OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 14, 2015

Call to Order:

Chairman Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 1:30 p.m.

Members Present:

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

Approval of Minutes:

The minutes of the March 12, 2015 meeting of the committee were approved.

Presentation:

"Standing and Justiciability"

Michael E. Solimine
Prof. of Law
University of Cincinnati

Chair Abaray recognized Michael Solimine, law professor from the University of Cincinnati College Of Law, to present on the topic of advisory opinions and declaratory judgments in state supreme courts.

Prof. Solimine indicated that a number of states use some version of the advisory opinion and some also use a procedure allowing for filing a declaratory judgment action in the supreme court. His conclusion is that he is against advisory opinions and is skeptical of the idea of a declaratory judgment action on constitutional issues in the Ohio Supreme Court. He noted the federal system does not have either of these things.

Prof. Solimine said there are 10 or 11 states, most east of the Mississippi River, that use advisory opinions. The reasons states use advisory opinions have been previously noted by Steve

Steinglass, Senior Policy Advisor to the Commission, in his memorandum on this topic (presented to the committee at its meeting in March 2015). Prof. Solimine said some of the reasons overlap with the reasons supporting filing a declaratory judgment action in the supreme court. He said it is viewed as less disruptive to have the concept of a state statute decided early. The constitutionality of state legislation is the question most likely to be raised in a request for an advisory opinion. In the normal litigation practice, a statute would be passed and go into effect, and its constitutionality would be raised in the ordinary course of litigation. Typically, years later, the state supreme court decides whether the statute is constitutional. Prof. Solimine said when there is a procedure allowing an advisory opinion, the constitutional issue is raised much earlier. He said Ohio would not have to follow what other states have done. The question typically comes into play right after the legislation is passed. For states that use advisory opinions, they believe it is good to resolve the constitutional issue early on, rather than to wait many years. Another reason could be that these states like the idea of having a healthy inter-branch dialog.

Prof. Solimine said advisory opinions are not considered binding, meaning the state legislature does not have to follow them. He said the most important reason against advisory opinions is that they contradict the concept of separation of powers. He added that advisory opinions tend to be extremely hypothetical, highly abstract, and devoid of a factual record, so that it is an inferior process to ask a state supreme court to answer a technical question without facts developed through an adversarial system. In some states, advisory opinions are treated as binding, even if they are not supposed to be considered as such. Prof. Solimine said the cons outweigh the pros on the advisory opinion.

With regard to the concept of an original, declaratory judgment action in the supreme court Prof. Solimine said it is a much better idea although he is skeptical. He said there are not as many weaknesses as are inherent in the advisory opinion. Ohio Supreme Court Justice Paul Pfeifer's proposal contemplates a declaratory judgment action would be brought by a plaintiff that has standing. In his article, regarding justiciability, he is critical of Ohio courts not following the federal standing doctrine, and that some Ohio cases have carved out public interest as an exception to standing requirements.

Prof. Solimine offered as his reasons for skepticism that if a case cannot be filed directly with the Ohio Supreme Court, this is a delay that the original action practice is designed to overcome. However, the delay problem can be addressed in ways other than amending the Ohio Constitution. As an example, he said it is possible under current practices to accelerate review of a constitutional issue in modest ways. Ohio R.C. 2502.02, relating to appellate jurisdiction, could be amended to permit the more rapid review of the constitutionality of certain issues. He said this can be done without amending the constitution.

Prof. Solimine said another reason for his skepticism is that, normally, a written record is assembled in the trial court, based on discovery in civil cases. He said that cannot be done when there is original action jurisdiction in the supreme court. He said it is awkward at best to create a record in an original action in the supreme court. He said Justice Pfeifer was not worried about this, and that Justice Pfeifer does talk about the record issue in his concurring opinion in *State ex rel. Ohio Academy of Trail Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062, and in his dissent in *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 2011-Ohio-

4101, 953 N.E.2d 329. Prof. Solimine stated that Justice Pfeifer has indicated constitutional challenges are mostly pure legal issues, and that a record is not necessarily required. Prof. Solimine stated that it is not possible to know ahead of time that these are pure issues of law; some may be and some may not be. He said court decisions are best made when you have an actual plaintiff and an actual defendant, and attorneys. He said it is difficult to assume that state constitutional law involves pure issues of law. He commented that the court could invite amicus curiae briefs for assistance in these cases, for example.

As his final comment Prof. Solimine indicated that Justice Pfeifer's proposal would not restrict declaratory judgment original actions to the constitutionality of tax and other legislation, but that the provision is far broader than that. He said that would be a concern because the definition of "public or great general interest" is too vague, and invests a lot of discretion in the Ohio Supreme Court. He said if the committee is inclined to adopt such a proposal, he would urge a more narrowly-written amendment. Prof. Solimine then invited questions from the committee.

