

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC 06-1184

IN RE: ADVISORY OPINION TO
 GOVERNOR RE: JUDICIAL VACANCY
 DUE TO MANDATORY RETIREMENT

BRIEF OF GOVERNOR JEB BUSH
INTERESTED PARTY

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PRELIMINARY STATEMENT

This brief is filed by the undersigned counsel on behalf of Jeb Bush, Governor of the State of Florida, whose substantial interests are affected by the decision. *See* Fla. R. App. P. 9.500(b)(2); *cf. In re Advisory Opinion to the Governor: Request of June 29, 1979*, 374 So. 2d 959 (Fla. 1979)(England, J., noting that Governor did not elect to brief or argue to the Court his position after requesting an advisory opinion). Governor Bush has the constitutional duty to ask the Judicial Nominating Commission to commence filling an actual vacancy on the First District Court of Appeal and to choose an appointee to fill Judge Richard W. Ervin, III's seat.

STATEMENT OF THE CASE AND FACTS

Judge Richard W. Ervin, III, a judge of the First District Court of Appeal, was born on October 16, 1934. On that day in 2004, Judge Ervin turned seventy years old. Article V, section 8 of the Florida Constitution provides that “[n]o judge or justice shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served.” Consequently, Judge Ervin was ineligible and did not seek to qualify for retention by the May 12, 2006, deadline.

On June 20, 2006, the Governor requested an advisory opinion. Two days later, on June 22, 2006, Judge Ervin wrote to the Governor, giving notice of his retirement at the end of the judge’s term on January 1, 2007, the day before the end of the Governor’s term. *See* attached Exhibit A; *see also* § 100.041(1), Fla. Stat. The letter did not state that Judge Ervin was resigning, a point which he has separately emphasized in conversation.

When a vacancy in judicial office occurs, a judicial nominating commission has up to sixty days to nominate three to six persons for appointment by the Governor. Art. V, § 11(c), Fla. Const. It is unusual for district court of appeal judicial nominating commissions to nominate persons by the initial thirty-day deadline, because of the lead time required for

advertising the vacancy, receiving applications, investigating the applicants, noticing the interviews, conducting the interviews, and submitting nominees to the Governor. Accordingly, the Governor routinely grants a thirty-day extension.

Once the judicial nominating commission has performed its function, the Governor has another sixty days in which to make an appointment. Art. V, § 11(c), Fla. Const. The Governor personally interviews all district court of appeal judicial nominees. In addition, staff conduct extensive due diligence, such as reviewing the applications; contacting references; consulting with the Bar, judiciary, and community leaders; and requesting full criminal, civil, and credit background checks. This process, scheduling the personal interview with the Governor and his staff, and the appointment decision consume all or most of the sixty-day constitutionally allowed period. This work occurs alongside the many competing obligations of the Governor and his staff.¹ Thus, most judicial appointments take nearly the maximum four months permitted by law.

¹ The demands associated with a transition to a new administration, makes it even more likely that a Governor's appointment will take the full sixty-day constitutional period.

SUMMARY OF THE ARGUMENT

An actual, constitutional vacancy occurred upon Judge Richard W. Ervin, III's failure to qualify for office on May 12, 2006. Under Article V, section 11(c), Florida Constitution, this vacancy requires the Governor to request the Judicial Nominating Commission for the First District Court of Appeal to begin filling it. Interpreting the vacancy to occur only at the end of Judge Ervin's term would leave an unreasonable vacancy on the First District Court of Appeal from January to April 2007, thwarting this Court's precedent holding that the intent of the framers of Article V was to avoid or minimize the time that vacancies exist on the bench. Precedent and Sections 8, 10(a) and 11(c) of Article V of the Florida Constitution can be afforded full meaning and import by interpreting the effective vacancy provision of Section 10(a) to mean that a judge who fails to qualify for retention serves until the end of his term, and the actual vacancy provision of Section 11(c) to mean that the successor judge must be available to assume office as soon as possible after the sitting judge physically vacates it.

ARGUMENT

POINT ONE

Failure to qualify for retention because of the constitutional mandatory retirement age for judges creates an actual vacancy in office, enabling the Governor to effectuate the process to fill it.

