Admin. June 9, 1999

Memorandum 99-27

Statutes Held Unconstitutional or Repealed by Implication — Court of Appeal Decisions

At the February 1999 meeting, the Commission decided:

> The Commission will explore the possibility of proposing annual omnibus legislation to clean out statutes that have been held unconstitutional or repealed by implication during the preceding year. The concept would be to include decisions of the Court of Appeal as well as of the Supreme Court. The staff will prepare materials for a subsequent meeting, using 1998 as a base year for demonstration purposes.

This memorandum gives an overview of the Commission's approach to reviewing supreme court decisions, presents the results of the analysis of 1998 court of appeal decisions, and recommends that this type of project should proceed on an incremental basis.

Experience with Supreme Court Decisions

The Commission has a statutory duty under Government Code Section 8290 to "recommend the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States." This mandate is not well-designed to achieve beneficial law reform, although the Commission has traditionally complied with it by making the statutory recommendation in the Annual Report. Hence, in strict compliance with the letter of statute, the Commission would state:

> Pursuant to the mandate imposed by Government Code Section 8290, the Commission recommends the repeal of the provisions referred to under "Report on Statutes Repealed by (Implication or Held Unconstitutional," … to the extent they have been held unconstitutional and have not been amended or repealed.

See, e.g., *Annual Report for 1992,* 22 Cal. L. Revision Comm'n Reports 831, 856 (1992). Generally, the Commission does not take further steps to seek repeal. The

Commission does not obtain a bill draft and seek out an author willing to "expressly" repeal the offending provision.

A casual review of the decisions reported over the years suggests that the subjects are frequently too controversial or inappropriate for a simple repeal or other quick fix. Many decisions invalidate a part of a larger scheme, such as penal statutes, sentencing rules, or regulatory schemes, making piecemeal reform difficult and outright repeal ill-advised. For example, minimum price provisions under the Dry Cleaners' Act of 1945 were held unconstitutional in *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 40 Cal. 2d (1953). There are quite a few "to the extent that" rulings. For example, in *Department of Mental Hygiene v. Hawley*, 59 Cal. 2d 247 (1963), a section was held unconstitutional to the extent that it imposed on designated relatives of mentally ill persons or inebriates liability for their care and support in state facilities. The following year a similar requirement in the Welfare and Institutions Code was held unconstitutional in *Department of Mental Hygiene v. Kirchner*, 60 Cal. 2d 716 (1964). Other cases are too controversial or otherwise inappropriate for Commission review without a specific legislative direction. For example, in *Silver v. Reagan*, 67 Cal. 2d 452 (1967), it was held impermissible to defer redistricting until after the 1970 census. And in *Purdy and Fitzpatrick v. State*, prohibitions on hiring aliens on public works projects were held unconstitutional. In *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1 (1971), the court invalidated the statute prohibiting females from tending bar, except in certain circumstances. In *California Teachers Association v. Riles*, 29 Cal. 3d 794 (1981), the court invalidated a statute authoring the state to provide textbooks to nonprofit, nonpublic schools. Finally, consider *Serrano v. Priest*, 5 Cal. 3d 584 (1971), the beginning of a series of cases on school funding matters.

There are also a handful of seemingly trivial matters. For example, in *People v. Chessman*, 52 Cal. 2d 467, 500 (1959), the Supreme Court's authority was challenged because the justices had not complied with Government Code Section 1060 requiring them to reside and have their offices in the City of Sacramento. The court implicitly held that if that is what the section meant, it was unconstitutional. The residence requirement was removed 25 years later, in 1984 (not as the result of a Commission recommendation).

But the bulk of these cases, whether complex or part of a scheme or seemingly trivial, are areas the Commission traditionally avoids. This may be because they are too controversial for the Commission's input to affect or are subjects that

interest groups, government agencies, or individual legislators are well aware of and it is likely that if anything can be done, it will be.

