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**Robert J. Pleus, Jr. v. Charles J. Crist, Jr.**

**SC09-565**

>> PLEASE RISE.

>> LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT, PLEASE BE  
SEATED.

>> FINAL CASE ON THE COURT'S  
DOCKET IS PLEUS VERSUS CRIST.

>> I'M TALBOT D'ALEMBERTE  
REPRESENTING THE PETITIONER, WE  
BELIEVE THE CASE IS A RELATIVELY  
SIMPLE CASE AND DEALS WITH A  
VERY STRAIGHTFORWARD PROVISION  
OF THE FLORIDA CONSTITUTION AND  
YOU HAVE A REMARKABLY SHORT  
RECORD.

JUST 8 LETTERS, AND A LETTER  
ORIGINATING FROM JUDGE PLEUS,  
OFFERING HIS RESIGNATION, A VERY  
COURTEOUS RESPONSE FROM THE  
GOVERNOR, SAYING THE GOVERNOR  
APPRECIATED THE IMPORTANCE OF  
HAVING NO DISRUPTION IN THE  
PROCEEDINGS OF THE COURT, AND  
THANKING JUDGE PLEUS FOR SENDING  
IN THE EARLY LETTER.

WE THEN HAVE THE RESPONSE FROM

THE JNC WHICH PROVIDED THE LIST OF SIX NAMES, MAXIMUM NAMES ALLOWED UNDER THE CONSTITUTION, AND TO THE GOVERNOR, AND THE GOVERNOR'S RESPONSE TO THAT AND, DECEMBER 11, AN IMMEDIATE RESPONSE FROM THE JUDICIAL NOMINATING COMMISSION, SAYING THAT THEY WERE UNABLE TO OPEN UP THE LIST OF NAMES, THEY THOUGHT THEY HAD NO CONSTITUTIONAL POWER TO DO THAT.

>> IS THAT BECAUSE THERE WERE ALREADY SIX NAMES THAT WERE SUBMITTED, IN OTHER WORDS, IF THEY SUBMITTED FOUR NAMES WOULD THEY BE ABLE TO THEN SUBMIT TWO MORE.

>> IT WAS BECAUSE, BECAUSE THEY HAD LOOKED AT THE LIST OF 26 NAMES.

AND AS I UNDERSTAND THE POSITION IT TOOK IN CORRESPONDENCE, YOUR HONOR, IS THEY SAID THEY LOOKED THROUGH THE LIST OF 26 PEOPLE NAMES AN SELECTED SIX OF THEM, AND THEY MOSTLY COULD SELECT AND HAD NO AUTHORITY TO TAKE PEOPLE

OFF THE LIST, OR PUT ANYBODY'S

ANYBODY ELSE ON THE LIST.

>> THEY HADN'T SUBMITTED THE  
MAXIMUM AND WHEN IT HAPPENED, I  
WONDER --

>> IF IT -- NOT SUBMITTED THE  
MAXIMUM, THEY THEN AT LEAST  
COULD CONSIDER THE GOVERNOR'S  
REQUEST.

>> THIS IS MY QUESTION GENERALLY  
AND I UNDERSTAND YOUR LEGAL  
POSITION.

IF THE GOVERNOR OR ANYONE FINDS  
OUT THAT DURING THE PROCESS OF  
THE JNC PROCESS, THAT SOMETHING  
SUSPECT HAD OCCURRED, YOU KNOW,  
SOMETIMES WE GET THIS IN THE  
JURY DELIBERATIONS, WHICH IS  
THAT THE REMARK WAS MADE...

[INAUDIBLE] DIDN'T HAPPEN, THERE  
IS NO EVIDENCE OF THIS BUT  
HYPOTHETICALLY, WE ARE GOING TO  
KEEP ANY AFRICAN-AMERICAN OFF  
THE LIST, WE KNOW THE GOVERNOR  
WILL APPOINT AN AFRICAN-AMERICAN  
IF THEY OR ON THE LIST, IF THAT  
TYPE OF THING SURFACED, THERE IS  
ANYTHING THE GOVERNOR CAN DO?

YOUR THEORY ONCE THE NAMES GO UP

AND THERE ARE SIX QUALIFIED  
PEOPLE, THERE IS -- THAT'S THE  
END OF THE -- THAT'S THE END AND  
THE GOVERNOR HAS TO SELECT FROM  
ONE OF THOSE NAMES.

>> THE THEORY DOES NOT  
INCORPORATE YOUR HYPOTHETICAL.  
IF INDEED THERE WAS EVIDENCE OF  
CORRUPTION, I THINK THERE ARE A  
COUPLE OF PATHS AVAILABLE TO THE  
GOVERNOR.

FIRST OF ALL, THE RULES  
THEMSELVES, THE RULES FOR THE  
JUDICIAL NOMINATING COMMISSION  
CONTEMPLATE THE POSSIBILITY  
COMPLAINTS MIGHT BE MADE AGAINST  
MEMBERS OF THE NOMINATING  
COMMISSION AND YOU MAKE THE  
COMPLAINT TO THE CHAIR ABOUT A  
MEMBER OF THE NOMINATING  
COMMISSION AND YOU SUBMIT THE  
COMPLAINT TO THE GOVERNOR, THE  
GOVERNOR ALSO HAS A SUSPENSION  
AND REMOVAL POWER, UNDER ARTICLE  
IV, AND, JNC OFFICIALS ARE --  
STATE OFFICIALS AND SUBJECT TO  
THAT SUSPENSION REMOVAL POWER,  
SO --

>> WOULD THAT INSTIGATE SOME  
TYPE OF STAY ON THE PART OF THE  
GOVERNOR, NOT TO HAVE TO APPOINT  
SOMEONE NOMINATED BY A  
SUPPOSEDLY CORRUPT JNC.

>> IF THE COURT WAS DEALING WITH  
SOMETHING ARGUABLY CORRUPT OR A  
HIDDEN OF CORRUPTION, THERE ARE  
PLENTY OF WAYS THAT YOU CAN GET  
AT IT.

AMONG OTHER THINGS YOU CAN DENY  
THE WRIT OF MANDAMUS.

>> -- MANDAMUS.

>> HYPOTHETICALLY SPEAKING,  
LET'S JUST SAY THAT THE  
GOVERNOR'S OFFICE FINDS OUT THAT  
FOR WHATEVER REASON THE JNC IS  
NOT NOMINATING THE PEOPLE FOR  
WHATEVER REASON.

WHAT, UNDER THE SCHEMES OF THE  
PRESENTS STATUTORY AND ARTICLE 5  
PROVISIONS, WHAT POWER OR  
AUTHORITY DOES THE GOVERNOR HAVE  
TO SAME I'M NOT GOING TO APPOINT  
SOMEONE FROM THOSE PICKS.

>> YOUR HONOR, IF HE HAS THAT  
EVIDENCE, IF THERE IS ANY  
SUGGESTION OF IMPROPRIETY ON THE  
PART OF THE JNC, THE GOVERNOR

CAN SIMPLY RAISE THAT.

THE COURT WOULD NEVER ISSUE A  
MANDAMUS AGAINST A GOVERNOR WHO  
SAID I AM NOT GOING TO APPOINT  
WHERE I KNOW THERE IS SOME  
CORRUPTION.