Committee member Dennis Mulvihill asked whether Prof. Solimine would be inclined to allow original jurisdiction for a facial constitutional challenge, rather than for an "as applied" challenge. Prof. Solimine replied that he would, indicating that his concerns are much less if we are talking about a facial challenge. But then the problem arises of how that could be written into the constitution. Prof. Solimine said he would have to think more about how to write that into the proposal. He said another way to deal with that would be to require it to be a "public or great general interest," but that this is not easy to distinguish in the real world of litigation. Mr. Mulvilhill asked whether the court does that now with discretionary appeals, that is, only accept the cases if they are of public or great general interest? Prof. Solimine agreed that is the procedure, but his concern is that the Ohio Supreme Court has not built up sufficient jurisprudence that directly addresses this issue. Vice-chair Fischer asked about the delay issue, wondering how often it is necessary to have an immediate review of the constitutionality of a government enactment. Prof. Solimine said he is unaware of any important Ohio legislation that has not eventually been reviewed for its constitutionality by the supreme court. Vice-chair Fischer said the current declaratory judgment act requires all real parties in interest to be joined, and wonders whether parties would be allowed to bring in implied parties, and whether the court could then be adjudicating other people's rights without them getting a full process. Prof. Solimine answered that there could be a general rule that any trial court action is going to be stayed until the supreme court renders a decision. Alternately, the rule could allow them to proceed on parallel paths and whoever rules first rules first and life goes on.

Vice-chair Patrick Fischer asked, regarding advisory opinions, if they are not binding, whether there have been any decisions in the states that allow advisory opinions that, once facts are fleshed out, the advisory opinions have been overruled as wrong. Prof. Solimine said Mr. Steinglass may know of some, but that he cannot give an example. He said the consensus seems to be that the advisory opinion, if not *dejure* binding, it is *defacto*, because the issue is not relitigated. Chair Abaray said a parallel would be the ethics opinion. Vice-chair Fischer said it is just as disruptive as waiting for the whole case to go through on the record. Chair Abaray said even on a facial challenge you might need discovery, and that if asked whether there is a rational basis for a particular piece of legislation, litigants would need to provide a record. She also mentioned that there is a requirement to name the attorney general if challenging a law on constitutional grounds, so that adds complexity.

Mr. Mulvihill said he has a concern that, if an advisory opinion was requested and took several years for an answer, and there was an intervening election, it might change the result. Prof. Solimine said the practice in other states is that only the governor or the majority of houses of the legislature can ask for the advisory opinion. Mr. Mulvihill asked whether, in a state that has the advisory opinion, if the governor or branch of legislature asks for an opinion that is nonbinding, and a group takes exception and pours millions into an election to change the makeup of the court, what happens. Prof. Solimine answered that he does not know, but even where there is an advisory opinion provision, no one forces anyone to ask for one.

Committee member Sen. Michael Skindell said he was one of three plaintiffs in the JobsOhio litigation, and described how the General Assembly, in a number of pieces of legislation, put in a declaration saying that should the legislation be challenged, the supreme court would have jurisdiction to address the constitutionality. Sen. Skindell said that when they filed the complaint, the first paragraph related to jurisdiction, saying the case was being brought pursuant to Section 3 of House Bill 1, and that section of the bill was declared unconstitutional. He added this was part of the reason why Justice Pfeifer said the Commission should examine whether to adopt an original action for declaratory judgment, because there may be reasons why some people want it addressed sooner rather than later. Prof. Solimine said this was an interesting suggestion, that if one left the declaratory judgment proposal as is, as part of the court's jurisdiction, the court could interpret it that way. One could write that into the proposal to reflect some of the things that were just said. Prof. Solimine said he is okay with the swift, prompt determination of the constitutionality of state statutes. Some federal statutes do what Sen. Skindell describes. The McCain-Feingold campaign finance act, for example, directed venue. Prof. Solimine said he feels it should be done in the right way.

Chair Abaray asked whether the Ohio Supreme Court said that it was unconstitutional for the statute to declare who had jurisdiction. Sen. Skindell replied that yes, this was the case. He said jurisdiction could have been dealt with in the legislation directly, but then it begins to be a problem with the issue of standing. He said the legislature might have been able to confer standing, in a declaration clause, but he is not sure they can do that. Sen. Skindell said another perplexing issue that was difficult in JobsOhio, and that led to the outcome in the third opinion in that case, was the 90 day issue. Prof. Solimine commented that it may not be fair to let that 90 days determine standing. He said the way he reads Ohio jurisprudence is that a statute could create standing, for example a provision permitting municipal taxpayers to bring lawsuits under certain situations.

