The Florida Senate

Issue Brief 2010-320 *September 2009*

Committee on Judiciary

LEGAL CHALLENGE RELATED TO THE JUDICIAL NOMINATING PROCESS

Statement of the Issue

When there is a vacancy in a judgeship, the State Constitution directs the Governor to fill the vacancy by appointing one person from no fewer than three and no more than six persons nominated by a judicial nominating commission. The commission shall offer recommendations within 30 days of the vacancy, unless the period is extended for no more than 30 days by the Governor, and the Governor shall make the appointment within 60 days of receiving the nominations.

Article V, section 11 of the Florida Constitution provides for a separate judicial nominating commission, as provided by general law, for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts in the circuit. The Legislature has provided for the membership of each judicial nominating commission, including four members of The Florida Bar appointed by the Governor from nominees recommended by the Board of Governors of the Bar and five members appointed by the Governor, at least two of whom are members of the Bar.

The Governor and a judicial nominating commission recently became engaged in a stalemate regarding a vacancy on the Fifth District Court of Appeal. The judicial nominating commission sent the Governor six names in November 2008. In December, however, the Governor rejected the list because it did not include any African-American nominees. The Governor requested that the commission submit another list. The commission reconvened but sent the same list of names.

In March 2009, the appellate judge whose retirement notice precipitated the impasse between the Governor and the judicial nominating commission filed a petition for a writ of mandamus with the Florida Supreme Court, seeking to compel the Governor to fill the vacancy. The Court heard oral arguments in the case on May 20 and entered its order on July 2, 2009, holding that "the Florida Constitution mandates that the Governor appoint a judicial nominee within sixty days of the certification of nominees by the Judicial Nominating Commission for the Fifth Appellate District."[1] The Court also concluded that "the Governor is not provided the authority under the constitution to reject the certified list and request that a new list be certified."[2]

The purpose of this issue brief is to provide a primer on the constitutional and statutory requirements and procedures related to the filling of judicial vacancies through the judicial nominating commission process. The purpose also is to explore the legal issues related to the stalemate between the Governor and a judicial nominating commission regarding the diversity of nominees submitted for a vacancy on the Fifth District Court of Appeal.

Discussion

Filling Judicial Vacancies

Article V, section 11 of the Florida Constitution directs the Governor to fill vacancies in judicial offices from a list of not fewer than three and not more than six persons nominated by the appropriate judicial nominating commission. The nominations must be made within 30 days of a vacancy unless extended by the Governor for an additional 30 days. The Governor must make the appointment within the 60 days after certification of the

[1] *Pleus v. Crist*, 2009 WL 1884805, *1 (Fla. 2009).
[2] *Id.*

nominations to the Governor. The constitution is silent, however, on what happens if the various time frames for nomination by the commission or appointment by the Governor are not met, or if the Governor has concerns about the nominees or the nomination process.

There are separate judicial nominating commissions for the Supreme Court, each district court of appeal, and each judicial circuit for all trial courts within the circuit.[3] The judicial nominating commissions at each level of the court system establish their own uniform rules of procedure. The rules may be repealed by general law enacted by a majority vote of both houses of the Legislature or by five concurring justices of the Supreme Court. All proceedings and records of the judicial nominating commissions are public. The only exception is for the deliberations of the judicial nominating commissions over the nominees.[4]

The nine-member composition of each judicial nominating commission is a creature of statute. The statute provides for the Governor to make all nine appointments. However, four of those appointments are based on nominees from The Florida Bar, while five are within the Governor's sole appointment discretion. The four members recommended by the Bar must be members of the Bar, must be engaged in the practice of law, and must reside in the territorial jurisdiction where they are appointed. That portion of the appointment process begins when the Board of Governors of The Florida Bar submits three recommended nominees for each position to the Governor. The Governor has the authority to reject all the nominees and request a new list of recommended nominees who have not been previously recommended. Of the five members appointed by the Governor under his or her sole discretion, two must be members of The Florida Bar engaged in the practice of law, and all must reside in the territorial jurisdiction where they are appointed.[5]