BUT LET'S MAKE IT CLEAR ON THIS  
RECORD, THERE IS NO SUCH  
SUGGESTION --

>> BUT WHERE IS THAT IN -- IN  
OTHER WORDS, WHERE IS THAT IN  
THE CONSTITUTION?

I THOUGHT THE WAY THAT THIS WAS  
BEING ARGUED IS THAT ONCE THOSE  
SIX NAMES GO UP, THAT THE  
GOVERNOR HAS NO AUTHORITY OTHER  
THAN TO APPOINT FROM THE LIST.

>> YOUR HONOR, I THINK THAT IS  
RIGHT.

THE CONSTITUTION SAYS THE  
GOVERNOR SHALL APPOINTS --  
APPOINT FROM THE LIST, IF YOU  
DON'T ENFORCE THE "SHALL" LOOK  
WHERE IT TAKES US.

>> THAT IS WHAT I'M ASKING YOU,  
YOU WOULD BE SAYING AS LONG AS  
THERE IS NO EVIDENCE OF  
IMPROPRIETY AND CORRUPTION BUT

WHERE ARE YOU GETTING THAT READ INTO WHAT OTHERWISE SOUNDS LIKE A UNBENDING, CLEAR MANDATE, THAT SAYS "SHALL APPOINT FROM THAT LIST"?

>> THE COURT LAW, THE CASE LAW OF THIS COURT WHICH SAYS THAT YOU HAVE DISCRETION ABOUT WHETHER TO ISSUE A MANDAMUS OR NOT AND IF YOU HAVE THE ISSUE OF CORRUPTION IN FRONT OF YOU HAVE THE DISCRETION NOT TO ISSUE A MANDAMUS AND YOU DON'T HAVE ANY EVIDENCE OF CORRUPTION IN FRONT OF YOU, YOU DON'T HAVE A HINT.

>> WHERE WOULD IT --

>> IF THERE WERE ALLEGATIONS OF CORRUPTION, THAT WOULD BE AN ENTIRELY DIFFERENT CASE.

TO THE POINT YOU ARE MAKING AND WE DON'T NEED TO DECIDE HOW THAT WOULD BE DEALT WITH.

AND, THESE -- WOULDN'T IT BE IMPROPER FOR TO US DECIDE HOW A HYPOTHETICAL CASE SUCH AS THAT WOULD BE DEALT WITH.

>> YOUR HONOR IT SEEMS TO ME IT IS FANCIFUL TO PULL OUT THAT

HYPOTHETICAL AND SAY IT SHOULD  
CONTROL IN THE INSTANCE WHERE  
YOU HAVE A CLEAR CONSTITUTIONAL  
PROVISION THAT SAYS THE GOVERNOR  
SHALL APPOINTS AND THE GOVERNOR  
SHALL APPOINT WITHIN 60 DAYS,  
AND NOW TO INTRODUCE AN IDEA OF,  
IT MIGHT BE SOME FUTURE  
CORRUPTION -- IT IGNORES THE  
OTHER POSSIBILITY, EQUALLY  
HYPOTHETICAL, THAT --

>> DESPITE THE FACT THAT THAT  
CASE MIGHT NOT BE BEFORE US, YOU  
HAVE SAID THAT IF THERE IS SOME  
EVIDENCE OF CORRUPTION WE WOULD  
NOT ISSUE THE MANDAMUS.

BUT, WHERE WOULD THAT TAKE SINUS  
IT SEEMS TO ME, THAT WE WOULD  
STILL BE IN SORTED OF THE  
POSITION WE'RE IN NOW.

IF THE GOVERNOR HAS NOT MADE THE  
APPOINTMENT, WHAT HAPPENS?

EITHER IN THAT SITUATION, OR THE  
ONE THAT IS BEFORE US, IF THE  
GOVERNOR HAS NOT MADE THAT --

MADE THE APPOINTMENT WITHIN THE  
60 DAYS, WHERE ARE WE?

YOU KNOW --

>> YOUR HONOR, IT SEEMS TO ME  
THAT THAT IS THE CORE QUESTION  
YOU'VE GOT TO ASK NOT ONLY IN  
THE HYPOTHETICAL, BUT IN THE  
CASE THAT IS ACTUALLY BEFORE  
YOU.

>> EXACTLY, SO WHERE ARE WE INTO  
YOU'RE IN A SITUATION WHERE THIS  
COURT NEEDS TO SAY THAT THE  
CONSTITUTION REQUIRING THE  
GOVERNOR TO MAKE AN APPOINTMENT  
IS ENFORCEABLE.

IT IS ENFORCEABLE AGAINST THE  
GOVERNOR EVEN AFTER 60 DAYS,  
BECAUSE YOU DO NOT BRING OF WRIT  
OF MANDAMUS BEFORE THE 60 DAYS  
IS UP BECAUSE HE STILL HAS TIME  
TO MAKE THE APPOINTMENT AND IT  
IS ESSENTIALLY IF THE  
CONSTITUTIONAL PROVISION IS  
GOING TO MEAN ANYTHING AND IF WE  
ARE GOING TO HAVE JUDICIAL  
NOMINATING COMMISSIONS  
FUNCTIONING THE GOVERNOR MAY NOT  
SUBSTITUTE HIS JUDGMENT FOR THAT  
OF THE JNC.

>> ISN'T IT THAT IT IS A  
NONDISCRETIONARY DUTY, ISN'T  
THAT YOUR ARGUMENT, THAT UNDER

THE CONSTITUTION, HE DOES NOT  
HAVE THE DISCRETION, THE  
GOVERNOR, TO DO ANYTHING OTHER  
THAN SELECT FROM THE LIST OF THE  
NOMINEES?

AND THAT IS WHY I'M HAVING -- I  
UNDERSTAND THERE ARE -- THE  
OTHER ISSUE IS NOT BEFORE US BUT  
IF WE, YOU KNOW, ISSUE AN  
OPINION IN THE CASE, AND IT IS  
BASED ON SAYING THAT THERE IS NO  
DISCRETION UNDER THE  
CONSTITUTION, FOR THE GARDEN TO  
DO ANYTHING OTHER THAN MAKE A  
SELECTION FROM WITHIN THE SIX  
AND THE ONLY DISCRETION IS WHO  
AMONG THE SIX WERE, YOU KNOW,  
BEING SUBMITTED, THAT IS TRUE  
FOR ALL SITUATIONS.

IT SEEMS TO ME.

THE CONSTITUTION DOESN'T SAY,  
WELL, OKAY.

BUT IF WE FIND OUT THAT THERE  
WAS SOMETHING ELSE GOING ON, AND  
IN THE DELIBERATIONS, THE  
DISCRETION HAS CHANGED.

IT IS EITHER, NOT DISCRETIONARY,  
OR, THERE IS SOME DISCRETION,

AND THAT IS -- SO I'M, THAT IS  
WHY MY HYPOTHETICAL, THOUGH THEY  
MAY NOT PERTAIN EXACTLY TO THE  
CASE, THAT IS THE RULE WE HAVE  
TO ENUNCIATED, UNDER THE  
CONSTITUTION THE GOVERNOR HAS NO  
DISCRETION BUT TO MAKE A  
SELECTION FROM WITHIN THE  
NOMINEES THAT ARE SUBMITTED BY  
THE JUDICIAL NOMINATING  
COMMISSION, ISN'T THAT THE  
HOLDING YOU WOULD HAVE US --

>> I HAVE FULL CONFIDENCE THAT  
THE COURT CAN CRAFT AN OPINION  
WHICH SAYS THE GOVERNOR HAS A  
DUTY HERE, AND HAS A DUTY IN THE  
ABSENCE OF SOME SUGGESTION OF  
CORRUPTION.

