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THE PROPOSED REVISION TO THE EXECUTIVE SUSPENSION POWERS OF THE GOVERNOR

Algia R. Cooper*

I. INTRODUCTION

One of the most significant revisions proposed by the Constitution Revision Commission is the expansion of the Governor's suspension power over elected public officers. This article will discuss the proposals and examine their probable impact on existing law if adopted.

II. PRESENT CONSTITUTION

Under article IV, section 7(a) of the 1968 Florida Constitution, 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 any county officer.1 These officers may be suspended by the Governor for the constitutionally designated grounds of malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or the commission of a felony.2 The Governor may suspend by filing an

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1. Fla. Const. art. IV, § 7 provides:

(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 any county officer, 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) 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 these powers are vested elsewhere by law or the municipal charter.

The nature and scope of the Governor's suspension power under the 1968 constitution has been the subject of a scholarly analysis by former Florida Supreme Court Justice Frederick B. Karl and William M. Barr, entitled Executive Suspension and Removal of Public Officers Under the 1968 Florida Constitution, 23 U. Fla. L. Rev. 635 (1971) [hereinafter cited as Barr & Karl]. See also Parsons, The Suspension and Removal of Florida Public Officers by the Governor, 1945-1960, 15 U. Fla. L. Rev. 400 (1962).

executive order with the secretary of state\(^3\) stating facts supporting one or more of the grounds of suspension. Upon suspension by the Governor, the Florida Senate decides whether the suspended officer will be permanently removed from office or reinstated.\(^4\) During the period of suspension, the Governor has the discretionary authority to fill the office by appointment or to reinstate the suspended officer at any time prior to removal by the senate.\(^5\)

The Governor's power to suspend municipal officers is much more limited. Under article IV, section 7(c) of the constitution, the Governor is authorized to suspend an elected municipal officer only if the officer has been indicted for a crime. Also, if the suspension powers over a specific municipal officer are vested elsewhere by law or municipal charter, the Governor is prohibited from suspending that officer.\(^6\) Unlike the suspension of a county or state officer, the suspension of a municipal officer remains in effect until the officer is acquitted or convicted of the crime for which he has been indicted.\(^7\) However, as with the suspension of county and state officers, the Governor can fill the municipal office by appointment during the period of suspension.\(^8\)

The principal advocate of revising the suspension powers of the Governor was Governor Reubin Askew. In a major address before the commission, he urged the commission to subject municipal officers to suspension and removal from office for the same grounds and according to the same procedures as state and county officers:

> The governor's power to suspend public officials for cause is crucial to maintaining public confidence in government. Currently, however, the governor may only suspend elected municipal officials upon their indictment. Why should the governor be able to suspend an elected county commissioner from one of the smallest counties in Florida for malfeasance or neglect of duty, for example, but not the elected mayor of one of the largest cities in the state?

> This power should be expanded to include suspension of elected municipal officers for the same causes presently applied to county officers.\(^9\)

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3. If the proposed revision to article IV, abolishing the Cabinet, is adopted, the executive order would be filed with "such officer designated by law." See Fla. C.R.C., Rev. Fla. Const. art. IV, § 8, Schedule with Regard to Abolition of Cabinet, § (j)(2).
4. Fla. Const. art. IV, § 7(b).
5. Id. § 7(a).
6. Id. § 7(c); see note 52 infra.
7. Id.
8. Id.
9. Address by Governor Reubin O'D. Askew to the Constitution Revision Commission
Former Florida Supreme Court Justice Fred Karl joined the Governor in suggesting this change. Karl felt that the historical distinction between municipal and county officers was no longer valid and that there was a need for more effective control over municipal officers.10

In his address, Governor Askew also recommended that the commission give the Governor authority to suspend Cabinet officers from office if they are indicted for a felony.11 The Governor indicated that the genesis of this recommendation came from a series of events which led in recent years to the resignation of two Cabinet officers while criminal charges were pending against them.12 Under the existing constitution, the only method of removing those officers was the impeachment process,13 and that process has been criticized as being "cumbersome" and "lengthy."14 Because the legislature had been somewhat slow to act in such cases, Governor Askew saw the need for a procedure whereby officers indicted for serious crimes could disqualify themselves or be disqualified from office without having to resign their offices.

III. PROPOSED REVISION

A. Committee Proposal

The proposal to revise article IV, section 7 was recommended by the commission’s Executive Committee.15 The committee’s proposal provided:

(Sept. 1, 1977), at 40 [hereinafter cited as Askew Speech]. There was also at least one newspaper editorial which supported the change: "There is no reason whatever for [a] different treatment of city officials and county officers. They play the same game; they should play by the same rules and be subject to the same penalties." Ouster Procedures Should Be Same For All, Tallahassee Democrat, Aug. 27, 1977, § 1, at 4, col. 1.


11. Askew Speech, supra note 9, at 41.


13. See FLA. CONST. art. III, § 17.


15. The commission specifically considered more than 800 issues and referred the following issues to the committee:

Whether Article IV, § 7, providing for a procedure for suspension, should be modified to:

(a) provide immunity from suspension and removal to any official who is required to appear by subpoena.
SECTION 7. Suspensions; filling office during suspensions.—
(a) By executive order stating the grounds and filed with 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 any county officer, of a special 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; unless these powers are vested elsewhere by law or by municipal or county charter. 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) By order of the governor any elected cabinet officer indicted for crime may be suspended from office until acquitted and the office filled by appointment for the period of suspension, not to exceed beyond the term unless these powers are vested elsewhere by law or the municipal charter of office for which the cabinet officer was elected.  