The Governor is required, to the extent possible, to ensure that membership of the commissions "reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered."[6] The membership must also include adequate representation of each county within the judicial circuit. No justice or judge may serve on a judicial nominating commission, but a member may hold any other public office. Furthermore, a member of a judicial nominating commission is not eligible for appointment to the state judicial office for which that commission has the authority to make nominations, either during his or her four-year term or up to two years thereafter. Membership on a commission lasts four years except when an appointment must be made to fill a vacant unexpired term. Members may be suspended for cause by the Governor.[7]

History of the Judicial Nominating Commissions

In Florida's early statehood, Supreme Court justices and county judges were elected, while circuit court judges were subject to appointment by the Governor and confirmation by the Senate.[8] By 1948, circuit judges were also required to be elected.[9] It was not until 1956 that district courts of appeal came into existence. These judges were also elected. The Governor, however, was given authority to fill vacancies in the different circuits when the population increased and required an additional judge in a court as mandated by article V of the State Constitution.

The judicial nominating commissions came into existence in 1972. It was in this year that Florida voters had the opportunity to vote on a complete revision of article V of the Florida Constitution. One of the amendments to article V was the creation of judicial nominations commissions for filling judicial vacancies. The amendment allowed for appointments to the judiciary be made from a list of names submitted to the Governor by the commissions. There was a commission for the Supreme Court, each district court of appeal, and each judicial circuit. Each of the commissions submitted three names to fill each vacancy. Florida statute governed the appointment and membership of the commission. The Governor named three members, none of whom were

[3] FLA. CONST. art v., s. 11(d).
[4] *Id.*
[5] Section 43.291, F.S.
[6] *Id.*
[7] *Id.*
[8] FLA. CONST. art. V (1885).
[9] FLA. CONST. art. V (1942).

required to be lawyers; The Florida Bar named three members, who were lawyers; and those six members in turn named, by majority vote, the remaining three members, who were prohibited from being members of the Bar. The most recent change in the appointment process to the judicial nominating commission came in 2001, allowing the Governor to make all the appointments to the judicial nominating commission.[10]

Legal Challenge Related to Appellate Judge Appointment

On March 30, 2009, retired Senior Judge Robert J. Pleus of the Fifth District Court of Appeal filed a Petition for Writ of Mandamus in the Florida Supreme Court seeking an order compelling Governor Crist to fill the vacancy created by Judge Pleus' retirement with a judicial appointment from the list of nominees certified by the Fifth Appellate District Court Judicial Nominating Commission (commission) on November 6, 2008.[11] A writ of mandamus is "issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly."[12]

Approximately six months prior to his resignation from the Fifth District Court of Appeal, Judge Pleus urged in his letter to the Governor of September 2, 2008, that his replacement be made in a timely manner. The Governor responded on September 8, 2008, asking the commission to select and submit names of individuals to fill the vacancy. The Governor stated that he believed that Florida's state judges should reflect the racial, gender, and geographic diversity of the people they serve.[13]

The commission received 26 applications. The commission reviewed the applications and conducted interviews with each of the applicants. Six applicants were chosen and sent to the Governor on November 6, 2008.[14] On December 1, 2008, the Governor sent a letter to the chairman of the commission, stating that in the interest of diversity he was rejecting the list of nominees and requesting that the commission reconvene and provide a new list of nominees. The Governor stated that he had been advised that there were at least three well-qualified African Americans who had applied for the position, none of whom were included on the list.[15]

The commission replied to the Governor on December 4, 2008. The commission stated that it had already submitted the six names as required by the State Constitution and expressed its concern about whether it had the constitutional authority to reconvene to consider more names. The commission did reconvene and resubmitted the six names. In lieu of making the appointment, the Governor sent a letter to the chairman of the commission stating that he was disappointed by the commission's response and requesting the commission to consider the state's interest in fostering diversity in the courts. The commission responded to the Governor, stating that it was the opinion of the commission that the state's interest in diversity was properly considered when the commission met. Citing to an attorney general advisory opinion, the commission also opined that the Florida Constitution limited the number of nominees to six and therefore the commission was prohibited from submitting more than the constitutional maximum of six or decertifying any of the previous nominees. After receiving no response from the Governor, Judge Pleus filed the petition.