>> COUNSEL, THAT --

>> AND DO YOU HAVE A TO -- DO  
YOU HAVE TO LOOK BEYOND YOUR OWN  
CASE LAW, RELATING TO THE  
ISSUANCE OF WRITS OF MANDAMUS TO  
FIND?

YOU NOW SAY --

>> ON THE HYPOTHETICAL, WOULDN'T  
WHAT HAS TO BE DONE IF THERE  
WERE TRULY SOME KIND OF UNLAWFUL  
ACTIVITY BY THE JNC, WOULDN'T

THERE HAVE TO BE A LEGAL ACTION  
BROUGHT AGAINST THE SHORT LIST  
PRODUCED FROM THAT, SOMEHOW,  
THAT TRIED TO INVALIDATE THAT  
LIST AND THEN THERE WOULD BE A  
SEPARATE LEGAL PROCEEDING AS TO  
WHAT HAPPENED AT THE JNC LEVEL  
AND THE LIST PRODUCED FROM THAT  
AND SEEMS LIKE A SEPARATE LEGAL  
PROCEEDING ADDRESSED TOWARDS  
THOSE ACTIVITIES.

THAT WOULD BE NOT INVOLVING THE  
GOVERNOR'S DISCRETION ABOUT THE  
SELECTION FROM THAT LIST.

>> -- JUSTICE POLSTON, THE  
QUESTIONS YOU A AND JUSTICE  
PARIENTE RAISE HERE, WHAT  
ALTERNATIVES DO YOU HAVE HERE IN  
THE HYPOTHETICAL, RECOGNIZING NO  
FACTS, NO FACTS AT ALL, EXIST,  
TO SUPPORT THE HYPOTHETICAL  
QUESTION.

BUT, IF THAT CAME ABOUT, WHAT  
ARE THE ALTERNATIVES FOR THE  
GOVERNOR?

THE GOVERNOR NOW HAS A  
SUSPENSION POWER UNDER ARTICLE  
IV.

THE GOVERNOR ALSO HAS THE POWER  
TO COME TO THIS COURT AND ASK  
FOR AN ADVISORY OPINION.

AND, THE GOVERNOR, OBVIOUSLY,  
COULD RESIST A MANDAMUS, SAYING,  
LOOK I HAVE EVIDENCE OF  
CORRUPTION IN THE SELECTION OF  
THESE PEOPLE, AND WE CANNOT DO  
IT.

AND, NOW, LOOK AT WHERE A  
CONTRARY RULING TAKES US.  
IF THE GOVERNOR IS ALLOWED TO  
SUBSTITUTE HIS JUDGMENT, THE  
JUDGMENT OF THE JUDICIAL  
NOMINATING COMMISSION, WHAT  
HAPPENS, IF WE HAVE A GOVERNOR  
WHO HAS NOT GOT THE KIND OF GOOD  
MOTIVATION OF THE GOVERNOR,  
LOOKING FOR DIVERSITY AND WHAT  
IF WE HAVE A MODERN DAY GEORGE  
WALLACE, AS A GOVERNOR, AND WE  
HAVE A NOMINATING COMMISSION  
THAT PUTS FORWARD ALL WOMEN  
CANDIDATES, ALL BLACK  
CANDIDATES, WHERE ARE WE?  
DON'T WE WANT THE NOMINATING  
COMMISSION SYSTEM TO FUNCTION?  
AND THIS POINT WE ALLOW, THE  
GOVERNOR TO SUBSTITUTE HIS

JUDGMENT, ON THE NOMINATING  
COMMISSION -- THEN WE DON'T HAVE  
A NOMINATING COMMISSION.

>> IN THE CASE THE LIST CAME OUT  
FROM THE JNC, DID THE GOVERNOR  
ACTUALLY DENY, NOT ACCEPTED THAT  
LIST.

>> HE WROTE A LETTER, I THINK ON  
DECEMBER 1ST, OF LAST YEAR, YOUR  
HONOR, SAYING, THAT HE REJECTED  
THE LIST AND ASKED THE JNC TO  
RECONSIDER.

>> WOULD YOU SEE A DIFFERENCE  
BETWEEN THE GOVERNOR SAYING  
WOULD YOU RECONSIDER THIS?  
AS COMPARED TO, I'M NOT  
ACCEPTING THIS LIST, OR  
REJECTION?

WOULD THAT BE A DISTINCTION  
THERE?

>> YOUR HONOR, I... I'M NOT SURE  
THERE IS A DISTINCTION.  
IT WILL DEPEND OBVIOUSLY ON WHAT  
THE JNC DECIDES TO DO, IF WE  
WALK THROUGH THAT HYPOTHETICAL.

>> AREN'T THERE QUESTIONS WHEN  
-- PARTICULARLY AN CASE WHERE  
THE LIST IS FULL AND THE NAMES

HAVE BEEN SUBMITTED AND DON'T  
THE PEOPLE ON THAT LIST, ONCE  
THIS LISTS ON BOARD HAVE SOME  
RIGHTS BASED ON THEIR PLACEMENT  
ON THE LIST, THEY CAN'T BE  
CAVALIERLY CAST OFF BECAUSE  
THERE IS A REQUEST FOR SOMEBODY  
DIFFERENT.

>> EXACTLY, YOUR HONOR, THINK  
ABOUT THE LIMIT OF THE JNC, YOU  
HAVE A FULL LIST OF 6 PEOPLE AND  
YOU HAVE MADE THE JUDGMENT, YOU  
HAVE ANNOUNCED THAT JUDGMENT,  
PUBLICLY, AND YOU HAVE CERTIFIED  
THAT TO THE GOVERNOR.

AND NOW, YOU ARE GOING TO TURN  
TO THE PEOPLE WHO HAVE BEEN ON  
THE LIST, AND SAY, I'M SORRY.  
WE ARE GOING TO TAKE YOU OFF THE  
LIST AND PUT ON SOMEBODY THE  
GOVERNOR WANTS US TO PUT ON.

>> BUT IT SEEMS TO ME, YOU  
EITHER HAVE THE GOVERNOR EITHER  
HAS A RIGHT TO ASK THE JNC TO  
RECONSIDER OR THEY DON'T.

I MEAN, YOU KNOW, THAT WHEN THE  
LIST WENT UP FOR THIS COURT, IT  
WANT A FULL LIST.

WASN'T SIX PEOPLE ON THE LIST,

AND THAT JNC DID IN FACT  
RECONSIDER AND ADDED A NAME, SO,  
DOES THE JNC HAVE THAT AUTHORITY  
OR DON'T THEY.

>> THEY HAVE IT UP TO SIX, YOUR  
HONOR AND ORIGINALLY, UNDER THE  
ORIGINAL 1972 CONSTITUTION, THEY  
HAD OPEN ENDED.

