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BY \_\_\_\_\_  
SC06-668

April 19, 2006

Honorable Barbara Pariente  
Chief Justice and  
the Justices of the Supreme Court of Florida  
Tallahassee, Florida

Dear Justices:

Pursuant to Article IV, Section 1(c), Florida Constitution, I hereby request your opinion on two questions involving the interpretation of my executive powers and duties. The first question pertains to a vacancy created by the intended resignation of a county sheriff, a state constitutional officer to whom Article IV, section 1(f), Florida Constitution applies. The second question, involving a judicial vacancy by resignation of a circuit court judge, requires interpretation of my appointment power under Article V, section 11(b), Florida Constitution.

### *County Sheriff*

1. The county sheriff is serving a four year term of office to expire on January 6, 2009.
2. I have been advised that he will tender his resignation in May of 2006, effective in October 2006.
3. A question has arisen, in reading Article IV, section 1(f), and Article X, section 3, Florida Constitution, as to whether the vacancy created by this voluntary resignation should be filled by appointment or election.
4. Article X, section 3, provides:

Vacancy in office shall occur upon the creation of an office, upon death, upon removal from office, *or resignation of the incumbent* or the incumbent's succession to another office, unexplained absence for sixty consecutive days, or failure to maintain the residence required when elected or appointed, and upon failure of one elected or appointed to office to qualify within thirty days from the commencement of the term.



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This provision addresses the question of when a vacancy occurs. A plain reading leads to the conclusion that a vacancy occurs upon the tendering of the resignation, even if the resignation becomes effective at a future date.

5. Article IV, section (1)(f), provides:

When not otherwise provided for in this constitution, the governor shall fill by appointment any vacancy in state or county office for the remainder of the term of an appointive office, and for the remainder of the term of an elective office if less than twenty-eight months, otherwise until the first Tuesday after the first Monday following the next general election.

This provision addresses the question of whether the vacancy is to be filled by election or gubernatorial appointment. An elected office is filled by gubernatorial appointment only if the remainder of the term is less than twenty-eight months.

6. If the language “remainder of the term,” of Article IV, section (1)(f), is interpreted to require a calculation from the date the resignation is tendered, creating a vacancy under Article X, section III, then the remainder of the terms is greater than twenty-eight months, requiring an election. *See In re Advisory Opinion to the Governor*, 600 So. 2d 460, 462 (Fla. 1992)(concluding that a judicial vacancy occurs when resignation is submitted and accepted by governor).
7. If, however, “remainder of the term” is interpreted to require a calculation from the effective date of the resignation, *i.e.*, when the officer physically vacates the office, then the remainder of the term is less than twenty-eight months, requiring that the office be filled by gubernatorial appointment. *See In re Advisory Opinion to the Governor*, 301 So. 2d 4, 6 (Fla. 1974)(“We recognize that a vacancy does not occur until the date upon which the office actually becomes vacant.”)(citing *In re Advisory Opinion to the Governor*, 158 So. 441, 442 (Fla. 1934)).
8. I am uncertain as to the proper date from which to calculate the “remainder of the term” provision in Article IV, section 1(f) of the Florida Constitution.

*Circuit Judge*

9. Circuit Judge Gene R. Stephenson is serving a six year term of office, to expire on January 2, 2007.
10. Judge Stephenson tendered his resignation on April 5, 2006, with a future effective date of May 31, 2006.
11. On April 14, 2006, I accepted the resignation and simultaneously notified the Judicial Nominating Commission, Eighteenth Circuit, of the vacancy, giving the Commission until June 14, 2006, to complete its work.
12. Had Judge Stephenson not tendered his resignation, his seat would have been up in this year's election.
13. The statutory qualifying period for Judge Stephenson's seat is from May 8 through May 12, 2006. The Department of State sent out the statutory notice of general election for this vacancy on April 12, 2006.
14. A question has arisen, in reading Article V, section 11(b), as to whether the vacancy created by Judge Stephenson's voluntary resignation should be filled by appointment or election.
15. Again, Article X, section 3, states that "[v]acancy in office shall occur upon... resignation of the incumbent." As noted in the first question, this Court has previously opined under Article V that when a letter of resignation to be effective at a later date is received and accepted by the governor, a vacancy in that office occurs and actuates the process to fill it. *See Advisory Opinion to the Governor*, 600 So. 2d at 462.
16. Article V, section 11(b), provides:

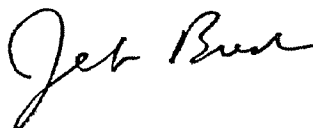
The governor shall fill each vacancy on a circuit court or on a county court, wherein the judges are elected by a majority vote of the electors, by appointing for a term ending on the first Tuesday after the first Monday in January of the year following the next primary and general election occurring at least one year after the date of appointment, one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission. An election shall be held to fill that judicial office for the term of the office beginning at the end of the appointed term.

17. If the vacancy is filled by appointment, under this constitutional provision, the appointee will probably be appointed by August 2006 and serve a term ending on the first Tuesday after the first Monday in January, 2009.
18. If the vacancy is filled by the election conducted in November of this year, then Judge Stephenson's judicial office will remain vacant until January 2, 2007.
19. "In *Pincket v. Harris*, 765 So. 2d 284 (Fla. 1st DCA 2000), the Court held that the vacancy created by the resignation of a circuit judge [submitted June 19, 2000 and] effective June 20, 2000, from a judgeship for which an election was scheduled that year should nonetheless be filled by appointment. In *Pincket*, the statutory qualifying period was scheduled for a period after the vacancy had occurred." *In re Advisory Opinion to the Governor re: Appointment or Election of Judges*, 824 So. 2d 132, 134 (Fla. 2002).
20. In the 2002 *Advisory Opinion*, the Court held that a vacancy created by involuntary retirement by order of the Court of a circuit judge on May 30, 2002, effective immediately, from a judgeship for which an election was scheduled that year should be filled by election. 824 So. 2d at 136. The statutory qualifying period had occurred prior to the court ordering the judge's mandatory retirement and three candidates had qualified.
21. In neither *Pincket* nor the 2002 *Advisory Opinion* were the vacancies effective at a future date, occurring after the statutory qualifying period. The statutory qualifying period in *Pincket* did not occur until after the vacancy and effective date, which was the next day. Conversely, in the 2002 *Advisory Opinion*, the statutory qualifying period occurred prior to the vacancy and effective date, which were one and the same.
22. A question arises with Judge Stephenson's judgeship because the statutory qualifying period occurs between the vacancy and its effective date.
23. Because the resignation was made *in futuro* and the qualifying period occurs prior to the effective date of the resignation, but after the vacancy is created, it is unclear as to whether the Judge Stephenson's vacancy should be filled by appointment or election.

The Honorable Barbara Pariente  
Chief Justice and  
the Justices of the Florida Supreme Court  
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In light of the foregoing circumstances, the impending qualifying period, and the approaching election, I respectfully request an expedited opinion of the Justices of the Supreme Court as to both questions presented.

Sincerely,



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THOMAS D. HALL

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CLERK, SUPREME COURT

BY \_\_\_\_\_