In contrast, the Administrative Law Committee of The Florida Bar took a broader view of the new court's jurisdiction, observing that the court "should function from its inception with judges who can develop an expertise to handle cases coming from any state administrative agency and thereby fulfill the only justification for a court of review of administrative action."[41]

Jurisdiction

Legislative discretion to define the new court's jurisdiction was limited in the 1970 proposal by two restrictions: (1) that the court "shall have appellate jurisdiction to hear appeals" and (2) "from such administrative action as may be prescribed by law."[42]

"Appellate Jurisdiction To Hear Appeals." Appelate jurisdiction was the only type expressly authorized for the new court. By omitting mention of jurisdiction to issue prerogative writs, the framers presumably intended to exclude them.[43] This presumption is strengthened by comparing the provisions for the new court with those regarding the supreme court, the DCA's, and the circuit courts, all of which have express authorization to issue writs of habeas corpus, certiorari, mandamus, prohibition, quo warranto, and all other writs necessary to the complete exercise of their jurisdiction.[44]

It is not clear what the framers intended to accomplish by preventing the new court from issuing writs. Although this restriction would affect the form of action that must be followed in the new court, it would not necessarily affect the type of controversy that could be adjudicated, since any litigation seeking review of administrative action could be articulated in the appellate rather than in the writ form. The citizen would simply ask the administrative agency for relief; if the agency denied his request, he would appeal the denial. If he prevailed in court, we might reasonably expect that the agency would respond by granting relief he had originally requested, even though the court's order might not be in the form of mandamus or injunction.[45] Thus, the citizen seeking review of an administrative denial of a license application could bring

40. *See* notes 18-22 *supra* and accompanying text.

41. Administrative Law Committee of the Florida Bar, *1969-1970 Annual Report*, 44 FLA. B. J. 276, 277 (1970).

42. Proposed art. V, §6.

43. A maxim of statutory construction, that inclusion of one item implies the exclusion of alternatives, applies also to constitutional interpretation. 6 FLA. JUR. *Constitutional Law* §21 (1955).

44. FLA. CONST. art. V, §4(2) (supreme court); §5(3) (district courts of appeal); §6(3) (circuit courts). All substantially unchanged in proposed art. V, §§4(b), 5((b), and 7(d) respectively.

45. Even if the court order is expressed in mandatory language, the court must rely ultimately upon the chief executive to enforce compliance, and the latter is likely to enforce compliance with a declaratory judgment just as readily as with a mandatory order. The French system of administrative law is based almost exclusively upon declaratory judgments, from which the administrative agencies are expected, on remand, to "draw the consequences." Partially in response to scholars' complaints about the nonenforceability of declaratory

an appeal that, if successful, would be tantamount to a petition for mandamus; the citizen seeking to prevent an administrative agency from executing a threatened course of conduct could bring an appeal that, if successful, would obtain the equivalent of injunctive relief. The use of the appellate rather than the writ form might indeed facilitate review, since appeal has traditionally existed as a matter of right, in contrast to writs that issue as a matter of discretion.[46]

"From Administrative Action." By providing that the new court might hear appeals "from such administrative action as may be prescribed by law," the 1970 proposal granted the legislature broad discretion concerning (a) types of activity, (b) types of agency, and (c) types of governmental unit served by the agencies, as they bear on the matter of jurisdiction.

(a) *Types of Activity*

The new court's jurisdiction might clearly include all types of administrative decisionmaking: quasi-judicial (adjudication), quasi-legislative (rulemaking), and so-called "quasi-executive" decisions.[47] Arguably, the legislature

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judgments, the French recently instituted a procedure whereby litigants could lodge formal complaints if they failed to receive appropriate relief on remand from such a judgment. A current report indicates that very few complaints have been filed. Même, *L'Intervention du juge administratif dans l'exécution de ses décisions,* 21 ETUDES ET DOCUMENTS DU CONSEIL D'ETAT: 1968 41 (1969). A similar conclusion is reached in L. BROWN & J. GARNER, FRENCH ADMINISTRATIVE LAW 127 (1967).

Even when orders of United States courts are expressed in mandatory language, enforcement is occasionally difficult to obtain. *See* Levinson, Book Review, 1970 WIS. L. REV. 944.

46. "Basically, there are two kinds of review, one as a matter of right, called 'appeal,' and the other as a matter of discretion in the reviewing court, called 'certiorari.'" Rutledge & Milledge, *Common and Special Types of Review,* in FLORIDA CIVIL PRACTICE AFTER TRIAL §9.1 (Fla. Bar Continuing Legal Educ. Practice Manual No. 6 (1966)). The distinction between appeal and certiorari is expressed in FLA. CONST. art. V, §4(2), which states, in part: "*Appeals* from trial courts may be taken directly to the supreme court, *as a matter of right,* only from" designated types of judgment. "The supreme court *may* directly *review by certiorari*" other types of order (emphasis added). The corresponding provision in proposed art. V, §4(b)(1), omits the words "as a matter of right," evidently because the framers regarded it as superfluous; it is difficult to attribute to the framers any intent to change the availability of appellate review by the omission of these words.

