



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

**MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE**

**FOR THE MEETING HELD
THURSDAY, NOVEMBER 13, 2014**

Call to Order:

Chairman Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 9:45 a.m.

Members Present:

A quorum was present with committee members Abaray, Batchelder, Jacobson, Kurfess, Mulvihill, Obhof, Sapphire, Skindell, and Wagoner in attendance.

Approval of Minutes:

The minutes of the September 11, 2014 meeting of the committee were approved.

Topics Discussed:

Article IV, Section 2(B)(1) (Supreme Court Original Jurisdiction)

Justice Paul E. Pfeifer, of the Ohio Supreme Court, appeared to discuss his proposal for a change to Article IV, Section 2, involving the organization and jurisdiction of the Supreme Court. Justice Pfeifer supports adding "Declaratory judgment in cases of public or great general interest" to the list of actions over which the Supreme Court has original jurisdiction.

According to Justice Pfeifer, this change would give the court the opportunity immediately to address constitutional questions arising out of legislative enactments. Right now, there is no provision allowing the court to immediately consider whether to grant a declaratory judgment; rather, questions of this nature are required to be adjudicated in the lower courts before the Supreme Court may hear them. He said that, on rare occasions, such as in the "Sheward" case involving tort reform, the court has considered questions of this nature without lower court review, and without comment, but there is no constitutional authority for this.

Problems arise with the current scheme because many years may pass before litigants obtain the relief sought. The lack of clarity of the legal standard in some cases creates uncertainty. The

example of this is in the JobsOhio line of cases, provided by Justice Pfeifer in his presentation materials. In that situation, the Ohio General Assembly enacted legislation intended to create a hybrid public/private entity that would promote job creation in Ohio. Those involved immediately recognized there could be a constitutionality question with the legislation, and sought review by the Supreme Court so that the uncertainty would be removed, thus allowing the bonding authorities to feel confident that future challenges would not hinder the project. The court, however, never reached the merits, instead concluding that there was no real controversy and that the plaintiffs lacked standing to bring the case.

Against the argument that this change would result in a backlog of cases in the court, Justice Pfeifer pointed out that the court would still have the discretion to reject cases; in fact, the court only hears a fraction of the hundreds of original actions filed each year, summarily rejecting most of them. Cases that would be considered include those that do not require a record from the trial court in order to be adjudicated.

Justice Pfeifer advocated that the court is one of three co-equal branches of government, and asked that when the commission is finished with its work it should be certain that the courts are co-equal and not an appendage. He said when he hears “judges should not legislate from the bench,” he feels it is an unhealthy statement because it demeans the importance of the common law. His view is that courts exist in order to interpret what the legislation is intended to achieve. He disagrees that this would constitute “legislating from the bench.” He believes that common law is just as important as statutory law.

Justice Pfeifer also indicated there are provisions in the Ohio Constitution that do not belong there, including the creation of the Livestock Board, the physical location of casinos, and the gay marriage amendment. He discussed this amendment [Article XV, Section 11] further, indicating that the recent decision of the Sixth Circuit Court of Appeals is a treatise on different views about the power of the courts. He urged the committee to read the opinion in that case [*DeBoer v. Snyder*, 2014 U.S. App. LEXIS 21191; 2014 FED App. 0275P (6th Cir.)] He said that regardless of whether the U.S. Supreme Court takes that case, Ohio’s constitutional amendment needs to be removed from the Constitution, and will be addressed either by a court decision or by the initiative process. He believes the Commission should look the issue squarely in the face. He said the dissent in that case, which argued the issue is really about the children of gay and lesbian partners, who suffer under the law when the legitimacy of their parents’ relationship is not acknowledged by the court system. He said that Ohio domestic relations judges are having to address the break-up of marriages that have occurred and been recognized in other states, and that this creates problems in which the Ohio judges either have to deny relief because they lack authority or they have to ignore the constitutional provision. Justice Pfeifer advocated that the commission address this issue, asking whether Article XV, Section 11 belongs in the Constitution.

Justice Pfeifer then answered questions from committee members.

Professor Saphire asked if Justice Pfeifer’s proposal conflated standing and jurisdiction. In response, Justice Pfeifer indicated that he does not think expanding original jurisdiction would solve the standing issue. He noted that in most cases the party bringing the action has standing.

For example, regarding tort reform damage caps, he indicated it is the injured plaintiff who is arguing the caps are unconstitutional.

Senator Skindell noted that the JobsOhio Bill [H.B. 1 of the 129th General Assembly] contained a provision to give original jurisdiction to the Ohio Supreme Court to decide constitutionality. The goal was to get to what Justice Pfeifer proposes. However, he noted that this does not resolve the issue of standing; the Court is the maker of standing. He asked whether the Commission should decide standing too. Justice Pfeifer stated he is not proposing that, but standing is still a difficult issue. If there is a constitutional provision allowing an original action, then the General Assembly might be able to give standing in a particular bill.

Commissioner Mulvihill asked if what Justice Pfeifer was proposing would just constitutionalize advisory opinions. Justice Pfeifer said that it would not. He stated the proposal does not create an ability to render advisory opinions, but rather allows the court to immediately address concerns about constitutionality.

