MESSAGE FROM THE CHAIR
from previous page

tice Section is delighted to co-host with the ABA the Welcome Reception at the national 2009 AJEI Appellate Summit in Orlando this November. In addition to the Welcome Reception, we encourage all to register for the Summit, which is a wonderful educational and networking opportunity for our appellate lawyers to attend and participate. We have more on our AJEI Appellate Summit in this Issue of The Record.

Also to that end, Programs Committee Chair June Hoffman is leading the way for our Appellate Practice Section co-hosting of the Welcome Reception with the ABA AJEI. Your participation in the Welcome Reception is an opportunity to highlight your firm to a national audience of prestigious federal and state appellate jurists, staff attorneys and practitioners. Your participation also demonstrates that we take an active role to fund educational programming and scholarships to increase judicial attendance at a time when court budgets are very restricted.

Appellate lawyers and judges share the same desire to make appellate justice more effective for themselves, the parties, and society in general. Our members have been active in scholarship and service in appellate law, and we remain dedicated to advancing appellate practice and supporting our appellate judiciary. I thank each of you for sharing your professional activities with us for inclusion in The Florida Bar Journal and The Record, and for your continued commitment to advancing high-quality appellate practice and pro bono service to the larger community. Through doing more with less, thinking "outside the box," and aggressive commitment to appellate education, the coming year promises to be an expansion of our Section, to promote greater services for our members and the community, and to capitalize on the expertise of all involved.

An Overview of the Selection of Florida's Judiciary

By Diana L. Martin[1] and Donna M. Krusbe[2]

Whoever said appellate law is boring hasn't been paying attention to the judicial appointment process in the past several months. The political tug of war between the governor, the judicial nominating commissions, and the appellate courts is as exciting as it gets. Well, maybe not as exciting as it gets, but at least interesting enough to prompt a review and discussion of the relevant constitutional and statutory provisions that form the backdrop for this recent political wrangling.

As appellate practitioners, we know that the governor appoints both the justices that sit on Florida's Supreme Court and the judges that sit on Florida's District Courts of Appeal. The governor's authority to make these appointments originates in Article V, §11 of the state constitution, which provides: "Whenever a vacancy occurs in a judicial office to which election for retention applies [i.e., appellate judges],[3] the governor shall fill the vacancy by appointing... one of not fewer than three persons nor more than six persons nominated by the appropriate judicial nominating commission."[4] This provision expressly limits the governor's authority by allowing appointment of only nominees first certified by the JNC for the appropriate jurisdiction. Because this is a relatively recent development in Florida law, it is important to understand the historical and constitutional basis for the governor's authority, the role of the JNCs, and the interplay between the two in selecting Florida's judiciary.

History of Judicial Election/ Selection in Florida

Florida's first constitution called for the election of supreme court justices and circuit court judges "by the concurrent vote of a majority of both houses of the general assembly."[5] Circuit judges were elected for an initial term of five years, while supreme court justices were "elected for the term of and during their good behavior."[6] In an effort to create an independent supreme court, the constitution was amended in 1851 to create eight-year terms for both judges and justices.[7]

The 1865 Constitution provided for gubernatorial appointment of supreme court justices, with senate consent[8] and election of circuit judges "by the qualified electors of each of the respective judicial circuits."[9] Just three years later, the constitution was amended to enlarge the power of Florida's governor so that he could appoint both supreme court justices and circuit court judges.[10] The supreme court justices could hold office for life, but, again, only "during good behavior."[11] This broad grant of power and influence over Florida's judiciary was criticized by proponents of judicial independence.[12]

The governor's power was again limited in Florida's Constitution of 1885, which provided that supreme court justices would be elected by the people.[13] But the governor retained the authority to appoint circuit court judges until 1942 when the constitution was amended to require the election of circuit court judges as well.[14]

See "Overview" page 24

OVERVIEW
from page 9

In 1957, Florida's district courts were created to provide an intermediate level of appellate review.[15] The first judges for the district courts of appeal were appointed by the governor.[16] Subsequent vacancies on the district courts were filled by general election in the same way supreme court justices and circuit court judges were elected.[17]

The direct election of all justices and judges in Florida led to abuses within the judicial system.[18] "Within [a period of] four years, four out of seven justices on the Florida Supreme Court left office through resignation or retirement after a scandal involving extensive investigations, public exposure, and threats of impeachment."[19] This prompted constitutional amendments in the 1970s that resulted in a merit selection and retention system for appellate judges.

