April 9, 2010

Supreme Court Advisory Committee

Proposed Rule Requiring Notice to Texas Attorney General When the Constitutionality of a Statute, Ordinance, or Franchise is Challenged in Litigation

Richard R. Orsinger, Chair
Subcommittee on Rules 15-165a

I. THE ISSUES. The Texas Legislature has recognized that the State of Texas has an interest that may need to be protected any time that a litigant, in private litigation, challenges the constitutionality of a Texas statute, ordinance, or franchise. In Tex. Civ. Prac. & Rem. Code § 37.006, the Legislature requires that the Texas Attorney General be notified when such an allegation is made.

It has been proposed that the Texas Supreme Court adopt a Rule of Civil Procedure that implements the notice requirement of TCP&RC § 37.006.

Federal Rule of Civil Procedure 5.1 is a rule requiring notice to the United States Attorney General any time a party to a law suit questions the constitutionality of a federal statute. When the constitutionality of a state statute is challenged, notice must be given to the Attorney General of that state. The federal court is also required to send a certification of the challenge to the appropriate attorney general. TRCP 5.1 gives the attorney general 60 days to intervene in the law suit. Failure to file or serve notice does not affect the merits of the claim. FRCP 5.1 could serve as a model of a Texas rule.

Drafting a rule requiring such notice involves five factors: (1) when is notice is required; (2) who should provide notice; (3) who should receive notice on behalf of the State of Texas; (4) how should failure to give notice be treated; and (5) what are the likely consequences of a broader notice requirement. *See* Arthur F. Greenbaum, *Government Participation in Private Litigation*, 21 ARIZ. STATE L. J. 853, 870 (1989).

The Subcommittee has proposed two possible rules (see pp. 17 & 18). Both rules would require notice in any civil court proceeding challenging constitutionality. This is an expansion of TCP&RC § 37.006, which applies only to declaratory judgment actions.

II. TEXAS CIVIL PRACTICE & REMEDIES CODE § 37.006.

Chapter 37. Declaratory Judgments

§ 37.006. Parties

(a) When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.

(b) In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

CREDIT(S)

Acts 1985, 69th Leg., ch. 959, § 1, eff. Sept. 1, 1985.

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

Uniform Law:

This section is similar to § 11 of the Uniform Declaratory Judgments Act. See Vol. 12A Uniform Laws Annotated, Master Edition or ULA Database on Westlaw.

Prior Laws:

Acts 1943, 48th Leg., p. 265, ch. 164, § 11.

Vernon's Ann.Civ.St. art. 2524-1, § 11.

III. CASES INTERPRETING SECTION 37.006(b).

McPherson v. City of Lake Ransom Canyon, 2003 WL 1562093, *2 (Tex. App.--Amarillo 2003, pet. denied) (memorandum opinion):

> Although subsection (b) does not require that the Attorney General be joined as a party to a proceeding, when a party seeks a declaratory judgment that an ordinance is unconstitutional, *see City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex.1985), under the Declaratory Judgments Act the failure to comply with the Act is a jurisdictional requirement which may not be disregarded. (Emphasis added). *Commissioners Court of Harris County v. Peoples National Utility Company*, 538 S.W.2d 228, 229 (Tex. Civ. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.). Even though subsection (b) states that the Attorney General must "be served with a copy of the proceeding and is entitled to be heard," for purposes of jurisdiction, substantial compliance is sufficient. *See Wichita County v. Robinson*, 155 Tex. 1, 276 S.W.2d 509, 511-12 (1954).
>
> Our review of the clerk's record does not indicate that the Attorney General was served as required by section 37.006(b). Moreover, by post-submission briefs requested by this Court, counsel do not suggest or cite us to any portion of the record to demonstrate substantial compliance with section 37.006(b). Thus, we conclude the trial court was without jurisdiction and as was done in *Peoples National Utility*, 538 S.W.2d at 229, we reverse the judgment of the trial court and remand the cause with instructions that unless the Attorney General of Texas is notified of the pendency of this suit within a reasonable time, the trial court shall dismiss the cause.

