

(citation omitted.) [Powell v. Fidelity and Deposit Co. of Maryland, 163 S.E. 239 (Ga. 1932)]

The aforementioned principles are founded upon logical and just considerations which serve to safeguard the public interest and have been summarized as follows:

The *de facto* doctrine was introduced into the law, as a matter of policy and necessity, to protect the interests of the public and individuals, where interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It was seen that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices, under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts, as to the public and third persons, on the ground that, as to them, although not officers *de jure*, they were officers in fact, whose acts public policy required should be considered valid. [State v. Carroll, 38 Conn. 449, 467.]

A situation analogous to the question presented in the instant case arose in *McCreary v. Major*, 22 A.2d 686 (Pa. 1941), where a city council appointed one of its members to a board formed by the council. Even though the appointment was held to be violative of public policy and void, the acts of the disputed appointee performed under color of authority were valid in respect to the public.

It should be noted also that, even though the deputy sheriff is ineligible to hold the office, his title to the office and his authority to act as a *de facto* officer cannot be attacked collaterally by third parties. *Treasure, Inc. v. State Beverage Comm.*, 238 So. 2d 580 (Fla. 1971). An office which is filled by an appointee who is exercising the functions of the office *de facto* and under color of title, may only be challenged in a court of law in a *quo warranto* proceeding. *Swoope v. City of New Smyrna*, 125 So. 371 (Fla. 1929); Fla. RCP 670.

Thus, even though the appointment by a sheriff of a relative to the position of deputy sheriff violates §116.111, F. S., the official acts performed by such deputy while serving under color of office are those of a *de facto* officer and, therefore, are valid. *State v. Murphy*, 13 So. 705 (Fla. 1893). "All official acts of a *de facto* officer are valid as if he is an officer *de jure* and no question can be raised as to them." *State v. Wisheart*, 28 So. 2d 589 (Fla. 1946).

073-348—September 17, 1973

SUNSHINE LAW

APPLICABILITY TO JUDICIAL NOMINATING COMMISSIONS

To: John J. Blair, State Attorney, Sarasota

Prepared by: Jan Dunn, Assistant Attorney General

QUESTION:

Are judicial nominating commissions subject to the Sunshine Law, §286.011, F. S.?

SUMMARY:

Judicial nominating commissions are not subject to the Sunshine Law.

Judicial nominating commissions are now official bodies set up under the Florida Constitution. Revised Art. V, §11. These commissions are charged with the duty and responsibility of recommending or "nominating" for gubernatorial appointment persons qualified and eligible to fill vacancies in judicial offices in this state.

The judicial nominating commissions are constitutional bodies falling under the executive branch of government. The legislature has no control over them. In *Times Publishing Co. v. Williams*, 222 So.2d 470 (2 D.C.A. Fla., 1969), the court stated that the Sunshine Law was intended to apply to "every board or commission of the state . . . over which [the legislature] has dominion and control." This would exclude judicial nominating commissions. "It has been held that the separation of powers provision [Art. II, §3, State Const.], prohibits the Legislature from applying the Sunshine Law to members of the Executive [or judicial] branch of the state government while exercising their constitutional duties in their capacities as members of that branch." Letter dated January 17, 1973.

I do not mean to say that the governor, the executive branch, or an administrative-executive body can never fall under the purview of the Sunshine Law. There may be circumstances where their exercise of duties given them by the legislature would bring an "executive" body under the Sunshine Law. For example, as stated in a letter dated January 17, 1973, ". . . when the Governor and Cabinet are sitting in their capacity as a board created by the Legislature, such as the Board of Trustees of the Internal Improvement Trust Fund or the Department of Natural Resources, they are subject to the Government in the Sunshine Law." Attorney General Opinion 072-400 says that a regulatory board created by the legislature although acting in an administrative or executive capacity is covered by the Sunshine Law. The facts that the commissions are created by the Constitution and are performing constitutional duties are controlling.

Your question is answered in the negative.

073-349—September 18, 1973

ELECTIONS

CITY COMMISSIONER MAY NOT BE CANDIDATE TO SUCCEED HIMSELF AT SAME ELECTION AT WHICH HIS RECALL IS SOUGHT

To: R. B. Fordyce, Mayor, Miami Springs

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

May a city councilman who is subject to recall qualify as a candidate to succeed himself, if recalled, and appear as a candidate on the ballot in the election wherein his recall is sought?

SUMMARY:

A city councilman who is subject to recall may not qualify as a candidate to succeed himself, if recalled, and appear as a candidate on the ballot in the election wherein his recall is sought.

While no decision on this point by an appellate court of this state has been found, the courts of other jurisdictions have answered this question in the negative. As stated in 63 Am. Jur.2d *Public Officers and Employees* §60, p. 667:

The cases have generally held that a removal from office bars the removed officer from an election or appointment to fill the vacancy for the