There are a small number of cases that fell into existing authority, such as in the creditors' remedies area. Thus, when *In re Harris*, 69 Cal. 2d 486 (1968), invalidated the remedy of civil arrest and bail, it was appropriate for the Commission to take heed since it had authority to study creditors' remedies matters. Then *McCallop v. Carberry*, 1 Cal. 3d 903 (1970), held prejudgment wage garnishment unconstitutional, and other cases followed, applicable to claim and delivery and attachment. These issues were considered in great detail and the problems remedied in a series of recommendations that repealed civil arrest and reformed claim and delivery, attachment, and wage garnishment law.

Since 1953 through 1998, the Commission has reported 108 unconstitutional rulings by the California Supreme Court and 11 by the US Supreme Court. We have detected three holdings of repeal by implication (all in 1976-77). About 35 cases have been noted that fall into a gray area, but don't explicitly hold a statute unconstitutional or repealed by implication.

The '90s, like the '50s, appear to be a time of relative calm on this front. From 1990 to 1998, there have been eight unconstitutional rulings — the same number as occurred between 1954 and 1959. In these eras, we average about one case a year, or less. The '70s saw 59 unconstitutional rulings, 58 of them by the California court. The '60s and the '80s complete our bell-shaped curve, with 24 and 20 unconstitutional rulings, respectively.

Scope of Task

The task of finding supreme court decisions is not too difficult. Even when we did it the old fashioned way, by reading or scanning the official summary for each California Supreme Court case, it represented only an afternoon's work to find the cases. In recent years, we have usually delegated the task to law students or sometimes to a junior staff member. Since we have usually not found much material in the cases for profitable study, the task has been fairly minor.

What would happen if we took on a review of court of appeal decisions? A rough count on Westlaw indicates there were about 800 court of appeal decisions rendered in 1998, omitting opinions ordered not published, but not pulling out cases where review has been granted.

With the assistance of McGeorge Law School student Sarah Aghassi, under the supervision of Professor J. Clark Kelso, we have looked at the 1998 calendar

year to assess the amount of work that might be involved. (See the Memorandum attached as Exhibit pp. 1-3.) Keeping in mind that 1998 is a year in which there were no high court decisions holding statutes unconstitutional, perhaps it is not surprising to find only three court of appeal decisions. As reported in the attached Memorandum, a case on child support (*County of Orange v. Ivansco*) would be appropriate for further study because it is in conflict with three other court of appeal decisions. Another case is a nullity because review was granted. The third case involving an unconstitutional attempt to amend Proposition 103 is the only candidate for a Commission cleanup. See *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal. App. 4th 1473 (1998). We have not studied this case, but from the first glance it could easily be one of those seemingly trivial cases with a ready solution of repealing the offending section that, in reality, is a political quagmire.

From the review of 1998 cases, then, it is clear that the review and decisionmaking process would not involve much time. Even though the McGeorge Memorandum reports finding 126 cases to review, Professor Kelso informed the staff that reviewing those cases only took a couple of hours. The task is also one that would not necessarily impose much burden on the Commission staff, because law students could do the basic research and enjoy a pleasant learning experience in the process. Professor Kelso suggests that students participating in his Institute could do this job.

Commission Authority Limitations

Matters within existing substantive authority. If a ruling of interest falls within the Commission's existing substantive authority, obviously there is no issue about whether the Commission can consider responding to the decision. The question whether a subject falls within existing substantive authority may not always be clear, however. From time to time, in reviewing new topics for Commission consideration, we have faced this issue, particularly where the authority is phrased in a specialized or limited way. For example, the Commission is authorized to study whether the "law relating to arbitration should be revised" — would that include mediation? The environmental law authorization is very broad in terms of the statutes that are covered, but the type of study is limited to reorganization and consolidation, resolving inconsistencies, and eliminating obsolete and unnecessarily duplicative statutes — would this language authorize responding to a ruling of unconstitutionality?

The Commission has several general authorizations that would cover a large number of potential constitutional decisions: (1) code-wide authority covers the Evidence Code, the Family Code, and the Probate Code, (2) general subject authority, some of which include "related matters," covers administrative law, contract law, creditors remedies, real and personal property, rights and disabilities of minors and incompetent persons, (3) more limited subject areas include arbitration, attorney's fees and civil discovery.

