



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee Report



Issued July 1, 2017

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Report of the Education, Public Institutions, and Local Government Committee

Report of the Finance, Taxation, and Economic Development Committee

Report of the Judicial Branch and Administration of Justice Committee

Report of the Legislative Branch and Executive Branch Committee

Letter from the Chair

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June 23, 2017

Senator Charleta B. Tavares, Co-chair
Senate Building
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Representative Jonathan Dever, Co-chair
Riffe Center for Government and the Arts
77 South High Street
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Columbus, Ohio 43215

Dear Co-chairs Tavares and Dever,

On behalf of the Judicial Branch and Administration of Justice Committee, I present the committee's final report. The committee's charge was to review the provisions of the Ohio Constitution pertaining to the judiciary and the administration of justice, which are found primarily in Article IV of the Ohio Constitution.

One of the first issues considered by the committee was the process for selecting judges in Ohio. At the time the committee was first formed, the Chief Justice had a proposal pending to modify the process for judicial elections in Ohio. The committee analyzed the Chief Justice's proposal, as well as other alternatives to revise the current election system. In addition, the committee reviewed in detail alternative suggestions to adopt a judicial appointment process in Ohio in lieu of elections. Ultimately, no consensus could be reached on this issue.

The committee also considered the Ohio Supreme Court's original action jurisdiction, heard a proposal for a change to the Modern Courts Amendment, and addressed provisions relating to the writ of habeas corpus and civil forfeiture. We were the first to issue reports and recommendations for change, successfully proposing to the Commission that Sections 19 and 22 of Article IV, outdated provisions relating to courts of conciliation and a supreme court commission, be repealed as obsolete.

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The committee spent considerable time discussing the grand jury portion of Article I, Section 10, at the request of a State Senator and the Chief Justice of the Ohio Supreme Court. We heard from many witnesses, and considered numerous possibilities for reform of the grand jury process. Our committee ultimately reached bipartisan support for two proposals to improve grand juries in Ohio which we put forth in a report and recommendation to the full Commission. Unfortunately, even though the report was ripe for consideration, it was not included as an agenda item at the last meeting of the OCMC. However, the proposals we recommended, that 1) the accused be provided transcripts of prior grand jury testimony for any trial witness, and 2) the court appoint a grand jury legal advisor (such as currently required in the Hawaii Constitution), represent important revisions that should be seriously considered in any future discussions about improvements to our criminal justice system.

While our committee discussions often were spirited, we always sought amicable resolution, and successfully crossed partisan lines in forming our recommendations. As chair of this committee, I would like to express my appreciation for the commitment of the committee members, their integrity in fulfilling their responsibilities, and the experience and wisdom each member brought to the process.

Thank you for the opportunity to present this report on behalf of the committee.

Very truly yours,



Janet Gilligan Abaray, Chair
Judicial Branch and Administration of Justice Committee

Enclosure

I. Introduction

This Report of the Judicial Branch and Administration of Justice Committee (“JBAJ Committee”) is issued pursuant to the conclusion of the work of the Ohio Constitutional Modernization Commission (“Commission”). It contains a summary of the committee’s organization and work products, including topics discussed and all recommendations made to the Commission.

The Commission was established in 2011 by enactment of Am. House Bill 188 by the 129th Ohio General Assembly. The Commission was charged with:

- Studying the Ohio Constitution;
- Promoting an exchange of experiences and suggestions respecting desired changes in the constitution;
- Considering the problems pertaining to the amendment of the constitution;
- Making recommendations from time to time to the General Assembly for the amendment of the constitution.

The Commission used six subject matter committees for the purpose of reviewing constitutional provisions: Education, Public Institutions, and Local Government Committee; Finance, Taxation, and Economic Development Committee; Judicial Branch and Administration of Justice Committee; Bill of Rights and Voting Committee; Constitutional Revision and Updating Committee; and Legislative Branch and Executive Branch Committee. There is a separate report for each committee providing a summary of its work and recommendations to the Commission.

The JBAJ Committee was assigned the responsibility of reviewing the following sections of the Ohio Constitution:

- Article I (Bill of Rights)
 - Sections 5, 8, 9, 10, 10a, 12, 14, 15, 16, and 19a only
- Article IV (Judicial)

In addition, all committees could be assigned to review other issues or proposed constitutional amendments as needed by the Coordinating Committee or the Commission.

II. Membership of the Committee

Under Rule 6.2, each member of the Commission was assigned to serve on two subject matter committees. In total, eleven members were appointed to the Judicial Branch and Administration of Justice Committee.

The following individuals were serving on the JBAJ Committee in June 2017:

- Janet Gilligan Abaray Chair
- Justice Patrick F. Fischer Vice-chair
- Rep. Glenn Holmes
- Jeff Jacobson
- Sen. Kris Jordan
- Charles F. Kurfess
- Rep. Robert McColley
- Dennis P. Mulvihill
- Richard B. Saphire
- Sen. Michael Skindell
- Mark Wagoner

Judicial Branch and Administration of Justice Committee Meeting



Photo credit: Katie Monahan

III. Summary of Recommendations

In total, the JBAJ Committee made four recommendations to the Commission. Table 1 summarizes the recommendations including when they were made and the Commission's action.

Under Rules 8.3 and 9.4 of the Commission Rules of Procedure and Conduct, a committee recommendation for no change to the Constitution required consideration at one scheduled meeting and a majority vote in favor, while a recommendation for change required consideration at two meetings and a vote in favor by a majority of the committee members. Following a favorable vote, a recommendation was forwarded to the Coordinating Committee to review the recommendation as to form. After Coordinating Committee approval, the recommendation was then sent to the Commission co-chairs to place on the Commission agenda.

Each recommendation was the subject of a separate report containing the background and discussion regarding the affected constitutional provisions. The separate report for each recommendation is available in Appendix 1.

In some cases, constitutional sections were the subject of discussion by the committee but no recommendation was made. In other cases, there were constitutional sections assigned to the committee that were not able to be discussed before the closure of the Commission. Appendix 3 contains a status summary of all sections assigned to the committee, including those which did not progress to the Commission.

Table 1: Judicial Branch and Administration of Justice Committee Recommendations

Constitutional provision	Topic	Recommendation	Committee approval	Commission action	Vote
Art. I, § 8	Writ of Habeas Corpus	Retain	Mar. 9, 2017	Adopted Apr. 13, 2017	25-0
Art. I, § 10	Grand Juries	Revise	May 11, 2017	Not considered	None
Art. IV, § 19	Courts of Conciliation	Repeal	Jan. 15, 2015	Adopted Apr. 9, 2015	23-1
Art. IV, § 22	Supreme Court Commission	Repeal	Jan. 15, 2015	Adopted Apr. 9, 2015	24-0

IV. Summary Proceedings of the Judicial Branch and Administration of Justice Committee

(NOTE: The full record of committee minutes is presented in Appendix 2.)

2013-2014

The Judicial Branch and Administration of Justice Committee devoted much of the biennium to considering problems and issues relevant to Ohio's current method of electing judges, considering whether adopting an appointive system might improve the quality of the judiciary and eliminate some perceived problems with judicial elections. The committee also considered whether two constitutional provisions, Article IV, Sections 19 and 22, were obsolete and should be recommended for repeal. Finally, the committee began consideration of a proposal to allow the Ohio Supreme Court to take original jurisdiction over actions for declaratory judgment in cases of public or great general interest.

Presentations to the committee included Attorney Mary Jane Trapp, of Counsel to the law firm of Thrasher, Dinsmore & Dolan, who discussed the history of the Ohio Constitutional Convention; Steven C. Hollon, Administrative Director of the Ohio Supreme Court, who spoke regarding various Court programs and initiatives as they relate to the Court's constitutional authority under Article IV; John Van Norman, Policy and Research Counsel for the Ohio Supreme Court, who discussed term limits for judges; Nancy G. Brown of the League of Women Voters, who addressed problems related to the politics of judicial elections; Professor Michael E. Solimine, from the University of Cincinnati College of Law, who advocated for an appointive, rather than an elective, process for judicial selection; Political Science Professor John Dinan of Wake Forest University's Department of Politics and International Affairs; Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, who spoke to the committee regarding the obsolescence of Article IV, Section 19 (providing for Courts of Conciliation), and Section 22 (providing for the creation of a Supreme Court Commission); William Weisenberg, Policy Advisor and Consultant to the Ohio State Bar Association, who proposed improvements for Ohio's judicial election system and gave a background on the 1970s Constitutional Revision Commission; and Ohio Supreme Court Justice Paul E. Pfeifer, who advocated for the expansion of the Supreme Court's constitutional jurisdiction to include original actions for declaratory judgment.

Reports and Recommendations

The Judicial Branch and the Administration of Justice Committee reached a consensus that Article IV, Sections 19 and 22, should be repealed as obsolete. At its November 2014 meeting, the committee took its first vote to approve a Report and Recommendation relating to Article IV, Section 19, and a Report and Recommendation on Article IV, Section 22, both of which recommend repeal of those sections.

2015-2016

After concluding that Article IV, Section 19 (Courts of Conciliation) and Section 22 (Supreme Court Commission) were obsolete provisions and should be repealed and issuing a recommendation to that effect, the Judicial Branch and Administration of Justice Committee

considered a proposal by Ohio Supreme Court Justice Paul E. Pfeifer to allow the Ohio Supreme Court to take original jurisdiction over actions for declaratory judgment in cases of public or great general interest. In July 2015, the committee took up the question of whether Ohio's grand jury system for procuring criminal indictments was in need of revision.

Presentations to the committee in 2015 included Ohio Supreme Court Chief Justice Maureen O'Connor's presentation regarding the evaluation of judicial elections and candidates, and a review of the legal concepts of standing and justiciability by Professor Michael E. Solimine of the University of Cincinnati College of Law.

Addressing the topic of the grand jury procedure in 2015 and 2016, the committee heard from Sen. Sandra Williams, a member of the Governor's Task Force on Community-Police Relations, on recommending changes to Ohio's grand jury process. The committee also heard from prosecutors Michael T. Gmoser of Butler County, and Morris J. Murray of Defiance County, as well as from state public defender Timothy Young. The committee benefited from scholarly presentations about grand juries by Professor Gregory M. Gilchrist of the University of Toledo College of Law, who provided a historical overview; and Professor Thaddeus Hoffmeister of the University of Dayton School of Law, who specifically addressed the use of a grand jury legal advisor as provided under the Hawaii Constitution. Providing additional information on the grand jury process in Hawaii was Attorney Ken Shimozono, a grand jury legal advisor who presented his perspective on the Hawaii grand jury system via telephonic conference.

As 2016 closed, the committee also began consideration of the Modern Courts Amendment provisions contained in Article IV, including the Supreme Court's rulemaking authority as provided in Section 5(B).

Reports and Recommendations

In 2015, the Judicial Branch and the Administration of Justice Committee issued a report and recommendation that recommended repeal of Article IV, Section 19 (Courts of Conciliation), and Section 22 (Supreme Court Commission). These recommendations were forwarded to the Commission, which adopted both reports and recommendations for presentation to the General Assembly.

2017

In 2017, the committee considered several reports and recommendations. Three were for no change to Article I, Section 8 (Writ of Habeas Corpus), Article I, Section 12 (Transportation for Crime, Corruption of Blood, Forfeiture of Estate), and Article I, Section 15 (No Imprisonment for Debt). The committee easily found consensus and issued the report and recommendation regarding the writ of habeas corpus, but found a need for more research and information on the other two, which were placed on hold.

The committee also firmed up its position on the portion of Article I, Section 10 relating to the grand jury. It settled on a recommendation to change the section by moving the grand jury portion to a new section, creating the position of grand jury legal advisor, and requiring the creation and availability of grand jury witness transcripts. Voting seven to one to issue the report, with three members absent, the committee's recommendation was not unanimous, and the

discussion reflected concerns of some members that grand jury legal advisors were not necessary, or at least should not be provided for in the constitution. This particular concept met with strong opposition from the Ohio Prosecuting Attorneys Association. Although members more consistently agreed that the right to confrontation could be compromised in a situation in which the criminally accused is not permitted a right to a transcript of the testimony of a grand jury witness who later is called to testify at trial, some members expressed that this problem could be addressed by court rule, rather than by a constitutional provision.

In relation to the committee's consideration of the civil forfeiture provision in Article I, Section 12, in March the committee heard from Robert Alt, president and CEO of the Buckeye Institute. Based on Mr. Alt's presentation, and on a suggestion by committee member Representative Robert McColley, the committee was prepared to consider new constitutional language that would prevent an individual's assets from being forfeited absent a criminal conviction unless that individual is unavailable or the property is unclaimed. More specifically, Rep. McColley suggested that the existing provision be expanded to expressly state that the due process protections of criminal proceedings would take precedence, allowing the state to only take proceeds, instrumentalities, and contraband, rather than the full estate.

In May 2017, the committee discussed other topics it might have resolved had time permitted. Committee members acknowledged that the topic of judicial selection, which had been the subject of so many meetings at the beginning of the process, had not culminated in a recommendation, although at least one committee member expressed opposition to making any change to the method by which Ohio selects judges. One member noted a prior vote in which the committee had agreed to issue a report describing the best possible elective system and the best possible selection system. Another committee member suggested a topic for future consideration would be an idea originating with Chief Justice Maureen O'Connor, which was to move judicial elections to odd-numbered years in order to provide the opportunity for judicial candidates to receive greater attention from voters.

Reports and Recommendations

The Judicial Branch and the Administration of Justice Committee reviewed and ultimately issued a report and recommendation in May 2017 to modify Article I, Section 10. The report and recommendation was poised for a second presentation and vote at the final Commission meeting on June 8, 2017, but was pulled from the agenda for lack of Commission support.

Appendix 1

Judicial Branch and Administration of Justice Committee

Reports & Recommendations of the Committee

Reports & Recommendations of the Committee

Constitutional provision	Topic
Art. I, § 8	Writ of Habeas Corpus
Art. I, § 10	Grand Juries
Art. IV, § 19	Courts of Conciliation
Art. IV, § 22	Supreme Court Commission



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 8

WRIT OF HABEAS CORPUS

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 8 of the Ohio Constitution concerning the writ of habeas corpus. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article I, Section 8 be retained in its present form.