Commissioners Court of Harris County v. Peoples National Utility Company, 538 S.W.2d 228,

228-29 (Tex. Civ. App.--Houston [14th Dist.] 1976, writ ref'd n.r.e.).:

> The State of Texas, which was not joined as a party in the trial court, has submitted a brief to this court as amicus curiae. The State has called our attention to a particular problem in this case involving the jurisdiction of the trial court to grant the temporary injunction. The State points out that the Declaratory Judgments Act, under which this case was brought, provides that '(i)n any proceeding . . . if the Statute . . . is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard.' Tex. Rev. Civ. Stat. Ann. art. 2524-1 s 11.
>
> The Attorney General was not served with a copy of the pleadings, or otherwise given notice of the pendency of this action. The State contends that the trial court was therefore deprived of jurisdiction to proceed.
>
> The question of whether this section of the Declaratory Judgments Act is jurisdictional has apparently not been previously decided in Texas. It is appropriate, however, to look to the decisions in other jurisdictions which have adopted the Uniform Declaratory Judgments Act. Those states which have construed this section of the Act have held that 'service of a copy of the proceedings upon the attorney general is not only mandatory, but goes to the jurisdiction of the court to hear the action in the first instance.' *McCabe v. City of Milwaukee*, 53 Wis.2d 34, 191 N.W.2d 926, 927 (1971) and authorities cited therein; *Sullivan v. Murphy*, 279 Ala. 202, 183 So.2d 798 (1966); *Lakewood Pawnbrokers, Inc. v. City of Lakewood*, 182 Colo. 315, 512 P.2d 1241 (1973); *Plantation Pipe Line Co. v. City of Bremen*, 225 Ga. 607, 170 S.E.2d 398 (Ga.1969). We hold that the requirement in section 11 of the Uniform Declaratory Judgments Act is mandatory, and that failure to notify the Attorney General of the pendency of an action under the Act in which the constitutional validity of a statute, ordinance or franchise is challenged deprives the trial court of jurisdiction to proceed.

Gutierrez v. Trevino, 2001 WL 273416 at *7, n. 6 (Tex. App.--San Antonio 2001, pet. denied) (not designated for publication):

> Gutierrez also challenges the constitutionality of the one-year statute of limitations. Appellees contend Gutierrez waived his constitutional challenge because he failed to serve the Attorney General pursuant to Tex. Civ. Prac. & Rem. Code § 37.006(b) (Vernon 1997). Gutierrez responds his action was not brought under the declaratory judgment provisions of the Civil Practice and Remedies Code, therefore, Section 37.006(b) does not apply.
>
> Because we hold former Section 1.91(b) is constitutional, Gutierrez's failure to serve the Attorney General was harmless, and therefore, we need not decide whether service was required. [FN6] In upholding Section 1.91(b), we align ourselves with

the Fourteenth Court of Appeals, the only Texas state court to directly address this issue. [FN7] *Dannelley v. Almond*, 827 S.W.2d 582, 585 (Tex.App.--Houston [14th Dist.] 1992, no writ) (holding former Section 1.91(b) does not violate either the open courts provision of the Texas constitution or the Equal Protection Clause of the U.S. and Texas Constitutions). [FN8] We overrule Gutierrez's constitutional challenge.

FN6. This court has previously held service on the attorney general is required even when a constitutional challenge is not brought under the declaratory judgment act. *See Hurst v. Guadalupe County Appraisal Dist.*, 752 S.W.2d 231, 232 (Tex.App.--San Antonio 1988, no writ). Other courts have determined no service on the Attorney General is necessary when the constitutional challenge arises in the context of a non-declaratory judgment proceeding. *Knie v. Piskun*, 23 S.W.3d 455, 466 (Tex.App.-- Amarillo 2000, pet. denied); *Willard v. Davis*, 881 S.W.2d 907, 910 (Tex.App.--Fort Worth 1994, orig. proceeding); *Alexander Ranch v. Cen. Appraisal Dist.*, 733 S.W.2d 303, 305 (Tex.App.--Eastland 1987, writ ref'd n.r.e.).

Knie v. Piskun, 23 S.W.3d 455, 466 (Tex. App.-- Amarillo 2000, pet. denied):

Knie's next group of points challenge the constitutionality of section 13.01 of the Act. The specific challenges are: point 6 violation of right to open courts, point 7 denial of equal protection, point 8 denial of due process, point 9 denial of her right of remonstrance, and points 10 and 11 violation of her right to free speech.

