9 November 2014

Opinion[1]: Chief Justice

Issues/Questions:

1. Can a chief justice who has not registered for session and paid the appropriate fees participate in session?
2. Can a governor rescind an appointment for chief justice that was made between sessions?
3. If a justice fails the Senate confirmation process, can he/she be appointed to another justice position during the same session?
4. Could failure to meet the statutory requirements for release of the Moot Court case constitute grounds for impeachment?

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1. Can a chief justice who has not registered for session and paid fees participate in session?

It is my opinion that a chief justice who has not registered for session and paid fees cannot participate in session, for the reasons outlined below.

The need to pay fees is evidenced by the exhaustive nature of Title 6, Chapter 2, Sections 201 and 202 of the OIL Statutes. Section 201 specifically states:

> "The Governor, Lieutenant Governor, Attorney General, President Pro Tempore of the Senate, Speaker of the House, Deputy President Pro Tempore of the Senate, Speaker Pro Tempore of the House, Secretary of State, and Justices of the Supreme Court shall each pay a fee equal to that of a Delegate in the House of Representatives or Senate per each regular conference."

Section 202 then notes "All attendants of any regular conference not previously prescribed in this Chapter shall be assessed a twenty-six dollar and twenty-five cent ($26.25) participation fee." Taken together, Section 201 and Section 2 clearly demonstrate a concern for the organization's financial well-being in that *all* attendants are to pay a fee. If a member were allowed to participate in session *without* paying the required fee, it would undermine the organization's long term financial stability.

The only exception to the requirement of everyone paying a fee would be in extreme circumstances. This is evidenced by Section 204, which states: "By a super-majority vote of the Board of Directors, fees may be decreased by any amount temporarily or permanently at any time." The requirement of a super-majority indicates that this is not intended to be used frequently or lightly, but remains an option if needed.

The registration requirement is found in Title 7, Chapter 1, Sections 100 and 102. Section 100, among other things, grants member-at-large status "to all Justices of the O.I.L. Supreme Court." Thus, a Chief Justice would be a member-at-large. Section 102 includes the provision that: "Members-at-large must register for each session through the delegation of the member institution at

[1]Title 5, Chapter 4, Section 400

which they are enrolled." The use of the words "must register" denotes that this is not option for members-at-large.

Overall, registration and payment are thus both *required* for Chief Justices. The failure or refusal to register and pay--except in exceptional circumstances resolved through established procedures, like a waiver from the BoD--ought to preclude participation in session, as to decide otherwise would threaten both the organization's financial stability (since others could follow this precedent) and the ability of officers to plan for session (as missing registrations would complicate the ability to anticipate attendants, potential leaders, etc.). Thus, barring exceptional circumstances (such as if the failure is due to a delegation chair and not the officeholder), if an officeholder has failed to register and pay, their position could reasonably be considered vacant and filled in accordance with the Constitution and Statutes.

Furthermore, if a chief justice (or other member of the Judicial or Executive Branches) were allowed to participate despite having not registered and/or not paid the fees, they could still be removed from session in accordance with Title 7, Chapter 2, Section 205, which states: "If any delegate is found to not be in good standing as determined by the Board of Directors and the OIL Statutes, the Board of Directors shall be authorized as set forth in Chapter Two of Title One of the OIL Statutes to bring proceedings to remove that delegate from session."

2. Can a governor rescind an appointment for chief justice that was made between sessions (an interim appointment)?

The answer to this question is less clear. The appointment of a chief justice is odd in that it involves one member of the Board of Directors (BoD) and Steering Committee--i.e., the Governor--appointing, with the advice and consent of the Senate, another member of the BoD and Steering Committee. When the Governor fills executive positions between sessions with the issuance of a "commission," those appointments can be accepted or declined between sessions by the Senate Committee on Inter-session Appointments (Article 5, Section 6 of the Constitution). However, no such provision currently exists for judicial appointees/nominees. Thus, in answering this question, I must rely on balancing the potential harms and benefits of each option. If a governor could rescind a nomination for chief justice made between sessions, this could give the governor significant leverage over the chief justice candidate between appointment and confirmation. If a governor *cannot* rescind a nomination for chief justice made between sessions, then there would not be a timely remedy if, for example, a nominee did not communicate with other BoD members or failed to fulfill their constitutional and statutory duties. Depending on the severity of it, this behavior could endanger the legitimacy of Moot Court competition. Thus, *not* allowing the Governor to rescind an appointment would have worse potential consequences. In addition, there would be a check on the abuse of this ability to rescind appointments: he/she could be impeached if it rises to the level of gross misconduct.