The committee's recommended proposal would have revised this section in three significant respects. First, it would have extended the Governor's suspension power to officers of special districts au-
authorized by law to levy ad valorem taxes and to elected municipal officers. Second, the proviso in subsection (c) of section 7 of the present constitution—"unless these powers are vested elsewhere by law or the municipal charter"—was deleted and transferred so that its limitation would apply to the Governor's power under subsection (a). Thus, it would apply to the Governor's suspension powers over state and county officers as well as municipal officers. Finally, the committee recommended that the Governor's suspension power be expanded to Cabinet officers indicted for a crime.

Commissioner Don Reed explained the committee's proposal: "Basically, what it does is put local officials and special district officials in the same position as county commissioners and others when it comes to the governor's authority to suspend them."\(^7\)

While this proposal did unify the procedures and grounds for suspension of county officers, municipal officers, and state officers not subject to impeachment, the proposal had two major flaws. First, moving the proviso in subsection (c) to subsection (a) authorized the legislature by general law or a charter provision to vest the suspension power over municipal officers and state officers not subject to impeachment in an officer or public body other than the Governor.\(^8\) This would have been a radical departure from the control over these officers that the people of Florida have historically vested in the chief executive.\(^9\) Second, the committee's recommendation that the Governor be given authority over indicted Cabinet officers, although enlightened, was unnecessarily broad, for it allowed the Governor unprecedented power to suspend Cabinet officers if indicted for any crime, not just a felony.\(^0\) However, as will be shown, these problems were corrected in the final revision recommended by the commission.

\(^7\) Transcript of Fla. C.R.C. proceedings 231 (Jan. 10, 1978).
\(^8\) See In re Advisory Opinion to the Governor Request of July 12, 1976, 336 So. 2d 97, 99 (Fla. 1976) [hereinafter cited as Governor's Request], in which the court advised the Governor that the proviso of article IV, § 7(c) "grants to the Legislature the authority to vest elsewhere by legislative act the suspension power over municipal officials."
\(^9\) Under article VI, § 19 of the 1838 constitution, the legislature was given the power to prescribe the procedures for removal from office of all nonconstitutional officers, civil and military. This provision was carried forward in article VI, § 15 of the 1861 constitution and article VI, § 15 of the 1865 constitution. Under article V, § 19 of the 1868 constitution, the Governor was given specific authority to suspend the county treasurer, surveyor, superintendent of common schools, and county commissioners. The Governor's suspension power was further broadened under the 1885 constitution, which, in article IV, § 15, authorized him to suspend all officers, elected or appointed, who were not subject to impeachment.
\(^0\) Governor Askew had called for suspension power only if the officer were indicted for a felony. Askew Speech, supra note 9, at 41.
B. Final Revision

The proposed revision adopted by the commission that will be presented to the people is:

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 any county officer of a school district or a special 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 by the governor by the filing of an executive order from performing any official duties 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 these powers are vested elsewhere by law or the municipal charter.

IV. IMPACT OF PROPOSED REVISION ON EXISTING LAW

A. General

This proposed revision would not change the existing procedures involved in the suspension process, nor would it change or reverse

any of the recent case law. However, two recent and particularly significant cases merit comment.

In 1973, the Fourth District Court of Appeal, in *Crowder v. State ex rel. Baker*, 22 ruled that the cases construing the jurisdictional requirements (i.e., allegation of sufficient facts upon which to predicate the charges of malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, or commission of a felony) under the suspension section of the 1885 constitution23 retained their vitality under the 1968 constitution. However, the court's application of those cases seemed at variance with its explicit holding.

In *Crowder*, Governor Askew had suspended Roy C. Baker, the sheriff of Martin County. The Governor's executive order of suspension alleged that Baker had (1) sanctioned and encouraged policies of non-cooperation between his office and various law enforcement agencies in the state; (2) been intoxicated during the performance of his official duties; and (3) permitted alcoholic beverages on the premises of the county jail, permitted a prisoner to consume such beverages, and had himself consumed such beverages. The court cited the accepted rule announced in the cases construing the pre-1968 constitution24 that

the allegation of fact contained in the executive order of suspension need not be as definite and specific as the allegations of an information or an indictment in a criminal prosecution, and the allegations will be adjudged as sufficient if, on the whole, they bear some reasonable relation to the charge made against the officer.25

But the court found that the Governor's executive order in this case was so "vague and indefinite" that it did not "apprise the accused officer of the alleged acts against which he must defend himself."26 In so ruling, the court departed from the longstanding tradition of deference to the executive in these matters. The cases before 1968 state that the Governor need not allege each specific fact which supports the constitutional ground of suspension. As Judge Gerald Mager argued in his dissent, "[a]ll reasonable intenments [should] be indulged in to support" an order of suspension.27

