OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

THURSDAY, MARCH 12, 2015
3:00 P.M.
STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of January 15, 2015

IV. Presentations

- "Ohio Supreme Court Original Jurisdiction"
  Article IV, Section 2

  Steven H. Steinglass
  Senior Policy Advisor

- "State Supreme Court Advisory Opinions"
  Article IV, Section 2

  Steven H. Steinglass
  Senior Policy Advisor

V. Committee Discussion

- Ohio Supreme Court Original Jurisdiction and Advisory Opinions

VI. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Janet Abaray, Vice Chair Patrick F. Fischer, and Members of the Judicial Branch and Administration of Justice Committee**

CC: **Steven C. Hollon, Executive Director**

FROM: **Steven H. Steinglass, Senior Policy Advisor**

DATE: **March 4, 2015**

RE: **Original Jurisdiction of the Ohio Supreme Court**

At the November 13, 2014, meeting of the Judicial Branch and Administration of Justice Committee, Justice Paul E. Pfeifer of the Ohio Supreme Court recommended an amendment to Article IV, Section 2(B)(1), to permit the Ohio Supreme Court to exercise original jurisdiction over declaratory judgment actions. This memorandum reviews the existing limitations on the court's original jurisdiction and identifies the broader topic of whether there is a need to allow the Ohio Supreme Court greater authority to exercise original jurisdiction over important issues.

Article IV, Section 2

Article IV, Section 2(B)(1) provides:

> (B)(1) The Supreme Court shall have original jurisdiction in the following:
>
> (a) Quo warranto;
>
> (b) Mandamus;
>
> (c) Habeas corpus;
>
> (d) Prohibition;
>
> (e) Procedendo;
>
> (f) In any cause on review as may be necessary to its complete determination;
>
> g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

Original Jurisdiction of the Ohio Supreme Court

In certain circumstances, the Ohio Constitution explicitly gives the Supreme Court not only original but also exclusive jurisdiction. For example, Article II, Section 1g allows litigants to bring challenges to petitions for initiatives and referenda directly to the court; Article III, Section 22 gives the court exclusive jurisdiction over allegations of gubernatorial disability; Article XI, Section 13 directs that challenges regarding apportionment are to go to the court; and Article XVI, Section 1 grants exclusive jurisdiction over challenges to the adoption or submission of proposed amendments. By comparison, the Article IV grant of original jurisdiction makes no reference to exclusive jurisdiction, and, pursuant to Article IV, Sections 3(B)(1) and 4(B), courts of appeals and courts of common pleas may also exercise original jurisdiction over such cases.

Under Article IV, Section 2(B)(3), "[n]o law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the Supreme Court." Under this provision, neither court rules nor state statutes may control the exercise of original jurisdiction. *See generally State ex rel. Ohio Democratic Party v. Blackwell*, 2006-Ohio-5202, ¶ 25, 111 Ohio St. 3d 246, 251, 855 N.E.2d 1188, 1194; *State ex rel. Wilke v. Hamilton Cty. Bd. of Commrs.*, 90 Ohio St.3d 55, 59, 734 N.E.2d 811, 817 (2000).

Declaratory judgment actions are not included on the list of cases over which the court has original jurisdiction, and the Ohio Supreme Court has interpreted the grant of original jurisdiction strictly to bar actions seeking declaratory judgments. For example, in *State ex rel. Ministerial Day Care Assn. v. Zelman*, 100 Ohio St.3d 347, 2003-Ohio-6447, 800 N.E.2d 21, ¶ 22, the Court stated that "neither this court nor the court of appeals has original jurisdiction over claims for declaratory judgment." *Accord, State ex rel. Satow v. Gausse-Milliken*, 98 Ohio St.3d 479, 2003-Ohio-2074, 786 N.E.2d 1289; *State ex rel. JobsOhio v. Goodman*, 133 Ohio St.3d 297, 299, 2012-Ohio-4425, 978 N.E.2d 153, 156; *ProgressOhio.org, Inc. v. Kasich*, 129 Ohio St.3d 449, 450, 2011-Ohio-4101, 953 N.E.2d 329, 330.