AND, INDEED, WE HAVE HAD  
INSTANCES WHERE WE HAVE HAD 7  
NOMINEES, AND, SOMEONE HAS BEEN  
SELECTED FROM LIST.

BUT, SINCE THE AMENDMENTS TO  
1972 PROVISIONS, WE NOW HAVE A  
LIMIT OF 6.

>> NO LESS THAN THREE, NO LESS  
THAN THREE.

>> NO LESS THAN THREE AND MONTH  
MORE THAN SIX.

>> AND THE -- OVER THE YEARS THE  
GOVERNOR HAS SEEMED TO HAVE  
WANTED ALL SIX BUT THAT IS NOT A  
-- BUT THAT SITUATION IS NOT  
BEFORE US.

>> THAT SITUATION, I THINK, IS  
AN IMPORTANT SITUATION, BUT, IS  
NOT THIS CASE.

THIS IS A FULL SLATE OF 6.

>> WILL YOU TALK TO ME ABOUT THE APPLICABILITY OF MANDATING THE... PURELY BEFORE MANDAMUS APPLIES THERE HAS TO BE A CLEAR LEGAL DUTY ON THE PART OF THE GOVERNOR.

THE GOVERNOR CONTENDS THAT ONCE THE 60 DAY PERIOD FOR HIM TO APPOINT SOMEONE EXPIRES, HE NO LONGER HAS AUTHORITY TO APPOINT ANYONE.

KIND OF LIKE THE STATUTE OF LIMITATIONS.

AND HE CLAIMS, CONTENDS THAT BECAUSE THERE ISN'T A CLEAR -- THAT PERIOD OF TIME... WHAT HE NEEDS TO DO AFTER THAT AND THEREFORE MANDAMUS DOES NOT APPLY.

HOW DO YOU RESPOND TO THAT.

>> I OBVIOUSLY READ THAT SECTION OF THE BRIEF AND I THOUGHT PERHAPS JUSTICE HELLER DRAFTED THAT PORTION OF THE BRIEF, DOESN'T THAT LEAVE YOU IN A CATCH 22 SITUATION, YOU CAN THE NOT BRING THE MANDAMUS BEFORE THE 60 DAYS APPLIES BECAUSE HE HAS 60 DAYS BEFORE THE

APPOINTMENT AND IF YOU ARE NOT  
ABLE TO BRING IT AFTER 60 DAYS,  
WHAT YOU ARE SAYING IS THAT  
THERE IS NO ENFORCEABILITY OF  
THE CONSTITUTIONAL PROVISION AND  
AGAIN, CHIEF JUSTICE'S QUESTION,  
WHERE DOES IT LEAVE US?

I THINK IT LEAVES US IN A  
SITUATION WHERE THE JNC SIMPLY  
CANNOT OPERATE.

>> IT SEEMS TO ME IT LEAVES US  
AT -- IT HAPPENED OVER AND OVER  
AGAIN AND WHERE WOULD WE BE.

>> AND IT COULD -- AND, UNLESS  
YOU ACT, YOU KNOW, IT CAN GO ON  
AND ON AND ON.

AND RIGHT PAST THE 60 DAYS AND  
START AGAIN AND THE GOVERNOR  
RE-- REFUSES AND IT HAS BEEN  
PLAYED OUT FIVE-AND-A-HALF  
MONTHS.

>> YOU ARE INTO YOUR REBUTTAL IF  
YOU WANT TO SAVE SOME TIME.

>> I'LL RESERVE THE REST OF MY  
TIME, THANK YOU.

>> MR. GONZALEZ.

>> MAY IT PLEASE THE COURT,  
JASON GONZALEZ ON BEHALF OF

GOVERNOR CHARLIE CRIST.

>> LET ME ASK YOU A QUESTION,

THAT -- THAT DOVETAILS INTO THE

LAST QUESTION TO

MR. D'ALEMBERTE.

IF WE IN FACT SAY THAT THE

GOVERNOR NOW HAS NO AUTHORITY TO

FILL THE VACANCY, WHERE DOES

THIS LEAVE US?

>> WELL, WE DON'T HAVE A CRYSTAL

BALL TO KNOW EVERYTHING THAT

WOULD PREPONDERANCE IF THE

PETITION IS DENIED.

WE WOULD HOPE AND EXPECT THE

JUDICIAL NOMINATING COMMISSION

WOULD START THE PROCESS OVER AND

CLEAR THE AIR, AND --

>> IF THE GOVERNOR IS NOT HAPPY,

WITH THE NEXT LIST OF PEOPLE

THAT CAME FROM THE JUDICIAL

NOMINATING COMMITTEE WE'D BE

RIGHT BACK IN THE SAME SITUATION

AND THAT IS WHY, I'M TROUBLED

THAT IF WE'D SAY THAT THE

GOVERNOR NOW HAS NO AUTHORITY,

TO FILL THE VACANCY.

THAT IS MY REAL ISSUE WITH THIS.

>> AND I THINK THAT IS A GOOD

QUESTION AN CONCERN AND I DON'T

THINK THE PROCESS WOULD REPEAT  
OVER AND OVER AGAIN AND WE  
CONTINUE IN THE STALEMATE, IS A  
REALISTIC POSSIBILITY AND THE  
REASON IS, IF YOU LOOK AT HOW  
THESE NOMINATIONS -- NOMINATION  
PROCESSES WORK THE CIRCUMSTANCES  
CHANGE AND THEY CHANGE FROM EACH  
PROCESS, TO THE NEXT, AND WE SEE  
JUST THIS WEEK, WE SAW A LIST OF  
APPLICANTS, FOR A SECOND CIRCUIT  
VACANCY AND THERE WAS ANOTHER  
SECOND CIRCUIT VACANCY STILL --  
FILLED LAST MONTH AND YOU SAW AN  
ENTIRELY DIFFERENT, VERY  
DIFFERENT NOMINEE.

>> THE ISSUE THAT I'M CONCERNED  
WITH, HERE, AND OBVIOUSLY, THE  
-- THOSE THAT HAVE ARGUED  
AGAINST THE GOVERNOR'S POSITION,  
IS THAT IF WE ASSUME GOOD FAITH  
ON WHAT THE GOVERNOR WANTED TO  
ACCOMPLISH, BUT, IF THE GOVERNOR  
CAN SIMPLY SAY I'M NOT GOING TO  
ACCEPT ANY OF THE SIX NOMINEES  
BECAUSE THERE ARE OTHERS THAT I  
WOULD RATHER HAVE --  
DID NOT ACT AND NOTHING ELSE CAN

HAPPEN.

TO ME AND TO MOST THAT HAVE  
COMMENTED, IT COMPLETELY  
UNDERMINED THE JUDICIAL  
NOMINATING COMMISSION PROCESS,  
IT COMPLETELY EVISCERATES THE  
CONSTITUTION LINE PROVISION THAT  
CONSTITUTES THIS.

THIS WAS NOT A DIVERSE SLATE.  
THAT IS WHY HE REJECTED IT.  
CORRUPTION, FRIDAY, 6 PEOPLES  
NOMINATED WERE NOT ALL QUALIFIED  
PEOPLE.