47. The distinction between rulemaking and adjudication is fundamental to the Administrative Procedure Act (APA), FLA. STAT. ch. 120 (1969). A recent decision recognized an additional category described as "quasi-executive" acts, in performance of functions where "legal rights, duties, privileges, or immunities are not the subject of adjudication. Such orders . . . are rendered pursuant to statutory authority based upon required inquiry and investigation, and involve the exercise of a discretion by the administrative officer or agency rendering it. If quasi-executive . . . acts are performed in violation of the mandatory requirements of law, or are infected by fraudulent, capricious, or arbitrary action of the agency, they are subject to assault by appropriate proceedings in a court of competent jurisdiction. It is in such a proceeding as this that procedural due process is afforded, but not in the agency's prior consideration." Accordingly, the court held that the hearing requirements of the APA did not apply to the "quasi-executive" function of granting a

might also be authorized to confer tort claims jurisdiction upon the new court on the theory that a tort claim resembles an appeal from agency decision-making to the extent that each is grounded upon the alleged illegality of the agency's conduct. Alternatively, a statutory scheme could provide administrative channels through which a victim could claim tort damages. If dissatisfied with the results of these administrative tort proceedings, the victim could appeal to the new court; the form of the appeal would be a request for review of the administrative decision that refused adequate damages, while the substance would be an inquiry into the allegedly tortious conduct that precipitated the claim.[48]

(b) *Types of Agency*

Under the proposal, the legislature had discretion to specify the types of agency whose administrative action would be appealable to the new court. All administrative agencies seem eligible, and for this purpose the term "administrative" could encompass any governmental agency other than the legislative or judicial branches.[49] Thus, the court could be given jurisdiction to hear appeals from such diverse agencies as regulatory commissions; the Governor; the police and other law enforcement agencies; penal and correctional institutions; and agencies responsible for public health, education, procurement, personnel, budgeting,[50] planning, and countless other func-

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banking license. Bay Nat'l Bank & Trust Co. v. Dickinson, 229 So. 2d 302, 306 (1st D.C.A. Fla. 1969).

48. The 1969 Florida Legislature enacted a tort claims act, Fla. Laws 1969, ch. 69-116 (effective July 1, 1969) and also enacted Fla. Laws 1969, ch. 69-357 repealing it (effective July 1, 1970). Since July 1, 1970, the state and counties have enjoyed their traditional immunity from suit except where statutes provide specific waivers. Recent criticisms of sovereign immunity include: Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant,* 68 MICH. L. REV. 387 (1970); *Project, Federal Administrative Law Developments — 1969,* 1970 DUKE L. J. 67, 200-20.

49. This is one of the acceptable meanings of the term "administrative." 1 FLA. JUR. *Administrative Law* §1 (1955).

50. In connection with the 1970 appropriations statute, a dispute developed between the Governor and leaders of the legislature concerning the amount of the budgetary deficit, if any, which the statute would produce for fiscal year 1970-1971. This problem was highlighted in the Governor's veto message, released June 9, 1970. After the legislature overrode his veto, the Governor mentioned this problem, among others, in a letter to the justices of the supreme court requesting an advisory opinion regarding whether he should sign warrants to expend appropriated funds. The justices made no reference to this problem in their reply. Advisory Opinion to the Governor, 239 So. 2d 1 (Fla. 1970). After the justices opined that the appropriation was generally valid, the Administration Commission on July 21, 1970, issued a revised financial plan for the general revenue fund, withholding over $28 million from designated appropriations to avoid deficit spending.

Without commenting on the merits, speculation may show that Florida would have been well served by a court possessing jurisdiction to determine (1) the size, if any, of the budgetary deficit, (2) whether the Administration Commission had authority to order the withholding of appropriated funds, and (3) if so, whether the Commission exercised its discretion in a permissable manner. Measurement of the budgetary deficit is simply a more complex version of the type of question traditionally adjudicated by courts in

tions.[51] Arguably, the legislature could also authorize the court to review administrative actions of nonadministrative agencies, such as the legislative auditor.

(c) Types of Governmental Unit

State agency action could clearly be included. Apparently, action by local government agencies could also be included by appropriate legislation.

The Judiciary on a Proposed Court of Administrative Appeals

Number of Judges on the Court. The court would be composed of at least three judges.[52] No upper limit was mentioned.