Background

Article I, Section 8 reads as follows:

The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body."¹ Originating in early English common law, the concept that persons should not be imprisoned contrary to law was a key aspect of the Magna Carta.² Eventually, this principle was embodied in a provision for a formal writ, also called "The Great Writ," by which a person wrongfully imprisoned could petition the government for release.³ As currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.⁴

From its appearance in the Magna Carta, the writ was preserved in various parliamentary enactments, and most notably was memorialized in the Habeas Corpus Act of 1679.⁵

The writ was incorporated as part of the Northwest Ordinance of 1787, in which Article 2 stated:

The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall beailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.⁶

Given this history, it was natural that the writ found a home in the United States Constitution in 1789, albeit not as part of the Bill of Rights (which was added later as a set of amendments), but at Article I, Section 9.⁷ It reads:

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

When the first Ohio Constitution was adopted in 1802, the writ was described in the Bill of Rights, then located in Article VIII. Section 12 of Article VIII of the first Ohio Constitution provides:

That all persons shall beailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it.⁸

Like the U.S. Constitution, the 1802 Ohio Constitution used the phrase “may require,” a construction that initially survived the 1851 revision process.⁹ However, when the provision was later reported by the convention’s Committee on Revision, Arrangement and Enrollment, the phrase was changed to remove the word “may.”¹⁰ The proceedings of the convention do not reveal that there was debate on this change. As adopted, the original, signed 1851 constitution states: “The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.”¹¹ This is the wording that now appears in the Ohio Constitution as published by the secretary of state and the General Assembly.¹²

In addition to changing the manner of reference to when the writ may be suspended, delegates to the Ohio Constitutional Convention of 1851 reorganized the Bill of Rights, placing it in Article I, separating the writ of habeas corpus from the requirement of bail, and placing provision for the writ in Section 8.¹³

The statutory procedure governing application for a writ of habeas corpus is set out in R.C. Chapter 2725, allowing, at R.C. 2725.01, anyone who is “unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived” to prosecute a writ of habeas corpus to inquire into the cause of the imprisonment, restraint, or deprivation. The statutes also describe which courts may grant the writ, what an application for the writ must contain, when the writ either is not allowed or is properly granted, and the procedural rules for considering and granting a writ.

As described in the Ohio Constitution, original jurisdiction over petitions for a writ of habeas corpus is assigned to the Supreme Court of Ohio by Article IV, Section 2(B)(1)(c), and to the Ohio courts of appeals by Article IV, Section 3(B)(1)(c). Although no specific constitutional provision allows for the original jurisdiction of the state common pleas and probate courts, Article IV, Section 4(B) assigns to the General Assembly the ability to provide by law for “original jurisdiction over all justiciable matters,” while Section 4(C) creates and provides for a probate division, thus indicating that a writ of habeas corpus may also be entertained by those courts. In fact, R.C. 2725.02 provides that the writ “may be granted by the supreme court, court of appeals, court of common pleas, probate court, or by a judge of any such court.”

Amendments, Proposed Amendments, and Other Review

The Constitutional Revision Commission in the 1970s (1970s Commission), in considering whether to recommend changes to Section 8, noted that the Constitutional Convention of 1874 unsuccessfully proposed adding language that would expressly permit the General Assembly to provide by law for suspension of the writ.¹⁴ The 1970s Commission concluded that its review did not “disclose any significant differences between federal and state interpretations nor any reasons to recommend changes in the language,” and so recommended no changes.¹⁵

Litigation Involving the Provision

Despite that myriad federal court cases address the writ as provided in the U.S. Constitution, relatively few Supreme Court of Ohio decisions address Article I, Section 8 of the Ohio Constitution, and still fewer hold a writ to be the appropriate remedy. The primary question for the reviewing court is whether the applicant possesses an adequate remedy in the ordinary course of law. Courts generally determine that petitioners for the writ of habeas corpus have an adequate remedy in the form of an appeal, and thus do not qualify for the writ. *See, e.g. Drake v. Tyson-Parker*, 101 Ohio St.3d 210, 2004-Ohio-711, 803 N.E.2d 811; *Jackson v. Wilson*, 100 Ohio St.3d 315, 2003-Ohio-6112, 798 N.E.2d 1086 (a writ of habeas corpus is not available to a petitioner having an adequate remedy at law by appeal to raise his claims of unlawful imprisonment). Nor is the writ available to test the validity of an indictment or other charging

instrument, or to raise claims of insufficient evidence. *Galloway v. Money*, 100 Ohio St.3d 74, 2003-Ohio-5060, 796 N.E.2d 528.

The writ is appropriate, however, to challenge the jurisdiction of the sentencing court. One example is *Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 2001-Ohio-1803, 757 N.E.2d 1153, in which the petitioner was an unarmed minor who was present during a robbery-homicide. After she was bound over for trial as an adult pursuant to the mandatory bindover provision in R.C. 2151.26, she petitioned for habeas corpus relief based on uncontroverted evidence that her circumstances did not meet the statutory bindover requirement that she be armed at the time of the incident. The Supreme Court of Ohio agreed, holding that the sentencing court “patently and unambiguously lacked jurisdiction to convict and sentence her on the charged offenses when she had not been lawfully transferred to that court,” and voiding the conviction and sentence. *Id.*, 100 Ohio St.3d at 617.

The writ also may provide a remedy in non-criminal cases, such as in involuntary commitment or child custody matters. *See, e.g., In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851; *Pegan v. Crawmer*, 76 Ohio St.3d 97, 1996-Ohio-419, 666 N.E.2d 1091.

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Discussion and Consideration

At its meeting on January 12, 2017, the committee briefly discussed Article I, Section 8 before concluding that the long history of the writ of habeas corpus, as well as the similarities between Ohio’s provision and its counterpart in the U.S. Constitution and other states, indicates that no change should be recommended.

Conclusion

The Judicial Branch and Administration of Justice Committee concludes that Article I, Section 8 should be retained in its current form.

Date Issued

After formal consideration by the Judicial Branch and Administration of Justice Committee on March 9, 2017, the committee voted to issue this report and recommendation on March 9, 2017.



Endnotes

¹ Bryan A. Garner, *A Dictionary of Modern Legal Usage* 395 (2d ed. 1995).

² Art. 39, in *Sources of Our Liberties* 17 (R. Perry & J. Cooper eds. 1959), as cited in *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

³ Dallin H. Oaks, *Habeas Corpus in the States: 1776-1865*, 32 U. Chi. L.Rev. 243 (1965).

⁴ *Habeas Corpus*, Black's Law Dictionary (10th ed. 2014).

⁵ 31 Car. 2, c.2, 27 May 1679, available at: http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html (last visited Dec. 21, 2016).

⁶ Northwest Ordinance of 1787, as reprinted in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 et seq. It may be found online at: Journals of the Continental Congress, 1774-1789, 32:334 (Worthington C. Ford, et al., eds., 1904-37); Ordinance of 1787: The Northwest Territorial Government, Act of July 13, 1787, <http://uscode.house.gov/browse/frontmatter/organiclaws&edition=prelim> (last visited Dec. 21, 2016), and additionally is available at: The Avalon Project, *Northwest Ordinance; July 13, 1787*, Lillian Goldman Law Library, Yale Law School (2008), http://avalon.law.yale.edu/18th_century/nworder.asp (last visited Dec. 21, 2016).

⁷ Additional history regarding the writ of habeas corpus may be found in *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁸ Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments* 92 (Cleveland, Arthur H. Clark Co. 1912).

⁹ *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51*, 2 vols. (Columbus: S. Medary, 1851), 231.

¹⁰ *Id.* at 806, 826.

¹¹ Ohio History Connection Archives, Image of Original First Page of the Ohio Constitution of 1851. Available at: <http://cdm16007.contentdm.oclc.org/cdm/ref/collection/p267401coll32/id/16791> (last visited Dec. 21 2016).

¹² The Ohio General Assembly provides a copy of the current constitution at: <https://www.legislature.ohio.gov/laws/ohio-constitution> (last visited Dec. 21, 2016); the Ohio Secretary of State provides a copy of the current constitution at: <https://www.sos.state.oh.us/sos/upload/publications/election/Constitution.pdf> (last visited Dec. 21, 2016).

¹³ A discussion of the history of the writ of habeas corpus in the Ohio Constitution may be found in Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 97-98 (2nd prtg. 2011).

¹⁴ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 25 (Apr. 15, 1976), available at: <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf>, (last visited Dec. 21, 2016).

¹⁵ *Id.*



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 10

THE GRAND JURY

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 10 of the Ohio Constitution concerning the requirement of a grand jury indictment for felony crimes. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article I, Section 10 of the Ohio Constitution be amended to remove the reference to the grand jury.

The committee further recommends that the reference to the grand jury in Section 10 be placed in a new provision, Section 10b.

Finally, the committee recommends that the new Section 10b include provision for a grand jury legal advisor and the creation of a right of the accused to a transcript of grand jury witness testimony under certain circumstances.

The new Section 10b would be divided into three separate parts that would consist of subdivision (A) expressing the original language regarding the grand jury from Section 10, subdivision (B) creating and describing the role of the grand jury legal advisor, and subdivision (C) relating to the requirement of a transcript.

The committee proposes that the new Section 10b would state as follows:

(A) Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise

infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.

(B) Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons admitted to the practice of law in this State.

(C) A record of all grand jury proceedings shall be made, and the accused shall have a right to the record of the grand jury testimony of any witness who is called to testify at the trial of the accused; but provision may be made by law regulating the form of the record and the process of releasing any part of the record.

Background

Article I, Section 10 reads as follows:

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Many of the concepts memorialized in Section 10, including the requirement of a grand jury indictment for felony crime, date from the 1802 constitution. In the 1802 constitution, Section 10 was part of the Bill of Rights that was contained in Article VIII. Section 10 read:



That no person arrested or confined in jail shall be treated with unnecessary rigor or be put to answer any criminal charge but by presentment, indictment, or impeachment.

Section 11 of the 1802 constitution provided additional rights of the accused, stating:

That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusations against him and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment a speedy public trial by an impartial jury of the County or District in which the offense shall have been committed; and shall not be compelled to give evidence against himself, nor shall he be twice put in jeopardy for the same offense.

The 1851 Constitution moved the Bill of Rights to Article I, and combined aspects of prior Sections 10 and 11 into one Section 10, which read:

Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; be the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense.

The 1912 Constitutional Convention resulted in several changes to the grand jury portion of the 1851 provision. First, the categorical reference to “cases of petit larceny and other inferior offenses,” was clarified to mean “cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary.” The 1912 convention also added a reference to the ability of the General Assembly to enact laws related to the total number of grand jurors, and the number of grand jurors needed to issue an indictment.

Other parts of Section 10 were changed in 1912, including allowing the General Assembly to enact laws related to taking and using witness depositions, and adding that the failure of the accused to testify at trial may be the subject of comment by counsel. Section 10 also requires that the accused be allowed to appear and defend in person, and sets out the right to counsel, the right to demand details about the accusation, to have a copy of the charges, to face witnesses, to have defense witnesses compelled to attend, to have a speedy trial by an impartial jury, the right against self-incrimination (nevertheless allowing comment regarding the accused’s failure to testify), and the protection against double jeopardy. The section further specifies provision may be made by law for deposing witnesses. In short, the lengthy section encompasses many of the



procedural safeguards enumerated in the United States Constitution, specifically in the Fifth and Sixth Amendments.¹

Originating in 12th century England under the reign of King Henry II, grand juries were a way for citizens to note suspicious behavior and then, as jurors, report on suspected crime to the rest of the jury.² This system helped centralize policing power with the king, power that otherwise would have been held by the church or barons. By the 17th century, grand juries were viewed as a way of shielding the innocent against criminal charges.³ Resembling the system used today, the government was required to get an indictment from a grand jury before prosecuting. Thus, the grand jury evolved from being a “tool of the crown” to “defender of individual rights,” a transformation helped by two famous refusals of a London grand jury to indict the Earl of Shaftesbury on a dubious treason charge in 1667. The resulting rule of law, that freemen are entitled to have their neighbors review the charges against them before the government can indict, was brought to the colonies with British citizens who, when their relationship with England soured, used the process to nullify despised English laws and deny indictment to dissenters. The most famous example of this was newspaper editor John Peter Zenger, who was arrested for libel in 1743 based on his criticisms of the New York royal governor. Three grand juries refused to indict him, and, although royal forces would still put him on trial after an information proceeding, a trial jury acquitted him.

After independence, the United States Constitution’s framers considered grand juries to be so vital to due process that the institution was enshrined in the Fifth Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *.” As described by the United States Supreme Court in *U.S. v. Calandra*, 414 U.S. 338, 342-343 (1974):

The institution of the grand jury is deeply rooted in Anglo-American history. [Footnote omitted.] In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by “a presentment or indictment of a Grand Jury.” Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury’s historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

Many states, including New York, Ohio, Maine, and Alaska, institutionalized grand juries in their own constitutions, using language almost identical to the Fifth Amendment.



Amendments, Proposed Amendments, and Other Review

The Ohio Constitutional Revision Commission (1970s Commission) created a special “Committee to Study the Grand Jury and Civil Trial Juries” to consider the purpose and function of grand juries. As described in the 1970s Commission report, that committee determined “there are some classes of cases in which the grand jury could serve a useful purpose,” including “cases that have complex fact patterns or a large number of potential defendants, such as conspiracies or instances of governmental corruption; cases which involve use of force by police or other cases which tend to arouse community sentiment; and sex offenses and other types of cases in which either the identity of the complaining witness or the identity of the person being investigated should be kept secret in the interest of justice unless the facts reveal that prosecution is warranted.”