WHAT KIND OF CLEARING THE AIR  
ARE YOU TALKING ABOUT AND WHERE  
IS THAT SUPPOSED TO BE, WHERE IS  
THAT DISCRETION THE GOVERNOR  
HAS, ESTABLISHING IT IN THIS  
FORUM, I DIDN'T LIKE THIS LIST,  
GO ON ANOTHER LIST.

>> YOUR QUESTION CALL FOR THE  
EVALUATION OF SOME FACTS THAT  
ARE NOT IN FRONT OF THIS COURT  
BECAUSE THE PETITIONER BROUGHT  
THIS ACTION DIRECTLY IN THE  
SUPREME COURT, IS A MANDAMUS  
ACTION --

[TALKING OVER EACH OTHER]

>> WHEN YOU RAISE WAS A BEAGLE

RESPONSE BECAUSE HE DIDN'T ACT  
WITHIN 60 DAYS, WE CAN'T COMPEL  
IT.

YOU DIDN'T RAISE AS A RESPONSE,  
THE REASON MANDAMUS SHOULDN'T BE  
ISSUED IN THIS CASE IS BECAUSE  
IF IT IS NOT A DECLARATORY  
JUDGMENT ACTION, WE WOULD NOT  
SHOW THAT THERE IS IMPROPRIETY  
OR CORRUPTION IN THE PROCESS,  
MUCH AKIN TO THE JURORS  
DELIBERATING AND THERE WAS  
RACIAL BIAS, YOU CAN HAVE THAT  
EXAMINED.

DO YOU NEED A FULL AIRING TO  
SHOW THAT THERE WAS IMPROPRIETY,  
IMPROPER MOTIVE IN THE WAY THAT  
THESE COMMISSIONERS CONDUCTED  
THEIR RESPONSIBILITIES,  
CONDUCTED THE PROCESS?

>> LET ME BE CLEAR ABOUT WHAT WE  
ARE TALKING ABOUT, THE GOVERNOR  
RECEIVED A LIST OF NOMINEES FROM  
THIS NOMINATING COMMISSION AND  
SOMETIME THEREAFTER, INFORMATION  
WAS BROUGHT TO HIS ATTENTION  
THAT RAISED A SERIOUS CONCERN AS  
TO WHETHER OR NOT ALL FLORIDIANS

HAD EQUAL ACCESS TO THIS  
PROCESS.

I UNDERSTAND THERE ARE ANY  
NUMBER OF ALTERNATIVE THINGS THE  
GOVERNOR MAY HAVE DONE, MORE  
EXTREME ACTIONS, HE EXERCISED  
GREAT RESTRAINT, HE DECIDED TO  
GIVE THE JUDICIAL NOMINATING  
COMMISSION A SECOND CHANCE THAT  
AND HE GAVE THEM A THIRD CHANCE  
AND AT ANY TIME, THEY CAN STILL  
RESOLVE THIS IMMEDIATELY AND GO  
BACK AND START THE PROCESS AND  
REMOVE ANY DOUBT AND REMOVE THAT  
CLOUD THAT IS HANGING OVER THE  
PROCESS.

>> I HAVE A REAL CONCERN, WHAT  
YOU ARE DESCRIBING IS A PROCESS  
THE JUDICIAL NOMINATING  
COMMISSIONS ARE SHAM  
ORGANIZATIONS AND THE GOVERNOR,  
THE SITTING GOVERNOR, NOT HAVING  
THE GOOD MOTIVES THAN YOUR  
GOVERNOR HAS, COULD RUN THIS  
SYSTEM ANYWAY THAT HE OR SHE MAY  
DESIRE.

I AM HAVING DIFFICULTY BECAUSE  
THE CONSTITUTION SAYS SHALL.

THIS COURT COULD TAKE THE

POSITION THAT WE WILL NOT WILL  
ON DEATH PENALTY CASES, WE WILL  
JUST LET THEM STACKED UP.

THE CONSTITUTIONAL PROVISIONS  
SAYS WE SHALL HEAR THOSE CASES.

WHAT PLACE IS THE GOVERNOR IN A  
POSITION BEYOND OR ABOVE THE  
CONSTITUTION OR THE PEOPLE OF  
FLORIDA WHEN WE HAVE NO FACTS  
ALLEGED?

WHEN YOU TALK ABOUT THESE THINGS  
BY INNUENDO, THERE ARE NO FACTS  
FOR US WITH REGARD TO  
IMPROPRIETIES OR ILLEGALITY OR  
ANYTHING LIKE THAT.

I AM HAVING A HARD TIME  
UNDERSTANDING HOW YOU CAN  
INTERPRET THE SHALL, THIS WILL  
LAST FOREVER.

HAVING THAT KIND OF POWER.

>> I DON'T THINK THE COURT  
SHOULD BE TOO CONCERNED.

85 DIGITAL APPOINTMENTS WERE  
MADE, HE HAD THE ABILITY UNDER  
THESE UNUSUAL CIRCUMSTANCES TO  
ASK TO START AGAIN.

HE NEVER ABUSED HIS POWER AND  
THERE IS NO BASIS --

>> IT IS A CONSTITUTIONAL  
PROVISION.

IT IS NOT SOMETHING WE CAN GO  
ALONG WITH IF WE DISREGARD IT IF  
WE DON'T.

>> YOUR HONOR RAISES A GOOD  
POINT.

THE PETITIONER HAS SAID THAT  
THIS LANGUAGE IN ARTICLE 5,  
SECTION 11, IS MANDATORY  
LANGUAGE AND WE HAVE AGREED IN  
OUR RESPONSE, THAT IS A  
REASONABLE CONSTRUCTION,  
MANDATORY LANGUAGE.

BECAUSE OF THAT, THE GOVERNOR  
DOES NOT HAVE A CLEAR LEGAL DUTY  
TO -- FROM THIS LIST AT THIS  
TIME.

IT HAS BEEN 195 DAYS SINCE THE  
NOMINATIONS WERE MADE.

>> THAT ARGUMENT TO ME SEEMS  
TERRIBLY SPEECHLESS, I CAN  
DISREGARD THE CONSTITUTION,  
BECAUSE THE DISREGARDED, I STILL  
DON'T HAVE TO FOLLOW IT.

>> UNDER THESE CIRCUMSTANCES,  
THE GOVERNOR, IN ORDER TO  
PROTECT THE INTEGRITY OF THE  
PROCESS AND CLEAR THE AIR, WE

START OVER.

>> THIS IS WHERE --

>> THIS IS THE PROBLEM.

WHAT ARE THE CIRCUMSTANCES YOU  
ARE ALLUDING TO?

THAT HAS NOT COME BEFORE US.

>> THE CIRCUMSTANCES, THAT IS A  
VERY GOOD QUESTION THAT IS BEST  
ADDRESSED AND EVALUATED IN A  
DECLARATORY JUDGMENT, WHICH IS  
AN ALTERNATIVE REMEDY THAT IS  
AVAILABLE TO THE PETITIONER,  
THIS COURT HAS BEEN VERY CLEAR  
THAT IF YOU HAVE OTHER AVAILABLE  
REMEDIES, YOU CANNOT BE ENTITLED  
TO A WRIT OF MANDAMUS.

THERE'S NOT A RECORD DEVELOPED  
FOR THE SCOURGE --

>> YOU ALLEGED IN YOUR BRIEF  
WHAT WOULD NEED TO BE DEVELOPED,  
IN A DECLARATORY JUDGMENT  
ACTION.