We initially address the Hospital's claim that this issue may not be considered because Knie failed to serve a copy of her petition on the Attorney General as it argues was required. The Hospital cites this court's opinion in *Allen v. Employers Casualty Co.*, 888 S.W.2d 219, 222 (Tex. App.–Amarillo 1994, no writ), for the proposition that the Attorney General must be served whenever the constitutionality of a statute is challenged. Allen relied on Estate of Ross, 672 S.W.2d 315, 317 (Tex. App.–Eastland 1984, writ ref'd n.r.e), cert. denied, 470 U.S. 1084, 105 S.Ct. 1844, 85 L.Ed.2d 143 (1985), which did indeed state that proposition, citing former Article 2524-1, sec. 11 of the Texas Revised Civil Statutes Annotated (Vernon 1965); *Commerce Independent School District v. Hampton*, 577 S.W.2d 740 (Tex. Civ. App.–Eastland 1979, no writ); and *Commissioners Court of Harris County v. Peoples National Utility Company*, 538 S.W.2d 228 (Tex. Civ. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.). Further examination shows that Article 2524-1 was at that time, the Declaratory Judgment Act. That act, like the current version of the act, Tex. Civ. Prac. & Rem.Code §§ 37.001-.010 (Vernon 1997), required service on the Attorney General when a party sought to have a state statute declared unconstitutional in a proceeding brought under the act. The Hampton and Harris County cases were declaratory judgment proceedings applying that statute.

In *Estate of Ross*, the Eastland court incorrectly applied the requirement of service on the Attorney General in a non-declaratory judgment proceeding. It corrected that

> error in *Alexander Ranch v. Central Appraisal Dist.*, 733 S.W.2d 303 (Tex. App.–Eastland 1987, writ ref'd n.r.e.), *cert. denied*, 486 U.S. 1026, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988), by specifically holding that the requirement of service on the Attorney General to challenge the constitutionality of a state statute is limited to actions brought under the declaratory judgment act. Id. at 305. We recognized this distinction recently in *In re Marriage of Richards*, 991 S.W.2d 32, 38 (Tex. App.--Amarillo 1999, pet. dism'd). To the degree Allen stands for the proposition that the Attorney General must be served as a predicate to challenge a state statute in an action not brought under the declaratory judgments act, we expressly overrule it.

Texas Dep't of Pub. Safety v. Chavez, 981 S.W.2d 449, 452 (Tex. App.–Fort Worth 1998, no pet.):

> In point three, DPS argues that the county court at law had no jurisdiction to proceed on this matter because appellee failed to serve the Attorney General of the State as required by section 37.006(b) of the Texas Civil Practice & Remedies Code. See tex. Civ. Prac. & Rem.Code Ann. § 37.006(b) (Vernon 1997).
>
> The main issue before the county court was whether there was sufficient evidence to support the administrative law judge's decision to suspend appellee's driver's license. The county court was functioning as a reviewing court as provided by the Transportation Code. *See* Tex. Transp. Code Ann. § 524.041. Because this case did not arise under the Declaratory Judgments Act, appellee was not required to serve the Attorney General. *See Willard v. Davis*, 881 S.W.2d 907, 910 (Tex. App.--Fort Worth 1994, no writ) (original proceeding).

Willard v. Davis, 881 S.W.2d 907, 910 (Tex. App.–Fort Worth 1994, orig. proceeding):

> On June 16, 1994, this court granted an emergency stay on all discovery proceedings and ordered the relator and real parties-in-interest to brief the following two issues:
>
> a) Was the attorney general served with the pleading challenging the constitutionality of section 17 of article 21.28-C, and if not, was such service required?
>
> b) If such service was required, did the trial court have jurisdiction to rule on the statute's constitutionality?
>
> *See* Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) (Vernon 1986).
>
> The real parties-in-interest challenge our authority to make this request, asserting that by ordering briefing on this point, we employed an incorrect standard of review and imposed on them the burden to disprove relator's right to mandamus relief. *See Walker v. Packer*, 827 S.W.2d 833, 837 (Tex.1992) (orig. proceeding) (relator has the burden of providing a sufficient record to establish his right to mandamus relief). We disagree with the real parties' contention. Each court of appeals may, on affidavit