The 1970s Commission recommended that the reference to the grand jury in Article I, Section 10 be moved to a new Section 10a, which would read:

Section 10a. Except in cases arising in the armed forces of the United States, or in the militia when in actual service in time of war or public danger, felony prosecutions shall be initiated only by information, unless the accused or the state demands a grand jury hearing. A person accused of a felony has a right to a hearing to determine probable cause. The General Assembly shall provide by law the time and procedure for making a demand for a grand jury hearing. In the absence of such demand, the hearing to determine probable cause shall be by a court of record. At either such hearing before a court or at a grand jury hearing, the state shall inform the court or the jury, as the case may be, of evidence of which it is aware that reasonably tends to negate the guilt of an accused or of a person under investigation. The inadvertent omission by the state to inform the court or the jury of evidence which reasonably tends to negate guilt, in accordance with the requirements of this section, does not impair the validity of the criminal process or give rise to liability.

A person has the right to the presence and advice of counsel while testifying at a grand jury hearing. The advice of counsel is limited to matters affecting the right of a person not to be a witness against himself and the right of a person not to testify in such respects as the General Assembly may provide by law.

In contrast to existing Section 10, which prevented a felony prosecution “unless on presentment or indictment of a grand jury,” the recommended change required all felony prosecutions to proceed by information unless either the accused or the state demanded a grand jury hearing.⁴

The recommendation thus rendered the information or complaint the primary method of initiating felony prosecutions, allowed those accused of a felony the right to a probable cause hearing, required the prosecutor to reveal to either the court or the grand jury any exculpatory evidence, and permitted grand jury witnesses to have counsel present to advise on matters of privilege.



The 1970s Commission described the rationale behind the recommended change as being to simplify the process, since the existing practice allowed both a preliminary hearing in the municipal or county court to determine probable cause, and a grand jury hearing if the person is bound over to the common pleas court – where again probable cause is determined. Thus, the goal of the suggested change was to provide either for a preliminary hearing or a grand jury hearing, but not both. The 1970s Commission also explained that the purpose of recommending the provision of a right to counsel to grand jury witnesses was to recognize the need to safeguard the rights of a witness who also may be the target of the criminal investigation. However, the recommended right only extended to allowing counsel in the grand jury room during the witness’s testimony and only for the purpose of advising on the witness’s privilege against self-incrimination.

The 1970s Commission’s recommendation for grand jury reform failed to result in a joint recommendation by the General Assembly and was not presented to voters.

Litigation Involving the Provision

The Ohio Supreme Court, following the language of the indictment clause, has ruled the grand jury to be a required entitlement of a person accused of a felony. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985).

Presentations and Resources Considered

Williams Presentations

Senator Sandra Williams first appeared before the committee on July 9, 2015 to discuss her view that the grand jury should be replaced by a preliminary hearing system. She expressed concern over the lack of transparency in grand jury procedures and the perception that the authority of the prosecutor is unchecked. Sen. Williams noted that, despite generally high indictment rates, grand juries frequently fail to indict police officers, indicating the discretion given to the prosecutor allows for favoritism toward law enforcement. She said if Ohio does not want to eliminate grand juries, the state may consider having a special prosecutor who would handle cases involving the police.

On February 11, 2016, Sen. Williams again presented to the committee, outlining legislation she introduced related to the use of grand juries. Identifying recommendations she would like the committee to support, Sen. Williams advocated requiring the attorney general to appoint a special prosecutor to investigate and, where necessary, charge a suspect in cases involving a law enforcement officer’s use of lethal force against an unarmed suspect.

Sen. Williams also advocated the court appointment of an independent grand jury counsel to advise the grand jury on procedures and legal standards. Sen. Williams said an independent counsel would have specific guidelines for interacting with jurors, asserting that the prosecutor should not be the jury’s only source of legal guidance. She said this would be another way to provide transparency, removing as it does the current ambiguity caused by allowing the prosecutor to be both active participant and referee.



Describing how this system would work in the grand jury room, Sen. Williams said the prosecutor would be able to present the case and offer his opinion on possible charges that apply, as determined by the evidence presented, but jurors' questions would be answered by the independent counsel, who could explain the proceedings based on law. Sen. Williams added that the independent counsel would be selected by the presiding judge of the local common pleas court, and the length of service of the counsel would be determined by law.

Sen. Williams also recommended that the General Assembly or Supreme Court expand the rules and set standards allowing access to grand jury transcripts. She said an additional reform would allow those directly impacted by a grand jury outcome to request the transcript. If there are concerns about witness privacy, Sen. Williams said sensitive information could be redacted.

Sen. Williams additionally advocated a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise, a practice she said is useful in cases in which there is a significant question whether the prosecutor is overcharging or undercharging. She said this recommendation would retain the need for secrecy while allowing review if there is a question whether the prosecutor is conducting the investigation in good faith.

Sen. Williams acknowledged the secrecy component has been an integral part of the grand jury process, but said modern realities demand that there be some way to review the proceedings in cases in which there is significant public interest, where the public may feel justice is being circumvented, or where motives are viewed as politically expedient. She said when it comes to high profile cases, the secrecy of the process and, in many cases, the evidence presented, no longer retains the need to be secret. She said the current grand jury system in Ohio operates without any mechanism to review the process.

Gilchrist Presentation

Also on July 9, 2015, Professor Gregory M. Gilchrist of the University of Toledo College of Law addressed the committee on the history of the grand jury. Prof. Gilchrist described that historically the grand jury served as a shield to protect the individual citizen, noting that in colonial times the grand jury thwarted royal prosecutors from bringing charges perceived as unjust. Today, he said, the procedure is largely in the control of the prosecution. He observed that, because grand juries serve for a period of months, jurors get to know the prosecutor on a day-to-day basis, and the prosecutor can serve as their only source for legal knowledge and information about the criminal justice system.

Gmoser and Murray Presentations

On December 10, 2015, two county prosecutors offered their perspectives on the use of the grand jury. Both prosecutors advocated for retaining the grand jury system in its current form. Michael Gmoser, Butler County Prosecutor, said 98 percent of felony prosecutions in the criminal division of his office begin with a grand jury indictment, as opposed to a bill of information. He said, unlike the popular saying, there is nothing to be gained by "indicting a



ham sandwich,” adding that might be true as an exception to the rule, “but we should not change the whole system because of it.”⁵ He said secrecy prevents the innocent person from being maligned and abused based on improper charges. He said prosecutors use the grand jury for investigatory purposes, so that, if the process becomes transparent, it will prevent opportunities for disclosure of crime.

Morris Murray, prosecutor for Defiance County, emphasized the grand jury process is “absolutely critical” to the fair and efficient administration of justice. Reading from the jury instructions that are provided to grand jurors at the time they are sworn by the judge, Mr. Murray described the grand jury as an “ancient and honored institution,” indicating that jurors take an oath in which they promise to keep secret everything that occurs in the grand jury room, both during their service and afterward.

On November 10, 2016, Mr. Murray again appeared before the committee, on behalf of the Ohio Prosecuting Attorneys Association, to provide additional perspective on the question of whether to change the grand jury process in Ohio as provided in Article I, Section 10.

Mr. Murray expressed continued support for the concept that the grand jury process “is a time honored and important piece of the criminal justice system not only in Ohio, but throughout the country.” He continued that grand juries take their oath seriously, and that jurors are instructed that if the evidence does not meet the probable cause standard they should not return an indictment.

Mr. Murray explained that prosecutors receive investigatory files from law enforcement agencies and review those investigations to make a preliminary assessment of the legal sufficiency to proceed. He emphasized that the statutory, ethical, and professional obligation of a prosecuting attorney is not simply to seek a conviction, but to seek justice. He said prosecutors are sworn officers of the court expected to comply with the ethical considerations and disciplinary rules established to ensure that lawyers conduct themselves professionally.

He commented that removing or diminishing the confidentiality of grand jury proceedings jeopardizes the purpose of the grand jury, and would remove an important protection for persons who are investigated but not ultimately indicted. He said confidentiality also protects witnesses from retribution or intimidation whether cases go forward or not.

Mr. Murray said the Ohio Prosecuting Attorneys Association is opposed to the concept of a grand jury legal advisor because that would add an unnecessary layer to the process. He said prosecutors are expected to provide instructions of law to the grand jury, providing evidence that proving the essential elements of the criminal violation. He said prosecutors must understand the rules of evidence, and how information may be impacted by those rules, and they have nothing to gain by submitting inadmissible evidence to a grand jury, or from withholding evidence that may prove or disprove allegations. In addition, he said, grand juries are instructed that they have the option to obtain further instructions or legal advice from the court, if they require it. He said adding an advisor attorney adds expense and bureaucracy.

Mr. Murray said if the concern is that prosecutors will pursue cases and seek indictments where they should not, or that they would fail to prosecute cases that should be prosecuted, the use of an advisor attorney will not address those concerns.

On January 12, 2017, Mr. Murray was present in the audience to answer questions by committee members. Asked whether prosecutors should be required to provide transcripts of grand jury witness testimony, Mr. Murray indicated the state has adopted “open file discovery,” in which prosecutors have to turn over everything they have, including statements outside the grand jury. He said his organization might be amenable to providing transcripts so long as the provision is drafted so as to protect witnesses who need protection.

Young Presentation

On February 11, 2016, State Public Defender Tim Young presented to the committee. Mr. Young said grand juries are “a vital and important step in the criminal justice process.” However, he said, the unfettered, unchecked secrecy in the process sets it apart from the rest of the justice system and society’s basic ideals relating to government. Mr. Young proposed several reforms to the committee for improving the grand jury process, including that, after indictment, the testimony of trial witnesses should be made available to the court and counsel; that the secrecy requirement be eliminated in cases involving the conduct of a public official in the performance of official duties; and that, in the case of a police shooting, a separate independent authority be responsible for investigating and presenting the matter to the grand jury.

Hoffmeister Presentation

On June 9, 2016, the committee heard a presentation by University of Dayton law professor Thaddeus Hoffmeister, who has written extensively about the grand jury system and particularly studied the Hawaii model of having a Grand Jury Legal Advisor (GJLA).

Professor Hoffmeister testified that the GJLA is a licensed attorney who neither advocates on behalf of nor represents anyone appearing before the grand jury, but serves as counsel to the grand jurors. The role of the GJLA is to provide grand jurors with unbiased answers to their questions, legal or otherwise.

He noted that historically the grand jury was an independent body, and the prosecutor had a limited role in the process. He said when communities were small and crimes were simple, the grand jurors actually were more knowledgeable than the prosecutor regarding both the law and the controversies giving rise to the investigations. Later, when the population grew and prosecutors became more specialized, the courts allowed the prosecutor to play a larger role in educating the grand jury.

Professor Hoffmeister advocated that introducing a GJLA to the process is one possible solution to restoring grand jury independence. He said the GJLA could be appointed by a common pleas judge who would also be responsible for settling any disputes between the GJLA and the prosecutor, which rarely arise. The GJLA’s main job would be to support grand jurors in their



determination of whether to issue an indictment. The GJLA would also be called upon to research and respond to questions posed by the grand jurors. However, there is no duty for the GJLA to present exculpatory evidence or to advise witnesses, which dramatically alters the traditional functions of the grand jury. Finally, the proposed GJLA typically serves for one or two year terms and is present during all grand jury proceedings.

Prof. Hoffmeister said the legal advisor is not permitted to ask questions, and is not with the jurors when they deliberate. When the advisor disagrees with the prosecutor regarding a legal interpretation, the dispute is presented to the common pleas judge who resolves the conflict, but that, in practice this is rare because the prosecutor and the GJLA usually work it out on their own.

Shimozono Presentation

In September 2016, Attorney Kenneth J. Shimozono, a grand jury legal advisor in Hawaii, was available via telephonic conference call to answer the committee's questions on the grand jury process in his state. Mr. Shimozono described the relationship between prosecutors and grand jury legal advisors as generally professional and cordial. He said most grand jury counsel are former prosecutors who are now defense attorneys, or they are defense attorneys. Mr. Shimozono said it is the prosecutor's decision to present evidence as he sees fit, and the jury's questions are directed to the witnesses. Asked whether there is an attorney-client relationship between the legal advisor and the grand jury, Mr. Shimozono said he would not disclose the jury's questions to the prosecutor so he would believe they have an attorney-client relationship. He said his understanding is that the advisor is there to advise the grand jury, but the grand jury is not the client in the traditional sense. Mr. Shimozono said the duty is owed to the jurors and not to the defendant. He said the jurors would notify the legal advisor if they wanted to ask a question but were not allowed, adding that, in that instance, everyone goes in front of the administrative judge and puts it on the record in a hearing. But, he said, to his knowledge that has never happened.

Asked what would happen if the legal advisor provided a wrong answer, left out an element of the offense, or misinterpreted the law, resulting in the grand jury moving forward with an indictment, Mr. Shimozono said the remedy would be for the defense counsel to look at the transcript to see if there were improprieties, and, if so, file a motion to dismiss the indictment. But, he said, the error has to be material and, if the defendant were found guilty, the issue would be preserved for appeal.

Asked about the procedure for a defendant to get access to a transcript of the grand jury hearing, Mr. Shimozono said the defendant has to request the transcript, but no one challenges the request. He said supplying the transcript is "more of a given," so that the defendant requests the transcript from the court reporters' office and they pull the video and make a transcript. Or, he said, the defense can watch the video and see if there is an issue, and then ask for the hearing to be transcribed so it can be submitted to the court.

Asked whether the legal advisor is immune for actions taken during grand jury proceedings, Mr. Shimozono said he would believe so, but has not been told that specifically. He said legal



advisors are paid by the state, but are independent contractors, so he is not sure if they have complete immunity. He said even if the legal advisor is not immune, the state attorney general would step in to defend in that situation, similar to what occurs in relation to the public defender.

Summarizing the effectiveness of the system, Mr. Shimozone said having the grand jury legal advisor is helpful because it improves the process to have someone there who is more neutral. He said it also may help the grand jurors feel more comfortable that they are getting an unbiased view, so that they have more confidence in the process. He said they have found grand jurors take their duties seriously and they get better at performing their role as the year progresses. He said once the jury catches on to how things work they have fewer questions.