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23. FLA. CONST. of 1885, art. IV, § 15.
25. 285 So. 2d at 35.
26. *Id.*
27. *Id.* at 37 (quoting *State ex rel. Hardee v. Allen*, 172 So. 222, 226 (Fla. 1937). At one time Judge Mager served as legal counsel to Governor Claude Kirk. In that capacity, he dealt with the practical problems posed by executive suspensions.
Because the suspension power is exclusively an executive function, the judiciary should be extremely cautious in nullifying an act of suspension. When an officer is suspended, it should be assumed that the Governor acted in good faith and, as long as the officer is put on notice of the general charges against him, the suspension order should be allowed to stand. It should be remembered that the final removal of the officer can be accomplished only by action of the senate. That body has the important responsibility of determining the specific facts supporting the general allegations contained in the order of suspension. If, after review, investigation, and hearings, the general allegations made by the Governor cannot be supported, the senate has the constitutional duty to reinstate the officer. This legislative safeguard should make the court extremely hesitant to declare a suspension order jurisdictionally insufficient.

Even though Crowder raised serious questions, their seriousness pales in comparison to those raised by the supreme court's decision in State ex rel. Meyerson v. Askew. In Meyerson, the court held that the senate acted improperly when it removed Constable Meyerson on grounds not contained in the Governor's order of suspension. The court said:

Since the executive suspension order did not charge misconduct on the part of Relator in the general terms indicated by the Senate, but based the suspension upon specific criminal acts, the Senate was not at liberty under principles of due process to make extraneous findings in keeping with its version of what the charges could have been in the light of general standards of required official conduct. While the Senate was not bound to accept the acquittal of Relator in the Criminal Court of Record of Dade County of the charges in the indictment, it did not find Relator was guilty of any of the same charges that also were the gravamen of the Executive Suspension Order.

28. As Judge Mager pointed out, the senate select committee which passes upon executive suspensions "is authorized to request the Governor 'to file a statement of further facts and circumstances supporting the suspension order.'" Id. at 36 (quoting Barr & Karl, supra note 1, at 638 n.12). Judge Mager went on to say:

An order of suspension containing "jurisdictional facts", as defined, should not be set aside because the allegations are couched in general language where the suspended official has not shown that he has resorted to and been denied "a statement of further facts and circumstances supporting the suspension order". Much like an information in a criminal proceeding which is subject to a bill of particulars so, too, is the order of suspension subject to a "statement of further facts . . . ."

Id. at 37.
29. 269 So. 2d 671 (Fla. 1972).
30. Id. at 676.
Former Justice Karl and Marguerite Davis have stated that “[t]he procedure used by the court in Meyerson was as remarkable as its failure to follow precedent.” In their recent article, Impeachment in Florida, they argue that “[t]he court evidently misconceived the purpose of the [senate] 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.” They go on to conclude that “Meyerson should dispel any doubt about the court's willingness to intrude into suspension-removal matters.”

“Intrusion” is correct. Meyerson and Crowder represent a trend of unwarranted judicial interest in an area historically entrusted exclusively to the executive and legislative branches of state government. To be sure, under the Florida Constitution, the judiciary is the final arbiter of what the law is. However, the judiciary is only one of three equal branches. In areas that are specifically committed by the constitution to another branch of government, the judiciary would be well advised to follow the spirit of the pre-1968 constitution cases, which hold that absent substantial and compelling reasons, the actions of the executive and legislative branches in suspension-removal matters are final and should not be reviewed by the courts.

While the revision commission did not debate the issues raised by Crowder and Meyerson, it apparently deemed not worthy of discussion a proposal which would have placed in the constitution a standard for judicial review of suspension-removal matters. A member of the public submitted the proposal to the commission, but it was never considered. However, the commission's refusal to consider the issue should not be interpreted as an implicit approval or rejection of either Crowder or Meyerson. The absence of debate on this issue suggests, if anything, the difficulty of trying to establish constitutional standards in an area that is inappropriate for rigid, fixed guidelines.

31. Karl & Davis, supra note 12, at 41 n.141.
32. Id.
33. Id.
34. See State ex rel. Hardie v. Coleman, 155 So. 129, 134 (Fla. 1934).
35. See (f) in note 15 supra.
36. In addition to Crowder and Meyerson, the following recent cases and attorney general's opinions interpreting the existing suspension provisions are worthy of mention.

In Sheffey v. Futch, 250 So. 2d 907 (Fla. 4th Dist. Ct. App. 1971), the court held that: (1) a scrivener's error in the executive order of suspension which was subsequently corrected by an amended order did not invalidate the otherwise valid removal of a public officer; (2) the
B. County Officers

Under the 1968 constitution, county officers are subject to the Governor's suspension power. No distinction is made between an elected county officer and an appointed county officer. Under the proposed revision, however, the suspension power would be limited to elected county officers. This change would clarify doubt about the existing law as to whether the Governor's suspension powers extend to appointed county officers.37

C. Special Districts

Under the present constitution, the Governor has no authority to suspend officers of special districts authorized by law to levy ad valorem taxes. The proposed revision would subject these officers to the Governor's suspension power.

failure of the senate to allow the public officer under suspension extensive discovery would not invalidate removal as long as the officer is not “prejudiced, surprised, inconvenienced or placed at any disadvantage”; (3) senate committee members who vote on suspension are not required to be present at each of the hearings concerning the officer unless the officer can show that the members were not familiar with the facts of the case; and, (4) it is proper for the senate to delegate removal hearings to a committee.