To be sure, there may be cases in which the need to declare the respective rights of the parties is bound up with a proper exercise of original jurisdiction over one of the enumerated cases, but this need does not bar the court from proceeding.

Finally, the court is aware that parties seeking declaratory relief often attempt to frame declaratory judgment actions as requests for writs of mandamus or writs of prohibition, but the court scrutinizes such petitions to determine their true nature. *See, State ex rel. Miller v. Warren County Bd. of Elections*, 130 Ohio St.3d 24, 28, 2011-Ohio-4623, 955 N.E.2d 379, 383 (if the allegations of a complaint for a writ of mandamus indicate that its real object is obtain a declaratory judgment, the court lacks jurisdiction and must dismiss), *citing State ex rel. Obojski v. Perciak* , 113 Ohio St.3d 486, 2007 Ohio 2453, 866 N.E.2d 1070, ¶ 13.

Limitations on the Legislative Expansion of Original Jurisdiction

In 2011, the General Assembly attempted to expand the Ohio Supreme Court's original jurisdiction to allow it to hear challenges to the constitutionality of the JobsOhio legislation, but in *ProgressOhio.org v. Kasich*, *supra*, the Supreme Court held that a statutory expansion of original jurisdiction was prohibited because only the Constitution may provide the parameters of judicial authority:

> "It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution. This principle is grounded on the separation of powers provisions found in many American constitutions * * *." See *Smith v. State* (1976), 289 N.C. 303, 328, 222 S.E.2d 412, and cases cited therein.
>
> Although *Smith* is from another jurisdiction, the principle set forth above is true in Ohio. "[N]either statute nor rule of court can expand our jurisdiction." *Scott v. Bank One Trust Co., N.A.* (1991), 62 Ohio St.3d 39, 41, 577 N.E.2d 1077; see also *State ex rel. Cleveland Mun. Court v. Cleveland City Council* (1973), 34 Ohio St.2d 120, 122, 296 N.E.2d 544 ("neither the Civil Rules nor statutes can expand this court's original jurisdiction and require it to hear an action not authorized by the Ohio Constitution"); *Classic Pictures, Inc. v. Dept. of Edn.* (1952), 158 Ohio St. 229, 229-230, 108 N.E.2d 319 ("If plaintiff's contention were true, the General Assembly would have conferred upon the Supreme Court original jurisdiction in addition to that conferred by the Constitution. Such legislation would be void"); *State ex rel. Richards v. Pittsburgh, Cincinnati, Chicago, & St. Louis Ry. Co.*(1895), 53 Ohio St. 189, 237, 41 N.E. 205 ("That the original jurisdiction of this court cannot be enlarged or diminished by legislative action, but is such, only, as the constitution confers, was settled at an early day after the present constitution was adopted").
>
> Therefore, insofar as Section 3 of H.B. 1 attempts to confer exclusive, original jurisdiction on this court to consider the constitutionality of the act's provisions, it is unconstitutional. Neither legislation nor rule of court can expand our jurisdiction under Section 2, Article IV of the Ohio Constitution.

129 Ohio St.3d at 450-51.

The Pfeifer Proposal

Justice Pfeifer, recognizing this background, has proposed adding declaratory judgment actions to the list of enumerated actions in Article IV, Section 2(B)(1) over which the Ohio Supreme Court may exercise original jurisdiction. The proposed new language would read as follows:

Declaratory judgments in cases of public or great general interest.

This proposal does not, by its terms, mandate that the Court exercise original jurisdiction over declaratory judgment actions, but simply permits the court to do so. Indeed, unlike other subsections of Section 2(B)(1), the Pfeifer proposal *expressly* limits the court's original jurisdiction to "cases of public or great general interest."