Judge Pleus argued in his petition that the Florida Supreme Court is authorized to issue writs of mandamus under article V, section 3(b)(8) in actions involving state officers and state agencies. He alleged that because the Governor is a state officer subject to the Florida Supreme Court, a writ of mandamus is appropriate. The petitioner further argued that article V, section 11(c) of the Florida Constitution provides a clear duty for the Governor to fill the judicial vacancy from the judicial nominating commission's list of six names. Judge Pleus concluded by stating that "[b]ecause compliance with this provision of the Constitution is acknowledged by the Respondent himself to be important, no other argument seems appropriate," and he requested the Court to order the Governor to expeditiously appoint a judge to the Fifth District Court of Appeal from the list of certified nominees.[16]

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[10] Section 43.291(4). See s. 1, ch. 2001-282, Laws of Fla.
[11] *Pleus v. Crist*, Petition for Writ of Mandamus, Case No. SC09-65.
[12] BLACK'S LAW DICTIONARY (8th ed. 2004).
[13] Letter on file with the Florida Senate Judiciary Committee.
[14] Letter on file with the Florida Senate Judiciary Committee.
[15] Letter on file with the Florida Senate Judiciary Committee.
[16] See *Pleus*, *supra* note 11.

Response of Governor in Opposition to the Petition

The Governor stated in the background section of his response to the petition that part of his mission was to "address, when possible, the historic underrepresentation of minorities on courts throughout the State of Florida" and it was for this reason he declined to select a judge from the judicial nominating commission's list of names.[17]

The Governor made two arguments in his response to Judge Pleus' petition: 1) Judge Pleus had no clear legal right to compel the Governor to exercise his judicial appointment power, and Judge Pleus should have sought a declaratory judgment, and 2) even if Judge Pleus had met the requirement for mandamus, the Court should decline to grant the writ.

The Governor reasoned that Judge Pleus could not establish a clear and certain right to mandamus because Florida law does not clearly establish that a Governor retains the authority to appoint a judge from a list certified to him by a judicial nominating commission after the 60-day period specified in article V, section 11(c) has run. Although acknowledging recent court decisions which have stated that article V, section 3(b)(8) gives discretionary authority to the Court to issue writs of mandamus to the Governor,[18] the Governor argued in his brief that what is more influential is the series of prior Court decisions that stood for the opposite proposition. The Governor cited court cases that held that the judiciary is without power to direct or coerce the Governor in the exercise of any administrative function[19] and that a Governor cannot be commanded by the courts to perform any act which may be required of him or her by a law of the state relating to the executive office.[20]

In support of his second argument, the Governor stated that "[b]ecause mandamus cannot be used to establish the existence of an enforceable right, a petition for a writ of mandamus grounded solely on the text of a statute or constitutional provision can only be appropriate if the construction of the provision offered by the petitioner is its only reasonable construction."[21]

There are a series of mandatory deadlines on the judicial nominating commission and the Governor for action, which include the 30 days for nominations to be made after a vacancy, unless extended by the Governor, and the 60 days in which the Governor must make an appointment. Accordingly, the Governor stated, there is a lack of authority of the judicial nominating commission or the Governor to act after the time period has expired, and as such neither can retain a clear legal duty to act.

According to the Governor's brief, Judge Pleus was not entitled to mandamus because a writ of mandamus is an extraordinary remedy and not intended as a substitute for other remedies. Rather, the Governor argued, Judge Pleus should have sought a declaratory judgment, the purpose which is to ask the courts to determine if any such right exists.

In conclusion, the Governor argued that even if Judge Pleus had met the requirements for the mandamus, the Court should decline to grant the writ for prudential reasons. The Governor cited to past case law in which the Court held that mandamus is a discretionary writ that is awarded, not as a matter of right, but in the exercise of a sound judicial discretion and upon equitable principles. The courts also denied mandamus in circumstances where the public would be injuriously affected. The Governor concluded that issuance of the writ would be injurious to the public because it would upset the constitutional balance of power in the judicial selection process between the Governor and judicial nominating commissions.