Matters within existing technical authority. The staff is not in complete agreement on the question whether the Commission's authority to recommend revisions "to correct technical or minor substantive defects" (Gov't Code § 8298) provides adequate authority. The losing party in the case would probably not consider it a "technical" or "minor substantive" issue. From a dispassionate perspective, however, some revisions might fall into this class.

Consider the recent case of *Filet Menu, Inc. v. Cheng*, 84 Cal. Rptr. 384 (1999), in which Division 4 of the Second District Court of Appeal held that the out-of-state tolling provision in Code of Civil Procedure Section 351 was an unconstitutional burden on California residents who travel in interstate commerce. This subject should have an air of familiarity, since the Commission's recommendation to repeal this section failed in 1997. See *Tolling Statute of Limitations When Defendant Is Out of State*, 26 Cal. L. Revision Comm'n Reports 83 (1996). It should also be noted that the Commission has requested that the authority to study this topic be removed from the calendar. See ACR 17, in current session. The court did not completely strike down the section in this case, however, so there is no clear way to fix the statute, at least without additional study. And of course, the Commission has already decided not to devote further resources to making Section 351 constitutional.

Treatment of court of appeal decisions lacking constitutional dimension. Historically, the Commission has responded to a number of troublesome cases within the Commission's authority, regardless of whether they raise constitutional issues. For example, the recommendation on *Statute of Limitations in Trust Matters: Probate Code Section 16460*, 26 Cal. L. Revision Comm'n Reports 1 (1996), revised the Trust Law to correct a misreading of the statute in DiGrazia v. Anderlini, 22 Cal. App. 4th 1337 (1994). Memorandum 99-32 on this meeting's agenda deals with conflicts in the cases in construing statutes on contractual

attorney's fees. The factor of a declaration of unconstitutionality does not make the study and reform process much different.

From this perspective, if the Commission decides to adopt a policy, it is a minor adjustment and formalization of existing practice. In addition to looking at cases that come to our attention, or that are brought to our attention by interested persons, the staff would regularly review the court of appeal decisions on a more systematic basis than we do now. We would report to the Commission at least annually on our findings, and presumably the report would be included in the Annual Report.

Looking back. If the Commission decides to proceed with this type of project, it is also worth considering two historical projects. If law students could be found to check the material, it would be interesting to find out what has happened in the wake of the 150 or so cases identified in the Commission's reports. Or, the project could be limited to cases in the last 10 or 20 years. Similarly, it would be valuable to look back a few years, perhaps even 10 or 20, to find relevant court of appeal decisions. This would also give us a better idea of how much work might be involved if the pendulum swings back toward the legal culture of the '70s, or even the '80s.

Staff Recommendation

The staff recommends that we undertake a prospective review of court of appeal decisions. We would make an effort, as time permits, to watch cases as they come down, but would probably count on student research to collect cases on an annual basis. In view of the possibility or probability of conflict between the districts, we would need to carefully consider whether to attempt repeal or amendment based on a single case. As a rule of thumb, we should wait for two years before acting on a case.

The staff recommends looking back for 10 years, both as to supreme court and court of appeal cases, to provide a test of the tentative conclusions based on our look at 1998 and at past supreme court cases.

We would not recommend formalizing this process too much at this point. We believe that the Commission would be most interested in looking at cases already within legislative authorizations. This is appropriate, if for no other reason than these are the areas with priority. Nothing is lost by this approach, since there is not likely to be an urgent need to act on a court of appeal decision outside the Commission's existing authority. We are assuming we would almost

always want to wait for a decision to be "seasoned" — and that should provide sufficient time to determine whether to proceed and to obtain the necessary authority where needed. Thus, the process of reviewing court of appeal decisions for possible study and recommended legislation would be essentially the same as considering other topics suggested for Commission study.