Number of Judges Required To Consider Each Case. Three judges would be necessary to consider each case with the concurrence of two being necessary to a decision. The same language was used in the 1970 proposal for both the new court and the DCA's.[53] Although the wording differed slightly from the existing constitutional language regarding the DCA's,[54] there is no indication that the change of wording implied a change of meaning. Presumably, therefore, the new court and the DCA's would be required, under the 1970 proposal, to follow the existing practice of the DCA's, sitting in panels of three, and not more than three, judges. By contrast, the existing constitution as well as the 1970 proposal provide that the supreme court has a quorum of five justices. Since the quorum sets a minimum but not a maximum number of justices who may consider a case, the supreme court may sit en banc.[55]

Eligibility To Become Judge. The 1970 proposal required persons to have been members of the Florida Bar for the preceding ten years in order to be

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determining whether the rate charged by a common carrier will provide the carrier with a reasonable rate of return.

For a discussion on the withholding problem at the federal level, see Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control over Executive Discretion,* 22 STAN. L. REV. 1240 (1970); Fisher, *Funds Impounded by the President: The Constitutional Issue,* 38 GEO. WASH. L. REV. 124 (1969).

51. Proposed art. V, §1 (1970) contained a new provision: "Administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices, and their orders shall be reviewed as provided by law." Presumably, the final clause was intended as a tie-in to §6 and other sections dealing with the review of administrative action; only a strained reading of the final clause of §1 would infer from it any limitation upon the scope of judicial review of administrative action.

52. Proposed art. V, §6.

53. Proposed art. V, §5(a).

54. In each district court of appeal: "Three judges shall constitute a panel for and shall consider each case, and the concurrence of a majority of the panel shall be necessary to a decision." FLA. CONST. art. V, §5(a).

55. In the supreme court: "Five justices shall constitute a quorum, but the concurrence of four shall be necessary to a decision." FLA. CONST. art. V, §4(1), substantially unchanged in proposed art. V, §4(a).

eligible to serve on the new court. This requirement also held for supreme court justices and DCA judges,[56] clearly elevating the new court above the circuit courts whose judges must have been members of the Florida Bar for only five years.[57]

Method of Selection. The method of selecting judges of the new court might by prescribed by law.[58] This contrasts with the constitutionally required election of supreme court justices and judges of the DCA's and circuit courts.[59] Thus, the new court could become the only major court in the state whose judges are selected by some means other than election.

Terms of Office of Judges. Judges would serve six-year terms.[60] These are the same terms served by justices of the supreme court and by judges of the DCA's and circuit courts.[61]

Impeachment of Judges. Judges would be subject to impeachment as well as to the disciplinary authority of the Judicial Qualifications Commission.[62] In this respect, judges of the proposed new court would be placed on the same basis as justices of the supreme court and judges of the DCA's and circuit courts.[63]

Reviewability of Court's Decisions

Decisions of the proposed new court would, when provided by law, be subject to certiorari review by the supreme court.[64] Thus, the legislature would have complete discretion either to make the new court a court of last resort or to define the situations in which the court's decisions were to be subject to certiorari review by the supreme court. In this respect the new court contrasts with the DCA's, whose decisions are reviewable by the supreme court in the enumerated situations detailed in the constitution.[65]

Suggested Modification of 1970 Proposed Amendment of Judiciary Article

The 1970 proposal is subject to criticism on a number of grounds: it is unduly vague in its grant of jurisdiction; it excludes the writ forms of action for no good reason; it prevents the new court from sitting in panels of more

56. Fla. Const. art. V, §13(A) unchanged in this respect by proposed art. V, §12.
57. *Id.*
58. Proposed art. V, §14(a).
59. Fla. Const. art. V, §15. The only change made by proposed art. V, §14(a) was that, when provided by general law, judges might be elected in nonpartisan elections.
60. Proposed art. V, §14(b).
61. Fla. Const. art. V, §16 unchanged in this respect by proposed art. V, §14(b).
62. Proposed art. V, §15(f).
63. Fla. Const. art. V, §17A(1), unchanged in this respect by proposed art. V, §15(d).
64. Proposed art. V, §4(b)(3).
65. Fla. Const. art. V, §4(2), substantially unchanged in proposed art. V, §4(b)(1)-(2).

than three judges; and it permits the legislature to declare the new court's decisions immune from further judicial review.

In order to meet these criticisms, the following modification of section 6 of the 1970 proposal is suggested for consideration:[66]

Section 6. *Court of Administrative Appeals*

(a) *Organization.*—There may be established by law a court of administrative appeals consisting of not less than three judges. Three judges shall constitute a quorum. The concurrence of a majority of the judges considering a case shall be necessary to a decision. The judges of the court shall be subject to impeachment.