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[17] *Pleus v. Crist,* Response of Governor Crist in Opposition to the Petition for Writ of Mandamus, Case No. SC09-65.
[18] Citing *Jones v. Chiles,* 638 So. 2d 48, 48 (Fla. 1994), and *Flack v. Graham,* 453 So. 2d 819, 820 (Fla. 1984).
[19] See *State ex rel. Axleroad v. Cone,* 188 So. 93, 93 (Fla. 1939), and *State ex rel. Bisbee v. Drew,* 17 Fla. 67, 83-84 (Fla. 1879).
[20] See *Sebring Airport Auth. v. McIntyre,* 783 So. 2d 238, 244 n. 5 (Fla. 2001), and *Kirk v. Baker,* 224 So. 2d 311, 317 (Fla.1969).
[21] See *Pleus, supra* note 17.

Amicus Briefs

Florida National Association for the Advancement of Colored People

The Florida State Conference of the National Association for the Advancement of Colored People (NAACP) filed an amicus brief in this case. In the brief, the NAACP stated that this case was of great public importance due to the issues of racial discrimination that had been raised in light of the fact that the judicial nominating commission failed to nominate any African-American candidates despite there being three well-qualified African-American candidates who had applied.

The Florida NAACP adopted the background and arguments in the Governor's response to Judge Pleus and focused on two specific issues: 1) whether discrimination is at the root of the lack of minority candidates for selection and 2) whether the rules governing the judicial nominating commission allow the Governor leave to obtain the requisite information to determine whether misconduct or discrimination has arisen that would warrant removal of commissioners.

In support of the Governor's request for the Judicial Nominating Commission for the Fifth Appellate District to give due consideration to diversity in the nominating process, and aligning with the Governor's argument that there was an opportunity for the commission to consider this request after 60 days had lapsed, the Florida NAACP argued that the judicial nominating commission was in violation of state and federal laws that prohibit discrimination. It argued that the chairman of the commission's statements regarding the commission giving due consideration to the Governor's request to consider racial, ethnic, and gender diversity, as well as geographic distribution of the population, were not supported by its actions. The Florida NAACP pointed out that the statistics for the African-American population of Orlando is 26.6 percent and the Hispanic or Latino population is 17.7 percent, while the Fifth District Court of Appeal has no African-American or Hispanic judges.

The Florida NAACP further argued that there was discrimination in the failure of the judicial nominating commission to consider that the African-American applicants were well qualified. The criteria required for applicants to be well qualified for a nomination for an appellate judgeship is that the applicant must a be a citizen of the county or circuit for which he or she is applying, a member of the Bar in good standing for five years, and a member of the Bar for the preceding 10 years. The Florida NAACP argued that the African-American applicants were well qualified, with one being a chief circuit judge of the ninth judicial circuit and another having been appointed to the circuit bench by Governor Bush in 1999, after serving as a county court judge for 10 years in Volusia County.

As a means to rectify the discrimination that it asserts takes place in making the nominations, the Florida NAACP recommended that the Supreme Court exercise its authority to amend the rules of the state judicial nominating commissions to allow the executive branch to obtain discovery that would help determine whether misconduct or discrimination has been committed by a judicial nominating commission. The Florida NAACP pointed out that, when article V, section 11(d) was amended in 1984 to allow for public access to the judicial nominating commissions, the one exception was that the deliberations be closed from the public and press. Doing so, the Florida NAACP argued, allows for hearsay and rumors to be considered in the deliberations without any measure of accountability.

Appellate Practice Section of The Florida Bar

The brief filed by the Appellate Practice Section of The Florida Bar (Appellate Practice Section) was aligned with the petition of Judge Pleus. It argued that article V, section 11 of the Florida Constitution contains a mandatory obligation and a writ of mandamus is an appropriate remedy in this situation. The Appellate Practice Section did commend the Governor on his goal to ensure that the nominees are the most qualified and reflect the diversity of the state. The section argued, however, that the promotion of diversity had nothing to do with this case. Allowing the Governor to "bypass the restraints otherwise set forth in our constitution," the Appellate Practice Section argued, "would materially erode, if not destroy, the integrity of the judicial selection process" and could undermine the very goal of promoting diversity that is shared by the Governor and the Appellate Practice Section.