In In re Advisory Opinion of the Governor, Appointment of County Comm'rs, Dade County, 313 So. 2d 697 (Fla. 1975), the supreme court held that the power of the Governor to appoint a temporary replacement for a county commissioner he had earlier suspended was not abrogated by a Dade County home-rule charter provision which provided that all commission vacancies would be filled by majority vote of the remaining members.

In 1972 FLA. Op. ATT’Y GEN. 072-222, the attorney general advised that an officer suspended under article IV, § 7 has no right to compensation during the period of suspension, even though the indictment on which the suspension is based is nol prossed, unless the officer is reinstated by action of the Governor, the senate, or a court.

In 1972 FLA. OP. ATT’Y GEN. 072-216, the attorney general advised that the senate had authority to appoint a special master to conduct hearings and make recommendations to the senate in suspension, and that the senate may provide by rule for the confidentiality of reports by the special master.

In 1976 FLA. OP. ATT’Y GEN. 076-51, the attorney general advised that the Governor does not have power to temporarily suspend elected county commissioners for a period such as 90 days. Also, the legislature and the Commission on Ethics are without authority to provide for suspension by the Governor in any manner other than that provided by the constitution.

In 1976 FLA. OP. ATT’Y GEN. 076-155, the attorney general advised that the Governor had the power to suspend the mayor of Jacksonville as a municipal officer under article IV, § 7(c) of the constitution. But see In re Advisory Opinion to the Governor Request of July 12, 1976, 336 So. 2d 97 (Fla. 1976).

37. See, e.g., In re Advisory Opinion to the Governor, 298 So. 2d 366 (Fla. 1974), in which the supreme court advised that the Governor does not have power to suspend a school superintendent when the county, pursuant to article IX, § 5, has exercised its constitutional option of an appointive rather than an elected superintendent. Of course, the result in this case can be explained by the unique local option provision in article IX, § 5.
D. School Board Members

There is ample precedent under the present article IV, section 7(a) for the inclusion of school board members within the rubric of "county officers" and thus within the Governor's suspension powers. However, in a request for an advisory opinion from the Florida Supreme Court in 1974, Governor Askew implied that there was a possibility that school board members were not county officers but could be viewed as "officers of other governmental entities such as special districts." In In re Advisory Opinion to the Governor, the supreme court indicated that school board members were indeed subject to the suspension power of the Governor. However, the court did not specify whether the school board members were county officers or state officers. The proposed addition of "school districts" to article IV, section 7(a) would make it absolutely clear that officers of school districts are subject to the Governor's suspension power.

E. County Judges

Under article IV, section 7(a), the term "county officer" has been interpreted to include county court judges. However, under a proposed revision to article III, section 17, county court judges would be included among those officers who are subject to impeachment. If the people adopt this revision extending the impeachment process to county judges, the Governor will no longer have the power to suspend them, for judicial officers subject to impeachment are not subject to gubernatorial suspension.

Taking county court judges from under the suspension power of
the Governor and subjecting them to removal by the Judicial Qualifications Commission45 and the legislature is a needed change.46 First, it would subject all judges and justices to removal from office in the same manner. Second, it would eliminate the sensitive separation of powers question raised when a Governor seeks to remove a county judge for matters pertaining to the accuracy and propriety of a judicial decision. This very question—the ability of the Governor to "review the judicial discretion and wisdom of a [judge] while he is engaged in the judicial process"—was presented in an advisory opinion request by former Governor Claude Kirk to the supreme court in 1968.47 While the Governor's request for the opinion did not specifically state as much, the court assumed that the basis of any action by the Governor would be the constitutional ground of incompetency: "But we are here concerned with the power of the Chief Executive to remove for incompetency a member of the Judicial Branch for judicial labor apparently unsatisfactory to some segment of the populace."48 The court advised the Governor that, under the constitution, he did not have the power to suspend a judge for matters relating to the wisdom or correctness of his judicial decisions.49

The commission's proposal would eliminate the potential for serious constitutional confrontation that could easily develop whenever a Governor sought to suspend a county judge because of disenchantment with the judge's judicial work. The proposal would vest the power to suspend and remove county judges exclusively in the supreme court50 and the legislature.51

F. Municipal Officers

One of the major changes to the suspension section proposed by the commission is the elimination of the restrictions on the Governor's power to suspend municipal officers.52 Under the proposed