Judicial Nominating Commissions

In 1971, Governor Reubin O'D. Askew created, by Executive Order, judicial nominating councils to assist in judicial selection.[20] Subsequently, by constitutional revision in 1973, the councils were supplanted by separate JNCs, one for the supreme court and one for each district and circuit court.[21] The JNCs were created "to screen applicants for judicial appointments within their respective jurisdictions and to nominate the . . . best qualified persons to the Governor for his appointment."[22] They are an arm of the executive branch, established "to insure that politics would not be the only criteria in the selection of judges, and to increase generally the efficiency of the judicial appointive process."[23] "The purpose of the [JNC] is to take the judiciary out of the field of political patronage and provide a method of checking the qualifications of persons seeking the office of judge."[24] As the Florida Supreme Court explained early on, "The purpose of such nominating commission . . . was to eliminate that kind of selection which some people referred to as 'picking a judge merely because he was a friend or political supporter of the Governor' thereby providing this desirable restraint upon such appointment and assuring a 'merit selection' of judicial officers."[25]

The 1973 revision to the Florida Constitution elevated JNCs to "constitutional statu[s] and permanence," making their nominations "binding upon the Governor, as he is under a constitutional mandate to appoint 'one of [the] persons nominated by the appropriate [JNC].'"[26] Since 1976, the governor has been required to make all judicial appointments from a list of nominees presented by the appropriate JNC.[27]

The Legislature is charged with the task of establishing the makeup of the JNCs.[28] Currently, each JNC is to consist of nine members, all of whom are appointed by the governor.[29] The Florida Bar Board of Governors submits to the governor three recommended nominees each for four of the nine spots, but "the Governor may reject all of the nominees recommended for a position and request that the Board of Governors submit a new list of three different recommended nominees for that position who have not been previously recommended by the Board of Governors."[30] In appointing members to a JNC, the governor "shall seek to ensure that, to the extent possible, the membership . . . 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."[31]

Prior to 2001, each JNC was composed of three members of the Florida Bar who were appointed by the Board of Governors; three electors appointed by the governor; and three electors not members of the Florida Bar that were selected and appointed by the other six members of the commission.[32] Because the JNCs were originally conceived as a way to place a check on the governor's power to appoint members of the judiciary, there was some concern in the legislature that amending the statute so that the governor appoints all members of each JNC would blur the lines between the executive and judicial branches of government,[33] contrary to the very purpose behind Florida's judicial reform movement in the 1970s.

Currently, JNCs are required to provide the governor with at least three but no more than six nominees for every vacancy on the supreme court and district courts of appeal.[34] "The nominations shall be made within thirty days from the occurrence of a vacancy unless the period is extended by the governor for a time not to exceed thirty days. The governor *shall* make the appointment within sixty days after the nominations have been certified to the governor."[35]

Prior to January 2009, the governor's authority to reject the nominees submitted by the JNC and request a new slate of nominees had not been challenged. Recently, however, events unfolded in Florida's fifth judicial district that raised the question of whether the governor has the authority to do so.

Fifth District Court of Appeal Vacancy

In January 2009, the Honorable Robert J. Pleus Jr. retired from the Fifth District Court of Appeal.[36] He notified Governor Crist in September 2008, of his impending retirement in order to begin the process of selecting his replacement in a manner that would maintain continuity in the operations of the court.[37] The JNC for the Fifth DCA met in November 2008 and certified six nominees for the upcoming vacancy.[38]

Governor Crist rejected the list of nominees "[i]n the interest of diversity on [Florida's] courts" and requested that the JNC reconvene, reconsider the nominations, and provide a new list of nominees.[39] The commission responded by recom-

continued on next page

OVERVIEW
from previous page

mending the same six nominees, assuring the Governor that the nominees were the most qualified applicants.[40] The Governor, again, asked for new nominees,[41] and the Commission responded that it is without the authority to withdraw the nominees previously certified or submit additional nominees in excess of the six permitted by the constitution.[42] When Governor Crist did not appoint a replacement within the sixty-day time period mandated by the constitution, Judge Pleus filed a petition for writ of mandamus in the Florida Supreme Court requesting an order requiring the Governor to appoint a judge to the Fifth District Court of Appeal from the list of nominees certified by the JNC.[43]

The supreme court recently decided this dispute by ruling "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 [and that] within this process, the Governor is not provided the authority under the constitution to reject the certified list and request that a new list be certified."[44]

Conclusion

Florida has run the gamut between giving the governor complete discretion in appointing members of the judiciary and allowing the people to choose all their judges by popular vote. In an effort to curb the abuses that developed under both systems, the legislature adopted a merit selection and retention system to ensure that gubernatorial appointees are first vetted by JNCs that narrow the governor's options to those most qualified to serve on Florida's judiciary. Although current statutory law gives the governor the power to appoint all members of each JNC, current events demonstrate that it has not eliminated the possibility of conflict between the governor, the JNCs, and Florida's courts.