Central Florida Association for Women Lawyers

The Central Florida Association for Women Lawyers (CFAWL) is a group of 260 men and women lawyers practicing in the jurisdiction of the Fifth District Court of Appeal. The CFAWL's brief argued that, by appointing a female to the vacancy, the Governor could have met the obligation of selecting a commission-certified nominee within the 60 days required by article V, section 11, and accomplished his goal of diversity on the court.

The CFAWL argued the Governor did not take into account that one third of the nominees were female when he twice rejected the list of nominees based on its lack of diversity. The CFAWL stated that "[g]ender diversity is important and simply has not yet been achieved, especially at the appellate level."[22] The CFAWL point out that, despite the aggressive diversity provisions in the statute governing selection of members of the judicial nominating commissions, only 19 percent of Florida's appellate judges are women and most notably only one of the judges on the Fifth District Court of Appeal is a female.

Supreme Court Order

The Court entered its order on July 2, 2009, holding that "the Florida Constitution mandates that the Governor appoint a judicial nominee within sixty days of the certification of nominees by the Judicial Nominating Commission for the Fifth Appellate District." The Court also concluded that "the Governor is not provided the authority under the constitution to reject the certified list and request that a new list be certified."[23] The Court did applaud the Governor's interest in achieving diversity in the judiciary but stated, however, that "the constitution does not grant the Governor the discretion to refuse or postpone making an appointment to fill the vacancy on the Fifth District Court of Appeal."[24] The Court did comment in a footnote that, had the case involved any sort of impropriety or illegality in the selection of the nominees, the opinion should not be understood to mean that a remedy would not be available in those situations.

The Court opined that interpretation of the Florida Constitution is a question of law for the Court and requires a straightforward analysis. It analyzed the intent of the framers and the voters. It found that the timetable governing the judicial nominating commission's nominations to fill vacancies and for the Governor to make judicial appointments is expressly provided in article V, section 11(c) of the Florida Constitution. It emphasized that the origin and purpose of article V, section 11 was to place restraints on the Governor's appointment power and to strengthen the non-partisan selection of the judiciary.

Citing *Chiles v. Phelps,* 714 So. 2d 453, 456 (Fla. 1998), the Court held that article V, section 11(c) "imposes a clear and indisputable legal duty upon the Governor in his exercise of appointing judicial nominees to act within sixty days of receiving the certified list of nominees. Petitioner, as a citizen and taxpayer, has a clear legal right to request that the Governor carry out that duty."[25] As such, the Court rejected the Governor's argument that failure to act within the constitutionally mandated time frame obviates the duty of the Governor to make an appointment from the list of nominees. As part of the Court's discussion, it also added:

> Significantly, in addition to the mandatory language that is expressly stated in the provision, we note the absence of any language granting the Governor authority to reject the JNC's certified list of nominees or to extend the time in which the appointment for judicial office must be made.[26]

Rejecting the Governor's other argument that the appointment process is inherently discretionary, the Court stated that it was simply recognizing and enforcing the mandate contained in article V, section 11. In closing, the Court also rejected the Governor's argument that a declaratory judgment in the circuit court was the appropriate legal remedy. Although the Court applauded the Governor's interest in achieving diversity in the judiciary, the Court held that the constitution does not grant the Governor discretion to refuse or postpone making an appointment.

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[22] *Pleus v. Crist,* Amicus Brief of the Central Florida Association for Women Lawyers at 6, Case No. SC09-565.
[23] *Pleus v. Crist,* 2009 WL 1884805, *1 (Fla. 2009).
[24] *Id.* at *4.
[25] *Id.* at *4.
[26] *Id.* at *4.

Appointment of Judge to Fifth District Court of Appeal

On August 4, 2009, the Governor's Press Office announced the appointment of Circuit Court Judge Bruce Waldron Jacobus of Indialantic to the Fifth District Court of Appeal to fill the vacancy created by the retirement of Judge Pleus. Judge Jacobus was one of the six nominees recommended by the commission. He served on the 18th Judicial Circuit since 1995 and has 22 years serving as a private practitioner in several law firms.[27]

[27] Press Release, Governor's Press Office, "Governor Crist Appoints Judge Bruce Jacobus to Fifth District Court of Appeal" (August 4, 2009), *available at* http://www.flgov.com/release/10944.