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45. County judges are subject to discipline by the J.Q.C. under present FLA. CONST. art. V, § 12(a). Nothing in the proposed revisions would change this.
46. However, there is some merit in providing for the less cumbersome suspension and removal procedure as opposed to impeachment. County court judges are, in at least two important senses, unlike circuit court judges, district court of appeal judges, and supreme court justices. Basically, county court judges handle relatively minor matters. And, of all judges, they are the closest to the people.
47. In re Advisory Opinion to the Governor, 213 So. 2d 716, 720 (Fla. 1968). Actually, the judge involved was a Criminal Court of Record Judge in Dade County. However, under the 1968 constitution, the office of county judge would be the analogous office.
48. Id. at 718.
49. Id. at 720.
50. See FLA. CONST. art. V, § 12, which provides an alternative procedure for removal of judges from office.
51. The legislature's power of suspension-removal is via impeachment.
52. In Governor's Request, supra note 18, the Governor had argued that under subsection
revision, the Governor would no longer be limited to suspending municipal officers for the single ground of indictment for a crime. Furthermore, the provision in subsection (c) of article IV, section 7 which allows the Governor's power of suspension over municipal officers to be placed elsewhere by law or charter provision would

(c) a municipality could not take the suspension power away from the Governor unless the law or charter provision vested both the suspension and appointment power elsewhere:

Under Article IV, Section 7(c), the Governor has the authority to fill the office of an elected municipal officer indicted for a crime during the period of suspension. The only limitation of the Governor's power to appoint in these circumstances, is "unless these powers are vested elsewhere by law or [the] municipal charter." Thus the power to appoint an interim mayor is again held by the Governor unless law or charter operates in some manner to supercede [sic] that authority.

In interpreting words in a Constitution "... the words and terms of a constitution should be given their plain, ordinary and common meaning. ... Similarly, "... each word of the Constitution should be given its intended meaning and effect." ... Further, "Language found in the Constitution must be presumed to have been deliberately used for the purpose of accomplishing some object, and in the determination of the meaning of words in the Constitution, they should not be considered separately but in conjunction with other words and in the light of the purpose of the law makers as shown by the provisions as an entirety.

Applying the foregoing principles to the specific words "these powers" used in Section 7(c), it should first be noted that the word "power" in the singular is not used. The framers of our Constitution specifically chose to use the plural "powers". It cannot be said that this was inadvertent as "... The provisions of a written Constitution are presumed to have been more carefully and deliberately framed ..."

It therefore appears that the proviso language of Article IV, Section 7(c) authorizes a statutory provision or charter provision which explicitly establishes a procedure for both suspension and interim appointment. However, appointment authority alone, with no provision for suspension does not fall within the confines of the proviso.

Brief for Governor Reubin O'D. Askew at 24-26, In re Advisory Opinion to the Governor Request of July 12, 1976, 336 So. 2d 97 (Fla. 1976).

53. It should be noted that the proposed revision would not affect statutory recall procedures whereby voters of local municipalities may remove municipal officers for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or conviction of a felony involving moral turpitude. FLa. Stat. § 100.361 (1977).

54. Commissioner Talbot D'Alemberte's commentary to the existing constitutional provision, written after the 1968 revision, states: "Elected municipal officers ... are subject to the power of suspension only if they have been indicted for a crime and even that power is subject to a contrary provision in a municipal charter or general law." 26 FLa. Stat. Ann. 102 (West 1970) (emphasis added).

The legislature has passed three statutes purportedly implementing this section. FLa. Stat. § 112.49 (1977), designates as "county officers" any officer (elected or appointed) who exercises power under any "form of government which provides for the merging of the powers, duties and functions of any municipal and county governments ..." Furthermore, if the charter or other authority effecting the merger provides a procedure for suspension or removal of the officer, the powers are concurrent with the power of the Governor provided for in article IV, § 7. Section 112.50 provides that if the power to suspend or remove any state, county, or municipal officer is made subject to the terms of any statute or municipal charter, the power
be eliminated. Approval of this revision would accomplish a major change in the suspension and removal powers over municipal officials. No longer would the legislature or local governments be able to remove such officials from the Governor's suspension power simply by providing for alternative means of removal in a statute or municipal charter.

These two changes would subject municipal officers to suspension on the same terms, in the same manner, and for the same reasons as state and county officers not subject to impeachment. Yet this proposal has received very little attention from the news media or from municipal officials. This is somewhat surprising in the light of the reluctance the people of Florida have historically exhibited in expanding gubernatorial power over municipal officers. One could argue that vesting the sole power to remove municipal officers in the executive is an unnecessary and dangerous infringement on the powers of municipalities. Whether this drastic a change in the state-municipal relationship was needed is somewhat questionable.

No empirical information was presented to the commission to suggest that the existing procedure is inadequate or inefficient. To the contrary, it would appear that the present procedure provides a perfect balance between protection of the rights of the people of the state as a whole and preservation of municipal autonomy. It would have been much wiser to revise this section to subject municipal officers to suspension and removal in the same manner as other officers, but to allow the legislature or a charter to vest the responsibility elsewhere—to be exercised concurrently with the Governor. Such a scheme would preserve the autonomy of local governmental bodies and still permit the Governor some measure of control.

of the Governor to suspend such officer shall not be affected, and such power "shall reside concurrently in the Governor and in the statutory or charter authority." Section 112.51 provides that if a grand jury indicts any elected or appointed municipal official as a result of actions of such official arising either directly or indirectly out of, or pertaining to, his official conduct or duties, the Governor has the power to suspend the municipal officer from office. The suspension by the Governor creates a temporary vacancy during the period of suspension which shall be filled by a temporary appointment during the period of the suspension. The temporary appointment is made in the same manner and by the same authority by which permanent vacancies in the office are filled.