or otherwise, as the court may determine, ascertain matters of fact that are necessary to the proper exercise of its jurisdiction. Tex. Gov't. Code Ann. § 22.220 (Vernon 1988). Where this court's jurisdiction is unclear, we may require further facts and briefing. *See Jones v. Griege*, 803 S.W.2d 486, 488 (Tex. App.–Dallas 1991, no writ). Jurisdiction over indispensable parties to a suit is essential to the court's right to proceed to judgment. *Eddowes v. Oswald*, 621 S.W.2d 843, 846 (Tex. App.–Fort Worth 1981, no writ). If the trial court proceeds to judgment without an indispensable party, it commits fundamental error. Id. Similarly, if jurisdiction had not been invoked in the trial court, this court would err if we were to address the merits of relator's case. If the attorney general were an indispensable party to the lawsuit and had not been served, we would have no jurisdiction to address the merits of relator's contention. The parties' briefs address this issue and nothing more.

We conclude service on the attorney general was not required. The real parties did not plead under the Declaratory Judgments Act, Tex. Civ. Prac. & Rem. Code Ann. § 37.001 (Vernon 1986), seeking a determination of their rights under the Property and Casualty Insurance Guaranty Act. *See* Tex. Ins. Code Ann. art. 21.28-C, § 17 (Vernon Supp.1994). Real parties' original petition raised a claim for medical malpractice. It was in their response to relator's motion that the constitutional issues were raised. Under these facts, notice to the attorney general was not required. *See Alexander Ranch v. Central Appraisal Dist.*, 733 S.W.2d 303, 305 (Tex.App.-Eastland 1987, writ ref'd n.r.e.), cert. denied, 486 U.S. 1026, 108 S.Ct. 2005, 100 L.Ed.2d 236 (1988). Accordingly, both the trial court and this court have jurisdiction to consider the issue, and we address the merits of relator's petition.

Scurlock Permian Corp. v. Brazos County, 869 S.W.2d 478, 483-84 (Tex.App.--Houston [1st Dist.] 1993, writ denied):

Jurisdiction of trial court

In its first two points of error, Scurlock asserts that the trial court erred in addressing the constitutionality of article 6701d-11. Specifically, Scurlock argues that because the attorney general of Texas was not served pursuant to section 37.006(b) of the Civil Practice and Remedies Code and because neither party raised the issue of constitutionality, the trial court lacked jurisdiction to rule on the constitutionality of article 6701d-11.

1. Service on the attorney general

In declaratory judgment actions, "if [a] statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceedings and is entitled to be heard." Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) (Vernon 1986) (emphasis added). Neither Scurlock nor Brazos County alleged that article 6701d-11 was unconstitutional; understandably, neither party

served the attorney general with a copy of the pleadings. Scurlock argues that because the attorney general did not receive notice of this action, the trial court did not have jurisdiction to consider the constitutional issue.

Brazos County asserts, however, that section 37.006(b) does not apply when the unconstitutionality of a statute is not expressly raised in the pleadings. We agree. Failure to notify the attorney general of the pendency of a declaratory judgment action in which the constitutional validity of a statute, ordinance, or franchise is challenged deprives the trial court of jurisdiction to proceed. *Commerce Indep. Sch. Dist. v. Hampton*, 577 S.W.2d 740, 741 (Tex. Civ. App.–Eastland 1979, no writ); *Commissioners Court of Harris County v. Peoples Nat'l Util. Co.*, 538 S.W.2d 228, 229 (Tex. Civ. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.). However, when neither party challenges the constitutionality of a statute, ordinance, or franchise, neither party is required to serve the attorney general with a copy of the pleadings; the failure to serve the attorney general will not, therefore, deprive a trial court of jurisdiction. *City of Willow Park v. Bryant*, 763 S.W.2d 506, 508 (Tex. App.–Fort Worth 1988, no writ); *Webb v. L.B. Walker and Assoc.*, 544 S.W.2d 952, 957 (Tex. Civ. App.–Houston [14th Dist.] 1976, writ ref'd n.r.e.). Here, neither party raised the issue of constitutionality; the attorney general's lack of notice of the pendency of this suit did not deprive the trial court of jurisdiction.

2. Failure to plead affirmative defense

Scurlock correctly notes that the unconstitutionality of a statute is an affirmative defense that must be pled. *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177, 183 (Tex. Civ. App.-Houston [14th Dist.] 1975, writ ref'd n.r.e.); see also Tex. R. Civ. P. 94. Scurlock asserts that because Brazos County never pled unconstitutionality as an affirmative defense, the issue was not properly before the trial court. In the absence of an appropriate pleading raising the issue of unconstitutionality, a trial court is without the authority to include such findings in its judgment. *Webb*, 544 S.W.2d at 957; *Houston Chronicle Publishing Co.*, 531 S.W.2d at 183.