It should also be noted that the Pfeifer proposal does not address the issue of standing or the continued ability of the court to entertain "public-rights actions." *See, e.g., State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St.3d 451, 1999-Ohio-123, 715 N.E.2d 1062 (refusing to bar public-rights actions).

Policy Issues

Justice Pfeifer's proposal to permit the Ohio Supreme Court to exercise original jurisdiction over declaratory judgment actions raises the important policy issue of whether Ohio should create a method for enabling a group of important cases to receive speedy review by the Ohio Supreme Court.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Janet Abaray, Vice Chair Patrick F. Fischer, and Members of the Judicial Branch and Administration of Justice Committee**

CC: **Steven C. Hollon, Executive Director**

FROM: **Steven H. Steinglass, Senior Policy Advisor**

DATE: **March 4, 2015**

RE: **Advisory Opinions by State Supreme Courts**

At the November 13, 2014, meeting of the Judicial Branch and Administration of Justice Committee, Justice Paul E. Pfeifer of the Ohio Supreme Court recommended an amendment to Article IV, Section 2(B)(1), to permit the Ohio Supreme Court to exercise original jurisdiction over declaratory judgment actions. During the discussion of this proposal, one member of the committee questioned whether the Ohio Constitution should be amended to permit the Ohio Supreme Court to issue advisory opinions. The purpose of this memorandum is to provide additional information on advisory opinions.

This memorandum reviews the nature of advisory opinions and the current approach to advisory opinions by both the federal courts and the Ohio Supreme Court. Finally, the memorandum reviews the advisory opinion policies (and to a limited extent the use of advisory opinions) in the states that currently permit them.

What Is an Advisory Opinion?

An advisory opinion is an opinion given by a court, typically involving the validity of pending legislation. But under the well-established nonbinding doctrine, "advisory opinions do not have the legal force of a binding decision."[1] Although the "advice" provided by a court of last resort is likely to be respected, a leading scholar, relying on the English experience, once noted that "[n]o one supposes [that] *** the Law Lords are bound by the opinions given."[2]

Federal Courts

The United States Supreme Court has rejected the availability of advisory opinions since the earliest days of the country, most famously in correspondence between the Court and the Washington administration.

On July 18, 1793, Secretary of State Thomas Jefferson had written Chief Justice John Jay and the associate justices to request answers to 29 questions involving the construction of treaties, the law of nations, and the laws of the country. Writing to President Washington on August 8, 1793, Chief Justice John Jay and the associate justices, relying on both separation of powers and constitutional text, declined to answer the questions. This letter, which ironically may be seen as an advisory opinion, stated:

> We have considered the previous question stated in a letter written to us by your direction by the Secretary of State on the 18th of last month. The lines of separation drawn by the Constitution between the three departments of the government—their being in certain respects checks upon each other—and our being judges of a court in the last resort—are considerations which afford strong arguments against the propriety of our extrajudicially deciding the questions alluded to; especially as the power given by the Constitution to the President of calling on the heads of departments for opinions, seems to have been *purposely* as well as expressly limited to the *executive* department.[3]

The United States Supreme Court has long adhered to this position, although individual justices have, from time-to-time, offered extrajudicial advice to sitting presidents.

Ohio

The Ohio Constitution has never directly addressed whether the Ohio Supreme Court may issue advisory opinions. Nonetheless, the Court has long made clear that it may not issue advisory opinions.

The case widely viewed as first barring the Ohio courts from issuing advisory opinions was the 1882 case of *State v. Baughman*, 38 Ohio St. 455 (1882). The General Assembly, by joint resolution, had instructed the attorney general to file a quo warranto action against the police commissioners of the City of Xenia seeking answers to four questions concerning their appointments. In concluding that it could not answer two of the questions, the Court stated:

> If the judiciary were to assume to decide hypothetical questions of law not involved in a judicial proceeding in a cause before it, even though the decision 'would be of great value to the general assembly' in the discharge of its duties, it

> would, nevertheless, be an unwarranted interference with the functions of the legislative department that would be unauthorized, and dangerous in its tendency.