55. But see note 9 supra.

56. There is even some suggestion that under present article IV, § 7(c), a municipal ordinance could limit the Governor's power to suspend municipal officers. See Memorandum from Patricia Gleason, assistant attorney general, to Donald Reed (Nov. 22, 1977) (on file with Constitution Revision Commission). See generally Brief for Hans G. Tanzler at 8, In re Advisory Opinion to the Governor Request of July 12, 1976, 336 So. 2d 97 (Fla. 1976); Address by Frederick B. Karl to the Constitution Revision Commission (Aug. 24, 1977), at 2-3. See also note 19 supra.

57. Fla. Stat. § 112.50 (1977) presently accomplishes this. See note 32 supra. However, if the proposed revision of article IV, § 7 is adopted, the constitutionality of that section will
G. Statewide Elected Constitutional Officers—State Officers Subject to Impeachment

Proposed new subsection (c) would create a self-disqualification procedure whereby certain designated public officers could disqualify themselves temporarily from performing the duties of their offices. The proposal provides that if any state officer subject to impeachment is indicted by a grand jury or informed against by a State's attorney for a felony, the officer may disqualify himself from performing any official duties of the office until acquitted or until the indictment or information is dismissed. This would be accom-
plished by the single act of filing an irrevocable notice of disqualification with an officer prescribed by law. The Governor would, in such cases, have the power, during the period of disqualification, to fill the office by appointment. The Lieutenant Governor would act as Governor during any period of the Governor's disqualification.

Commissioner Robert Shevin was the primary proponent of this measure. He stated that the purpose of the revision was to allow any state officer subject to impeachment who was indicted or informed against for a felony to disqualify himself from office until acquitted or until the indictment or information was dismissed. Commissioner Lew Brantley agreed: "[T]he underlying reason for . . . suspension of a cabinet officer by a chief executive is that he could remove that individual who has a cloud over his head and replace him with someone who would be an acceptable functionary . . . until [the officer] has [been] cleared . . ." Commissioner Shevin concurred, stating that the proposed revision would give the officers the "option of removing themselves voluntarily." As it stands now, Shevin argued, only two options are available to an indicted or informed-against impeachable officer: "[k]eep your job [and] retain your rights and responsibilities, or resign outright. If you resign outright, you could never come back in the event you are exonerated." The proposal, on the other hand, would "provide a vehicle for somebody to voluntarily remove themselves" and, if later acquitted, reclaim his office.

wrong with imposing the same standards on Cabinet officers. Id. at 243.

It should be noted that this provision tracks the language of article III, § 17. This was suggested by former Justice Frederick B. Karl. Letter from Frederick B. Karl to Talbot D'Alemberte, (Jan. 23, 1978) (on file with Constitution Revision Commission).

60. The author suggested to the commission that the notice should be irrevocable. This would prohibit the officer from withdrawing the notice once it is filed. Allowing for withdrawal would be devastating to the effective operation of the office in question. If a disqualified officer were allowed to reassume his office, he would begin his work under a cloud much darker than would exist if the officer were merely under suspicion and had not earlier disqualified himself. Prohibiting revocation would lend finality to the act of self-disqualification and thus stabilize the office.

65. Id. at 161.
66. Id.
Commissioner James Apthorp proposed an amendment to the Shevin-Douglass proposal which would expand the Governor's power to disqualify the Lieutenant Governor or a Cabinet officer, if indicted for a felony, if either of those officers refused to disqualify himself voluntarily.67

The Apthorp amendment differed in several significant respects from the Shevin-Douglass proposal. First, it did not give the Governor the authority to disqualify judges and justices. Second, it authorized disqualification by the Governor only if the officer were indicted by a grand jury. The Governor would have no power to disqualify the officer based on an information filed by a State's attorney. Third, if the Governor chose to disqualify the Lieutenant Governor or a Cabinet member, the amendment did not require that the executive order be irrevocable, as under the self-disqualification procedure. This would suggest that the drafters intended the Governor to have the power to withdraw the executive order if at some later date he deemed such a withdrawal to be in the public interest.

Commissioner Apthorp explained that the proposal would give the Governor only "temporary power" to disqualify an officer until he is impeached.68 He proposed the amendment, he said, because he felt that it was improper for an officer to remain in office while under indictment.69

Commissioner Douglass argued against Apthorp's proposed amendment, stating that it would leave the Governor in a better position than the Lieutenant Governor and other Cabinet officers.70

67. Id. at 161-62 (remarks of the Commission Secretary). This addition was intended to allow the Governor to suspend only the Lieutenant Governor and Cabinet officers. Id. at 184 (remarks of James Apthorp). If the proposed revision to article IV, § 4 is adopted, the Cabinet members would be eliminated in 1983. Thus, the only officer this provision would apply to would be the Lieutenant Governor. It should also be noted that there is no requirement that the felony be related to the duties performed by the officer. Id. at 180 (remarks of Bill James).

68. Id. at 162.

69. Id. at 162-63.

70. Id. at 169. Under the proposed revision, the Governor would still be subject to removal from office by impeachment pursuant to article III, § 17. Commissioner Apthorp seemed to argue that the Governor might be subject to removal under article IV, § 3(b) as well. Apthorp said:

[T]here is a way for the governor to be removed from office short of impeachment. Now, I know nobody has talked about this, but incapacity to serve as governor can be determined by the Supreme Court. There is no description of what, in fact, it means in the constitution. So, incapacity could be because of an indictment . . . .