WHAT IS IT WE NEED TO DEVELOP  
THAT WE DON'T HAVE IN THIS  
MANDAMUS PETITION AND THE  
RESPONSE?

>> WE ARE NOT THERE YET.

SO I DON'T KNOW EVERYTHING THAT

WOULD BE DEVELOPED.

THERE HAS NOT BEEN AN EVALUATION  
OF THOSE FACTS --

>> A DECLARATORY JUDGMENT  
ACTION, THE PETITIONERS HERE  
WOULD BE ASKING THE COURT TO  
DECLARE THEIR RIGHTS, THE  
GOVERNOR WOULD THEN HAVE TO DO  
SOME KIND OF ANSWER, WHAT WOULD  
THAT ANSWER BE?

WHAT WOULD HE ANSWER AND SAY  
THAT WE DON'T HAVE BEFORE US?  
THAT IS WHAT WE ARE GETTING AT  
HERE.

>> I THINK, YOUR HONOR, ONE OF  
THE REASONS MANDAMUS IS AND  
UNAVAILABLE REMEDY FOR THIS  
PETITIONER IS BECAUSE THE  
PETITIONER CANNOT MEET ANY OF  
THESE REQUIREMENTS.

HE HAS TO HAVE A CLEAR LEGAL  
RIGHT TO A WRIT OF MANDAMUS.

>> CLEARLY LEGAL RIGHT WOULD BE  
THAT THE GOVERNOR HAS, UNDER THE  
CONSTITUTION, 60 DAYS TO PICK  
FROM THAT JUDICIAL NOMINATING  
LIST AND HE DIDN'T DO IT.

>> THIS PETITIONER CANNOT HAVE A  
CLEAR LEGAL RIGHT TO A WRIT OF

MANDAMUS TO COMPEL THE GOVERNOR  
TO EXERCISE HIS APPOINTMENT  
POWERS BECAUSE THIS COURT, IN  
CONSTRUING ITS GENERAL POWER,  
THE ISSUES OF MANDAMUS, SAID  
THERE REASONABLE LIMITATIONS TO  
THAT POWER.

>> I HAVE PROBLEMS WITH THE IDEA  
THAT BECAUSE 60 DAYS ELAPSED, HE  
DIDN'T FOLLOW WHAT HE WAS  
SUPPOSED TO DO IN 60 DAYS, NO  
ISSUE OF A WRIT OF MANDAMUS.

I THINK IT GOES TO ME TO HOW  
THERE'S CONCERN ABOUT THE  
JUDICIAL NOMINATING, HOW IN A  
LAWFUL WAY, THE GOVERNOR IS  
PERMITTED TO EXERCISE SOME  
AUTHORITY OVER IT.

FROM YOUR RESEARCH, YOU FOUND  
WHAT MAY NOT BE REPORTED, AS  
COUNSEL TO THE GOVERNOR.

HAVE YOU FOUND SITUATION WHERE  
PREVIOUS GOVERNORS HAVE REJECTED  
LIST BECAUSE OF CONCERN ABOUT  
IMPROPRIETY DURING THE PROCESS?

I KNOW THERE WAS SOMETHING IN  
THE JUDICIAL CIRCUIT MANY TIMES  
-- MANY YEARS AGO.

WHETHER THERE ARE THOSE KINDS OF  
DISCRETIONS, WITH THIS EXECUTIVE  
PROCESS AND THAT IS WHAT YOU ARE  
RELYING ON AND IT WOULD HAVE TO  
BE FULLY ARTICULATED.

WHY THE APPOINTMENT WAS NOT  
BEING MADE, I DIDN'T LIKE THIS  
LIST, I WANT ANOTHER LIST.

THE GOVERNORS HAVE REJECTED THE  
JUDICIAL NOMINATING COMMISSION.

THE PROCESS STARTED IN THE 70S.

WHEN FACED WITH CONCERNS WITH  
THE PROPRIETY OF THE  
DELIBERATION.

>> I DON'T BELIEVE THE COURTS  
HAVE ADDRESSED THIS TYPE OF  
SITUATION AND BECAUSE OF THAT  
THERE COULD NOT HAVE BEEN AN  
ESTABLISHED LEGAL RIGHT FOR THIS  
PETITIONER TO BRING THIS  
PETITION AND BRING A WRIT OF  
MANDAMUS.

THERE MAYBE ALTERNATIVE  
CONSTRUCTIONS.

AS FOR THAT QUESTION, I WOULD  
SAY THE BEST CASE FOR THE SCORE  
TO LOOK AT.

WHERE THE GOVERNOR HAS A  
MANDATORY, TO THE APPELLATE

COURT JUDGES, HE REFUSED TO MAKE  
THOSE APPOINTMENTS.

THERE WERE DISCRETIONARY POWERS  
INVOLVED, EVEN WHEN REQUIRED TO  
IT MAKE THE APPOINTMENT WHEN  
CHOOSING BETWEEN INDIVIDUALS.

A VERY SUBJECTIVE EVALUATION,  
THEIR DISCRETIONARY, MANDAMUS,  
THIS DOES NOT MEET ANY OF THE  
REQUIREMENTS FOR A WRIT OF  
MANDAMUS.

THIS DOES NOT EXTEND AGAINST THE  
GOVERNOR.

THEY CAN'T POSSIBLY HAVE A CLEAR  
LEGAL RIGHT TO IT OF MANDAMUS  
WHEN THIS COURT --

>> WITH A DISCUSSION REGARD TO  
EXECUTIVE POWERS.

>> ALAN VERSES --

>> THAT IS THE MANDAMUS  
JURISDICTION, THE JUDICIAL  
BRANCH CANNOT ORDER HOW THE  
DISCRETION IS EXERCISED.

UNDER A PROVISION, SHALL DO  
SOMETHING.

I KNOW OF NO LAW THAT SAYS  
THERE'S NOT ANOTHER DECISION  
THAT AND TIRPITZ A CLEAR

SENTENCE.

YOU ARE SAYING THE FIRST TIME IT  
IS CONSIDERED.

>> THE FIRST B C A SAID THE  
FIRST TIME A COURT IS  
INTERPRETING A PROVISION OF THE  
CONSTITUTION, IF THERE ARE OTHER  
REASONABLE CONSTRUCTION THIS IN  
THAT PROVISION, IT CANNOT BE  
RIGHT.

>> IT VERY CLEARLY STATES SHALL  
APPOINT.

>> I RESPECTFULLY AGREE, HE HAS  
A CLEAR DUTY.

AFTER THAT LIST IS EXPIRED, I  
DON'T KNOW THAT WE CAN SAY THAT  
-- IT IS NOT CERTAIN AND CLEAR  
THAT HE COULD MAKE A VALID  
APPOINTMENT.

>> EXCEPT THAT THE PROBLEM IS  
THEY CAN'T BRING ANY THING,  
UNTIL 60 DAYS, YOU SAY THE 60  
DAYS EXPIRES, SO NOW HE CAN'T  
MAKE THE APPOINTMENT THAT WOULD  
BE THIS RATE THE JUDICIAL  
NOMINATING PROCESS, REPUBLICAN  
OR DEMOCRAT GOVERNOR, JUST  
DIDN'T WANT TO MAKE THE  
APPOINTMENTS, THE GOVERNOR HAD

SOME PEOPLE THAT HE WANTED, THEY  
DID GET ON THE LIST BECAUSE THEY  
INCOMPETENT.