Id. at 459.

In taking this position, the Court recognized that in some states, such as Massachusetts, "the constitution authorizes the legislature and the governor to require of their highest judicial tribunal its opinion on important questions of law the decision of which become necessary to the discharge of their public duties." *Id*. at 459-60. But the Court noted that "[t]his power does not include the right to require an opinion on abstract or hypothetical questions however valuable as a future guide, nor the such questions as affect private rights merely." *Id*. at 46.

Baughman did not refer to advisory opinions by name, but the decision has been come to stand for its prohibition on the rendering of advisory opinions. Moreover, the Court repeatedly has clarified its rejection of any role in issuing advisory opinions. *See, e.g., Egan v. National Distillers & Chemical Corp.,* 25 Ohio St. 3d 176, 495 N.E.2d 904, at syllabus (1986) ("[I]t is well-settled that this court will not indulge in advisory opinions."); *Armco, Inc. v. Pub. Utilities Commission*, 69 Ohio St. 2d 401, 406, 433 N.E.2d 923, 926 (1982) ("Under these circumstances, any opinion this court might express *** would be purely advisory, and it is well-settled that this court does not indulge itself in advisory opinions.").

The issue of whether the Ohio Supreme Court has authority under the Modern Courts Amendment to adopt a rule permitting the issuance of advisory opinions (akin to Rule XVI of the Supreme Court Rules of Practice permitting the answering of questions certified by federal courts) is beyond the scope of this memorandum. It should be noted, however, that in upholding its power to answer certified questions, the court noted that answering certified questions is not an exercise of jurisdiction. *See Scott v. Bank One Trust Co.*, 62 Ohio St.3d 39, 42, 577 N.E.2d 1077, 1079-1080 (1991).

Advisory Opinions in the States

Most states follow the federal model and do not permit their courts to issue advisory opinions. However, ten states, Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota, permit their courts to issue advisory opinions:[4]

Of these ten states, eight authorize advisory opinions in their state constitutions, while two (Alabama and Delaware) authorize them in state statutes. The statutory and constitutional language authorizing advisory opinions in these states is contained in the chart, provided as Attachment A, and the survey, provided as Attachment B.

As shown in the chart and in the survey, states demonstrate a wide array of different policies as to who may request advisory opinions, the standards for issuing advisory opinions, and whether courts are required to answer requests for advisory opinions.

All ten states that authorize advisory opinions authorize the governor to request advisory opinions, and seven states permit either house of the state legislature to request advisory opinions. One state requires both houses of the state legislature to join in any such request.

States also vary on whether courts are required to provide advisory opinions. Four states expressly require the state supreme court to provide the requested opinion, while two states clarify that courts have discretion to decline to do so. Four states, however, use language that is vague, and it is unclear whether these state courts are required to render advisory opinions. In any case, the ability of state courts to determine whether an issue is an "important question of law" (as well as the "upon solemn occasion" clause), will generally provide courts with room to decline requests they find problematic.[5]

All states permitting advisory opinions permit their courts to address constitutional issues, although it appears that three limit their supreme courts to constitutional issues and thus bar giving advice on pure statutory questions. Finally, two states limit advisory opinions to issues that will help the governor perform his/her responsibilities.

The Experience of the States with Advisory Opinions

A full review of the use of advisory opinions in those states that permit them is beyond the scope of this memorandum. Nonetheless, it appears that in states that permit advisory opinions the device has become part of the jockeying that often characterizes the political process.

Endnotes

[1] Mel A. Topf, A Doubtful and Perilous Experiment: Advisory Opinions, State Constitutions, and Judicial Supremacy 69-70 (2011).

[2] Thayer, Advisory Opinions, in Legal Essays 42 (1908; 1st ed. 1885) [quoted in *Topf, supra*, at 97 n. 1].

[3] *See* Correspondence of the Justices in Fallon, Manning, Meltzer & Shapiro, Hart & Wechsler's The Federal Courts and the Federal System (6th ed. 2009), pp. 50-52.