Transcript of Fla. C.R.C. proceedings 186 (Jan. 12, 1978). To the extent that Commissioner Apthorp's argument suggests that the mere fact of indictment alone would trigger the operation of this section, it is probably incorrect. Article IV, § 3(b) refers to "physical or mental incapacity." This suggests that the basis of the supreme court's removal power under this section must have its origin in the inability of the Governor to carry on his duties because of health reasons, mental or physical. See generally In re Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959); State ex rel. Ayres v. Gray, 69 So. 2d 187, 194 (Fla. 1953).
Douglass felt that the Governor should be on the same footing as other statewide elected constitutional officers and that any other procedure would not be democratic. Finally, he argued that the impeachment power vested in the house of representatives would amply protect the public against an officer who refused to disqualify himself if indicted for a felony.

Commissioners B.K. Roberts and Bill James agreed with Commissioner Douglass. They felt it was unfair to allow a single individual, the State’s attorney, through and by his authority over grand juries, to oust an elected constitutional officer from office.

72. Id. at 169-73. It should be noted here that neither of the procedures authorized under this new section would impair any of the existing impeachment powers of the legislature under article III, § 17. The legislature would have the discretion to institute the impeachment process while the officer is disqualified from performing the duties of the office or could choose simply to delay the process until the felony charge is dismissed or until the officer is exonerated or found guilty.
74. The dialogue was as follows:

COMMISSIONER DOUGLASS: [L]et’s look at what could happen in the scenario of what is possible. The state-wide grand jury indicts the Attorney General. The Attorney General recognizes it for what it is. It is a political ploy of the state-wide prosecutor who wants his job, in cahoots with the governor. So, he says—and the legislature knows this. He says, “I’m not going to voluntarily suspend myself. And, Governor, you can’t because you’re in cahoots with that state-wide prosecutor. You can’t suspend me either. I will take my chances with the House of Representatives, which is an elected body. And they can either impeach me or not.

So, he goes down to the House of Representatives. He says, “I won’t suspend myself, gentlemen. This is a crooked deal cooked up by these two politicians. And I want to stay right here where the people put me.”

And the House believes him. And they say, “We won’t vote articles of impeachment.”

He remains in office under those conditions. If the House does not believe him and thinks it would affect his job, they vote the articles of impeachment, and he is out for the time until the Senate tries the impeachment itself, which will probably exceed the time of indictment.

So, Commissioner Apthorp would say that that is not the case, that the governor should have the power to suspend the Attorney General . . . where the legislature hadn’t voted articles of impeachment . . . pending the outcome of the charge, which grants to the governor inordinate powers that he shouldn’t have in this area—not over just Cabinet officers, but the judiciary.

COMMISSIONER APTHORP: No, sir.

COMMISSIONER DOUGLASS: It does. They are impeachable officers. I know your amendment attempts not to do that. There isn’t any reason for the difference, other than you were afraid of Judge [sic] Overton.

Now, he doesn’t want to be impeached either. I don’t either. But the truth of the matter is that what we are doing if we adopt this amendment is putting the governor in a different position as an elected official with the power to suspend the Cabinet officer, where the legislature won’t impeach. I don’t think anybody really wants to do that.

What we want to do is preserve the integrity of the three branches of government, and at the same time preserve the integrity of charges—of criminal charges. It will
As Commissioner Douglass put it, "What Mr. Apthorp would do would replace the integrity of the House of Representatives with an accusation by a grand jury orchestrated by the State Attorney."75

Commissioner Shevin disagreed with these arguments and supported the Apthorp amendment. He stressed that disqualification by the Governor would not premanently remove the officer from the office but would merely be a temporary suspension.76 Permanent removal would remain the sole prerogative of the legislature, through the impeachment process.77 Finally, Shevin claimed that arguments suggesting that the State's attorney controlled the grand jury were misleading and inaccurate. He specifically noted for the record that "it is [not] easy for anybody to be indicted in the State of Florida."78

The Shevin-Douglass proposal, together with the Apthorp very seldom occur that a person who is indicted will not—as it has occurred in the legislature—voluntarily suspend himself pending the outcome of the charge. That is what has happened in the legislature. That is all that can happen now other than having the legislature meet and throw him out under their own rules.

I think that this procedure is consistent with what happens to a legislator, for the state-wide elected official. It is consistent with the Cabinet officers and the judges and all.

We should put our confidence in the system. I agree with Commissioner Messer, who isn't here, who said that anytime you have to explain something it gets very difficult to get it passed. But I want to tell you that Mr. Apthorp's explanation is not correct because it does give to the governor additional power. It does give him the power to suspend a Cabinet officer. And that is what he is seeking. And that is it. Because I guarantee you that scenario I gave you could occur—not that it will.

And, therefore, we should leave it on the same footing so that the governor and the Cabinet, if indicted, can voluntarily suspend themselves. If they don't, articles of impeachment can be voted by the House, which automatically suspend them. And that is the only way we ought to deal with those state-wide elected officials.