Brazos County argues that Scurlock raises this issue for the first time on appeal, and has therefore waived appellate review. Scurlock asserts that this issue was raised in its motion for new trial. Scurlock's motion does indeed state that neither party raised the issue of unconstitutionality. However, Scurlock addressed the issue of unconstitutionality in connection with its assertion that the trial court's actions violated section 37.006 of the Civil Practice and Remedies Code and deprived Scurlock of the participation of the attorney general; Scurlock never specifically mentioned the failure of Brazos County to plead unconstitutionality as an affirmative defense. An objection at trial that is not the same as the objection urged on appeal presents nothing for appellate review. *Exxon Corp. v. Allsup*, 808 S.W.2d 648, 655 (Tex. App.-Corpus Christi 1991, writ denied); *see also Pfeffer v. Southern Texas*

Laborers' Pension Trust Fund, 679 S.W.2d 691, 693 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.) (an appellant may not, on appeal, enlarge a ground of error to include an objection not asserted at trial). We need not determine whether Scurlock has preserved this complaint for review, however. Our discussion and ruling under points of error three and four dispose of any complaint under points one and two.

IV. 28 U.S.C.A. § 2403.

§ 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

V. FRCP 5.1. Constitutional Challenge to A Statute--Notice, Certification, and Intervention.

(a) **Notice by a Party.** A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or

(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned--or on the state attorney general if a state statute is questioned--either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

(b) **Certification by the Court.** The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.

(c) **Intervention; Final Decision on the Merits.** Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) **No Forfeiture.** A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

(Effective December 1, 2006; amended April 30, 2007, effective December 1, 2007.)

ADVISORY COMMITTEE NOTES

2006 Adoption

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party that files a pleading, written motion, or other paper drawing in question the constitutionality of a federal or state statute to file a notice of constitutional question and serve it on the United States Attorney General or state attorney general. The party must promptly file and serve the notice of constitutional question. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or state attorney general. The notice of constitutional question will ensure that the attorney general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's certification obligation remains, and is the only notice when the constitutionality of a federal or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any federal or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the attorney general is able to determine whether to seek intervention on the ground that the act or statute affects a public interest. Rule 5.1 refers to a "federal statute," rather than the § 2403 reference to an "Act of Congress," to maintain consistency in the Civil Rules vocabulary. In Rule 5.1 "statute" means any congressional enactment that would qualify as an "Act of Congress."

Unless the court sets a later time, the 60-day period for intervention runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-period [So in original. Probably should read "60-day period".] on its own or on motion. One occasion for extension may arise if the court certifies a challenge under § 2403 after a party files a notice of constitutional question. Pretrial activities may

continue without interruption during the intervention period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action -- including a constitutional challenge -- at any time, even before service of process.

2007 Amendment

The language of Rule 5.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

VI. Note, *Federal Intervention in Private Actions Involving the Public Interest*, 65 HARV. L. REV. 319, 321-324 (1951).

The student note reads in part:

> Apart from the power to protect itself or its property from a judgment between private parties, the Government has been granted a statutory right to intervene in certain cases involving the public interest. [FN12] Perhaps the most important authority is Section 2403 of the Judicial Code, which provides:
>
> > In any action . . . in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest [FN13] is drawn in question, the court shall certify such fact to the Attorney General, [FN14] and shall permit the United States to intervene . . . . The United States shall, subject to the applicable provisions of law, have all the rights of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.
>
> This section, a remnant of the Court-packing plan, [FN15] was passed in 1937 in recognition of the inadequate treatment constitutional issues had received in suits between private parties. [FN16] Too often constitutional litigation had been hampered by the financial inability and lack of perspective of the party upholding the constitutionality of the statute, and full consideration of the issues had been endangered by collusive actions. Moreover it was felt that several cases had arisen in unfortunate fact situations which tended to prevent full examination of the effects of the statute. Better consideration of the constitutional questions was expected to result from allowing the Department of Justice to give a fuller presentation of the broader issues, and to choose an appropriate "test case." [FN17]
>
> The Act was questioned at the time of its enactment on the ground that the United States lacks a sufficient "legal interest" to justify its becoming a party where its