Asked whether he would advise another state to adopt a procedure like Hawaii's, Mr. Shimozone said he would recommend not adopting the system in its entirety. He said one thing that would make a difference is to require the grand jury counsel to sit through the entire proceedings to get a better grasp of what is going on. He said, under Hawaii's current system, in which the legal advisor is not always in the room, the jury may not realize something is improper and so would not bring it to the legal advisor's attention. He said, as a defense attorney, he would prefer that cases be brought through a preliminary hearing process. He said he has not seen abuse with the grand jury process, but, generally speaking, there was not a huge problem when he was a public defender, although sometimes there was a little more hearsay evidence than he thought was appropriate.

Discussion and Consideration

Committee members expressed a variety of views on whether and how to reform the grand jury process. While committee members generally agreed that the grand jury process could allow prosecutors to exert undue influence on the grand jury's deliberations, and that the absence of transparency contributes to public concern over the grand jury's operation, some members were reluctant to conclude that reform was necessary or that constitutional change is necessary for reform.

Some committee members focused on the possibility of creating a separate procedure for cases involving police use-of-force. Such a procedure would allow or require appointment of a special prosecutor as a way of addressing concerns arising out of the perception that the working relationship between prosecutors and local police creates a conflict of interest. Some committee members expressed concern that creating a special procedure for such cases could have unintended consequences, and so were not in favor of treating police use-of-force cases differently.

Committee members generally agreed that, although there are problems in the grand jury system, they were not in favor of eliminating the constitutional requirement of a grand jury indictment for felony prosecutions.

The committee considered the concept of a grand jury legal advisor, with some members seeing a benefit in the appointment of an independent attorney to assist the grand jury. Although committee members found the idea to be interesting, they expressed concerns about how such a



system would work as a practical matter, particularly in smaller counties. Committee members also expressed that, although Hawaii provides for a grand jury legal advisor in its constitution, it may not be necessary for Ohio to create a constitutional provision allowing for a grand jury legal advisor; rather, such a system could be created by statute or court rule.

The committee also gave serious consideration to whether a constitutional provision is needed to grant the accused a right to a transcript of grand jury witness testimony. Some committee members expressed that denying the accused the opportunity to obtain the transcript of witness testimony might violate the right to confrontation, as well as due process rights. Believing the transcript issue touches on these fundamental rights, those committee members asserted constitutional language may be necessary to guarantee access to a transcript. While agreeing that access to a transcript is important, other committee members suggested the issue did not rise to the level of requiring a constitutional provision, instead asserting that the accused's interest in obtaining a transcript could be protected by statute.

Conclusion

Committee members expressed concern over the role of prosecutors in the grand jury process, recognizing that, under the current system, the prosecutor is the only attorney in the room, and has sole control over what the grand jury is told about the law. Some committee members were concerned that this arrangement creates the risk that grand jurors could be given inaccurate information, or that their questions will not be objectively answered. Based on these concerns, a majority of the committee favored the system used in Hawaii, by which a neutral grand jury legal advisor is available to answer juror's questions. Thus, the committee recommends an amendment that would create the role of grand jury legal advisor. However, the committee would leave it to the legislature to address the details of appointment and funding of the legal advisor, as well as to specify issues such as the legal advisor's presence during the grand jury proceedings and immunity for official acts.

An additional concern of members was that, under current Criminal Rules 6 and 16, a criminal defendant does not have a right to a transcript of grand jury proceedings. In particular, members expressed support for the concept that criminal defendants should have access to transcripts of grand jury witness testimony in order to impeach witnesses in situations in which inconsistent testimony was provided during the grand jury proceedings. Although the committee felt that access to the grand jury record was an important principle to articulate, the committee felt that the details of how that access could be achieved was best addressed by statute or court rule, and so recommends that access would be afforded "as provided by law."

Date Issued

After formal consideration by the Judicial Branch and Administration of Justice Committee on March 9, 2017, April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 2017.



Endnotes

¹ The Fifth Amendment to the U.S. Constitution provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

² For more on the history of grand juries, see, e.g., Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?* 82 B.U.L. Rev. 1 (2002); Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. Crim. L. & Criminology 1171 (2007-2008); Richard H. Helms, *The Early History of the Grand Jury and the Canon Law*, 50 U. Chicago L.Rev. 613 (1983).

³ Beale, Sarah, et al., *Grand Jury Law & Practice* 1.2.

⁴ As Bryan Garner has explained, the federal court system distinguishes between an indictment, an information, and a presentment:

Any offense punishable by death, or for imprisonment for more than one year or by hard labor, must be prosecuted by indictment; any other offense may be prosecuted by either an indictment or an information. Fed. R. Crim. P. 7(a). An information may be filed without leave of court by a prosecutor, who need not obtain the approval of a grand jury. An indictment, by contrast, is issuable only by a grand jury.

Presentments are not used in American federal procedure; formerly, a presentment was ‘the notice taken, or statement made, by a grand jury of any offense or unlawful state of affairs from their own knowledge or observation, without any bill of indictment laid before them.’ [citation omitted].

Bryan Garner, *A Dictionary of Modern Legal Usage*, 438 (2d ed. 1995).

A “presentment” is an informal accusation returned by a grand jury on its own initiative, as opposed to an indictment, which results from a prosecutor’s presentation of charges to the grand jury. Both a presentment and an indictment result from actions by a grand jury. Ballentine’s Law Dictionary (3rd ed. 1969), available at LexisNexis.com (last visited Feb. 28, 2017).

Some states allow both a grand jury hearing and a preliminary hearing, but restrict the grand jury process to certain types of crimes or investigations.

⁵ Mr. Gmoser’s “ham sandwich” remark is a reference to the famous comment by New York Chief Judge Sol Wachtler that New York district attorneys have so much influence on grand juries that they could get jurors to indict “a ham sandwich.” Marcia Kramer & Frank Lombardi, “New top state judge: Abolish grand juries & let us decide,” *New York Daily News*, Jan. 31, 1985. Available at: <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208> (last visited June 28, 2016).





OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION ARTICLE IV, SECTION 19

COURTS OF CONCILIATION

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 19 of the Ohio Constitution concerning courts of conciliation. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee finds that Article IV, Section 19 is obsolete and therefore recommends its repeal.

Background

Article IV, Section 19 reads as follows:

The General Assembly may establish courts of conciliation, and prescribe their powers and duties; but such courts shall not render final judgment in any case, except upon submission, by the parties, of the matter in dispute, and their agreement to abide such judgment.

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.¹

Section 19, which is original to the 1851 Constitution, was proposed at the 1850-51 Constitutional Convention to allow the resolution of disputes without resorting to the traditional legal process.²

George B. Holt, a delegate from Montgomery County whose long career in the law included

serving terms as a state representative, state senator, and common pleas court judge, was the leading proponent of the proposal to permit the General Assembly to create courts of conciliation. Holt's comments during the discussion of courts of conciliation suggest that the adoption of Section 19 was motivated by concern over the adversarial and formal nature of litigation under the established court system:

The plan of a court of conciliation has many advocates, who desire to see it established. It has been tried in other countries, with excellent effect—greatly diminishing litigation, and subduing a litigious spirit—a spirit which is the bane of a community. It sets neighbor against neighbor, brother against brother and even father against son, and son against father. Such litigation have I often witnessed, and in some cases seen it prosecuted with an embittered spirit, little short of devilish. Every means which promises only a mitigation of the evil should be employed. The expense and time wasted in such controversies, employing judges, jurors, witnesses, lawyers and suitors, is but a little of the mischief. The monstrous evil consists in the engendering and perpetuating of strife and contention among neighbors, begetting and nursing discord and hatred in families, and in disturbing the harmony and peace of society. A judicious peace loving and peace making officer of this kind may be more useful, far more useful than the first judge of your State, whom you propose to dignify with title of Chief Justice of Ohio.³

Despite the authority provided by Section 19, the General Assembly has never established courts of conciliation; rather it has created arbitration proceedings and other methods for litigants wishing to avoid using the courts.⁴

Amendments, Proposed Amendments, and Other Review

Article IV, Section 19 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission recommended the repeal of Section 19, based upon its conclusion that the General Assembly had never exercised its constitutional authorization to establish courts of conciliation. In making this recommendation, the commission noted that its repeal would not affect current or future alternative dispute resolution provisions under Ohio law.⁵ Despite this recommendation, the General Assembly did not submit the proposed repeal of Section 19 to the voters.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 19.⁶ The question was presented to voters as “Issue 1” on the November 8, 2011 ballot, which also included a proposal to repeal Article IV, Section 22 (authorizing the creation of supreme court commissions) as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal, involving age eligibility requirements for judicial office, was

the principal focus of the opposition to Issue 1 and perhaps was the reason for its sound defeat at the polls.⁷

Litigation Involving the Provision

There has been no litigation involving this provision, and no court of conciliation has ever been established by the General Assembly.

Presentations and Resources Considered

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the committee on Article IV, Section 19. Ms. Cline noted that it is unlikely under the current structure of the judicial branch that courts of conciliation would be necessary.

Also on September 11, 2014, William K. Weisenberg, Senior Policy Advisor to the Ohio State Bar Association, presented his perspective on Section 19. He observed that the judicial and legislative branches have collaborated to enact laws and encourage alternative dispute resolution measures such as arbitration, mediation, and private judging. Mr. Weisenberg stated that he does not believe Section 19 is necessary to allow for alternative dispute resolution but, instead, the section is a remnant of history and properly should be repealed.

Conclusion

The Judicial Branch and Administration of Justice Committee finds that Article IV, Section 19 has not been used since its adoption in 1851, and determines it is not necessary to authorize any existing or future alternative dispute resolution mechanisms. Therefore, the committee concludes that the provision is obsolete and recommends that Article IV, Section 19 be repealed.

Date Adopted

After formal consideration by the Judicial Branch and Administration of Justice Committee on November 13, 2014, and January 15, 2015, the committee voted to adopt this report and recommendation on January 15, 2015.

Endnotes

¹ Ohio Constitution, Article IV, Section 1.

² Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* (2nd prtg. 2011), p. 207.

³ Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio 1850-51 (Columbus: S. Medary, 1851), p. 391.

⁴ Steinglass & Scarselli, *supra*, p. 208, citing R.C. Chapter 2711, and R.C. 2701.10.

⁵ Ohio Constitutional Revision Commission, *Recommendations for Amendments to the Ohio Constitution, Part 10, The Judiciary*, March 15, 1976, p. 65, and p. 420 of Appendix J of the Final Report.

⁶ As it appeared on the ballot, Issue 1 read as follows:

Proposed Constitutional Amendment

TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.

Proposed by Joint Resolution of the General Assembly:

To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.

This proposed amendment would:

1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.
2. Eliminate the General Assembly's authority to establish courts of conciliation.
3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.

If approved, the amendment shall take effect immediately.

A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.

A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

⁷ The voters rejected Issue 1 by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); <https://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2011results/20111108Issue1.aspx> (last visited 10-27-2014).



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION ARTICLE IV, SECTION 22

SUPREME COURT COMMISSION

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article IV, Section 22 of the Ohio Constitution concerning supreme court commissions. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee finds that Article IV, Section 22 is obsolete and therefore recommends its repeal.

Background

Article IV, Section 22, reads as follows:

A commission, which shall consist of five members, shall be appointed by the governor, with the advice and consent of the senate, the members of which shall hold office for the term of three years from and after the first day of February, 1876, to dispose of such part of the business then on the dockets of the supreme court, as shall, by arrangement between said commission and said court, be transferred to such commission; and said commission shall have like jurisdiction and power in respect to such business as are or may be vested in said court; and the members of said commission shall receive a like compensation for the time being, with the judges of said court. A majority of the members of said commission shall be necessary to form a quorum or pronounce a decision, and its decision shall be certified, entered, and enforced as the judgments of the supreme court, and at the expiration of the term of said commission, all business undisposed of shall by it be certified to the supreme court and disposed of as if said commission had never existed. The clerk and reporter of said court shall be

the clerk and reporter of said commission, and the commission shall have such other attendants not exceeding in number those provided by law for said court, which attendants said commission may appoint and remove at its pleasure. Any vacancy occurring in said commission, shall be filled by appointment of the governor, with the advice and consent of the senate, if the senate be in session, and if the senate be not in session, by the governor, but in such last case, such appointment shall expire at the end of the next session of the general assembly. The general assembly may, on application of the supreme court duly entered on the journal of the court and certified, provide by law, whenever two-thirds of such [each] house shall concur therein, from time to time, for the appointment, in like manner, of a like commission with like powers, jurisdiction and duties; provided, that the term of any such commission shall not exceed two years, nor shall it be created oftener than once in ten years.¹

Article IV governs the judicial branch, specifically vesting judicial power in the state supreme court, courts of appeals, courts of common pleas, and other courts as may be established by law.²

Section 22 is not original to the 1851 Constitution, but it was adopted by Ohio voters in 1875.

The creation of a supreme court commission to alleviate the court's backlog was a topic of considerable discussion at the 1873-74 Constitutional Convention. Some delegates felt that the creation of a commission to assist the court in dealing with its burgeoning docket would dilute the authority of the court; others were concerned that it would be difficult to recruit lawyers willing to leave successful practices in order to render this public service. Proponents of the use of commissions pointed out the difficulties faced by the court in attempting to keep up with the workload: despite 14-hour workdays and diligent attention to its responsibilities, the court was unable to reduce its significant backlog.³

After extensive debate, the Convention approved provisions to create an initial commission for a three-year term and to authorize the General Assembly to create subsequent commissions.⁴ The voters, however, rejected the proposed Ohio Constitution of 1874.

In 1875, after the rejection of the 1874 Constitution, the General Assembly proposed Section 22, a variant of the earlier plan to create supreme court commissions. Voters approved the amendment on October 12, 1875⁵ by a 77.5 to 22.5 percent margin of those voting on the proposal.⁶ This was the first amendment approved by the voters under the authority given the General Assembly in the 1851 Constitution to propose amendments directly to the voters.⁷

The first supreme court commission was created by direct operation of this largely self-executing amendment. Section 22 required the governor to appoint the five members of the initial commission with advice and consent of the Senate for a three-year term beginning in February 1876. Additionally, the amendment gave the General Assembly authority to create subsequent commissions for two-year terms by a two-thirds vote (after application by the Ohio Supreme Court), and the General Assembly created a second commission in 1883. The second commission ceased operation in 1885, and since then there have not been any commissions to provide docket relief to the Ohio Supreme Court.⁸

Amendments, Proposed Amendments, and Other Review

Article IV, Section 22 has not been amended since its approval by voters in 1875.