Id. at 168-71.

Regarding the amount of control a prosecutor has over a grand jury, one author has said:

As the state's prosecutor, with the duty to prosecute those who he believes have committed crimes, he may present or select the evidence in a manner designed to influence the grand jury to agree with his view of the case. As a practical matter, he is likely to be more strongly motivated by his duty to bring people to trial than by his duty to advise the grand jury impartially. Consequently, the prosecutor may press for the result he desires so strongly that the grand jury may be unable to make an intelligent, independent determination of probable cause and becomes simply a rubber stamp of the prosecutor.


76. See id. at 182.
77. See id. at 162 (remarks of James Apthorp).
78. Id. at 185.
amendment, was adopted by the commission, twenty-eight to three. Unlike many of the other hotly contested revisions, this issue, except for minor style and drafting changes, was never revisited.

The Shevin-Douglass proposal, as amended, was a needed change. It is a fair compromise for a difficult situation—a situation faced whenever high-ranking state officers are indicted for serious crimes. The provision strikes a delicate balance, protecting both the rights of the people and the rights of government officials. High-ranking public officers could be removed from the important governmental decisionmaking process while under the suspicion of committing a serious criminal act. Yet, these same officers would be protected by the alternative of suspending themselves temporarily from any official duties. If an officer were acquitted or exonerated, the provision would allow him to return to office. The procedure is simple. It could be executed efficiently and would save the citizens of Florida from having an indicted officer remain in office until the legislature acted through the impeachment process.

H. Other Statewide Officers

The revision commission has proposed the creation of a total of twenty-four new constitutional offices. Proposed revisions would create a five-member Public Service Commission, a nine-member Board of Education, a nine-member Board of Regents, and a single officer to head the proposed Department of Health.

A 1951 opinion of the Florida Supreme Court, In re Advisory Opinion to the Governor, makes clear that these officers would be subject to suspension under article IV, section 7(a). In that case, Governor Fuller Warren asked the court whether he had authority to suspend the members of the constitutionally created Game and

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79. *Id.* at 187.
83. *Id.* art. IV, § 11.
84. 52 So. 2d 646 (Fla. 1951). In *In re Advisory Opinion to Governor*, 82 So. 608 (Fla. 1919), the supreme court stated that the Governor did not have authority to suspend the state health officer because, under the constitution of 1885, the Governor’s suspension power extended only to officers elected by the people or appointed by the Governor. Since the state health officer was neither (he was considered an employee of the State Board of Health), the Governor was without power to suspend him. Under the proposed revision creating article IV, § 11, the head of the Department of Health will be appointed by the Governor. Accordingly, he will be a state officer, subject to the Governor’s suspension power.
Fresh Water Fish Commission. The Governor noted that the constitution provided for membership on the commission but that the document made no reference to whether the members were subject to suspension and removal by action of the Governor and senate or impeachment by the legislature. The court advised Governor Warren that "[t]he power to suspend or recommend for removal, as the case may be, vested in the governor by the Constitution is the general rule and those subject to impeachment constitute the exception to the general rule. The exception, therefore, is limited to those expressly named in the Constitution." Since members of the commission were not specifically listed with those officers subject to impeachment, the court advised the Governor that they were subject to suspension under article IV. Similar reasoning would apply if the proposed revisions creating the new officers specified above are adopted. The absence of these officers in the list of those subject to impeachment under article III, section 17, authorizes the Governor to suspend them as state officers under article IV, section 7. Similarly, these officers would not be subject to the new self-suspension procedure in article IV, section 7, because that procedure is limited to officers subject to impeachment.

V. CONCLUSION

Viewed broadly, the changes proposed by the Florida Constitution Revision Commission would expand significantly the suspension power of the Governor. They are, for the most part, progressive and necessary changes. They would make uniform the procedure for suspending and removing state officers not subject to impeachment, county officers, municipal officers, school district officers, and officers of the militia not in the active service of the United States. They would offer an officer subject to impeachment the opportunity

85. 52 So. 2d at 648.
86. Id.
87. The proposed addition of § 1(g) to article IV presents an interesting problem in this regard. This provision would provide that the Governor shall act jointly with at least one other officer, as provided by law, in the performance of certain of the Governor's constitutionally designated duties. Since the office or offices are not specifically created in the constitution and one could argue that any elected office(s) created by statute would not be a statewide elected constitutional officer, the officer(s) envisioned in the proposal may not be subject to impeachment and thus could be subject to the Governor's suspension power. Such an interpretation, however, would lead to the absurd result of authorizing the Governor to suspend the officer who is supposed to provide a check on his duties. The better-reasoned interpretation is that any such officer would be a constitutional officer subject to removal only by impeachment by the legislature. However, if the legislature created a nonelected office, the officer would not be subject to impeachment because the revised impeachment provision by its terms applies only to statewide elected officers.
to disqualify himself from office temporarily if indicted for a felony. And, finally, the revision would authorize the Governor to disqualify from holding elective office a statewide officer who refused to disqualify himself, thus eliminating the apprehension and doubt the public feels when a high-ranking officer is charged with a serious crime.

All these changes further strengthen the executive power of the Governor. The people would be wise to adopt them.