We would not recommend seeking amendment of the Commission's statute to add this authority. As discussed, the Commission has very broad authority, and the "technical or minor substantive defects" authority may cover a few other situations. However, if the opportunity ever presents itself, the staff believes that the mechanical requirement in Section 8290 mandating that the Commission recommend the "express repeal" of unconstitutional statutes should be revised to permit appropriate revision.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Memorandum

STATUTES FOUND UNCONSTITUTIONAL BY CALIFORNIA COURTS IN 1998
(June 9, 1999)

The California Law Revision Commission is charged by statute with the responsibility of "recommend[ing] the express repeal of all statutes repealed by implication, or held unconstitutional by the Supreme Court of the state or the Supreme Court of the United States." Gov't Code § 8290. The Commission is also authorized, but not required, "to study and recommend revisions to correct technical or minor substantive defects in the statutes of the state without a prior concurrent resolution of the Legislature referring the matter to it for study." Gov't Code § 8298. Finally, subject to the limitations imposed by Section 8293, the Commission is directed to "[r]ecommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state into conformity with modern conditions." Gov't Code § 8289.

In fulfilling its statutory obligations, the Commission may wish to expand its review of appellate decisions declaring statutes to be unconstitutional beyond the California and United States Supreme Courts to encompass decisions by the California Courts of Appeal. If denied review by the California Supreme Court, a Court of Appeal decision declaring a state statute unconstitutional may be conclusive, as a practical matter, and may have the same effect as a decision by the California Supreme Court declaring a statute to be unconstitutional.

To determine whether a search for Court of Appeal decisions declaring state statutes unconstitutional is likely to create a substantial research burden on the Commission, the Institute for Legislative Practice at the University of the Pacific's McGeorge School of Law agreed to conduct a pilot study for the year 1998. We searched the California cases database on Westlaw using the search term "da(1998) and unconstitutional". This result in a pool of 126 cases which were then reviewed to determine which cases declared a statute unconstitutional. We found only three decisions declaring a state statute unconstitutional in 1998, and only two of those decisions warrant further discussion. [1]

The first case is *County of Orange v. Ivansco*, 67 Cal.App.4th 328 (1998), where the Court of Appeal for the Fourth District, Division 3 found Section 4071.5 of the Family Code unconstitutional. Section 4071.5 deprives the trial court of discretion to consider a payor's expenses for children living with him or her if the children for whom support is being determined are AFDC recipients. According to the court, the statute violates equal protection by infringing on the payor's fundamental right to support children residing with him or her. Three other Court of Appeal decisions have rejected the result in *Ivansco* and have upheld the constitutionality of Section 4071.5. *See City and County of San Francisco v. Freeman*, 71 CalApp.4th 869 (1999); *City and County of San Francisco v. Garnett*, 70 Cal.App.4th 845 (1999); *Moreno v. Draper*, 70 Cal.App.4th 886 (1999). In light of these decisions, we recommend that no action be taken with respect to Section 4071.5.

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1 A third decision, *Kasler v. Lungren*, 61 Cal.App.4th 1237 (1998), declared unconstitutional certain elements of the Roberti-Roos Assault Weapons Control Act (Penal Code § 12275 *et seq.)*. However, the Supreme Court granted review in the case on May 20, 1998, and we have therefore excluded the case from the remainder of the memorandum.

The second case is *Proposition 103 Enforcement Project v. Quackenbush*, 64 Cal. App. 4th 1473 (1998), where the Court of Appeal for the Second District, Division 3, found that Section 769.2 of the Insurance Code, which entitles insurers to full credit for all premium taxes, commissions, and brokerage expenses paid during rate rollback period mandated by Proposition 103, was an unconstitutional amendment to Proposition 103. Proposition 103 provided that "The provisions of this act shall not be amended by the Legislature except to further its purposes." Proposition 103, § 8(b). The court found that Section 769.2 amended Proposition 103 without furthering its purposes. The court remanded the matter for further proceedings consistent with the opinion (which most likely included the entry of a final judgment and injunction barring the Insurance Commissioner from enforcing the statute). The decision in *Proposition 103 Enforcement Project* became final when review was denied on September 16, 1998. In light of this decision, the Law Revision Commission may wish to consider recommending the repeal of Section 769.2.

It did not take a substantial amount of time to search for these cases or to determine whether a recommendation for repeal was appropriate. However, it is worth noting that in two of the three cases we found, no further action by the Commission is warranted. Review was granted in one of the decisions, and the other decision was rejected by other Courts of Appeal. This experience suggests that searching for Court of Appeal decisions declaring state statutes to be unconstitutional may be a low yield project.

Respectfully submitted,

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J. Clark Kelso