



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 12, 2015

Call to Order:

Chairman Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 3:00 p.m.

Members Present:

A quorum was present with committee members Abaray, Curtin, Fischer, Jacobson, Manning, Mulvihill, Obhof, Sapphire, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the January 15, 2015 meeting of the committee were approved.

Presentation:

“Ohio Supreme Court Original Jurisdiction”

Steven H. Steinglass
Senior Policy Advisor

Steven H. Steinglass, Senior Policy Advisor, presented his memorandum on Ohio Supreme Court Original Jurisdiction.

Committee member Richard Sapphire asked whether a declaratory judgment action under state law is a cause of action, a remedy, or both. He asked if, under the proposition that the Supreme Court only has jurisdiction where the constitution confers it, this would apply to the appellate jurisdiction.

Mr. Steinglass replied that appellate jurisdiction is also constitutional. He said it is his assumption that a declaratory judgment action, filed in the court of common pleas, can go on to the appellate level and then to the Supreme Court, if the court will accept it.

Vice-Chair Judge Patrick Fischer explained there are parameters on a declaratory judgment action in that there must be a controversy and it must bring in all the parties. He said it is not a

remedy in that sense. The action usually is used to adjudicate contractual provisions, and you need all parties to be there in order to get a declaratory judgment.

Committee member Dennis Mulvihill directed the committee to Revised Code Chapter 2721, which governs declaratory judgment actions.

Mr. Steinglass indicated that Justice Paul Pfeifer, in his remarks to the committee regarding the original jurisdiction of the Supreme Court, did not address standing. He said a party would still have to demonstrate that it has a justiciable controversy. Mr. Steinglass said there is a group of cases for which it would benefit the parties to have a quick resolution of their respective rights. The policy issue this committee has to address is whether they want to create a route directly to the Supreme Court for these cases.

The General Assembly in the JobsOhio legislation felt it would be good policy to have a quick resolution of this issue, due to wanting to market bonds and remove uncertainty. The legislation attempted to expand original jurisdiction, but the Supreme Court said the expansion was unconstitutional, causing the plaintiff to have to go back and work its way up through the system. At one point, the state wanted the court to decide, but after the bonds sold the state took a different position. That would be the type of case an original action in the Supreme Court would address.

Mr. Saphire asked whether standing is also necessary in advisory opinions, explaining that in federal court it is different.

Committee member Jeff Jacobson said he was having trouble envisioning how an original jurisdiction declaratory judgment action would proceed in the Supreme Court. He used JobsOhio as an example, asking who the state would sue if it wanted to get the court to declare that a bond sale is good. Mr. Jacobson wondered whether such an action would be used preemptively by the state, or state related entities, to sue someone to establish that what the state is doing is okay. He asked whether there is a risk the state would sue someone who is not adversarial just to get a result.

Mr. Steinglass said he could look at what other states do, but that he could not say how Mr. Jacobson's scenario would play out. He said that proposed bonds have been challenged and courts have considered the propriety of them being adjudicated. The simple answer is that a taxpayer could bring an action if he opposes the issuance of bonds. The JobsOhio case did not preclude taxpayer actions under certain circumstances, but would people seek friendly plaintiffs to bring those suits? Mr. Steinglass thinks that yes, they probably would.

“State Supreme Court Advisory Opinions”

Steven H. Steinglass
Senior Policy Advisor

Mr. Steinglass then presented his memorandum on “State Supreme Court Advisory Opinions.” He said there are ten states which allow advisory opinions, but only the government is permitted to seek them. He said an advisory opinion is part of the political process, and with politics involved the issues are usually contentious. Mr. Steinglass said that in federal courts advisory

opinions have been prohibited since the 1790s. He said that the term “advisory opinion” has become sort of a pejorative in the court system.

Mr. Sapphire asked why the other forty states do not have advisory opinions; is it because those states reflect the federal model? He wondered whether there have been efforts to amend state constitutions to allow them. Mr. Steinglass answered that he would need to do more research to answer that question.

Chair Abaray observed that an advisory opinion is more like a certified question and is not adversarial.

Mr. Mulvihill raised the example of writs of prohibition and mandamus, in which citizens sue common pleas judges. He said this example does not fit the JobsOhio situation because a person would not sue common pleas judges to not enforce, or to enforce the law. He asked if it would be possible to allow original actions, without amending to clarify the standing issue, basically to allow someone to bring a suit as a public right.

Mr. Steinglass answered that would be one possibility.

Committee member Mark Wagoner asked whether expanded jurisdiction would resolve the problem, and if advisory opinions would be more helpful.

Mr. Sapphire commented there is no obvious outcry in favor of allowing advisory opinions or for expanding original jurisdiction, and that most judges are agnostic about this. He wondered whether legislative leaders and executive leaders might find the proposed change useful, and suggested the committee should try to learn what their views on the topic are.

Mr. Steinglass answered that these are two different concepts. A declaratory judgment action would be available through expanding original jurisdiction, but people in government who may feel a need to get a declaratory judgment can probably do so in the lower courts.

Mr. Jacobson said he is worried about the potential for abuse of advisory opinion power, should it be permitted. He raised the example of a governor calling for a change in the law, but legislative leaders not wanting the change and passing it off to the Supreme Court. He said he could see the different branches fighting among themselves, using the court as a shield. He believes this might be used to try to change the political governing process in a very unhelpful way.