Chair Abaray wondered what the best way to accomplish Justice Pfeifer's goal might be. She asked if the proposed change would create a jurisdictional vehicle similar to certifying the question. She also wondered whether the capability of deciding original declaratory judgment actions should be limited to constitutional challenges. Justice Pfeifer said that this would be another way of accomplishing the same thing, but noted everyone should remember that even where there is a conflict the court's jurisdiction is discretionary. Chair Abaray then asked how Justice Pfeifer's proposal was different. In response he remarked that either way, it is better than what we have now. There is a sidestep: it's political. He noted that became an excuse in the *DeRolph* cases. He is open to anything that improves the status quo, and these matters always are handled on a case-by-case basis.

Committee member Wagoner asked how we might have judicial review more quickly. He indicated that Michigan allows the court to issue advisory opinions. He questioned if that capability is needed here. Justice Pfeifer noted that offering advisory opinions would be great but the philosophy of a majority of the court right now is to shrink judicial power. That will change with personnel changes, but allowing an advisory opinion is a way to address important issues. He indicated that the Court does screen cases: noting that there are twelve original actions before the Court that have to be reviewed; but that most will not survive the screening process. This occurs for a variety of reasons, and the Court usually just dismisses the matter without an explanation.

Chair Abaray asked about the lack of the development of a record. She relayed that in the area of caps on tort reform damages she was involved with the case of [*Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948 (2007)], in which a federal court certified the matter to the Ohio Supreme Court pursuant to S.Ct.Prac.R. 5.04 on the question of the constitutionality of tort damage caps. She indicated she was not permitted to develop the record with evidence that would have shown there was no rational basis justifying the caps. In response, Justice Pfeifer: said with a question like that, you cannot really prove rational basis one way or another, so the record is not going to add much to the analysis.

Commission member Kurfess asked if Justice Pfeifer's proposal was approved if the legislature could pass a piece of legislation that says it becomes effective once the Supreme Court immediately rules it is constitutional. Justice Pfeifer said that in that case the Court would be skeptical. He said the legislature couldn't do that without a constitutional amendment. Probably the legislature cannot change the jurisdiction of the court because it is constitutional.

Justice Pfeifer concluded his remarks with compliments to the Commission for the important work it is doing, and said he looks forward to the submissions of the Judicial Branch and Administration of Justice Committee.

Report and Recommendation Regarding Article IV, Section 19, Courts of Conciliation

Senator Obhof presented a report and recommendation prepared by Commission staff on the topic of Article IV, Section 19 dealing with Courts of Conciliation. He noted that the proposal to repeal this section was an outgrowth of conversations the committee had with Dean Steinglass. He noted that the philosophy is to not burden the constitution with provisions that have never been used. He also indicated that research from Commission staff indicates there would be no effect on alternative dispute resolution should the section be deleted from the constitution.

The committee approved Senator Obhof's suggestion that the phrase "serves no purpose" and the comma after the word "mechanisms" be deleted.

Professor Saphire questioned whether the proposed constitutional amendment to repeal this provision which was rejected by the voters in 2011 might have been defeated because it was presented at the same time as the question of whether the retirement age for judges should be increased and also failed at the ballot. He asked if there is any reason to believe this recommendation will have a better result. Do we know why the voters rejected Issue 1 in 2011? Senator Obhof noted that age restriction may have been the issue. But we don't know why voters rejected Issue 1.

In further consideration of the report and recommendation, Senator Obhof suggested substituting the word "perhaps" for "likely" where the reason for the failure of Issue 1 is discussed.

Chair Abaray noted that arbitration can cause problems and one advantage to the current language is that it allows courts to set up courts of conciliation, which are likely cheaper. She wondered if anyone looked at if these courts are a good alternative to arbitration? Senator Obhof responded that he is not aware of anyone having any intent to create courts of conciliation.

Report and Recommendation Article IV, Section 22, Supreme Court Commission

Senator Obhof then presented a report and recommendation prepared by Commission staff regarding Article IV, Section 22 dealing with Supreme Court Commissions. He noted that the phrase "serves no purpose" and the comma following should be deleted, and that the comma after "1885" should be eliminated to which all agreed.

Professor Saphire also suggested that the word “likely” be replaced with the word “perhaps” when discussing why the voters voted down a proposal to delete this provision from the constitution in 2011. The suggested was approved.

Senator Obhof noted that the report and recommendation is that Article IV Section 22 should be repealed, eliminating the ability of the legislature to create Supreme Court Commissions. The only purpose to the provision was to create a stop gap measure 140 years ago.

The committee voted in favor of adopting these two Reports and Recommendations, which will be up for a second consideration at the next meeting of the committee.

Professor Saphire proposed that Justice Pfeifer’s proposal be discussed at the next meeting, and this was approved.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:32 a.m.

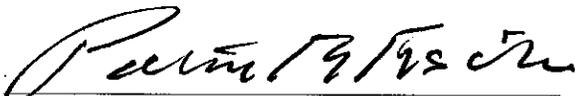
Attachments:

- Notice
- Agenda
- Roll call sheet
- Biographical sketch of Justice Paul E. Pfeifer
- Prepared remarks of Justice Paul E. Pfeifer
- Report and Recommendation Article IV Section 19, Courts of Conciliation
- Report and Recommendation Article IV, Section 22, Supreme Court Commission

Approval:

The minutes of the November 13, 2014 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the January 15, 2015 meeting of the committee.


Janet Gilligan Abaray, Chair


Judge Patrick F. Fischer, Vice Chair