In the 1970s, the Ohio Constitutional Revision Commission twice recommended that Section 22 be repealed. It first recommended the change as part of its review of the General Assembly's administration, organization, and procedures. In May 1973, however, the voters rejected a ballot issue proposing repeal of Section 22. The 1970s Commission attributed this rejection to a lack of appropriate voter education.⁹ Then, in 1976, it again recommended the repeal of this provision,¹⁰ but the General Assembly did not resubmit this renewed recommendation to repeal Section 22 to the voters.

In recommending repeal of the authority to create commissions, the 1970s Commission noted that the case backlog in the 1870s arose out of an organizational system that expected supreme court judges to hear cases in multiple districts around the state. At the time, the delegates thought that the use of commissions could help resolve the problem. Subsequent to adoption of Section 22 in 1875, the voters approved an amendment in 1883 reorganizing the court system and relieving the judges of their remaining circuit-riding responsibilities. Finally, in 1912, the voters again amended Article IV to create courts of appeals, thus significantly reducing the caseload burden on the Ohio Supreme Court and removing the need for supreme court commissions.

In 2011, the 129th General Assembly adopted Amended House Joint Resolution Number 1, intended, in part, to repeal Section 22.¹¹ The question was presented to voters as "Issue 1" on the November 8, 2011, ballot, which also included a proposal to repeal Article IV, Section 19 (authorizing the General Assembly to create courts of conciliation), as well as a proposal to amend Article IV, Section 6 to increase the maximum age for assuming elected or appointed judicial office from 70 to 75. This last proposal involving age eligibility requirements for judicial office was the principal focus of the opposition to Issue 1 and perhaps was the reason for its defeat at the polls.¹²

Litigation Involving the Provision

During the relatively brief existence of supreme court commissions, there was no significant litigation concerning the operation of commissions and their relationship to other constitutional courts.

Presentations and Resources Considered

On September 11, 2014, Jo Ellen Cline, Government Relations Counsel for the Ohio Supreme Court, presented to the committee on the topic of Article IV, Section 22. Ms. Cline noted that, in practice, the section essentially allows for the simultaneous operation of two supreme courts. She observed that the requirement that the Ohio Supreme Court hold court in each county annually was not an onerous requirement in 1803, when Ohio only had nine counties. However, by 1850, Ohio had 87 counties and a fast-growing population, thus resulting in a heavier burden

for the court and a backlog of cases. The elimination of most circuit-riding responsibilities for members of the Ohio Supreme Court in 1851 Constitution did not solve the problem of delay, and by the 1870's the court was four years behind in its docket. Based upon 2013 statistics showing that the current court has a 99 percent clearance rate for cases, Ms. Cline asserted that “the need for such a drastic docket management tool no longer exists.”

Conclusion

The Judicial Branch and Administration of Justice Committee concludes that Article IV, Section 22 has not been utilized since 1885 and no longer is necessary to assist the Supreme Court in reducing any backlog. Further, the committee observes that subsequent changes to the Ohio Constitution have resolved the challenges created by the judicial branch's former organizational structure, and so a future need to create a supreme court commission is unlikely.

Therefore, the committee concludes that the provision is obsolete and recommends that Article IV, Section 22 be repealed.

Date Adopted

After formal consideration by the Judicial Branch and Administration of Justice Committee on November 13, 2014, and January 15, 2015, the committee voted to adopt this report and recommendation on January 15, 2015.

Endnotes

¹ This provision is sometimes erroneously referred to as Section 21[22]. There has never been a Section 21 of Article IV of the 1851 Constitution, but for reasons that are not clear some commentators treat Section 22 as once having been Section 21 and thus use a bracketed citation. *See, e.g.*, Isaac F. Patterson, *The Constitution of Ohio: Amendments and Proposed Amendments* (Cleveland: Arthur H. Clark Co. 1912), p. 238 (referring to section “21[22]).

² Ohio Constitution, Article IV, Section 1.

³ Official Report of the Proceedings and Debates of the Third Constitutional Convention of Ohio (Cleveland: W.S. Robison & Co., 1873-74), pp. 751-74.

⁴ *See* Patterson, *supra*, Proposed 1874 Constitution, Article IV, Sections 4-6, pp. 198-99.

⁵ *See* Laws of Ohio, vol. 72, p. 269-70 (1874).

⁶ There were 339,076 favorable votes, comprising 57.3 percent of the 595,248 votes that were cast in that election, thus satisfying the super-majority requirement. *Id.*, p. 238.

⁷ Article XVI, Section 1, as it existed from 1851 to 1912, provided that an amendment proposed by the General Assembly had to receive a majority of votes cast in the election, as opposed to a majority of votes on the proposed amendment. All seven amendments proposed by the General Assembly under the 1851 Constitution between 1857 and 1874 failed because they did not receive a majority of the votes cast at the election; six of the proposed amendments that failed received more affirmative than negative votes but still failed under the super-majority requirement. *See* Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* (2nd prtg. 2011), pp. 373-74.

⁸ *See id.* at p. 209.

⁹ Ohio Constitutional Revision Commission, *Recommendations for Amendments to the Ohio Constitution, Final Report, Part 1, Administration, Organization, and Procedures of the General Assembly*, December 31, 1971, pp. 65-67.

¹⁰ Ohio Constitutional Revision Commission, *Recommendations for Amendments to the Ohio Constitution, Final Report, Part 10, The Judiciary*, March 15, 1976, pp. 67-68, and pp. 422-23 of Appendix J of the Final Report.

¹¹ As it appeared on the ballot, Issue 1 read as follows:

Proposed Constitutional Amendment

TO INCREASE THE MAXIMUM AGE AT WHICH A PERSON MAY BE ELECTED OR APPOINTED JUDGE, TO ELIMINATE THE AUTHORITY OF THE GENERAL ASSEMBLY TO ESTABLISH COURTS OF CONCILIATION, AND TO ELIMINATE THE AUTHORITY OF THE GOVERNOR TO APPOINT A SUPREME COURT COMMISSION.

Proposed by Joint Resolution of the General Assembly:

To amend Section 6 of Article IV and to repeal Sections 19 and 22 of Article IV of the Constitution of the State of Ohio. A majority yes vote is required for the amendment to Section 6 and the repeal of Sections 19 and 22 to pass.

This proposed amendment would:

1. Increase the maximum age for assuming elected or appointed judicial office from seventy to seventy-five.
2. Eliminate the General Assembly's authority to establish courts of conciliation.
3. Eliminate the Governor's authority to appoint members to a Supreme Court Commission.

If approved, the amendment shall take effect immediately.

A "YES" vote means approval of the amendment to Section 6 and the repeal of Sections 19 and 22.

A "NO" vote means disapproval of the amendment to Section 6 and the repeal of Sections 19 and 22.

¹² Issue 1 was defeated by a vote of 2,080,207 to 1,273,536, a margin of 62.03 percent to 37.97 percent. Source: Secretary of State's website; State Issue 1: November 8, 2011 (Official Results); <https://www.sos.state.oh.us/SOS/>



Appendix 2

Judicial Branch and Administration of Justice Committee

Minutes of the Committee

Minutes of the Committee

NOTE: In the early years of the Commission, committee records were kept on an ad hoc basis by various individuals assisting the Commission. Unfortunately, this left committee records, in particular, in a haphazard state. After the hiring of permanent staff in 2014, committee records were regularly kept and put into a standardized format. In addition, staff revised early committee minutes, where available, to put them into the standardized format and to correct any errors or omission discovered during the process. Both the original and revised minutes have been retained with the full files of the Commission; however, the revised minutes have been endorsed as the official record of the committee and are the only documents included here.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 9, 2013

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 12:00 p.m.

Members Present:

A quorum was present with Chair Abaray and committee members Kurfess, Mulvihill, Murray, Obhof, Saphire, Skindell, and Walinski in attendance.

Approval of Minutes:

This being the first meeting of the committee, there were no minutes to approve.

Discussion:

Chair Abaray provided a general overview of the committee's subject matter, and questioned the committee about their interest in possible subject-matter-specific subgroups, to which they declined.

The committee then discussed administrative matters, including a possible budget or ability to purchase items, how to obtain resources, and if there is a set standard of general committee procedures that must be followed.

Next, the committee discussed possible organizations that may be of assistance for the purpose of research or general input. Possible organizations included: the Ohio Prosecuting Attorneys Association, the Ohio Association of Criminal Defense Attorneys, and the Ohio Judicial Conference.

Finally, the committee discussed the topics they hope to consider. Those included:

- A historical overview of the Constitution and the Supreme Court's interpretation up to modern day
 - Possible removal of no longer relevant portions of Constitution or portions of the Constitution that conflict with statute or court rules
- Criminal law
 - Bail
 - Rights of accused
- Civil law
 - Failure to pay debt resulting in imprisonment
- Judicial issues
 - Election vs. appointment of judges
- Relationship between the Legislative and Judicial branch
 - Specific to rule making
 - The rules of evidence vs. the rules of civil procedure
- The general issue of privacy as well as search and seizure as it relates to surveillance and increased developments in technology

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:41 p.m.

Approval:

The minutes of the May 9, 2013 meeting of the Judicial Branch and Administration of Justice Committee were approved at the June 13, 2013 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, JUNE 13, 2013

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 12:00 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members French, Kurfess, Mulvihill, Murray, Obhof, Saphire, Skindell, and Walinski in attendance.

Approval of Minutes:

The minutes of the May 9, 2013 meeting of the committee were reviewed and approved.

Presentations and Discussion:

Chair Abaray recognized Attorney Mary Jane Trapp, of Thrasher, Dinsmore & Dolan, LPA, who presented on the history of the Ohio Constitutional Convention.

Chair Abaray next recognized William Weisenberg, assistant executive director of the Ohio State Bar Association, who presented on judicial selection and the 1970s Ohio Constitutional Revision Commission.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:14 a.m.

Approval:

The minutes of the June 13, 2013 meeting of the Judicial Branch and Administration of Justice Committee were approved at the July 11, 2013 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE FOR THE MEETING HELD THURSDAY, JULY 11, 2013

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 9:36 a.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members French, Murray, Obhof, Saphire, and Walinski in attendance.

Approval of Minutes:

The minutes of the June 13, 2013 meeting of the committee were reviewed and approved.

Presentations and Discussion:

Committee member Richard Walinski suggested that notes should be more detailed since the meeting was not being recorded.

Chair Abaray called on William Weisenberg, assistant executive director of the Ohio State Bar Association, to resume his presentation to the committee regarding proposals put forth by the 1970s Constitutional Revision Commission. Mr. Weisenberg advised he would give a more detailed outline on paper to the committee at a future date.

Mr. Weisenberg suggested that a speaker from the National Center for State Courts present to the committee on the efficiency of the courts.

Committee member Richard Saphire asked if there were any rules regarding budgeting of local courts. John VanNorman, senior policy research counsel for the Ohio Supreme Court, who was present in the audience, advised that the Court has not received much information regarding local funding. He said the Court recently sent out a survey to see how different localities fund their courts.

Senator Larry Obhof inquired about public funding of elections. Mr. Weisenberg observed that public funding would not prohibit financing of advertisements by outside groups.

Mr. Weisenberg discussed the issue of having voter guides to provide background information about candidates. Committee member Judith French asked if the Ohio State Bar Association would be willing to be a central place for posting voter guides of judicial candidates online. It was noted that voter guides could be seen as having political ramifications and may not be appropriate for posting on the Ohio Supreme Court website.

Mr. Saphire asked for clarity on how local courts are funded. Jo Ellen Cline, government relations counsel for the Ohio Supreme Court, who was in the audience, responded to his inquiry, stating that court funding includes a combination of state and local funding.

Justice French suggested the committee hear a presentation regarding the basic overview of the structure of the court system in Ohio by staff from the Supreme Court.

Ms. Cline suggested the committee have a panel discussion about organization of the courts. Chairwoman Abaray was receptive to this idea. Chair Abaray further suggested putting together questions for public input.

Mr. Saphire suggested a set of protocols for all committees to follow regarding public input so there is uniformity. Justice French suggested that the committee take testimony in certain areas on certain days.

Vice-chair Patrick Fischer requested information on how other states are funding their courts and if they either elect or appoint their judges.

Representative Dennis Murray suggested the committee needed some input from the full Commission on issues to review.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:30 p.m.

Approval:

The minutes of the July 11, 2013 meeting of the Judicial Branch and Administration of Justice Committee were approved at the August 8, 2013 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, AUGUST 8, 2013

Call to Order:

Vice-chair Patrick Fischer called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:28 a.m.

Members Present:

A quorum was present with Vice-chair Fischer and committee members French, Kurfess, Mulvihill, Murray, Obhof, Saphire, and Skindell in attendance.

Approval of Minutes:

The minutes of the July 11, 2013 meeting of the committee were reviewed and approved.

Presentations and Discussion:

Vice-chair Fischer recognized Steven C. Hollon, administrative director of the Ohio Supreme Court, who presented on Article IV relating to the courts.

Committee member Richard Saphire asked Mr. Hollon how many people enter the mentor program for professionalism, per Mr. Hollon's presentation. Mr. Hollon advised around fifty to sixty percent of attorneys enter the program.

Committee member Dennis Mulvihill asked if there is anything the court finds unmanageable or confusing about Article IV, Sections 1 through 5, that the Commission could make easier for the Supreme Court. Mr. Hollon advised there is not anything he could comment on that would need to be changed.

Mr. Saphire asked if there is a selection process for the mentors in the program referenced in the presentation. Mr. Hollon answered that there is a selection process involved.

Mr. Sapphire asked if there is any reason why Mr. Hollon thought clarity could come from a change in Ohio's constitution.

Vice-chair Fischer asked Mr. Hollon if the Court had any idea of what the Commission could improve in the constitution. Mr. Hollon responded to his inquiry.