(b) *Jurisdiction.*—

(1) The court of administrative appeals shall have such jurisdiction as may be provided by law to review administrative action by, and to adjudicate claims against, state and local governmental agencies, enterprises, and officials.

(2) In any cause properly before the court of administrative appeals, the court or any judge thereof may issue writs of habeas corpus returnable before that court or any judge thereof or before any circuit judge.

(3) In any cause properly before the court of administrative appeals, the court may exercise appellate jurisdiction and may issue writs of mandamus, injunction, certiorari, prohibition, quo warranto, and all other writs necessary to the complete exercise of its jurisdiction.

Name of Court

The modification reflects the present author's preference for calling the new tribunal the "Court of Administrative Appeals."

Jurisdiction

The modification draws a clear distinction between subject-matter jurisdiction on the one hand and form of action on the other. Subject-matter jurisdiction is expressed in the broadest possible terms, authorizing the legislature to provide for the reviewability of all administrative action by, and for the adjudication of claims against, state and local governmental agencies, enterprises, and officials. The full range of this authorization may be implicit in the 1970 proposal; it is placed beyond dispute by being made explicit in the modification.

Both the appellate and the writ forms of action are expressly authorized in language that follows as closely as possible the existing constitutional provisions regarding the DCA's.[67] Forms of action are not made dependent upon legislative discretion; any discretion allowed by the constitution on such matters should fall within the rulemaking authority of the supreme court.[68] Although the new court might well be able to function without writ

66. See note 72 *infra* for a suggested change of another section of proposed art. V.

67. FLA. CONST., art. V, §5 (3).

68. FLA. CONST., art. V, §3; proposed art. V, §2.

jurisdiction, by the simple expedient of treating every complaint as an appeal,[69] practitioners would probably prefer the opportunity of invoking writ jurisdiction in situations that have traditionally been litigated in this manner.[70]

Quorum

The modification establishes a quorum of three judges. If the court consists of more than this number the modification would therefore permit the court to sit in panels of three or more (and, consequently, en banc).

This feature may be important if (1) the court receives a broad grant of subject-matter jurisdiction, (2) it handles a large caseload, (3) the legislature increases the number of judges to more than three, and (4) the supreme court authorizes the new court to convene in various parts of the state[71] in panels smaller than the full court. A rehearing en banc may then be appropriate as a means of bringing the expertise of the full court to bear on a matter adjudicated by a small panel.

Reviewability

If section 6 of the 1970 proposal is modified as suggested above, section 4(b) should also be modified, so as to subject decisions of the new court to supreme court review to the same extent that DCA decisions are reviewable.[72]

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69. *See* notes 45-46 *supra* and accompanying text.

70. Compare the experience with article 78 proceedings under the New York Civil Practice Law and Rules, §7801. A recent commentary observed: "[W]hile Article 78 has unified the procedure in mandamus, certiorari and prohibition proceedings, the substantive law governing these writs has not changed. . . .[T]he great body of case law developed over the years distinguishing administrative [mandamus] from judicial [certiorari] action has not been rendered moot by Article 78. Article 78 simply eliminates the procedural differences between the old writs." McLaughlin, *Supplementary Practice Commentary on CPLR* § 7801, in 7B *Consolidated Laws of New York Ann.*, CPLR, at 12-13 (McKinney Supp. 1970-1971).

71. Proposed art. V, §2(d) would have specifically authorized the supreme court to adopt rules governing the locations for holding court. Arguably, the supreme court already possesses similar power under FLA. CONST., art. V, §3, which authorizes the court to adopt rules governing practice and procedure in all courts. *See also* FLA. CONST., art. V, §5(2), requiring the DCA's to hold at least one session every year in each judicial circuit wherein there is ready business to transact.

72. This modification would require proposed art. V, §4(b) to be reworded as follows:

(b) JURISDICTION.—The Supreme Court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from orders of trial courts and decisions of district courts of appeal *and the court of administrative appeals* initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.

(2) May review by certiorari any decision of a district court of appeal *or of the court of administrative appeals* that affects a class of constitutional or state officers, that passes upon a question certified by the district court of appeal *or by the court of administrative appeals* to be of great public interest, or that is in direct conflict with a decision of another district court of appeal *or of the court of administrative appeals* or of the supreme court on the same question of law, and may issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review, and all writs necessary to the complete exercise of its jurisdiction.

(3) When provided by law, shall hear appeals from final judgments and orders of trial courts imposing life imprisonment or entered in proceedings for the validation of bonds or certificates of indebtedness, and issue writs of certiorari to [the court of review of administrative action and] commissions established by law and writs of mandamus and quo warranto to state officers and state agencies.

(4) The supreme court or any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, *the court of administrative appeals or any judge thereof,* or any circuit judge.

(Italicized words indicate suggested additions to text of 1970 proposal. Bracketed words indicate suggested deletions.)