

May 5, 2008

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

RE: Request for Advisory Opinion

Dear Justices:

Pursuant to Article IV, Section 1(c), Florida Constitution, I hereby request your opinion on a question involving the interpretation of the Governor's constitutional duty to appoint judges under Article V of the Florida Constitution. Specifically, I request your opinion on whether circuit and county court vacancies that occur before any candidate has qualified to run must be filled by gubernatorial appointment, irrespective of whether the qualifying period for election has begun.

This question has arisen in the context of the recent vacancy in Leon County Court Seat 5. Seat 5 was previously scheduled for election in the 2008 general election cycle with the qualifying period scheduled to commence at noon, Monday April 28, 2008, and continue through noon, Friday, May 2, 2008. On April 30, 2008, the Court entered an order declaring incumbent Judge Timothy D. Harley to be involuntarily retired from judicial service effective midnight on the date of the order. (Exhibit "A").

In an advisory opinion issued in 2002, the Justices of the Court opined that circuit and county court vacancies are filled by gubernatorial appointment, unless the vacancy occurs after the "election process" begins, which the Justices found to be "when a candidate or candidates have qualified for the circuit or county judgeship." *In re Advisory Opinion to Governor re: Appointment or Election of Judges*, 824 So. 2d 132, 135 (Fla. 2002). According to the Leon County Supervisor of Elections (the "Supervisor"), at the time the Leon County Court vacancy occurred at midnight, April 30, 2008, no candidate or candidates had qualified for the judgeship. After receiving that information, and in accordance with the Court's 2002 advisory opinion to the Governor, my General Counsel notified the Judicial Nominating Commission for the Second Judicial Circuit (the "JNC") of the vacancy and constitutional requirement that the JNC

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submit a list of nominees to the Governor within thirty days from the date of the vacancy. (Exhibit "B"). On May 1, 2008, the JNC advertised the vacancy and application deadline (Exhibit "C").

On May 1, 2008 my legal counsel contacted the Leon County Supervisor of Elections, and informed him that the JNC had been notified of the vacancy and commenced the judicial nominating process. The Supervisor informed my counsel that he was aware of the vacancy to be filled by gubernatorial appointment and that he intended to refuse to accept qualifying papers from individuals attempting to qualify on May 1, 2008. On Friday, May 2, 2008, the Supervisor contacted my legal counsel and informed him that, upon further review, the Supervisor had reversed his position and determined that, despite commencement of the JNC process, he had a ministerial duty to accept qualifying papers and fees. On the morning of May 2, 2008, prior to the noon qualifying deadline, the Supervisor also affirmatively advised three candidates of his reversal and qualified these candidates for Leon County Court, Seat 5, all of whom the Supervisor had refused to qualify on May 1, 2008. Consequently, both the appointment and election processes are now underway to fill the same vacancy.

I recognize that extended judicial vacancies are disfavored. *In re: Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d 460, 464 (Fla. 1992) ("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."). In order to minimize hardship on the Leon County Court, I intend to fill the vacancy in June 2008, resulting in a vacancy of no more than 30 to 60 days. By contrast, if the vacancy were to be filled by election, Seat 5 would be unoccupied for more than eight months from May 1, 2008 until January 6, 2009.

My authority and duty to fill vacancies on circuit and county courts for a limited, interim term is set forth in the Florida Constitution. 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

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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.

Although this section appears to direct the Governor to fill any circuit or county court vacancy by appointment, the Justices of the Court opined in their *Advisory Opinion to Governor re: Appointment or Election of Judges*, 824 So. 2d 132 (Fla. 2002), that article V, section 11(b) must be read in conjunction with the prefatory statements contained in article V, section 10(b)(1) and (b)(2), which require that “[t]he election of [circuit and county court judges] be preserved notwithstanding the provisions of [article V, section 10(a)], unless addressed by the prescribed local action.” *Id.* at 135. In that opinion, the Justices described article V, section 10(b) as a public policy statement requiring that “the election of . . . judges . . . be preserved” even outside of the context of article V, section 10(a). *Id.* The Justices described the apparent conflict between article V, section 10(b) and article V, section 11(b) as expressing an implied constitutional preference for filling vacancies by election after the election process has commenced, and the Justices found that “the election process for the election of circuit and county judges mandated by section 10(b)(1) and (2) and implemented by section 105.051(1), Florida Statutes, begins when a candidate or candidates have qualified for the circuit or county judgeship.” *Id.*