Mr. Mulvihill asked if the Supreme Court has any interest in splitting the docket into separate criminal and civil dockets in order to streamline the civil process. Mr. Hollon responded to his inquiry.

Representative Dennis Murray asked if the Court has formulated a position about whether the ideas from the 1970s Constitutional Revision Commission regarding Article IV, Sections 1 through 5 should be recommended by this Commission.

Senator Mike Skindell advised that the General Assembly passed legislation regarding the unauthorized practice of law relating to what is and is not authorized. He said, if the General Assembly is going to go further with this topic, he suggested the Supreme Court provide advice.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:25 a.m.

Approval:

The minutes of the August 8, 2013 meeting of the Judicial Branch and Administration of Justice Committee were approved at the September 12, 2013 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, SEPTEMBER 12, 2013

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:30 a.m.

Members Present:

A quorum was present with Chair Abaray and committee members Mulvihill, Murray, Obhof, Sapphire, Skindell, and Walinski in attendance.

Approval of Minutes:

The minutes of the August 8, 2013 meeting of the committee were reviewed and approved. Committee member asked that the minutes be amended to reflect his excused absence from the previous committee and Chair Abaray confirmed.

Presentations and Discussion:

Chair Abaray opened up the floor for discussion regarding the election of judges in Ohio.

Representative Dennis Murray advised that the questions Chair Abaray sent in an email to all the committee members be left up to the General Assembly to decide.

Committee member Dennis Mulvihill cited the lack of voter information in the election of judges was an issue and recommended the committee discuss whether partisanship should be put back into judicial races.

Senior Policy Advisor Steven H. Steinglass addressed the issue of term lengths for justices, then recommended that John VanNorman, senior policy and research counsel for the Supreme Court of Ohio, continue his presentation from a previous meeting on this topic. Mr. VanNorman continued his presentation on term lengths for judges.

Mr. Mulvihill asked Mr. VanNorman about voter turnout, comparing odd years to even years.

Committee member Richard Saphire asked if the committee should take up issues even if they are not politically palatable.

Chair Abaray suggested one area the committee should focus on is the election of judges.

Mr. Saphire suggested looking at other states and see what they have done in this area.

Senator Mike Skindell asked about having dialogue regarding judicial vacancies.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:40 a.m.

Approval:

The minutes of the September 12, 2013 meeting of the Judicial Branch and Administration of Justice Committee were approved at the October 10, 2013 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, OCTOBER 10, 2013

Call to Order:

Vice-chair Patrick Fischer called the meeting of the Judicial Branch and Administration of Justice Committee to order at 9:05 a.m.

Members Present:

A quorum was present, including Vice-chair Fischer and committee members Kurfess, Mulvihill, Murray, and Obhof.

Approval of Minutes:

The minutes of the September 12, 2013 meeting of the committee were reviewed and approved.

Discussion:

Vice-chair Fischer directed the committee's attention to Chair Abaray's previously-circulated discussion of the agenda of the committee in regard to evaluating proposals for judicial selection and election.

Vice-chair Fischer discussed the suggestions of Chair Abaray with the committee. After much discussion, the committee decided to adopt the following goals:

1. Promote the independence of the judiciary;
2. Increase the respect and public confidence of the judicial branch;
3. Ensure that well-qualified persons serve in the judiciary;
4. Increase public awareness of the candidates as well as increase public participation in the judicial selection process;
5. Reflect the priorities of Ohio residents;
6. Deem whether the proposal demands constitutional action in order to
 - A. Be active in selection of Supreme Court judges; and
 - B. Focus on the manageability for success.

Vice-chair Fischer then provided an update from a meeting that included himself, the Ohio Judicial Conference, Justice Judith French, Committee member Charles Kurfess. Vice-chair Fischer mentioned that the Ohio Judicial Conference was looking at the following items: judicial and elected official compensation, court funding, uniformity in the management of municipal and county courts, active participation of judges on advisory boards, indigent defense, case priorities for civil, criminal and other cases, whether to continue mayor's courts, constitution matters and the defense against them, and intra-district disputes.

Senator Larry Obhof asked the purpose of the criteria for the agenda of the committee regarding evaluating proposals for judicial selection and election. Sen. Obhof proposed adding something to recognize the possible impact of the legislature on the judicial branch.

Vice-chair Fischer asked to vote on these guidelines. Committee member Dennis Mulvihill moved to adopt the guidelines, with Representative Dennis Murray seconding the motion. Without objection the guidelines were accepted.

Senior Policy Advisor Steven H. Steinglass asked the committee whether it would like to delve deeper into the 1970 Constitutional Revision Commission's reports. Rep. Murray mentioned that the philosophical debate could last forever and the committee needs to start with concrete proposals. Sen. Obhof stated that most of the concepts under consideration relate to legislation and not the constitution.

Mr. Mulvihill inquired if the committee would tackle the issue of judicial elections first. Vice-chair Fischer stated that Chair Abaray wishes to do so. Mr. Mulvihill mentioned that he would like to hear more discussion on direct elections, that is, governor appointments, as well. Mr. Kurfess agreed and said he would like to discuss filling judicial vacancies. Sen. Obhof said he would like to discuss jurisdictional courts.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:36 a.m.

Approval:

The minutes of the October 10, 2013 meeting of the Judicial Branch and Administration of Justice Committee were approved at the November 14, 2013 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE FOR THE MEETING HELD THURSDAY, NOVEMBER 14, 2013

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 11:13 a.m.

Members Present:

A quorum was present, including Chair Abaray, Vice-chair Fischer, and committee members French, Saphire, and Walinski.

Approval of Minutes:

The minutes of the October 10, 2013 meeting of the committee were reviewed and approved. Chair Abaray asked that the minutes be amended to reflect that she did not open the floor for discussion at the previous meeting, rather she previously circulated discussion regarding the agenda of the committee in regards to evaluating proposals for judicial selection and election.

Presentations and Discussion:

Chair Abaray read the League of Women Voters Mission Statement then recognized Nancy G. Brown, director and advocacy committee chair for the Ohio League of Women Voters. Ms. Brown presented her testimony and circulated copies of "The New Politics of Judicial Elections 2011-12" published by The Brennan Center for Justice, informing the committee that her organization plans to conduct courtroom observations to allow citizens to evaluate judges' fairness and performance.

Chair Abaray requested that a copy of "The New Politics of Judicial Elections 2011-12" be added to the official committee record.¹

¹ Justice at Stake, Brennan Center for Justice, The National Institute on Money in State Politics. *The New Politics of Judicial Elections 2011-12*. Washington, DC: n.p., 2013. Print.

The committee then asked Ms. Brown questions, and discussed:

1. Whether Ms. Brown's testimony pertained exclusively to Ohio Supreme Court races.
2. Whether it is the money or the politics behind the money that undermines the confidence in the judiciary.
3. What an evaluation system would look like under the appointment/retention election system and whether an example from another state is available for reference.
4. Whether appropriate criteria have been developed to ensure sound, indiscriminant, evaluations of appellate judges.

Committee member Judith French informed the committee that the bar association provides evaluation criteria.

Chair Abaray inquired about the availability of data measuring the qualification differences between appointed judges and elected judges. Committee member Richard Saphire confirmed the availability of the data, but informed the committee that the data may be subjective.

Chair Abaray then called Michael E. Solimine, professor of law at the University of Cincinnati College Of Law, who presented on the following topics:

1. Brief History of Judicial Selection in Ohio;
2. The Current State of Judicial Elections in Ohio;
3. Maintaining the Status Quo;
4. Reforms, Constitutional and Otherwise.

Specific questions and concerns raised during Prof. Solimine's presentation included whether he advocates lifetime appointments for state-level judges. The committee expressed concerns that a screening commission may cause appointments to be delayed, asking if other states using the appointment system experience problems with the appointments being prolonged by the screening commission.

Vice-chair Patrick Fischer informed the committee that Iowa has retention elections, and that Iowa Judicial Nominating Commission hearings are open to the public and broadcast on television. He then inquired if there is a sense that the public wants to change the process.

Mr. Saphire informed the committee that Prof. Solimine co-authored a book that argues, all things considered, there is no reason to favor the federal system over the state system. He said there is an impression that federal judges are more qualified than state judges, but neither is superior.

Chair Abaray suggested funding may taint the integrity of the judges and inquired about the likelihood that another "Citizens United" case will reemerge.²

² *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010).

Chair Abaray opened up the floor for discussion relative to the committee goals documented in the previous minutes.

Judge Fischer suggested that fundraising may be deterring highly qualified judges from running.

Justice French suggested inviting an individual who is familiar with judicial fundraising to come testify before the committee.

Judge Fischer asked if more money is needed to educate the electorate.

Mr. Saphire expressed interest in inviting former candidates to testify on the difficulties of raising money for an election.

Committee member Richard Walinski expressed interest in hearing about the professional progression of judges in various counties.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 1:07 p.m.

Approval:

The minutes of the November 14, 2013 meeting of the Judicial Branch and Administration of Justice Committee were approved at the March 13, 2014 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 13, 2014

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:23 a.m.

Members Present:

A quorum was present with Chair Abaray and committee members Curtin, Kurfess, Mulvihill, Obhof, Sapphire, Skindell, and Wagoner in attendance.

Approval of Minutes:

The minutes of the November 14, 2013 meeting of the committee were reviewed and approved.

Discussion:

Chair Abaray asked for the committee's thoughts on proceeding with judiciary branch issues. She said the committee had been discussing several topics, including structure and duplication. Chair Abaray offered to follow Chief Justice Maureen O'Connor's previous testimony on the appointment procedure and then focus on the structure of courts.

Chair Abaray asked whether the committee preferred judicial election, judicial appointment, or a hybrid approach as a recommendation to the full Commission. Chair Abaray offered the possibility of the committee recommending doing away with elections and going to a selection process.

Other members of the committee also contributed to the discussion. These suggested changes were discussed by the committee:

1. Reinstating political party identification on the ballot for judges. Currently judges have very strict guidelines for what they can discuss or not discuss during an election

- cycle. The point of reinstatement of party identification would allow voters to have more information when voting.
2. Moving judicial elections so that they could take place during the off-year elections cycle.
 3. Clarifying the appointment process, because the majority of judges are appointed rather than elected for their first term.
 4. Researching reasons for the drop-off in judicial elections.

During the discussion, committee members expressed interest in continuing research and discussion before preparing anything for the full Commission's consideration.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:24 a.m.

Approval:

The minutes of the March 13, 2014 meeting of the Judicial Branch and Administration of Justice Committee were approved at the April 10, 2014 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, APRIL 10, 2014

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 9:15 a.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Curtin, Jacobson, Obhof, Sapphire, Skindell, and Wagoner in attendance.

Approval of Minutes:

The minutes of the March 13, 2014 meeting of the committee were reviewed and approved.

Discussion:

Committee member Richard Sapphire distributed written material to committee from the Law Day 2003 Planning Guide, which provided examples of judicial selection from other states. He proceeded to read through the handout and answered questions from the committee.

Chair Abaray sought discussion on how the committee wanted to proceed on addressing the judicial selection and election. Several committee members noted that financial contributions on the local level have been a longstanding issue. A suggestion was made to consider giving voters more than one option with regard to selection or electing members of the judiciary. It was noted that, although members may not be in favor of a merit system, one should still be designed as an option.

A concern was expressed with respect to the requirement that an attorney be admitted to the bar for at least six years in order to run for the Ohio Supreme Court. A suggestion was made that the committee should consider how members of the judiciary are appointed and to approach the Ohio State Bar Association about conducting an evaluation of the judiciary.

Chair Abaray distributed written material to the committee that was comprised of alternative proposals for selection of Ohio Supreme Court justices. She described the options, asking for committee discussion.

Before concluding, a suggestion was made to review the Modern Courts Amendment at a future meeting.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:30 a.m.

Approval:

The minutes of the April 10, 2014 meeting of the Judicial Branch and Administration of Justice Committee were approved at the May 8, 2014 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 8, 2014

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:28 a.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Curtin, Kurfess, Mulvihill, Sapphire, Skindell, and Wagoner in attendance.

Approval of Minutes:

The minutes of the April 10, 2014 meeting of the committee were reviewed and approved.

Discussion:

Written material was distributed to the committee that included:

- Legislative language to provide for judicial retention elections;
- Judges For All, 2013, "Reducing judicial campaign fundraising and increasing voter participation with the Retention Ballot";
- A letter from Darke County Judge Jonathan P. Hein regarding proposed election reform for judicial offices;
- American Constitution Society: "Justice At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions";
- Joint Resolution language from Senator Larry Obhof to repeal Article IV, Section 22 of the Ohio Constitution;
- Joint Resolution language from Sen. Obhof to repeal Article IV, Section 19 of the Ohio Constitution;
- *New York Times*, May 5, 2014: "Outside Spending Enters Arena of Judicial Races";

- *Huffington Post*, May 7, 2014: “Wide Majorities Losing Faith In John Roberts’ Supreme Court, Want Term Limits.”

Steven C. Hollon, executive director of the Ohio Constitutional Modernization Commission, formally introduced himself in his new role and explained to the committee how he plans to assist in that capacity.

Chair Abaray asked for committee discussion on how to address the matter of selecting or electing members of the judiciary. The committee discussed Ohio Supreme Court Chief Justice Maureen O’Connor’s recent speech about judicial reforms in which she advocated moving elections to odd numbered years and removing party labels from the ballot. A suggestion was made to have the chief justice address a joint meeting of the committee with the Bill of Rights and Voting committee.

Senior Policy Advisor Steven H. Steinglass discussed the Missouri Plan with the committee. A suggestion was made to create a commission that will make recommendations to the governor for judicial appointments.

Mr. Hollon reported statistics requested by the committee pertaining to the makeup of the Ohio judiciary.

Committee member Dennis Mulvihill was asked to look into election reform options. Committee member Richard Saphire was asked to look into selection reform options.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:08 p.m.

Approval:

The minutes of the May 8, 2014 meeting of the Judicial Branch and Administration of Justice Committee were approved at the June 12, 2014 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE FOR THE MEETING HELD THURSDAY, JUNE 12, 2014

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 12:31 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Batchelder, Curtin, Jacobson, Kurfess, Mulvihill, Obhof, Sapphire, and Wagoner in attendance.