The question presented by the request for an advisory opinion is when does a constitutional vacancy occur effectuating the process to fill it under the Florida Constitution: upon the failure of a judge subject to retention to qualify for retention because of mandatory retirement or at the expiration of the term being served? Precedent and Sections 8, 10(a) and 11(c) of Article V of the Florida Constitution can be afforded full meaning and import by interpreting the effective vacancy provision of Section 10(a) to mean that a judge who fails to qualify for retention serves until the end of his term, and the actual vacancy provision of Section 11(c) to mean that the successor judge must be available to assume office as soon as possible after the sitting judge physically vacates it.

Article V, section 8, Florida Constitution, requires mandatory retirement of judges and justices upon reaching the age of seventy, except upon temporary assignment or to complete a term, one-half of which has already been served. Article V, section 11(c), Florida Constitution, states that within sixty days of the occurrence of a vacancy, a judicial nominating

committee must make nominations and within another 60 days, the Governor must make a judicial appointment. Article V, section 10(a) provides:

Any justice or judge may qualify for retention by a vote of the electors in the general election next preceding the expiration of the justice's or judge's term in the manner prescribed by law. *If a justice or judge is ineligible or fails to qualify for retention, a vacancy shall exist in that office upon the expiration of the term being served by the justice or judge.*

(Emphasis added).

This Court's precedent has long recognized a distinction between "actual" and "effective" vacancies within the meaning of Article V. *See In re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 461-62 (Fla. 1992). An "actual" vacancy is implied at law and occurs, for instance, when a judge submits a resignation letter to the Governor that is accepted, even if the resignation is effective in the future. *See id. at 462; see also In re Advisory Opinion to the Governor re: Sheriff and Judicial Vacancies due to Resignations*, 928 So. 2d 1218, 1220 (Fla. 2006). An "effective" vacancy happens when a judge is no longer on the bench; i.e., when the judge physically vacates his seat on the effective date of a judge's resignation. *See In re Advisory Opinion*, 600 So.2d at 461-62.

This Court has repeatedly held that the actual vacancy, not effective vacancy, triggers the process to fill a judicial seat. *See In re Advisory*

Opinion, 928 So. 2d at 1220 (referencing *In re Advisory Opinion*, 600 So. 2d at 462) (“When a letter of resignation to be effective at a later date is received and accepted by you, a vacancy in that office occurs and actuates the process to fill it.”)); *Judicial Nominating Comm’n, Ninth Cir. v. Graham*, 424 So.2d 10, 12 (Fla. 1982) (“[I]f an irrevocable communication of an impending vacancy is presented to the Governor at the time of or after the first primary ... the governor is authorized to use the merit selection process....”); *Spector v. Glisson*, 305 So. 2d 777, 784 (Fla. 1975) (resignation letter made in the context of a mandatory retirement created a vacancy that could be filled by available elective machinery).

Underlying this Court’s reasoning for holding that actual vacancies trigger the judicial nominating process is that “[v]acancies in office are to be avoided whenever possible.” 600 So. 2d at 462:

We are confident that the framers of article V intended that the nominating and appointment process would be conducted in such a way as to avoid or at least minimize the time that vacancies exist. Judges are encouraged to and do submit their resignations, to be effective in the future, at a time that permits the process to proceed in an orderly manner and keep the position filled.

Id. Thus, the rule recognized in Florida is that when an officer resigns in futuro, the office is not available until the effective date of the vacancy, consistent with Article V, section 10(a) of the Florida Constitution, but the Governor may grant a commission to an appointed successor to be effective

on this date once an actual vacancy exists, consistent with Article V, section 11(c) of the Florida Constitution. *See In re Advisory Opinion to the Governor*, 158 So. 441, 442 (Fla. 1934); *see also In re Advisory Opinion*, 600 So. 2d at 463 n.4 (recognizing that precedent nullified the rule that a vacancy does not occur until the date upon which the office actually becomes vacant).