(Endnotes)

1 Diana L. Martin is appellate counsel at Leopold~Kuvin, P.A. in Palm Beach Gardens. Her practice focuses on state and federal civil appeals and complex litigation support. Ms. Martin is a 2002 high-honors graduate of the University of Florida Levin College of Law where she was inducted into the Order of the Coif. Before entering private practice, she was law clerk to the Honorable Martha Warner at the Fourth District Court of Appeal.

2 Donna M. Krusbe is appellate counsel at Billing, Cochran, Lyles, Mauro & Ramsey in West Palm Beach. Her practice focuses on state and federal civil appeals and civil litigation support. Ms. Krusbe was previously a law clerk to the Honorable George A. Shahood at the Fourth District Court of Appeal and is a graduate of the University of Miami School of Law where she was an assistant editor of the Entertainment and Sports Law Review.

3 Art. V, § 10(a), Fla. Const. County and circuit judges are also subject to merit retention if the merit selection/retention method was chosen by the people of the applicable jurisdiction in a general election. *Id*. at §10(b).

4 Art. V, §11(a), Fla. Const.

5 Art. V, §11, Fla. Const. (1838).

6 *Id*. at § 12.

7 Amendment, Fifth General Assembly, 1850: Judicial Elections (Article V, Sections 11, 12, 17), §§ 1 & 3; Walter W. Manley II et al., The Supreme Court of Florida and its Predecessor Courts, 1821-1917, 137-40 & 154 (1998).

8 Art. V, §10, Fla. Const. (1865)

9 *Id*. at §11.

10 Art. VI, §§3 & 7, Fla. Const. (1868).

11 *Id*. at §3.

12 Walter W. Manley II et al., The Supreme Court of Florida and its Predecessor Courts, 1821-1917, 213-14 (1998).

13 Art. V, §8, Fla. Const. (1885).

14 Art. V, §46, Fla. Const. (1942); *see also* 1941 Florida Committee Substitute For Senate Joint Resolution No. 334.

15 Art. V, §5, Fla. Const. (1957).

16 *Id.*

17 *Id*. at §5(b).

18 Gerald F. Richman, *The Case for Merit Selection and Retention of Trial Judges*, Fla. Bar Journal, Oct. 1998, at 71.

19 *Id*.

20 *In re Advisory Opinion to Governor*, 276 So. 2d 25, 28 (Fla. 1973).

21 Art. V, § 11(d), Fla. Const. (1973).

22 *Id*. at 29.

23 *Id.* (citation omitted).

24 *Id*. at 30.

25 *Spector v. Glisson*, 305 So. 2d 777, 783 (Fla. 1974).

26 *In re Advisory Opinion to Governor*, 276 So. 2d at 30.

27 Art. V, §11(a)-(b), Fla. Const. (1976).

28 *Id.*

29 § 43.291(1), Fla. Stat.

30 § 43.291(1)(a).

31 § 43.291(4).

32 §43.29, Fla. Stat. (2000).

33 Representative Doug Wiles made the following statement when voting against the amendment, "I fear that this legislation will blur the lines that separate the judicial branch of government with the executive branch of government. I hope that I will one day be proven wrong, however the risk of unintended consequences far out weigh the potential for good reforms. In the spirit of political theorist Baron de Montesquieu, who said 'there is no liberty if the power of judging be not separated from the legislative and executive powers,' I cast a no vote." Journal of the House of Representatives, 2001 Regular Session, Number 6, FL H.R. Jour., 2001 Reg. Sess., No. 6, March 22, 2001, p. 332.

34 Art. V, §11(a), Fla. Const.

35 Art. V, §11(c), Fla. Const. (emphasis added).

36 February 13, 2009 Letter by William D. Palmer, Chief Judge of Fifth District Court of Appeal, http://www.5dca.org/Judges/Palmer/Gov_Crist_%20letter_Overdue_Appointment.pdf

37 September 2, 2008 letter by Judge Robert J. Pleus, Jr., http://tinyurl.com/pleuspetition1, p.8.

38 November 6, 2008 letter by James H. Fallace, Chair of Judicial Nominating Commission for Fifth District Court of Appeal, http://tinyurl.com/pleuspetition1, p. 10.

39 December 1, 2008 letter by Governor Charlie Crist, http://tinyurl.com/pleuspetition1, p. 11.

40 November 4, 2008 letter by James H. Fallace, Chair of Judicial Nominating Commission for Fifth District Court of Appeal, http://tinyurl.com/pleuspetition1, p. 12-13.

41 January 13, 2009 letter by Governor Charlie Crist, http://tinyurl.com/pleuspetition2, p. 3.

42 January 21, 2009 letter by James H. Fallace, Chair of Judicial Nominating Commission for Fifth District Court of Appeal, http://tinyurl.com/pleuspetition2, 4-5.

43 Petition for Writ of Mandamus, p. 10, http://tinyurl.com/pleuspetition1.

44 *Pleus v. Crist*, 34 Fla. L. Weekly S389 (July 02, 2009).