RETURN OF THE KINGS: A GLANCE AT *BUSH* V. *SCHIAVO*

*BY GEOFFREY W. HYMANS**

The practice group for which I volunteer is the "Federalism and Separation of Powers" practice group. Federalism cases, with their emphasis on exploring the constitutional limits on the power of the federal government, sometimes receive far more attention than cases involving separation of powers. Last year, then, may have been an exception. At least one high profile Supreme Court case this year had serious separation of powers implications,[1] and a state Supreme Court case that received a huge amount of media attention actually contained the most direct showdown between separate branches in several years.

The latter case was *Bush v. Schiavo*.[2] That case made national headlines because of the underlying facts. In 1990, Theresa Schiavo suffered a cardiac arrest as a result of a potassium imbalance. She has never regained consciousness, and has been fed through tubes. In 1998, Theresa's husband Michael petitioned the guardianship court in Florida to authorize "the termination of life-prolonging procedures."[3] Theresa Schiavo's parents opposed the petition.

Using the clear and convincing evidence standard, the trial court determined and the appellate court affirmed that Theresa Schiavo was in a "'permanent or persistent vegetative state'" and that she would "'wish to permit a natural death process to take its course.'"[4] The decision was affirmed by the intermediate Florida appellate court, and the Florida Supreme Court denied review.

The parents of Terry Schiavo sought relief from judgment by instituting additional, separate proceedings attacking the judgment. Yet after these separate proceedings had run their course, the intermediate Florida appellate court affirmed the denial of the motion for relief from judgment, the Florida Supreme Court denied review, and Theresa's feeding tube was removed on October 15, 2003.

The next step forms the crux of the separation of powers issue. On October 21, 2003, the Florida Legislature enacted a law which purported to allow the Governor to "issue a one-time stay to prevent the withholding of nutrition and hydration from a patient"–*i.e.*, from Theresa.[5] The law had a 15-*day* sunset clause.[6] The Governor promptly issued a stay through an executive order.

Thus, the Florida legislature delegated to the Governor a claimed power to "stay" the execution of a final judgment from the Florida courts. This is the most direct challenge by one branch of government to another that we have seen in many years.[7] While couched as a law of general application, the timing of the law's passage, along with its short effective duration, allowed the Florida Supreme Court to determine that the act of the legislature was aimed at legislatively overturning a specific decision of the court. A far more interesting scenario might have developed had the legislature had a bit more courage in their delegation convictions, and purported to provide the Governor the claimed power on a permanent basis.

After reviewing the need for "'strict'"[8] separation of powers, the court announced the categorical rule that would guide its decision: "'[H]aving achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy'"[9] and "'purely judicial acts . . . are not subject to review as to their accuracy by the Governor.'"[10] The court held that the legislation "effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary."[11] The court added:

> When the prescribed procedures are followed according to our rules of court and the governing statutes, a final judgment is issued, and all post-judgment procedures are followed, it is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. That is precisely what occurred here and for that reason the Act is unconstitutional *as applied* to Theresa Schiavo.[12]

The "as applied" language is interesting. It leaves open the question of whether an arguably broader encroachment on the court's power to render final judgments—a similar law passed without a 15-day sunset clause—might survive review. This commentator suspects that would not be the case, but the court is at least attempting to limit its holding to the facts of the present case.

Another interesting aspect of the law at issue was that the Governor retained authority to lift the stay, and upon issuance of the stay, the circuit court was required to appoint a guardian ad litem to "make recommendations to the Governor and the court."[13] This ongoing involvement of the Governor in the determination of whether to terminate life-prolonging procedures was not analyzed by the court because the law's central focus, the ability to enter a stay, was found to violate separation of powers. But the continuing interference of the executive branch in what most courts would view as core judicial functions would almost certainly not have been welcomed.

The Florida Supreme Court buttressed its holding by also deciding that the act constituted an unconstitutional delegation of legislative authority to the Governor.[14] Of course, the court apparently did not see any irony in examining the delegation of a "power" that the court just held the legislature did not possess.

The *Bush v. Schiavo* case represents the most direct challenge to the power of a court by a legislature since *City*

of Boerne v. Flores.[15] And just as the Supreme Court defended what it viewed as its constitutional role to interpret the Constitution, so the Florida Supreme Court defended the finality of its decisions, and those of the lower courts, reached through application of the judicial power. Following the lead of the United States Supreme Court, state Supreme Courts will not hesitate to defend their institutional "turf" when challenged by other branches. As Walter Dellinger has put it, "non-deference"[16] has become the primary characteristic marking the U.S. Supreme Court, and we can expect that to become—or as some might say, remain—the primary characteristic of state Supreme Courts when they address separation of powers issues regarding the judicial branch.

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Footnotes

[1] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), addressed and decided a separation of powers issue. Other cases sidestepped such concerns. *See, e.g.*, Rasul v. Bush, 124 S. Ct. 2686, 2699-01 (2004) (Kennedy, J., concurring).

[2] 885 So. 2d 321 (Fla. 2004).

[3] Schindler v. Schiavo, 780 So. 2d 176, 178 (Fla. Dist. Ct. App. 2001).

[4] *Schiavo*, 885 So. 2d at 325 (quoting *Schindler*, 780 So. 2d at 177, 180).

[5] *Id.* at 328 (quoting 2003 FLA. LAWS ch. 418, § 1(2)).

[6] 2003 FLA. LAWS ch. 418, § 1(2).

[7] Some might place *Guinn v. Nevada*, 71 P.3d 1269 (2003), in a similar category. But even that case, in which the Nevada Supreme Court held that a "substantive" provision of the Nevada State Constitution trumped the "procedural" requirement for a two-thirds vote of the legislature in order to raise taxes, involved the interpretation of specific sections of the document, rather than a direct challenge to legislative authority by the court.

[8] *Schiavo*, 885 So. 2d at 329 (quoting State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000)).

[9] *Id.* at 330 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19, 227 (1995)).

[10] *Id.* (quoting *In re* Advisory Opinion to the Governor, 213 So. 2d 716, 720 (Fla. 1968)).

[11] *Id.* at 331.

[12] *Id.* at 332 (emphasis added).

[13] 2003 FLA. LAWS ch. 418, § 1(3).

[14] *Schiavo*, 885 So. 2d at 332.

[15] 117 S. Ct. 2157 (1997).

[16] Walter Dellinger, Remarks at the American Constitution Society Supreme Court Roundup at the National Press Club, Washington, D.C. 3 (July 1, 2003); *available at* http://www.acslaw.org/pdf/SCOTUStrans.pdf.