I believe that initiation of the appointment process following the involuntary retirement of Judge Harley was mandated by article V, section 11(b), and, further, that initiation of the process was consistent with the Justices’ reconciliation of article V, section 11(b) with article V, section 10(b) in the *Appointment or Election of Judges* advisory opinion. However, that advisory opinion was expressly limited to the scenario presented in the governor’s letter: “i.e., where a candidate or candidates have already qualified during the statutory qualifications period, one of whom will fill the position by election.” *Id.* Further, in a subsequent advisory opinion, the Justices described the “the statutory qualifying period” as “the start of the election process.” *Advisory Opinion to Governor re Sheriff and Judicial Vacancies Due To Resignations*, 928 So. 2d 1218, 1220-21 (Fla. 2006). However, the circumstances presented in that case are inapposite to those presented here. The Justices did not specify that the “start of the statutory qualifications period” was the start of the elections process, nor did the Justices recede from the statement in *Appointment or Election of Judges* that “the election process for the election of circuit and county judges . . . begins when a candidate or candidates have qualified for the circuit or county judgeship.”

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*Pincket v. Harris*, 765 So. 2d 284 (Fla. 1st DCA 2000), a decision of the First District Court of Appeal, cited as authority in these advisory opinions, further supports my construction of article V, section 11(b). The district court in that case explained that article V, section 11(b) was amended in 1996 (by extending the term of gubernatorial interim appointments until January of the year following the election occurring at least one year after the date of appointment) for the specific purpose of avoiding protracted vacancies on the circuit and county courts. *Id.* at 287-88; *see also in re Advisory Opinion to the Governor (Judicial Vacancies)*, 600 So. 2d at 463 (concluding that the governor had a duty under the pre-1996 version of article V, section 11 to fill a five-month vacancy resulting from the resignation of a circuit judge on the ground that the Governor should not allow an “unreasonable vacancy” on a circuit court to exist). If I lack the authority to appoint an interim judge to the Leon County Court, an actual vacancy will exist on that court for more than eight months. This result is difficult to reconcile with the letter and spirit of this provision as amended.

Finally, I am concerned that a rule preventing the Governor from filling a vacancy occurring during a qualifying period could have harsh consequences for citizens and attorneys practicing within a circuit, even beyond those resulting from the protracted vacancy. Intuitively, such vacancies will occur most often by surprise to the local legal community. Members of the bar generally weigh very differently a campaign for an open seat versus a campaign to oust an established, incumbent jurist. Accordingly, a rule preventing interim appointment to fill such vacancies would result in surprise, last-minute contests that would be skewed in favor of a small pool of members of the bar possessing inside information and those with the wherewithal to mobilize for a campaign very, very quickly.

In light of the foregoing, I respectfully request an opinion of the Justices of the Supreme Court as to whether the Governor’s constitutional obligation under article V, section 11(b), Florida Constitution, to fill a vacancy on a circuit or county court by appointment continues until a candidate or candidates have qualified for the office, irrespective of whether the statutory qualifying period has commenced.

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In order to facilitate an orderly judicial selection process, I further respectfully request that the opinion of the Justices be expedited. Accordingly, I do not intend to submit any further briefing on this matter unless specifically requested by the Court.

Sincerely,

Charlie Crist

CC/rf

cc:

Jason Gonzalez, General Counsel

Jose Lorenzo, Chair, Second Circuit Judicial Nominating Commission

Ion Sancho, Leon County Supervisor of Elections

Honorable Charles A. Francis, Chief Judge, Second Judicial Circuit