I AM NOT GOING TO DO ANYTHING.  
THAT SEEMS TO BE COMPLETELY  
CONTRARY TO THE EXPRESS LANGUAGE  
OF THE CONSTITUTION.

I STILL GO BACK TO THE QUESTION  
AND ASK YOU, THE GOVERNOR HAD A  
MOTIVE, YOU SAID THAT THERE WERE  
IMPROPRIETIES, I DON'T KNOW IF  
THAT WAS YOUR LANGUAGE, CONCERNS  
WERE BROUGHT TO HIS ATTENTION  
AND HE THOUGHT THAT THE AIR  
NEEDED TO BE CLEARED, BUT  
PRESUMABLY HE COULD HAVE, ONCE  
IT WAS CLEAR B.J. NC WASN'T  
GOING TO SUBMIT A LIST, HE HAD  
THE AUTHORITY, DIDN'T NEED TO  
BRING SOME ACTION, BRING AN  
INVESTIGATION TO DO SOMETHING TO  
GET THE AIR CLEARED?

>> I AM SURE THERE ARE OTHER  
THINGS THE GOVERNOR COULD HAVE  
DONE.

>> HAS YOUR RESEARCH SHOW WHAT  
THOSE WOULD HAVE BEEN?

>> THERE IS NO PRECEDENT, NO

ROAD MAP AS TO THE ONE WAY THIS SHOULD BE DEALT WITH.

WHAT THE GOVERNOR DID IS A MEASURED APPROACH, AND GAVE THE OPPORTUNITY TO START IT, THAT WOULD RESOLVE THIS AND WE DON'T BELIEVE THE DECLARATORY JUDGMENT REMEDY IS AVAILABLE AND THE PETITION SHOULD BE DENIED, WE DON'T THINK IT SHOULD COME TO THAT.

>> SEEMS TO ME THAT WOULD BE THE WORST PRECEDENT, THE AFFIDAVIT, OR SOMETHING IN THE RECORD, THAT A GOVERNOR COULD JUST SAY I DON'T WANT THIS LIST, GO START AGAIN.

SEEMS TO ME THAT THAT WOULD BE THE WORST KIND OF PRECEDENT FOR US TO ESTABLISH.

>> WE HAVE TO ASK, ARE WE TO BELIEVE THAT THE CONSTITUTION OF THE STATE OF FLORIDA SOMEHOW REQUIRES THE GOVERNOR TO SIT IDLY BY WHEN THERE IS A SERIOUS QUESTION LIKE THIS THAT HAS BEEN RAISED?

>> THAT IS WHY I ASKED, I AM SURE THERE MUST BE, AND MR.

D'ALEMBERTE SAID THERE ARE,  
INVESTIGATIONS OF THE J N C  
WITHIN THEIR OWN RULES.

>> THERE'S NO ABILITY OTHER THAN  
THE COURSE OF ACTION THE  
GOVERNOR HAS TAKEN TO START  
OVER.

I DON'T KNOW IF THAT ANSWERS  
YOUR QUESTION, BUT THERE'S NO  
PRECEDENT FOR A ROAD MAP OTHER  
THAN WHAT THE GOVERNOR HAS DONE.  
IF YOU LOOK AT --

>> LET ME ASK YOU THIS.

WHAT IS IT THAT YOU THINK -- I  
KNOW THAT YOU THINK THIS COURT  
SHOULD DENY THE MANDAMUS, BUT IF  
THIS COURT DENIED THE MANDAMUS,  
WHAT THEN?

WHERE WOULD WE BE?

>> WE WOULD HOPE THE JUDICIAL  
NOMINATING COMMISSION WAS THAT  
THE PROCESS OVER.

>> I'M CONCERNED WITH HOW THE  
GOVERNOR HAS THE AUTHORITY HAS  
THE AUTHORITY TO START THE  
PROCESS.

IF THE GOVERNOR DOES NOT WANT  
THIS LIST FROM THE JUDICIAL

NOMINATING COMMITTEE, THE  
GOVERNOR HAS THE AUTHORITY TO  
ASK THE JUDICIAL NOMINATING  
COMMITTEE TO START OVER.

>> ARTICLE 5, SECTION 11 C, DOES  
NOT ADDRESS THIS.

IT IS A CONSTITUTIONAL  
PROVISION.

IT DOESN'T ADDRESS EVERY  
SCENARIO.

BUT THE CIRCUMSTANCES, THESE  
UNIQUE CIRCUMSTANCES REQUIRE THE  
GOVERNOR NOT TO ENGAGE, AND TAKE  
PART IN DISAPPOINTMENT WHEN  
THERE IS THIS SERIOUS CONCERN.

>> THESE ARE UNIQUE  
CIRCUMSTANCES, SERIOUS CONCERNS,  
AND YET YOU HAVE NOT ARTICULATED  
YOUR RESPONSE -- YOUR RESPONSE  
DOES NOT ARTICULATE THE BASIS  
FOR THE SERIOUS CONCERN.

IN WANTING RACIAL DIVERSITY,  
THAT IS A WONDERFUL GOAL, THERE  
BEING RACIAL DISCRIMINATION IN  
THE PROCESS WOULD BE A SEPARATE  
THING.

ALL I UNDERSTOOD IS THE GOVERNOR  
WAS CONCERNED OVER THE LACK OF  
RACIAL DIVERSITY, NOT THAT HE

WAS ALLEGING INTENTIONAL  
DISCRIMINATORY ACTIONS ON THE  
PART OF THIS JNC.

THAT IS THE SITUATION WE HAVE AS  
OPPOSED TO JUST NOT LIKING THE  
LIST OF NOMINEES.

>> THE JUDICIAL NOMINATING  
COMMISSION MEMBERS ARE PRIVY TO  
ALL OF THE FACT INFORMATION THAT  
WENT ON IN THIS PROCESS, THERE  
HAS BEEN NO DISCOVERY, THERE IS  
NO WAY FOR THE COURT TO EVALUATE  
THOSE FACTS AT THIS LEVEL.

THAT IS BECAUSE THE PETITIONERS  
SHOWS THIS REMEDY, WHICH IS  
INAPPROPRIATE, AND HE CAN'T MEET  
ANY OF THE REQUIREMENTS, HE  
DOESN'T HAVE A CLEAR LEGAL  
RIGHT, IN THE OTHER CASES WE  
HAVE QUOTED FROM LIKE BISBEE V.  
DREW, HE HAS OTHER AVAILABLE  
REMEDIES.

HE FAILS IN BOTH RESPECTS.  
THAT IS NOT TO SAY THAT THERE  
ARE NOT OTHER REMEDIES, WE HAVE  
MENTIONED DECLARATORY JUDGMENT,  
OTHER CHECKS AND BALANCES ON THE  
EXECUTIVE BRANCH, BUT THIS

PARTICULAR REMEDY IS AN  
EXTREMELY LIMITED JURISDICTION,  
AND EVERYONE HAS SAID, INCLUDING  
THE PETITIONER, THE GOVERNOR'S  
MOTIVE HAD BEEN PURE IN THIS  
MATTER, HE ACTED WITH GOOD  
INTENTIONS, THIS IS A  
DISCRETIONARY JURISDICTION EVEN  
IF YOU SOMEHOW FOUND THAT THEY  
MET THE REQUIREMENTS.  
THIS WOULD BE PRECISELY THE KIND  
OF CASE WHERE YOU WOULD EXERCISE  
JUDICIAL RESTRAINT AND NOT GRANT  
THE WRIT OF MANDAMUS.