Thus, it is my opinion that, in the absence of language similar to that for executive appointees, a chief justice who was appointed between sessions should not be arbitrarily removed by a rescinding of an appointment; however, the Governor *can* reasonably rescind appointments when necessary. If this authority is abused, then the threat or pursuit of impeachment can provide a check.

As an alternative course of action, the BoD could remove the appointee from the organization in accordance with Title 1, Chapter 2, Section 101, as a chief justice appointee's failure to perform their

duty as a BoD member, Steering Committee member, and/or responsible party for creating and disseminating the Moot Court case "can be reasonably foreseen to bring the organization" to "substantial harm." This route has the benefit of allowing a more timely resolution than impeachment, which is especially important during the planning phases between sessions.

As a former Senator, I believe the Senate should carefully and consistently elect 2 members each session to serve on the Committee on Inter-session Appointments, as required in Article 5, Section 6 of the Constitution. Furthermore, to remedy such situations in the future and ensure timely resolutions, I believe the committee's jurisdiction should be expanded to include *all* the Governor's interim appointees, not just those for executive offices. Such internal legislation could still be submitted during the Fall 2014 session *without a fine,* per Title 5, Chapter 5, Section 505.C.3 as it pertains to the Constitution.

3. If a justice fails the Senate confirmation process, can he/she be appointed to another justice position during the same session?

Yes, this could theoretically be permissible. Article 6, Section 4.3 of the Constitution states, "A Justice who fails retention or resigns from the Court is not eligible for reappointment to the Supreme Court until such time as one (1) full regular conference shall have elapsed between the time the Justice resigns or fails to be retained and the time he or she is reappointed to the Supreme Court." However, failing a confirmation hearing is neither failing retention (a vote in a general election) or resigning. Thus, for example, an appointee for chief justice who fails the confirmation process could subsequently be appointed as an associate justice during the same session--at the discretion of the Governor with the advice and consent of the Senate, per Title 3, Chapter 2, Section 210. A caveat on this would be that an obvious abuse of this interpretation (i.e. a constant reappointment of one candidate, despite multiple refusals to confirm them) could undermine the Governor's legitimacy and perhaps eventually justify impeachment in egregious cases.

4. Could failure to meet the statutory requirements for release of the Moot Court case constitute grounds for impeachment?

Yes, a failure to meet the statutory requirement whereby the Moot Court must be released three weeks before session could be considered grounds for impeachment. Furthermore, it could be also be taken into consideration during Senate confirmation hearings.

According to Title 3, Chapter 2, Section 208.A of the OIL Statutes, "The Supreme Court shall simultaneously provide to all the delegation chairs the moot court case(s) three (3) weeks before each session." The use of the word "shall" indicates the mandatory aspect of this section. The provision that it shall be released to all the delegation chairs simultaneously indicates attention to fairness. The three week requirement helps ensure an educationally-beneficial competition in which all delegates have adequate time to prepare; releasing it later than this undermines the educational value of the competition and its legitimacy as a key part of the organization.

Barring exceptional circumstances, the failure to release the case in accordance with the statutes could indicate willful neglect of duty, dereliction of duty, or incompetence--the ground for impeachment included in Title 1, Chapter 1, Section 100 of the Statutes. Given the importance of the

Court Competition to the educational mission and diversity of OIL, such failures could justify consideration of impeachment. Extenuating circumstances could, of course, be considered before or during impeachment proceedings, if applicable. In a case where a justice is being impeached, the Court of Impeachment would be presided over by a member of the Senate, per Article 4, Section 3.4 of the OIL Constitution.