Approval of Minutes:

The minutes of the May 8, 2014 meeting of the committee were reviewed and approved.

Discussion:

Chair Abaray opened up the discussion by noting the recent ruling of United States District Court Judge Susan J. Dlott in favor of the state in a 2010 case filed by the American Federation of State, County and Municipal Employees, the Ohio Democratic Party, and three people who, at the time, were judicial candidates. The ruling upheld Ohio's system of having judicial candidates run as Democrats or Republicans in primary elections, but then stripping them of partisan labels in the general election.

Committee member Richard Sapphire read through his handout on judicial selection and the committee discussed the various parts of it.

Steven C. Hollon, executive director of the Ohio Constitutional Modernization Commission, explained to the committee that, once staff is assembled, informational packets will be put together to better assist with each committee as they move forward. He noted that he plans to meet with committee clerks to discuss their role.

Senator Larry Obhof read through a memorandum prepared for him by the Legislative Service Commission regarding obsolete provisions of the Ohio Constitution. The committee proceeded to discuss the memo.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:04 p.m.

Approval:

The minutes of the June 12, 2014 meeting of the Judicial Branch and Administration of Justice Committee were approved at the September 11, 2014 meeting of the committee.

/s/ Janet Gilligan Abaray _____
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer _____
Justice Patrick F. Fischer, Vice-chair

Co-Chair
Charleta B. Tavares
Assistant Minority Leader
15th Senate District



Co-Chair
William G. Batchelder, Speaker
69th House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, SEPTEMBER 11, 2014

Call to Order:

Chairman Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:18 a.m.

Members Present:

A quorum was present with the following members attending: Janet Abaray, Judge Fischer, Professor Sapphire, Rep. Curtin, Jeff Jacobsen, Senator Obhof, Sen. Skindell, and Mark Wagoner

Approval of Minutes:

The minutes from the previous meeting were read and approved without objection.

Topics Discussed:

Identification of Obsolete Provisions and Judicial Appointment Proposals

JoEllen Cline of the Ohio Supreme Court presented on the obsolete provisions. Issue 1 on the Ballot in 2011 was defeated, but would have removed these provisions. Historically, these provisions were adopted because in 1851 the Supreme Court did not have supervisory authority, but now, under the Modern Courts Amendment, it does. These provisions were intended to address a backlog of cases. In 1875, the Supreme Court Commission provision was created, but has only been used two times: immediately after amendment for 3 years, and in 1883 for two years. In 1875, the Supreme Court was 4 years behind in getting cases resolved.

Today, the court has more limited jurisdiction, no more riding the circuit, so no need for these provisions. In 2013, the court had 22,000 cases filed, which represents 9/10% decrease over the prior year. The caseload has gone down, and the court has a 99% clearance rate.

Questions: Chair Janet Abaray asked who JoEllen Cline speaks on behalf of. Answer: she speaks on behalf of Chief Justice Maureen O'Connor, who recommends repeal of these provisions. Richard Saphire asked what happened regarding these provisions in the 1970s Commission, JoEllen Cline does not know, but William Weisenberg, who is also present, may be able to answer this. Judge Pat Fischer asked whether there is a need for a constitutional provision to give the Supreme Court authority for Alternate Dispute Resolution. JoEllen Cline: no, the court has intrinsic authority for that.

Presentation by William Weisenberg: he concurs with JoEllen Cline, issues have never arisen under these provisions regarding arbitration and mediation. The Supreme Court has dealt with mediation for many years, mediation is not new. There was much discussion during the Moyer era about mediation. Judge John McCormac was an early proponent of ADR. In fact, trial is a true form of ADR, but trial is a last resort. The concept of courts of conciliation was never brought up during that time. Nor has the Supreme Court Commission provision been raised. Richard Saphire asked again whether the 1970s Commission had addressed these questions, Weisenberg said he has information in his office about this but did not know why the provisions were not repealed then. He will follow up.

Chair Janet Abaray asked whether we know whether other justices support eliminating these provisions, answer is that we do not know. Rep. Mike Curtain indicated that the 1970s Commission recommendation did not deal with getting rid of these obsolete provisions. Judge Pat Fischer asked how we could get rid of them, there would have to be much public information to get the voters to consider it; might be best to put with other obsolete provisions. William Weisenberg agreed that it needs to be appropriately packaged for voter support. He further stated that it won't be a big deal for the press and doesn't think it is a controversial issue. Editorial writers could support the effort.

Chair Abaray: we could vote that the provisions are obsolete and let the Commission decide what to do next. Mark Wagoner: see the rules we are going to adopt for the relevant procedure.

William Weisenberg then presented on the issue of judicial selection. He directed the committee to some resources on the topic, including the Institution for Advancement of American Legal Systems, which is working on the judicial selection issue. He said they have done a Report on Judicial Nominating Provisions, which provides an update on judicial selection around the country. He also mentioned the American Judicature Society, Judge Carparelli, has done some scholarship studying judicial selection. Finally, Judicature Magazine has an article on Performance Evaluation Standards in various states. William Weisenberg offered to be a contact if the committee wants to pursue information from these resources.

Chair Janet Abaray: if we come up with a proposal on selection, would they be able to get input from these groups? Weisenberg: won't say A versus B, they will say here are states that do X and their experience with that format.

Chair Abaray then presided over a discussion by the committee. First question: are the two provisions obsolete? Senator Obhof suggested that Dean Steinglass talk about the 1970s Commission experience with these provisions. Shari O'Neill also was asked to attempt to

discover what the other Supreme Court justices think about the judicial selection issue. They will wait until the next meeting to conclude the discussion on this point. Mark Wagoner suggested that the committee make its recommendations to the coordinating committee and allow that committee to figure out how to go forward with moving the issue toward voters.

Proposals for Appointment Process to Supreme Court of Ohio

Chair Janet Abaray suggested that if Ohio is going to adopt this, it should start on a limited basis, make this a streamlined proposal. She referenced the proposal from the 1970s, it was cumbersome, providing commissions from each appellate district. Rep. Mike Curtin had suggested following the federal system, but it has its own set of problems and voters lack a choice. Chair Janet Abaray is thinking of a jury system comparison, in which a candidate is “struck” –this would be cleaner and have a time table. By this system, the governor would send names to the senate, and each caucus has one strike.

Another issue is how long a judicial term would be, and when there would be a retention election. This becomes problematic. She proposes a longer term of office, for example a 12 year term, or requiring a candidate to be a licensed attorney for X number of years. Whatever system is adopted, it has to address the problem of too much money spent on judicial elections, the perception of influence that suggests, and what qualifications should a judicial candidate have.

Jeff Jacobson expressed a dislike of the concept of merit selection. He said it is elitist, and is a system controlled by insiders. He is not for this being on the committee’s agenda, as he does not believe a majority of the committee is in favor of a selection plan, regardless of what it would entail. Chair Janet Abaray said the committee decided to put a provision out there for discussion purposes to see if there could be support or consensus on the matter. Jeff Jacobson: no recommendation is a vote, too—he believes this is a “fool’s errand.”

Professor Saphire: we have discussed this for 2 years, and the committee has actually decided to come up with some proposed language for discussion. Could Chair Abaray reduce her proposal to paper so we can review and question it? He wants more opportunity to look at this and give it some thought.

Judge Pat Fischer indicated the Chief Justice likes the proposal that judicial elections be held in the odd year. Chair Abaray raises the problem of the influence of outside money on state judicial elections. Mark Wagoner states that it will not be possible to ban outside money under the U.S. Constitution. Jeff Jacobson indicated that the level of contribution could be limited by the Supreme Court’s rulemaking authority.

Judge Pat Fischer: it is an independent expenditures issue. The state can’t control outside contributions. He references the problem he had: a judge may raise a lot of money, but has to compete for precious television time in a presidential year and so the money isn’t enough. However, independent expenditures will go on no matter whether there is a retention election or a direct election. Those states that experimented with retention elections and didn’t like them are going to a federal type system and not back to direct election. Rep. Mike Curtin: likes the

federal model but won't vote for it because the party will still dictate who gets nominated. Rep. Curtain pointed out that if we don't get reapportionment reform, all else fails. We need to wait to see if reapportionment reform goes through to see if we could get judicial selection reform.

Richard Saphire pointed out a gerrymandering article he read indicating that few people have a true choice because of secure districts, so the money being donated in a district is going outside the district or even the state because it can have more impact elsewhere. Jeff Jacobson said he saw that article as well, and commented that residence patterns matter more than gerrymandering.

Chair Janet Abaray commented that the idea of merit selection was voted down in 1987. In surveys, the people reject the idea, but there has been such a dramatic change regarding the money spent in elections and no ability to control the spending, it is possible that public sentiment may have shifted since then. Richard Saphire agrees but needs to see the model plans to see what might work. It was suggested that the committee work on two tracks: consider two models simultaneously so can compare and contrast. Jeff Jacobson reiterated that the people have a fundamental right to select their judges, and we can't let a lack of control on the money force a relinquishment of the right to vote for judges.

William Weisenberg stated that so long as we elect people, the money will be in the system. Disclosure is the issue that we can deal with legitimately. This is not going to change: people aren't going to vote differently. We can address the issue of money. In the area of independent expenditures: we can deal with it through disqualification and recusal. Create presumptions that judges could recuse based upon the limit. Perception of money as an influence can be dealt with. Let's not forget that the "justice for sale" campaign against Justice Resnick backfired, although campaigns have become more sophisticated since then. Maybe the candidates should be more involved. Judges are vulnerable to recall if they make improper decisions. Need disclosure and recusal standards. The Ohio Supreme Court has recently updated the standards.

Mark Wagoner: the disqualification standards—who sets that? William Weisenberg: the Supreme Court does that by rule. Judge Pat Fischer: this is an ethical issue. Rep. Curtain: could there be some OSBA recommendations given to the Supreme Court after the election? Weisenberg: will try to relay this to the OSBA Board. Jeff Jacobson: naïve to think money doesn't find its way into merit selection. Is there money in the federal system? William Weisenberg, yes, probably, but the question is what system do we really want. People need to trust the system. It is a perception issue. The challenge is to have a system that gives people confidence.

William Weisenberg doesn't like the term "merit selection," instead likes "appointive election." People get appointed all the time because of merit. But "merit" suggests "elitism" in people's minds. C.J. Moyer called it an "appointive elective" system. Chair Abaray says she likes that phrase better. Judge Pat Fischer asks that this issue be given a time frame, when both sides can conclude they have heard all they need to hear and are ready to move on to other matters. Richard Saphire says 2 years is enough. Dennis Mulvihill had volunteered to put together a model election reform plan, Chair Janet Abaray will follow up with him. Chief Justice Maureen O'Connor will present at the next meeting.

Adjournment:

With no further business, the committee adjourned at 11:32 a.m.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Biographical sketch of Jo Ellen Cline
- Prepared remarks of Jo Ellen Cline
- Biographical sketch of William Weisenberg
- Prepared remarks of William Weisenberg
- Article "*Choosing Judges: Judicial Nominating Commission and the Selection of Supreme Court Justices,*" Institute for the Advancement of the American Legal System

Approval:

These minutes of the September 11, 2014 meeting of the Organization and Administration Committee were approved at the November 13, 2014 meeting of the committee

/s/ Janet Abaray

Janet Abaray, Chair

/s/ Patrick Fischer

Patrick Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 13, 2014

Call to Order:

Chairman Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 9:45 a.m.

Members Present:

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

Approval of Minutes:

The minutes of the September 11, 2014 meeting of the committee were approved.

Topics Discussed:

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.

Report and Recommendation Regarding Article IV, Section 19, Courts of Conciliation

Senator Obhof presented a report and recommendation prepared by Commission staff on the topic of Article IV, Section 19 dealing with Courts of Conciliation. He noted that the proposal to repeal this section was an outgrowth of conversations the committee had with Dean Steinglass. He noted that the philosophy is to not burden the constitution with provisions that have never been used. He also indicated that research from Commission staff indicates there would be no effect on alternative dispute resolution should the section be deleted from the constitution.

The committee approved Senator Obhof's suggestion that the phrase "serves no purpose" and the comma after the word "mechanisms" be deleted.

Professor Saphire questioned whether the proposed constitutional amendment to repeal this provision which was rejected by the voters in 2011 might have been defeated because it was presented at the same time as the question of whether the retirement age for judges should be increased and also failed at the ballot. He asked if there is any reason to believe this recommendation will have a better result. Do we know why the voters rejected Issue 1 in 2011? Senator Obhof noted that age restriction may have been the issue. But we don't know why voters rejected Issue 1.

In further consideration of the report and recommendation, Senator Obhof suggested substituting the word "perhaps" for "likely" where the reason for the failure of Issue 1 is discussed.

Chair Abaray noted that arbitration can cause problems and one advantage to the current language is that it allows courts to set up courts of conciliation, which are likely cheaper. She wondered if anyone looked at if this these courts are a good alternative to arbitration? Senator Obhof responded that he is not aware of anyone having any intent to create courts of conciliation.

Report and Recommendation Article IV, Section 22, Supreme Court Commission

Senator Obhof then presented a report and recommendation prepared by Commission staff regarding Article IV, Section 22 dealing with Supreme Court Commissions. He noted that the phrase "serves no purpose" and the comma following should be deleted, and that the comma after "1885" should be eliminated to which all agreed.

Professor Saphire also suggested that the word “likely” be replaced with the word “perhaps” when discussing why the voters voted down a proposal to delete this provision from the constitution in 2011. The suggested was approved.

Senator Obhof noted that the report and recommendation is that Article IV Section 22 should be repealed, eliminating the ability of the legislature to create Supreme Court Commissions. The only purpose to the provision was to create a stop gap measure 140 years ago.

The committee voted in favor of adopting these two Reports and Recommendations, which will be up for a second consideration at the next meeting of the committee.

