

SUPREME COURT OF FLORIDA

ADVISORY OPINION TO THE
GOVERNOR,

Case No. SC10-1186

RE: JUDICIAL VACANCY
DUE TO RESIGNATION

**BRIEF OF INTERESTED PARTY,
JUDGE DAVID B. ACKERMAN**

JOSEPH L. HAMMONS
Florida Bar Number 218979
The Hammons Law Firm, P.A.
17 West Cervantes
Pensacola, Florida 32501
Telephone: (850) 434-1068
Facsimile: (850) 434-3597

Attorney for Judge David B. Ackerman

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ISSUE	2
ARGUMENT	3
1. The Florida Constitution requires the County Judge position at issue for the term commencing January 4, 2011, be filled by election.	
CONCLUSION	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF COMPLIANCE	10

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<i>Advisory Opinion to Govenor re: Appointment or Election of Judges</i> 824 So.2d 132, 135, 136 (2002)	3, 4, 6
<i>Appointment or Election of Judges, SC08-844</i> 983 So.2d 526, 528 (Fla. 2008)	4, 6
 <u>Constitutional Provisions</u>	
Article V, §10, Fla. Constitution	3
Article V, §11, Fla. Constitution	3, 6

STATEMENT OF CASE AND FACTS

Judge David Ackerman is one of five County Judges in Escambia County. Judge Ackerman was elected for a six year term that expired January 3, 2011. Judge David Ackerman was first elected as Escambia County Judge in 1990. He ran unopposed in the 1994 and 1998 elections. In the 2004 election Judge Ackerman ran with opposition, however, he was elected with approximately seventy-two percent of the vote. The last term expires January 3, 2011.

The County Judge term at issue is scheduled to be filled by election in the Fall of 2010. (See *Governor's Request for Advisory Opinion* dated June 21, 2010 "Governor's Request" at page 1). The qualifying period for the County Judge term at issue ran from 12:00 p.m., April 26, 2010 to 12:00 p.m., April 30, 2010. Judge Ackerman submitted his qualifying papers to the Supervisor of Elections on April 28, 2010. No other candidates submitted qualifying papers for the position. Therefore, Judge David Ackerman was and remains the sole qualified candidate for the County Judge position for the term commencing January 4, 2011.

Due to family financial considerations not of his making on May 24, 2010, Judge Ackerman tendered his resignation to Governor Crist for the remainder of the six year term he was then serving. While that term expired January 3, 2011, Judge Ackerman resigned effective May 28, 2010. The resignation letter stated the

following:

It is with great reservation and difficulty that I write this letter. However, due to personal considerations I must now tender my resignation *for the duration of the term that I am currently serving*, effective the close of business on May 28, 2010. I look forward to returning to my public service at the earliest possible time. (Emphasis supplied).

Subsequent to Judge Ackerman's resignation from the term he was then serving and notwithstanding his qualifying as a candidate for the upcoming judicial term to commence January 3, 2011, the Governor has requested an advisory opinion from this Court regarding the Governor's authority to appoint someone to fill the county judge position at issue. See *Governor's Request for Advisory Opinion*, dated June 21, 2010, at page 1.

SUMMARY OF ARGUMENT

The Florida Constitution requires, and this Court has consistently held, that once the election process begins by candidates qualifying for judicial position, an existing vacancy must be filled through election and not by appointment. While the Governor may prefer the opportunity to appoint someone to fill a judicial position, and while equities regarding appointment or election may be argued from different perspectives, the requirements of the Constitution remain firm.

ISSUE

THE ISSUE PRESENTED FOR ADVISORY OPINION IS WHETHER THE

COUNTY JUDGE POSITION FOR THE NEXT TERM COMMENCING JANUARY 4, 2011, IS TO BE FILLED BY ELECTION OR BY APPOINTMENT BY THE GOVERNOR.

ARGUMENT

The Florida Constitution requires the County Judge position at issue for the term commencing January 4, 2011, be filled by election.

The issue presented through the Governor's request in this matter has twice been previously addressed and resolved by this Court. In ADVISORY OPINION TO the GOVERNOR re: APPOINTMENT OR ELECTION OF JUDGES, 824 So.2d 132 (2002) (The 2002 opinion), this Court specifically addressed the question now presented by the Governor in this matter. In the 2002 opinion this Court recognized conflicting provisions of the Florida Constitution with respect to the filling of judicial vacancies. While Article V, §11(b) provides that the Governor shall fill each vacancy on the circuit or county court occasioned by the vacation of a position by an elected Judge, Article V, §10(b)(1) - (2) specifically provides that the election of circuit and county court Judges "shall be preserved".

In the 2002 advisory opinion the Court addressed facts and circumstances similar to those in this matter. The 2002 advisory opinion addressed circumstances where a Judge of the Thirteenth Judicial Circuit involuntarily retired effective May 30, 2002, due to a physical disability. That Judge's term would otherwise have ended January 7, 2003. The qualifying period for the next term, May 13 through May 16,

2002, had expired by the time of the Judge's retirement. During that qualifying period three persons qualified for election to the position for the next term commencing January 8, 2003. The question presented to the Court was whether the vacancy created by the involuntary retirement of the Judge should be filled by appointment or election. Answering that question this Court concluded that once the "election process begins", a vacancy in a county or circuit court position is to be filled by election. This Court held:

Once the election process begins by candidates qualifying for the Judge position, the election method is the method by which the Judicial position is to be filled. Our opinion, however, is limited to the circumstances described in your letter, i.e., where *a candidate* or candidates have already qualified during the statutory qualifications, one of whom will fill the position by election. (Emphasis supplied). (824 So.2d at 136).