interest in a pending action is only that of defending the constitutionality of a statute. [FN18] Particularly, it was charged, would this be so where the Government could appeal an adverse decision which the litigants were willing to let rest. [FN19] Under the requirement that there be an actual "case or controversy," [FN20] it has long been held that a party to an action must have a direct [FN21] rather than a contingent [FN22] interest in the dispute. However, the interest of the Government has been recognized as extending beyond that of a private litigant, for, in addition to its proprietary or pecuniary rights, it is charged as sovereign with the protection of the public interest. [FN23] Thus, in *SEC v. United States Realty & Improvement Co.*, [FN24] the SEC was permitted to intervene under Rule 24(b) in order to assert a particular construction of Chapter XI of the Bankruptcy Act, because it was the administrative agency directly concerned in the interpretation and enforcement of the statute. Defense of the constitutionality of an act would seem to present an even stronger justification for intervention.

Under Section 2403, the Government may intervene when the constitutionality of a statute is "drawn in question." [FN25] Intervention is not limited to cases where an injunction against enforcement is sought before a three-judge district court, [FN26] but must be granted in any action involving the constitutionality of an act of Congress without regard to how the question is raised. Moreover, the constitutionality of a statute is "drawn in question" even though the court may decide the case without considering the constitutional issue. [FN27] Even though the parties do not raise a constitutional issue, if the court is nevertheless about to decide the case on constitutional grounds, it should allow the Government an opportunity to make an adequate case for the statute before giving its decision. [FN28] If there is timely application, there should be little inconvenience to the litigants so long as the Government is kept within reasonable bounds with respect to the raising of new issues.

The grant to the United States of all the rights of a party "to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality" leaves uncertain the extent to which new matters can be raised. But since the issue of constitutionality can rarely be dissociated from the question of the construction to be given the act, it would be unrealistic to limit the Government's evidence and argument to the abstract question of constitutionality. [FN29] It may be consistent with Section 2403 to go beyond the precise issues of the case and to pass more broadly on the constitutionality of the statute, for one of the purposes was to shorten the period of uncertainty by a prompt determination of the validity of the act, as evidenced by the provision for direct appeal to the Supreme Court from a three-judge court which has enjoined the enforcement of an act of Congress as unconstitutional. [FN30] But the Government on occasion has used its power of intervention to argue against making a decision on constitutional grounds. [FN31] Further, a decision on constitutionality more sweeping than the actual issues not only might infringe the rights and convenience of the private parties, but would be

inconsistent with the long-standing practice of the Supreme Court not to pass on constitutionality unless clearly necessary to the case. [Footnotes omitted]

VII. COMMENTS FROM THE TEXAS SOLICITOR GENERAL

From: James C. Ho
Sent: Wednesday, February 17, 2010 1:31 PM
To: Richard Orsinger
Cc: Kennon.Peterson@courts.state.tx.us; 'Nathan Hecht'; Don.Willett@courts.state.tx.us; Bill.Davis@oag.state.tx.us
Subject: RE: SCAC: Potential Rule Regarding Notice ofConstitutionalQuestion

Richard,

Thanks so much for your e-mail, and for your interest in this issue. We very much look forward to working with you and the committee.

If you don't mind, we'd like to begin by making a few threshold comments:

The Office of the Attorney General has a formal policy in which we do not take positions on pending legislation. Out of an abundance of caution, we will apply that policy here, and thus take no position on your rulemaking process. That having been said, we are of course delighted to offer comments and to answer any questions.

* * *

The committee may find FRCP 5.1 to be a helpful model, because it contains the three key ingredients of a robust and successful "notice of constitutional question" regime:

First, FRCP 5.1 imposes a duty of notice on any litigant who challenges the constitutionality of a state statute (the committee may want to include challenges to agency rules and regulations as well). (It also imposes a duty of notice on the court—but the committee may wish to consider whether the primary duty should be on the litigant, and impose only a secondary duty on the court, only in the event that the litigant fails to do so.)

Second, FRCP 5.1 gives the State the right—and, importantly, the discretion—to intervene in the litigation to defend the constitutionality of a state law.

