

June 20, 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 a question involving the interpretation of my executive powers and duties. The question pertains to my constitutional power to appoint judges under Article V of the Florida Constitution.

Judge Richard 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.” Judge Ervin’s term ends on January 1, 2007. Because of mandatory retirement, he was ineligible for retention and did not seek to qualify for retention during the qualifying period, May 8-12, 2006.

Article V, section 10 provides that “[i]f 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.” Article V, section 11(a) provides for the Governor to fill a vacancy in a judicial office to which election for retention applies.

Although I understand that a physical vacancy occurs upon the termination of the term, a question has arisen as to when a constitutional vacancy occurs, effectuating the process to fill it. If a constitutional vacancy occurs upon the failure of a judge to qualify for retention, the judicial nominations commission must submit nominations to me within 30 days from the occurrence of the vacancy, unless extended by me for another 30 days. Art. V, sec. 11(c), Fla. Const. In such instance, I will be able to appoint a successor who can take office immediately after the conclusion of Judge Ervin’s term, and there will be no prolonged vacancy on the First District Court of Appeal. If a constitutional vacancy occurs only at the expiration of his term, the nominations may not be made until thirty to sixty days thereafter, and it may be as late as May 2007 before a successor is appointed, leaving a four month vacancy on the court.

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Therefore, I respectfully request an opinion of the Justices of the Supreme Court as to the question of when a vacancy occurs resulting from the mandatory retirement of the judge who is not eligible for retention.

Sincerely,

Jeb Bush

cc:

The Honorable Charles J. Kahn, Jr., Chief Judge, First District Court of Appeal
The Honorable Richard Ervin, III, First District Court of Appeal
Jason Gonzalez, Esq., Chair, Judicial Nominating Commission, First Appellate District