[4] Oklahoma is sometimes characterized as permitting advisory opinions, but the Oklahoma provision is very limited and only permits the governor to make requests for advisory opinions in capital cases where an appeal has not been taken. *See* 22 Okla. Stat. Ann., Section 1003.

[5] All states except two use the standard of "public importance" or "upon solemn occasion" or a combination of the two in order to underscore that advisory opinions should only be rendered in special circumstances. *See generally* Topf, *supra*, at 87-89 (noting that six states use the phrase "upon solemn occasions").

Attachment A

ADVISORY OPINIONS IN THE STATES
2015

State	May Governor Request	May Legislature Request	Duty of Court	Standards
Alabama	Yes	Yes	Yes ("may obtain")	"important constitutional question"
Colorado	Yes	Yes	Yes	"important questions upon solemn occasions"
Delaware	Yes	Yes, but both houses	No	"the proper construction of any provision in the Constitution of this State, or of the United States, or the constitutionality of any law or legislation passed by the General Assembly, or the constitutionality of any proposed constitutional amendment which shall have been first agreed to by two-thirds of all members elected to each House"
Florida	Yes	No	Yes	"the interpretation of any portion of this constitution upon any question affecting his executive powers and duties"
Maine	Yes	Yes	Yes	"upon important questions of law, and upon solemn occasions"
Massachusetts	Yes	Yes	Yes ("authority to require")	"upon important questions of law, and upon solemn occasions"
Michigan	Yes	Yes	No	"on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date"
New Hampshire	Yes	Yes	Yes ("authority to require")	"upon important questions of law and upon solemn occasions"
Rhode Island	Yes	Yes	Yes	"any question of law"
South Dakota	Yes	No	Yes ("authority to require")	"upon important questions of law involved in the exercise of his executive power and upon solemn occasions"

Attachment B

SURVEY OF STATE LAWS PERMITTING ADVISORY OPINIONS

ALABAMA

The Governor, by a request in writing, or either house of the Legislature, by a resolution of such house, may obtain a written opinion of the justices of the Supreme Court of Alabama or a majority thereof on important constitutional questions.
Ala. Code s 12-2-10 (1995).

COLORADO

The supreme court shall give its opinion on important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court.
Colo. Const. art. VI, s 3.

DELAWARE

The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, may give them their opinions in writing touching the proper construction of any provision in the Constitution of this State, or of the United States, or the constitutionality of any law or legislation passed by the General Assembly, or the constitutionality of any proposed constitutional amendment which shall have been first agreed to by two-thirds of all members elected to each House.
Del. Code Ann. tit. 10, s 141(a) (1996).

FLORIDA

The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.
Fla. Const. art. IV, s 1(c).

MAINE

The Justices of the Supreme Judicial Court shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Senate, or House of Representatives.
Me. Const. art. VI, s 3.

MASSACHUSETTS

Each branch of the legislature, as well as the governor or the council, shall have the authority to require the opinions of the justices of the supreme judicial court, upon important questions of law, and upon solemn occasions.
Mass. Const. pt. II, ch. 3, art. 2.

MICHIGAN

Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date.
Mich. Const. art. III, s 8.

NEW HAMPSHIRE

Each branch of the legislature as well as the governor and council shall have the authority to require the opinions of the justices of the supreme court upon important questions of law and upon solemn occasions.
N.H. Const. pt. II, art. 74.

RHODE ISLAND

The judges of the supreme court shall give their written opinion upon any question of law whenever requested by the governor or by either house of the general assembly.
R.I. Const. art. X, s 3.

SOUTH DAKOTA

The Governor has authority to require opinions of the Supreme Court upon important questions of law involved in the exercise of his executive power and upon solemn occasions.
S.D. Const. art. V, s 5.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

EXCERPT FROM MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 13, 2014

REMARKS BY JUSTICE PAUL E. PFEIFER REGARDING
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.