In this matter the undisputed facts demonstrate that Judge Ackerman is the "candidate" who has already qualified during the statutory qualification period. While in the 2002 advisory opinion addressed circumstances where qualifying period had ended and three candidates had qualified to run for the judicial position, the fact that only one "candidate" has qualified to run for the judicial position in this matter does not distinguish the holding in the 2002 advisory opinion.

Similar circumstances were addressed in this Court's advisory opinion in 2008 titled "Appointment or Election of Judges, SC08-844". 983 So.2d 526 (Fla. 2008).

In the 2008 advisory opinion this court again emphatically and in detail answered the same question. In 2008 this Court defined when the election process begins identifying the statutory qualifying period as the start of the election process and referring to its previous holding in 2002 that once the “election process begins”, a vacancy in the county or circuit court is to be filled by election. The Court detailed its reasoning through past cases and logic in reaching this final conclusion of law.

The facts in the 2008 opinion are remarkably similar to those of the instant case. The issue in both cases is straightforward. Judge Harley retired late in his term leaving approximately eight months of his term unfilled. Judge Ackerman retired late in his term leaving seven months of his term unfilled. The Governor wrote for an opinion of this Court making the same argument to the Court regarding the length of the vacancy. The bare bone legal issue is exactly the same. There is no difference. One might attempt to distinguish between Judge Harley’s involuntary retirement and Judge Ackerman’s “voluntary” retirement, however, such an argument would be disingenuous. Involuntary was a descriptive word regarding Judge Harley’s circumstance and is never discussed or mentioned in that case as playing any role in the legal reasoning that the Court so details in its holding. It simply describes the retirement. Judge Ackerman’s personal circumstances prompting voluntary retirement for the duration of the term does not call for a different conclusion. The Constitutional

requirement remains the same.

In the 2008 opinion the Governor argued if the vacancy were to be filled by election, the seat would be unoccupied for more than eight months. The Governor inquired 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 an office, irrespective of whether the statutory qualifying period has commenced. This Court analyzed the conflicted portion of the Florida Constitution and concluded:

In view of this conflict between sections of the constitution, we conclude that the *conflict 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.*

Advisory Opinion to Governor re Appointment or Election of Judges, 824 So.2d 132, 135-36 (Fla. 2002) (emphasis supplied); see also *Judicial Nominating Comm'n, Ninth Circuit v Graham*, 424 So.2d 10, 10 (Fla. 1982) (“[T]he constitution *mandates an election* when there is sufficient time to afford the electorate an opportunity to fill a judicial vacancy.” (Emphasis supplied)). Accordingly, we have previously held that once the “*election process begins*,” a vacancy in the county or circuit court is to be filled by election. *Appointment or Election of Judges*, 824 So.2d at 136 (emphasis supplied). 983 So.2d at 528.

The voters voted for the election process. The election process begins when a candidate or candidates had qualified for the judgeship. Judge Ackerman qualified for the judgeship during the qualifying period. The election process had begun.

The fact that Judge Ackerman received no opposition and was the only qualifying candidate does not call for a different conclusion. To do so would be to hold that a judicial election may be circumvented, notwithstanding the availability of a qualified candidate, simply because the qualifying candidate, either voluntarily or involuntarily, relinquished the remaining few months of the preceding term. As this Court has consistently held, the State Constitution must be interpreted giving affect to the will of the voters that circuit and county judges be selected by election. To reach a different result because the election process has “ended” once a sole qualified candidate is elected without opposition, suggests the Governor may throw out the results of a single candidate election and appoint a judicial successor. To do other than honor the election of a judicial candidate for the term at issue would clearly violate Article V of the Florida Constitution.

Whether Judge Ackerman or John Doe was to take that seat is in irrelevant. The first judge served from January 2005 to January 3, 2011. The next judge serves from January 4, 2011 through 2017. Why would or should the succeeding judge be disenfranchised of his position because the proceeding judge retired before the end of the term? The Florida Constitution never meant or would allow that conclusion.

Our circuit and county court judges do not hold office for life. They hold that term for a given length of time, its temporary. It has a beginning and an end. His or

her authority and responsibility to that office are only during the term of that office. The judge has no authority before he or she takes office or after he or she leaves office. The termination of one term is a single unique event. It has no effect on the next term.

CONCLUSION

Based on precedent established by this Court as addressed above and because the Florida Constitution requires the election of circuit and county judges, the election of Judge Ackerman in this matter must be honored.

Respectfully submitted,

/s/ Joseph L. Hammons
JOSEPH L. HAMMONS
Florida Bar Number 218979
The Hammons Law Firm, P.A.
17 West Cervantes
Pensacola, Florida 32501
Telephone: (850) 434-1068
Facsimile: (850) 434-3597

Attorney for Judge David B. Ackerman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to

Honorable Charles Crist, Governor, THE CAPITOL, Tallahassee, FL 32399, and Charles F. Beall, Jr., Esquire, Moore, Hill & Westmoreland, P.A., 220 West Garden Street, 9th Floor, SunTrust Tower, Pensacola, FL 32591-3290, by U.S. Mail this 1st day of July, 2010.

/s/ Joseph L. Hammons
JOSEPH L. HAMMONS
Florida Bar Number 218979
The Hammons Law Firm, P.A.
17 West Cervantes
Pensacola, Florida 32501
Telephone: (850) 434-1068
Facsimile: (850) 434-3597

Attorney for Judge David B. Ackerman

CERTIFICATE OF COMPLIANCE

I CERTIFY that the foregoing brief was prepared using Times New Roman 14-

point font and complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/ Joseph L. Hammons
Joseph L. Hammons