Third and finally, FRCP 5.1 includes an enforcement mechanism—namely, that the court may not enter an adverse judgment until 60 days after notice has been given.

* * *

You asked about the UDJA/CPRC § 37.006. That provision has certain limitations. To begin with, it applies only in cases that involve a request for declaratory judgment. Constitutional challenges can, of course, arise in a wide range of proceedings outside of declaratory judgments. In addition, the provision is ambiguous (e.g., what is a "proceeding"?) and lacks an enforcement mechanism and other procedures.

* * *

Turning to your specific questions:

1. CPRC § 37.006(a) does NOT require the State to be made a party. To the contrary, the UDJA does not waive the State's sovereign immunity, because the State is not a "person" under the express

terms of the UDJA (CPRC § 37.001; see also Tex. Gov't Code § 311.034). And in all events, the State should retain the discretion whether or not to intervene in a particular proceeding to defend a particular law or regulation—as in FRCP 5.1, as well as CPRC § 37.006(b) (which requires the joinder of municipalities, but not the state attorney general).

2. Typically, under CPRC § 37.006(b), we receive the first filing in which the constitutional challenge is raised (e.g., the original petition, or an answer containing a relevant affirmative defense). More generally: We do not believe that the quality of notice will be an issue. Sufficient notice could be accomplished simply by sending a letter to the Attorney General stating the following: "In Smith v. Jones, No. ____ (____ District Court), Plaintiffs/Defendants argue that Texas ___ Code Section ___ violates the Texas/U.S. Constitution," along with any relevant motions or briefing attached.

3. Yes, we believe that the word "unconstitutional" covers constitutional challenges under either the Texas or U.S. Constitutions.

4. Yes, the committee may wish to conclude that the State should be notified, and have the opportunity to intervene, whether the target of the constitutional challenge is a state statute or agency rule or regulation.

5. Yes, the committee may wish to follow the model of FRCP 5.1, which requires both notice of constitutional question and service of any underlying documentation. As we explained above in #2, we do not believe that the notice requirement will be burdensome on litigants.

6. Yes, the committee may wish to follow the model of FRCP 5.1, which provides for notice by the court—although the committee may wish to consider placing the primary duty on the litigant, and only a secondary duty on the court in the event the litigant fails to do so.

* * *

Thanks again for reaching out to us to solicit our comments. Please let us know if we can be of service.

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VIII. A PROPOSED RULE.

Rule ~~5.1~~ 53a. Constitutional Challenge to A Statute~~--Notice, Certification, and Intervention~~

(a) ~~Notice by a Party~~. A party that files a pleading~~, written motion, or other paper drawing into question~~ questioning the constitutionality of a ~~federal or state~~ Texas statute must promptly:

(1) file a notice ~~of constitutional question~~ identifying the statute, stating the question and identifying the ~~paper~~ pleading that raises it ~~if:~~

~~(A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; or~~

~~(B) a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity;~~ and

(2) serve the notice and ~~paper~~ pleading ~~on the Attorney General of the United States if a federal statute is questioned--or~~ on ~~the state attorney general if a state statute is questioned.~~ the Attorney General of Texas either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose.

~~(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the appropriate attorney general that a statute has been questioned.~~

~~(c)~~ (b) ~~Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but~~ A court may not enter a final judgment holding the statute unconstitutional until sixty days have expired after the serving of the notice.

~~(d)~~ (c) ~~No Forfeiture.~~ A party's failure to file ~~and~~ or serve the notice~~, or the court's failure to certify,~~ does not forfeit a constitutional claim or defense ~~that is otherwise timely asserted.~~

(d) This rule shall not apply if the State of Texas, one of its agencies, or one if its officers or employees in an official capacity is a party.

IX. ANOTHER PROPOSED RULE.

Tex. R. Civ. P. 47a. Notice to Texas Attorney General.

Any party who files a pleading, motion, response, or brief that alleges that a Texas statute, ordinance, or franchise is unconstitutional must serve notice of the document upon the Texas Attorney General, either by certified mail or by sending such notice to an electronic address designated by the attorney general for this purpose. The notice shall consist of a letter informing the Attorney General of the style of the case, and identifying the statute, ordinance, or franchise that is claimed to be unconstitutional, together with a copy of the pleading, motion, response, or brief challenging constitutionality. A copy of the notice, with a certificate of service, shall be filed with the court and served on all parties.