Honorable Peggy A. Quince  
Chief Justice and Associate Justices  
of the Supreme Court of Florida  
Tallahassee, Florida  

RE: Request for an Advisory Opinion

Dear Chief Justice and Justices:

I hereby request the opinion of the Justices of the Court, pursuant to Article IV, section 1(c) of the Florida Constitution, relating to the Governor’s constitutional responsibility to appoint judges under Article V of the Florida Constitution.

By letter dated May 24, 2010, Judge David B. Ackerman, formerly a county court judge on the Escambia County Court, submitted a letter of resignation to my office. I accepted Judge Ackerman’s resignation on May 28, 2010.

Prior to his resignation, Judge Ackerman’s term of office was scheduled to expire on January 3, 2011. The new term, commencing on January 4, 2011, is scheduled to be filled by regular election this year. Pursuant to section 105.031, Florida Statutes, the time for qualifying to run for this seat began at noon on April 26, 2010, and ended at noon on April 30, 2010. Judge Ackerman submitted qualifying papers on April 28, 2010. No other candidate qualified during the qualifying period.

There will be an actual vacancy on the Escambia County Court for a period of at least seven months if the vacancy resulting from Judge Ackerman’s resignation is to be filled by election. As a result of his qualifying unopposed, Judge Ackerman will be deemed elected for a new term commencing January 4, 2011, pursuant to section 105.051(1)(a), Florida Statutes. However, I have been informed that Judge Ackerman does not intend to resume his judicial duties until February 1, 2011.

Following Judge Ackerman’s resignation, the First Circuit Judicial Nominating Commission (the “JNC”) convened for the purpose of certifying nominees to me to fill the vacancy. The JNC notified the Florida Bar of its proceedings to advertise the vacancy, then notified my general counsel and requested that I submit this request for an advisory opinion. I have acquiesced in the JNC’s request because it is not entirely clear as to whether the vacancy created by Judge Ackerman’s resignation should be filled by
appointment or the constructive election that would result from Judge Ackerman’s having qualified unopposed for re-election.

Article V, section 11(b) of the Florida Constitution 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.

In previous advisory opinions, the Justices of this Court have opined that the Governor’s power of appointment outlined in this section yields to the election process, with respect to contested seats, at the commencement of the qualifying period. The primary rationale for that exclusion has been the Justices’ view that tension exists between Article V, section 11(b) and Article V, sections 10 (b)(1) and 10(b)(2), which state that the election of circuit court and county court judges “shall be preserved,” absent referendum of the voters to adopt retention elections as a local option. See In re Advisory Opinion to Governor re Appointment or Election of Judges, 983 So. 2d 526, 529 (Fla. 2008) (‘election period’ began at the start of the qualifying period, and a vacancy created during the qualifying period is filled by election); In re Advisory Opinion to Governor re Sheriff & Judicial Vacancies Due to Resignations, 928 So. 2d 1218, 1221 (Fla. 2006) (a vacancy created before the qualifying period is filled by appointment). The Justices have never addressed this tension in circumstances such as those presented here, where an incumbent judge resigns following an uncontested qualifying period.

In the case at hand, I am greatly concerned that Judge Ackerman’s resignation will deprive the people of Escambia County of a county court judge for too long and to no benefit. The courts are already overburdened, and, as the Justices have recognized, extended judicial vacancies should be avoided, if at all possible. In re Advisory Opinion to the Governor (Judicial Vacancies), 600 So. 2d 460, 464 (Fla. 1992). Significantly, the singular purpose of the 1996 constitutional amendment that resulted in the current version of Article V, section 11(b), was to reduce instances and duration of actual judicial vacancies by lengthening the term of gubernatorial judicial appointments. See Pincket v. Harris, 765 So. 2d 284, 287-88 (Fla. 1st DCA 2000).

Judge Ackerman’s resignation occurred after the start of the qualifying period. However, filling the vacancy by election under these circumstances—as an unopposed candidate not appearing on the ballot pursuant to section 105.051(1)(a)—would increase the duration of a vacancy without any countervailing interest in giving effect “to the clear will of the voters.” Advisory Opinion to Governor re Appointment or Election of Judges, 983 So. 2d 526, 528 (Fla. 2008) (noting that conflict between the sections of the
constitution must be resolved “by a construction which gives effect to the clear will of the voters that circuit and county judges be selected by election”); In re Advisory Opinion to Governor re Appointment or Election of Judges, 824 So. 2d 132, 136 (Fla. 2002).

In light of the foregoing, I respectfully request an opinion of the Justices of the Supreme Court as to whether the Governor’s constitutional responsibility to fill vacancies on circuit and county courts by appointment exists when a vacancy on such a court occurs after the conclusion of a qualifying period in which no candidates other than the incumbent judge have qualified for election.

Sincerely,

[Signature]

Charlie Crist