>> THANK YOU, MR. GONZALEZ.

ORBITAL -- REBUTTAL?

>> I HAVE 7 QUICK COMMENTS.

WE HOPE THE COURT WILL LOOK  
CLOSELY AT THE FEBRUARY 13TH,  
2009, LETTER FROM CHIEF JUDGE  
PALMER, WHICH DESCRIBES THE  
PROBLEMS THE COURT IS HAVING, TO  
THE GOVERNOR INQUIRING ABOUT  
WHEN THE APPOINTMENT WOULD BE  
MADE.

IT SHOWS THE CLEAR AND IMMEDIATE  
DESTRUCTION OF A FUNCTIONAL  
GOVERNMENT WHICH IS SIGNIFICANT.  
COUNCIL HAS SUGGESTED THAT WE

ABANDON THIS PROCEEDING OR DENY  
OUR PETITION AND THE GO BACK TO  
TRIAL COURT AND START ALL OVER  
AGAIN.

AS YOU LOOK AT JUDGE OLIVER'S  
LETTER, WE LOOK AT WHAT HAS  
ALREADY OCCURRED AND THINK ABOUT  
THE COLLAPSE OF TIME THAT  
OCCURRED IN PROPRIETARY  
JUDGMENT.

MY BIG PROBLEM WITH PROPRIETARY  
JUDGMENT IS WHAT DO I DO WHEN I  
GO TO PLEAD THE CASE FOR THE  
JUDGMENT AS I READ THE STATUTE,  
IT REQUIRES THAT I EXPRESSED  
DOUBT.

AM I SUPPOSED TO SAY I HAVE  
DOUBT ABOUT WHAT SHALL MEANS?  
HOW TO I PLEAD DOUBT IF I'M  
SEEKING A DECLARATORY JUDGMENT?

>> MR. GONZALEZ SAID THERE WAS  
NO PRECEDENT.

WHAT ARE THE OPTIONS AVAILABLE  
TO THE GOVERNOR, FACED WITH A  
COMPLAINT, AND DOCUMENTATION OF  
INTENTIONAL DISCRIMINATION?

>> IF I HAVE COMPLAINED AND  
DOCUMENTATION, NEITHER OF WHICH

YOU HAVE IN THIS CASE, THE GOVERNOR HAS THE AUTHORITY OVER LAW ENFORCEMENT TO CONDUCT ANY INVESTIGATION THAT HE WANTS TO CONDUCT, HE HAS THE AUTHORITY UNDER ARTICLE IV TO SUSPEND JUDICIAL NOMINATING COMMISSIONERS, AND THERE'S A 40 UNDER THE RULES OF THE JNCS THEMSELVES TO CONDUCT AN INVESTIGATION.

>> SUSPEND THE ENTIRE JUDICIAL NOMINATING COMMISSION AND DO WHAT?

>> THE POINT THAT THE GOVERNOR DECIDES TO SEND TO THE NOMINATING COMMISSIONERS, THEY ARE OBVIOUSLY SUBJECT TO SOME ACTION BY THE SENATE.

BUT THE GOVERNOR GETS TO APPOINT.

THE GOVERNOR HAS A SUBSTANTIAL DISCRETION IN THE CIRCUMSTANCES WE ARE DESCRIBING, THE GOVERNOR GETS TO APPOINT THE JNC MEMBERS ORIGINALLY.

IN SUBSTANTIAL NUMBERS.

THE GOVERNOR GETS TO SELECT FROM THE FINAL LIST.

THE ONLY SHALLS THAT APPLY TO  
HIM I SHALL APPOINT WITHIN 60  
DAYS.

EVERYTHING ELSE, THE GOVERNOR  
HAS DISCRETION, WE ARE NOT  
ASKING THIS COURT TO IMPROVE ON  
THAT DISCRETION.

I WANT TO PICK UP ON JUSTICE  
LEWIS'S QUESTION, A NICE  
PARALLEL HERE WITH THE KIND OF  
MANDAMUS HE DESCRIBED.

WE FREQUENTLY ISSUE MANDAMUS TO  
LOWER COURTS AND TELL THEM TO  
MAKE A DECISION.

DISTRICT COURTS OF APPEAL SOME  
TIME, GIVE IT TO TRIAL LAWYERS,  
THEY HAVE NOT MADE A DECISION,  
YOU DON'T TELL THE JUDGE HOW THE  
JUDGE HAS TO DECIDE, YOU TELL  
THEM THEY MUST DECIDE.

ALL WE ARE SUGGESTING IN THIS  
POSITION IS THE CONSTITUTION  
SAYS THEY SHALL MAKE AN  
APPOINTMENT AND REQUIRE THAT THE  
CONSTITUTION --

>> MR. GONZALEZ MENTIONED THE  
RELIEF THE GOVERNOR WOULD PREFER  
IS TO GO BACK TO THE COMMISSION

TO HAVE HIM START THE PROCESS

AGAIN.

ARTICLE V SECTION 11 SAYS

NOMINATIONS FOR THE OFFICE SHALL

BE MADE WITHIN A 30 DAYS FROM

THE OCCURRENCE OF VACANCY.

SEEMS TO ME THAT'S AN AREA

CANNOT BE DUPLICATED.

IT CANNOT BE DUPLICATED.

THE VACANCY HAS BEEN ANNOUNCED,

30 DAYS HAS EXPIRED.

IS IT POSSIBLE TO DO THAT?

>> THE CONSTITUTION DOES NOT

ALLOW THE GOVERNOR TO DO WHAT

THE GOVERNOR SUGGESTED.

IF THE GOVERNOR GETS TO EXTEND

THE TIME OF THE PROCEEDINGS --

>> 30 DAYS.

>> THAT WAS DONE IN THIS CASE.

BUT NOW THE GOVERNOR'S THE TORY

TO EXTEND THE TIME TO JNC IS

OVER.

INITIALLY JNC RELIED ON SOME LAW

INCLUDING THE OPINION OF THE

ATTORNEY-GENERAL SAYING THEY

HAVE NO AUTHORITY TO WITHDRAW

THE NOMINEES ONCE THEY WERE

SUBMITTED.

SO WE SUBMIT THAT JNC WAS TRYING

TO FOLLOW THE LAW.

WE HOPE THE COURT WILL ISSUE A

WRIT OF MANDAMUS.

WE HAVE EVERY CONFIDENCE THE

COURT BESIDES THIS QUESTION AND

THERE'S A CLEAR DUTY AND THE

CONSTITUTION AS WE BELIEVE THERE

IS TO COME TO COMPLIANCE AND WE

WILL MAKE AN APPOINTMENT TO THE

PEOPLE WHO HAVE BEEN NOMINATED.

>> THANK YOU FOR YOUR ARGUMENT.

THE COURT IS NOW IN RECESS.