Honorable R. Fred Lewis, Chief Justice
and the Justices of the Florida Supreme Court
Tallahassee, Florida

Re:  Advisory Opinion to the Governor Re: Judicial Vacancy Due to Mandatory Retirement
Case No.: SC 06-1184
Comments of the Judicial Nominating Commission for the First District Court of Appeal

Dear Justices:

The Judicial Nominating Commission for the First District Court of Appeal is charged with the responsibility of submitting nominations to the Governor to fill vacancies on the First DCA. It is crucial to the Commission, in fulfilling that duty, to have a “bright line” for establishing when the deadline for submitting nominees begins to run. Thus, the Commission has an interest in the request for advisory opinion submitted to this Honorable Court by the Governor.

Judge Richard W. Ervin, a judge on the First District Court of Appeal, attained the age of 70 years on October 16, 2004. Judge Ervin’s current term on the First DCA ends on January 1, 2007. Pursuant to Article V, Section 8 of the Florida Constitution, Judge Ervin is ineligible to serve an additional term on the Court, and did not qualify for merit retention election by the May 12, 2006, deadline.

When, as in the instant situation, a judge is ineligible to qualify for retention, “a vacancy shall exist in that office upon the expiration of the term being served” by the judge. Article V, Section 10(a), Fla. Const. Whenever a vacancy occurs in a judicial office to which election for retention applies, the Governor is to fill the vacancy by appointment. Article V, Section 11(a), Fla. Const. The appointment is to be made from a list of persons nominated by the appropriate Judicial Nominating Commission. Id. The Judicial Nominating Commission initiates the nominating process “whenever a vacancy occurs in a judicial office” within the jurisdiction of that Judicial Nominating Commission. Uniform Rules of Procedure for District Courts of Appeal Judicial Nominating Commissions, Section 1. The nominations shall be made within 30...
days from the occurrence of the vacancy unless the period is extended by the Governor for a time not to exceed 30 days. Article V, Section 11(c), Fla. Const. The Governor shall make the appointment within 60 days after the nominations have been certified to the Governor. Id. Thus, the appointment process may, and often does, take four months from the time a “vacancy occurs” until the Governor makes a selection.

On June 20, 2006, the Governor requested that the Court give an advisory opinion as to when a vacancy occurs that will result in the JNC’s initiation of the nomination process. Does a vacancy occur immediately following the expiration of Judge Ervin’s term or at some earlier date?

Article X, Section 3 of the Florida Constitution provides as follows:

**SECTION 3. Vacancy in office.** -- Vacancy in office shall occur upon the creation of an office, upon the death, 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 30 days from the commencement of the term.

If these provisions are interpreted to mean that the Judicial Nominating Commission must not begin the nomination process until the term has actually expired, then the office will necessarily remain unfilled for up to four months after the expiration of the term being served, while the nomination and appointment process is completed.

If the provisions do not mandate that the Judicial Nominating Commission wait until the expiration of the term being served, the Judicial Nominating Commission is left with the question of when to initiate the nominating process. We have known since Judge Ervin’s last retention election that he would not serve past January 1, 2007, and that a vacancy would occur no later than that date. Judge Ervin is ineligible to qualify for the upcoming merit retention election, and therefore, he did not qualify by the May 12, 2006, deadline. Judge Ervin advised the Governor by letter dated June 22, 2006, (Attachment “A”) that he would serve the entire remainder of his term. The general election, which includes merit retention elections for eligible judges, will be held on November 7, 2006.

The issue before this Court is not precisely addressed in the text of the Florida Constitution or Statutes. The process of judicial appointments and merit retention for the Florida Supreme Court and District Courts of Appeal was not instituted until 1976. Prior to that time, Supreme Court Justices and District Court Judges were elected. The commentary to the Florida Constitution, Article V, Section 10, informs us that if a judge subject to a retention vote receives a “no” answer to the retention question posed on the ballot, then “a vacancy is created and it will
be filled through the nominating commission process.” See Commentary, Article V, Section 10, Fla. Const., 1976 Committee Substitute for Senate Joint Resolutions 49 and 81. The Commentary seems to indicate that a Judicial Nominating Commission is to begin its work immediately after the “no” retention vote. Given that the same section of the Constitution provides that the judge stays in office until the expiration of his or her term, the appointment process can be at least underway, if not completed, before the position becomes vacant.

At least two prior opinions of this Court seem to direct us to begin the nomination process as soon as possible in order to ensure that judicial positions are not unfilled during the pendency of the process. In In Re: Advisory Opinion to the Governor (Judicial Vacancies), No. 79694, 600 So.2d 460 (1992), the Supreme Court considered vacancies occurring due to resignations from office:

> Vacancies in office are to be avoided whenever possible. 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. at 462. The Court followed its earlier decision in Spector v. Glisson, 305 So.2d 777 (1974), when it advised that the appointment process is actuated when a letter of resignation to be effective at a later date is received and accepted by the Governor. Id. It should be noted that both Spector and the Court’s 1992 Advisory Opinion on judicial vacancies related to elected court positions.

The Judicial Nominating Commission for the First District Court of Appeal does not advocate in favor of any particular outcome in this matter. The Commission’s only interest is in fulfilling its constitutional and statutory duties in a timely manner. For this reason, the Commission respectfully requests that the Court identify a “bright line” for establishing when the deadline for submitting nominees begins to run. The Commission also respectfully requests that the Court address this important issue as quickly as possible, as we do not want to be remiss in carrying out our duties under the Florida Constitution. Thank you for providing the Commission with the opportunity to submit these comments.

Sincerely,

Jason Gonzalez
Chairman, Judicial Nominating Commission
for the First District Court of Appeal
cc:  Governor Jeb Bush
     Raquel A. Rodriguez
     Nathan Adams
     Gladys Perez
     Heidi Hughes
     Honorable Sue M. Cobb
     Honorable Charles J. Kahn, Jr.
     Honorable Charles J. Crist, Jr.
     Honorable Richard W. Ervin, III
     Members of the Judicial Nominating Commission
       for the First District Court of Appeal