When a judge is ineligible or fails to qualify for retention or is not retained in office, an actual vacancy arises as surely as by operation of a letter of resignation accepted by the Governor. This Court recognized as much in *Spector* by holding that a justice's failure to qualify for retention due to mandatory retirement triggered the process to fill his seat, albeit via election no longer applicable to justices or appellate judges.² 305 So. 2d at 784. According to this Court, the replacement machinery is invoked "in situations as here where the vacancy must mandatorily (sic) occur and it is shown reasonably in advance ... that the provision for compulsory

² The people have provided in Article V, section 11(a) of the Florida Constitution that appellate judges are subject to retention at least one year after the date of appointment, *accord In re Advisory Opinion*, 600 So.2d at 463 n.1, so the outcome in this case is unaffected by any competing interest in elections including the date of any qualifying period. *Spector* is distinguishable on this basis. *See Pincket v. Harris*, 765 So. 2d 284 (Fla. 1st DCA 2000) ("*Spector*, as limited by *In re Advisory Opinion to the Governor*, [600 So. 2d at 462,] does not limit the Governor's power to fill an interim vacancy.").

retirement in our constitution will require a judge to retire by virtue of attaining age 70.”³ 305 So. 2d at 783. Because Judge Ervin is subject to the same mandatory retirement as Justice Ervin, it was legally impossible for him to qualify for merit retention. A constitutional vacancy occurred upon the failure of Judge Ervin to qualify for retention by May 12, 2006, enabling the Governor to effectuate the process to fill it.

Holding that an actual constitutional vacancy is created upon a judge’s failure to qualify for retention or failure to be retained serves the public’s need to fill judicial vacancies in a timely manner. *In re Advisory Opinion to Governor*, 600 So.2d at 462. In this case, it would allow the Governor to appoint a successor to a retiring district judge who would take office immediately after the conclusion of the retiring judge’s term. *See* Art. V, § 11(a), Fla. Const. Thus, there will be no prolonged vacancy on the district court of appeal.

³ In *Spector*, Justice Ervin submitted a resignation letter setting forth an effective vacancy date, but authority at the time enabling him to withdraw his resignation letter proves the holding did not turn on it. *See, e.g., In re Advisory Opinion*, 158 So. at 441. The Court found an actual vacancy because his mandatory retirement made it legally impossible for him to withdraw the letter. *Spector*, 305 So. 2d at 780. The letter was important only insofar as Justice Ervin set a sooner date for his effective vacancy than was required by law. *Id.* at 784. Likewise in this case, Judge Ervin might have chosen an effective vacancy date sooner than the legal default, the end of his term, but he had no liberty to choose a later actual vacancy date than May 12, 2006.

If a judge's failure to qualify for retention does not create an actual vacancy, but only the effective vacancy does, the intent of the framers of Article V to avoid or minimize the time that vacancies exist would be thwarted. *See In re Advisory Opinion*, 600 So. 2d at 462. In this event, the nominations could not be made until thirty to sixty days after the effective vacancy, and it would be as late as May 2007, before a successor could be appointed, leaving a four month gap on the bench. The vacancy in other instances involving judges subject to election could be even longer. Therefore, this Court should find that a constitutional vacancy has occurred, effectuating the process to fill it, upon the failure of Judge Ervin to qualify for retention because of mandatory retirement.

CONCLUSION

Based on the foregoing arguments and authorities, Governor Jeb Bush respectfully submits that the Court should advise that a constitutional vacancy presently exists for Judge Richard W. Ervin, III's seat, enabling the Governor to notify the Judicial Nominating Commission for the First District Court of Appeal to begin the process to fill it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this brief was furnished to: Heidi Hughes, Chief of Staff & General Counsel, Department of State, R.A. Gray Building, 500 S. Bronough Street, Tallahassee, Florida 32399-0250; Honorable Sue Cobb, Secretary, Department of State, R.A. Gray Building, 500 S. Bronough Street, Tallahassee, Florida 32399-0250; Honorable Charles J. Kahn, Jr., Chief Judge, First District Court of Appeal, 301 South Martin Luther King Blvd., Tallahassee, Florida 32399; Honorable Charles J. Crist, Jr., Attorney General, Office of Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050; Honorable Richard W. Ervin, III, First District Court of Appeal, 301 South Martin Luther King Blvd., Tallahassee, Florida 32399; and Jason Brent Gonzalez, Chair, Judicial Nominating Commission, First Appellate District, Ausley & McMullen, 227 South Calhoun Street, Tallahassee, Florida 32301, by facsimile and United States Mail, on this ____ day of July, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Petition is typed in Times New Roman 14-point font and complies with Florida Rule of Appellate Procedure 9.100(1).

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