Mr. Wagoner commented that this could be prevented with procedural protections, for instance creating a ninety day window to seek the opinion after legislation is signed. He said this would eliminate a lot of the gamesmanship, and it also could allow an early answer about whether something is constitutional. He said the provision could provide for limited standing. Mr. Wagoner said if the committee could put those protections in place, it would be better for the interested parties to obtain a resolution in that ninety day window, rather than having to wait two and half years.

Chair Abaray asked whether, in states with advisory opinions, supreme courts invite submission of amicus briefs. Mr. Steinglass said there have been many amicus briefs filed in Michigan, which allows advisory opinions, so that questions do not get asked in the dark.

Mr. Mulvihill asked what remedy is available, and what would happen if a record needs be developed.

Mr. Steinglass said the problem is that if litigation does go forward, it ultimately goes to the same court that issued the advice.

Mr. Mulvihill said allowing advisory opinions might affect judicial elections, where an advisory opinion could provoke money thrown at a candidate.

Mr. Steinglass said courts have discretion whether to render an advisory opinion.

Mr. Wagoner observed if the law regards the authority of government to do something, the court can deal with whether it is facially invalid or not.

Chair Abaray cited as an example a case in which she could not develop the record.

Mr. Wagoner commented that an advisory opinion for the legislature would not involve developing whether there is a rational basis. Instead, he said what you will see are structural issues you present to the court.

Mr. Jacobson asked whether a statute, once struck down, could be revived by a subsequent decision.

Mr. Steinglass said striking it does not take it off the books. Mr. Sapphire said whether a statute that has been invalidated by a court, and may have a later effect, is a function of state law, and if the state tried to enforce it, then presumably the effort to do so would be blocked.

Chair Abaray noted that there are some provisions in the Ohio Constitution that have been declared unconstitutional; what should the committee do with these?

Mr. Jacobson wondered, if there was a controversial case and new court personnel are named, would that invalidate the invalidation.

Chair Abaray said she understood Justice Pfeifer to be asking to expand jurisdiction for declaratory judgment actions just for constitutional questions, not for contractual rights of private litigants.

Mr. Sapphire asked whether the committee could hear from the two branches of government as to whether they have an opinion on this. Would this be a useful tool to make government more efficient? If the answer is no, then why pursue it.

Mr. Steinglass offered to reach out to leadership in the General Assembly to gauge their interest.

Mr. Jacobson asked whether the committee could have a version drafted that incorporates narrow specifications for who could bring such an action and under what circumstances.

Mr. Wagoner said he felt that the committee does not need further research.

Chair Abaray asked about other states' original jurisdiction provisions and whether the committee could have some research on this.

Mr. Mulvihill said he is concerned that advisory opinions would have no force and effect so there does not seem to be a point in having them. Mr. Mulvihill said he asked Justice Pfeifer if he really wants advisory opinions and he said no.

Mr. Wagoner said the committee could put restrictions on such a measure because it is writing the rules.

Mr. Mulvihill said he does not think that whatever the committee labels it, the provision needs to have force and effect.

Mr. Saphire commented that as long as there is judicial review, courts will interpret the constitution; having the court rule early, as opposed to later, is a valuable thing. Even if it is an advisory opinion that people do not have to act upon, the ruling would give information to people about our commitment to constitutional government.

Mr. Mulvihill disagreed, saying that although it would give information, it sets up a conflict between branches of government. He said he agrees with Mr. Saphire on the value of early determination, but that he does not agree that the court should be allowed to issue advisory opinions that no one has to pay attention to, which would further set up conflict and create additional problems.

Chair Abaray commented that she is concerned with the lack of an adversarial process and the lack of development of the record.

Mr. Saphire said the experience in Massachusetts would be a good model to look at, and said it would be interesting to see how often these opinions are ignored.

Mr. Steinglass said he will look at the practice in some of the states. He agreed to come up with language that would maintain the discretion in the court, and try to limit the open-endedness of advisory opinions as a discussion piece. He said he would try to answer, in a limited way, if there should be a way to get a more authoritative opinion from state highest court.

Mr. Jacobson asked whether constitutional challenges would be limited to facial or as applied, and Mr. Steinglass said he could address that.

Chair Abaray would like to know if other members of the Supreme Court have comments on Justice Pfeifer's proposal.

Mr. Mulvihill asked whether adopting these changes would really be creating a super legislature, so that any time someone does not agree they go to the Supreme Court.

Committee Discussion:

Mr. Steinglass then turned the committee’s attention to the remainder of Article IV, indicating that Commission staff needs guidance as to what the committee would like to address next. He said the Modern Courts Amendment in 1968 addressed many of the nuts and bolts issues, but there may be other issues that have come up that could be addressed. He has done overviews in other committees and said that such an overview might benefit this committee.

Mr. Sapphire pointed out that the committee also has jurisdiction over some provisions in Article I, and that it had been suggested that the committee could combine meetings of this committee and the Bill of Rights and Voting Committee to deal with the Article I sections.

Mr. Wagoner said he would be interested in seeing a side-by-side analysis of the Federal Rules Enabling Act and Ohio law, specifically, how those rules are adopted as compared to Ohio’s rules of court. He said that in Ohio it is required that there be a resolution of disapproval, and one legislator introduces the rules. He said this can be problematic, and that in the federal system rules approval requires an act of Congress. Mr. Steinglass said that a discussion of that topic could be scheduled.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:00 p.m.

Attachments:

- Notice
- Agenda
- Roll call sheet

Approval:

The minutes of the March 12, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the May 14, 2015 meeting of the committee.

/s/ Janet Gilligan Abaray

/s/ Patrick F. Fischer

Janet Gilligan Abaray, Chair

Judge Patrick F. Fischer, Vice Chair