Sen. Skindell commented about subsequent sections that are declarations, asking whether that is to provide for standing. He asked, if standing is granted in a declaration part of legislation, whether that would be sufficient, or would it be necessary to create statutory law to grant standing. Prof. Solimine said this is an interesting question, but the General Assembly could put in a statute a provision to permit standing to people who otherwise would not have it.

Chair Abaray said she wanted to confer with other members of committee to see whether they wanted more testimony on the advisory opinion issue or whether they want to move on. There was no support among the committee members for proceeding on advisory opinions. Chair Abaray then polled committee members about whether they wanted to consider the issue of a

provision allowing for original jurisdiction for declaratory judgment actions in the supreme court. Mr. Kurfess asked whether, regarding Justice Pfeifer's proposal, other members of the court have commented on that subject. Chair Abaray said she wanted to see if the group wants to pursue it first.

Committee member Jeff Jacobson said he is not interested in going forward with considering an original action provision. He further commented regarding the standing question that the committee could almost confuse an important question with the procedural way it got handled. He said declaratory judgment original action jurisdiction invites mischief and discovery issues, and is best avoided.

Mr. Mulvihill said he does not feel strongly either way about pursuing it. Sen. Skindell said he would vote in favor of continuing to discuss the issue, and that the General Assembly could benefit from such a provision because there can be situations where there is a need for the supreme court to weigh in sooner rather than later.

Vice-Chair Fischer and Chair Abaray both said they are ready to move on. It was noted that the committee had a quorum. There was a brief discussion about whether the matter required a motion, second, and vote, and the conclusion was that the matter did not require formal action.

Committee Discussion:

Judicial Candidates Solicitation

Chair Abaray then turned the committee's attention to the United States Supreme Court's opinion in *Williams-Yulee v. Florida Bar*. She said the case made it clear that the Citizen's United case did not wipe out the ability of the state to govern judicial campaigns. Mr. Jacobson commented that he read the case as narrow, that a bar association could not limit third party speech in a judicial race. He said it is clear we can continue to have standards. Chair Abaray commented the case still leaves on the table whether there is a preferred method, because of the influence of outside money on judicial elections. She said she just wanted all to be aware of the case.

Grand Juries

Chair Abaray opened discussion on the grand jury system in Ohio, and a recommendation by the Ohio Task Force on Community-Police Relations as appointed by Governor Kasich regarding possible changes to the system. She said she would like to suggest that the committee hear from someone who has some expertise on this issue. Mr. Kurfess observed that he has thought that the area of grand juries and their operation needs to be examined, as it fluctuates between jurisdictions, and he is not sure a constitutional matter is involved. However, in some places there is a tug of war between the prosecutors and the courts, and questions about who the grand jury belongs to. He said it is an aspect of our judicial system that has the least understanding by the public. Mr. Kurfess added this is an arena that needs close examination, but he is not suggesting it is appropriate in the constitutional context. Mr. Jacobson said we hear of misuse of the grand jury system by prosecutors, but he has not heard of it happening in Ohio. He said it would be useful to ask the questions of someone, if there is much of a body of evidence, whether

there is questionable use or misuse, and what makes Ohio different from other states that have had more problems.

Chair Abaray said the issue came up recently because of a lack of indictments, and that she heard a lecture connected with the Innocence Project at the University of Cincinnati College of Law, and that some information the speaker shared could bear on grand juries and how the prosecutors are proceeding. Vice-chair Fischer said he agrees more with Mr. Kurfess, and that unless the committee is going to propose something to end grand juries, it is a small sentence in the constitution. Vice-chair Fischer said he had two cases as a practitioner where one person got no bill and it was appropriate, and another where he represented the victim and the person got no bill. Should there be legislation? Should this be looked at? Yes, he said, but this is not in our realm. He said the committee can talk about this, and Ohio could end grand juries, use presentments and information and preliminary hearings, but otherwise he did not think the committee should waste time on what is a statutory issue. Mr. Jacobson asked whether the committee could just look at what is in other constitutions around the country. Mr. Jacobson concluded by saying that otherwise this is a matter for the legislature to take up.

Chair Abaray directed the committee's attention to correspondence sent by Sen. Sandra R. Williams and Chief Justice Maureen O'Connor, addressing the grand jury recommendation by the Ohio Task Force on Community-Police Relations. She said the committee could start with some research about what other states do with regard to grand juries so that they could have some background for a discussion. Executive Director Steve Hollon said that staff could provide this review. Mr. Steinglass added that there is information about what happened in the 1970s that he could provide to the committee.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 3:00 p.m.

Attachments:

- Notice
- Agenda
- Roll call sheet

Approval:

The minutes of the May 14, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the July 9, 2015 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Judge Patrick F. Fischer, Vice Chair