Professor Saphire proposed that Justice Pfeifer’s proposal be discussed at the next meeting, and this was approved.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:32 a.m.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Biographical sketch of Justice Paul E. Pfeifer
- Prepared remarks of Justice Paul E. Pfeifer
- Report and Recommendation Article IV Section 19, Courts of Conciliation
- Report and Recommendation Article IV, Section 22, Supreme Court Commission

Approval:

The minutes of the November 13, 2014 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the January 15, 2015 meeting of the committee.

/s/ Janet Abaray

Janet Abaray, Chair

/s/ Patrick Fischer

Patrick Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, JANUARY 15, 2015

Call to Order:

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

Members Present:

A quorum was present with committee members Abaray, Curtin, Fischer, Jacobson, Kurfess, Mulvihill, and Saphire in attendance.

Approval of Minutes:

The minutes of the November 13, 2014 meeting of the committee were approved.

Chair Abaray thanked Executive Director Steven Hollon for the more detailed minutes. Committee member Saphire moved to approve, committee member Mulvihill seconded. Minutes from the last meeting unanimously approved.

Reports and Recommendations

Article IV, Section 19 (Courts of Conciliation)

Article IV, Section 22 (Supreme Court Commission)

The committee then heard, for a second time, the reports and recommendations presented by Sen. Obhof at the last meeting in November 2014 on Article IV, Sections 19 and 22.

In the excused absence of Sen. Obhof, Mr. Hollon presented the proposed report and recommendation on Article IV, Section 19 regarding courts of conciliation, indicating that some minor changes had been made at the committee's request.

Chair Abaray asked for clarification whether, after the committee votes, the Coordinating Committee reviews the recommendations next.

Mr. Hollon said that there would be a Coordinating Committee meeting that afternoon at which he would be presenting these reports and recommendations for approval. He then said that next month the Coordinating Committee would meet in the morning to discuss these items a second time and, hopefully, approve them so they could then be presented to the Commission at its meeting later that day. The Commission would then have two full readings before voting on whether to forward the reports and recommendations to the General Assembly.

Chair Abaray said that she believes it might be more strategic if all committees reviewing obsolete provisions could organize them so as to make one presentation to voters. Mr. Hollon said this would be an appropriate discussion for the Coordinating Committee later that afternoon.

Chair Abaray asked whether there were any public comments on the proposal to repeal Article IV, Section 19, regarding Courts of Conciliation. There were no comments.

It was noted that the committee had a quorum. A vote was taken, and all present voted yes. Therefore the recommendation to repeal Article IV, Section 19, regarding Courts of Conciliation, will be forwarded.

Mr. Hollon then presented the Report and Recommendation for Article IV, Section 22, regarding the Supreme Court Commission.

Chair Abaray invited discussion or comments from the public. There were none. The committee then voted unanimously to approve the Report and Recommendation for Article IV, Section 22, regarding the Supreme Court Commission. Chair Abaray then acknowledged Sen. Obhof's work on this issue.

Speaker Kurfess commented he is not sure he has read everything on this, but was wondering if the history shows any time when the Supreme Court or the governor considered using this provision. Mr. Hollon answered that staff did not find any example of this in their research.

Chair Abaray commented she had raised a question regarding mediation in relation to Courts of Conciliation, but that the answer was that the Supreme Court already has authority for this. She said it might be possible to revisit the issue when it comes before the full Commission.

Presentation:

*Chief Justice Maureen O'Connor
Supreme Court of Ohio*

The committee then heard a presentation from Maureen O'Connor, Chief Justice of the Ohio Supreme Court, who spoke about her plan for judicial election reform.

Chief Justice O'Connor noted that these are ideas she has been promoting for over a year, and that they involve suggestions for reforms regarding the judiciary. She said the motivation for these reforms is that the public needs to understand why it is important for them to participate in the selection of the judiciary. She said that we have a good bench, but that it can improve. She

remarked that there is a disconnect, because many dedicated people serve in the judiciary, but that public opinion doesn't really reflect a level of confidence that is needed.

The Chief Justice continued by saying the reasons for reform are that the public is influenced by politics and contributions, and that voters do not have access to quality information. She said she believes we will always have an elective system for judges and that the public always says they want to keep electing judges. Her proposals are not a "get out the vote effort," and will not enhance the number of people who come to the polls and participate in elections. She said she simply wants a more informed electorate. She said that judges are always at the end of the ballot, and that ballot fatigue sets in. Voters do not think it is important enough to learn about judicial candidates so they do not vote. She said that in 2012, 40 percent of the electorate did not vote for judges, even though it was a presidential election year and there were large numbers of voters going to the polls.

Her suggestions include moving judicial elections to odd numbered years and putting judicial candidates at the top of ballot, educating voters about candidates, and increasing basic qualifications for judicial service. She said she believes these changes will emphasize that the judicial branch is as important as the other two branches.

The Chief Justice described a new website being launched that would provide information about all judicial candidates. This is being done with the assistance of the League of Women Voters and the Ray C. Bliss Institute of Applied Politics at the University of Akron. She said that in 2013 some 70 percent of judicial races in Ohio were unchallenged. She believes these measures will help increase the pool of persons interested in running for judge and engage the public to be more aware of the judiciary and the role they play. She believes the website will help improve voter knowledge and opinion about what judges do. She said her plan to increase basic qualifications for judge was something that former Chief Justice Thomas Moyer advocated, as well as trying to lengthen the terms for judicial office.

Chief Justice O'Connor then answered questions from the committee.

Committee member Sapphire asked what type of selection process the Chief Justice would prefer if she were setting up the constitution today. She said that Ohioans want to continue to elect their judges, noting that the question has been on the ballot in the 1930s, and in the 1980s, and there was a poll that said overwhelmingly that voters wanted to keep the ability to elect judges. She said other states have appointive processes, but that does not take the politics out of the process. One appealing method is an appointment system whereby, when there is a vacancy, candidates are screened by a neutral bipartisan committee, and then the governor appoints, after which there is an election in which the public determines whether to retain the judge. She said in that scheme the judge is running and being judged on his or her record. She said that method is still influenced by outside influences, but would be better than the system that we have. Another alternative, she said, would be to expand the number of years for a judicial term so that a judge is up for election less frequently and does not have to be political as frequently.

Mr. Sapphire asked what she thinks about a public financing system for judicial elections. Chief Justice O'Connor answered that this is not just under the control of candidates because you

cannot preclude interested third parties from getting involved, and there is no regulation on their dollars. Even if there is a limit, you can't keep special interest groups from getting involved.

Committee member Mulvihill asked the Chief Justice whether she thinks there is a problem with decisions being influenced by campaign contributions. She said that, rather than there being a problem, there is a perception of a problem. She assured the committee that judges in Ohio do not consider who their contributors are when they make their decisions. She said there is an overemphasis on thinking judges are memorizing contribution lists. She does not believe that judges are influenced by their donors.

Mr. Mulvihill then asked if a donor is going to your event and is prepared to write a check, what is the expectation of the donor? He said the donor is either expecting a quid pro quo or that the judge's view is consistent with the donor's, so either way it works. Chief Justice O'Connor said donors do not call judges and ask for a vote on a case; rather donations are about judicial philosophy or world view.

Mr. Mulvihill asked why the proposal was to move judicial elections to years when fewer people participate. Chief Justice O'Connor answered that this will be a culture change that will not happen overnight and that she anticipates participation will grow with time.

Mr. Mulvihill asked whether she was advocating putting party designation on the ballot, since that would give the voters more information. Chief Justice O'Connor agreed this would be a cue but said that it should be a miscue because party does not matter for judges. She said she is opposed to putting party designation on the ballot.

Rep. Curtin remarked that not all odd numbered year elections are created equal, asking whether, if we were to extend judicial terms from 6 years to 8 years, put in a two-term limit, have all judicial elections in a presidential year, and put the judges right below the president on the ballot, this would alleviate these concerns. Chief Justice O'Connor answered that moving judicial elections to the presidential years is problematic because competition is greater for media time, recognition, and dollars. She said she is trying to change the culture and anticipates that one thing will build on another.

Chair Abaray asked whether this proposal only affects Supreme Court races or whether it will affect all levels of the judiciary. Chief Justice O'Connor answered that it may send a mixed message to have the measures apply only to the Supreme Court and that her recommendation is not to distinguish between judicial races.

Chair Abaray asked whether the problems described could be resolved by limiting judges to only one term of service, which could be a long term. Chief Justice O'Connor said this would be a problem in that we would get a lot of people becoming judges either at the end of their careers or at the beginning to enhance a later law practice. She said she does not think members of the Supreme Court make decisions based upon their ability to run for another term

Chair Abaray asked whether a longer term of office would be appropriate, and wondered what the ideal length would be. Chief Justice O'Connor said maybe 8 or 10 years for common pleas judges, 12 for appellate, and 15 for supreme court.

Speaker Kurfess asked about the information website described by Chief Justice O'Connor, wondering what will and will not be included. He said that while the candidates themselves are limited to what they can say, those who have served in other branches of government and have a track record can use that personal history. Speaker Kurfess wondered if the website would be a public information system or would be simply allocating advertising time to candidates. Chief Justice O'Connor said that the website would include the candidate's occupation, history of cases tried as a lawyer, and judicial experience. She said if candidates want to put that they are members of a religious group, she thinks that is relevant information. Speaker Kurfess observed that some political purists are sometimes limited in what they think are legitimate considerations by a voter. Chief Justice O'Connor said the website will involve a committee that will decide what kind of information will go on the site, and that there will be a review of responses by candidates to be sure nothing inappropriate is included.

Adjournment:

The questions having come to a close, Judge Fischer moved to adjourn, Mr. Mulvihill seconded, and the meeting adjourned.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Report and Recommendation Article IV Section 19, Courts of Conciliation
- Report and Recommendation Article IV, Section 22, Supreme Court Commission
- Biographical sketch of Chief Justice Maureen O'Connor
- Prepared remarks of Chief Justice Maureen O'Connor

Approval:

The minutes of the January 15, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the March 12, 2015 meeting of the committee.

/s/ Janet Gilligan Abaray

Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer

Judge Patrick F. Fischer, Vice Chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 12, 2015

Call to Order:

Chairman Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 3:00 p.m.

Members Present:

A quorum was present with committee members Abaray, Curtin, Fischer, Jacobson, Manning, Mulvihill, Obhof, Sapphire, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the January 15, 2015 meeting of the committee were approved.

Presentation:

“Ohio Supreme Court Original Jurisdiction”

Steven H. Steinglass
Senior Policy Advisor

Steven H. Steinglass, Senior Policy Advisor, presented his memorandum on Ohio Supreme Court Original Jurisdiction.

Committee member Richard Sapphire asked whether a declaratory judgment action under state law is a cause of action, a remedy, or both. He asked if, under the proposition that the Supreme Court only has jurisdiction where the constitution confers it, this would apply to the appellate jurisdiction.

Mr. Steinglass replied that appellate jurisdiction is also constitutional. He said it is his assumption that a declaratory judgment action, filed in the court of common pleas, can go on to the appellate level and then to the Supreme Court, if the court will accept it.

Vice-Chair Judge Patrick Fischer explained there are parameters on a declaratory judgment action in that there must be a controversy and it must bring in all the parties. He said it is not a

remedy in that sense. The action usually is used to adjudicate contractual provisions, and you need all parties to be there in order to get a declaratory judgment.

Committee member Dennis Mulvihill directed the committee to Revised Code Chapter 2721, which governs declaratory judgment actions.

Mr. Steinglass indicated that Justice Paul Pfeifer, in his remarks to the committee regarding the original jurisdiction of the Supreme Court, did not address standing. He said a party would still have to demonstrate that it has a justiciable controversy. Mr. Steinglass said there is a group of cases for which it would benefit the parties to have a quick resolution of their respective rights. The policy issue this committee has to address is whether they want to create a route directly to the Supreme Court for these cases.

The General Assembly in the JobsOhio legislation felt it would be good policy to have a quick resolution of this issue, due to wanting to market bonds and remove uncertainty. The legislation attempted to expand original jurisdiction, but the Supreme Court said the expansion was unconstitutional, causing the plaintiff to have to go back and work its way up through the system. At one point, the state wanted the court to decide, but after the bonds sold the state took a different position. That would be the type of case an original action in the Supreme Court would address.

Mr. Saphire asked whether standing is also necessary in advisory opinions, explaining that in federal court it is different.

Committee member Jeff Jacobson said he was having trouble envisioning how an original jurisdiction declaratory judgment action would proceed in the Supreme Court. He used JobsOhio as an example, asking who the state would sue if it wanted to get the court to declare that a bond sale is good. Mr. Jacobson wondered whether such an action would be used preemptively by the state, or state related entities, to sue someone to establish that what the state is doing is okay. He asked whether there is a risk the state would sue someone who is not adversarial just to get a result.

Mr. Steinglass said he could look at what other states do, but that he could not say how Mr. Jacobson's scenario would play out. He said that proposed bonds have been challenged and courts have considered the propriety of them being adjudicated. The simple answer is that a taxpayer could bring an action if he opposes the issuance of bonds. The JobsOhio case did not preclude taxpayer actions under certain circumstances, but would people seek friendly plaintiffs to bring those suits? Mr. Steinglass thinks that yes, they probably would.

“State Supreme Court Advisory Opinions”

*Steven H. Steinglass
Senior Policy Advisor*

Mr. Steinglass then presented his memorandum on “State Supreme Court Advisory Opinions.” He said there are ten states which allow advisory opinions, but only the government is permitted to seek them. He said an advisory opinion is part of the political process, and with politics involved the issues are usually contentious. Mr. Steinglass said that in federal courts advisory

opinions have been prohibited since the 1790s. He said that the term “advisory opinion” has become sort of a pejorative in the court system.

Mr. Sapphire asked why the other forty states do not have advisory opinions; is it because those states reflect the federal model? He wondered whether there have been efforts to amend state constitutions to allow them. Mr. Steinglass answered that he would need to do more research to answer that question.

Chair Abaray observed that an advisory opinion is more like a certified question and is not adversarial.

Mr. Mulvihill raised the example of writs of prohibition and mandamus, in which citizens sue common pleas judges. He said this example does not fit the JobsOhio situation because a person would not sue common pleas judges to not enforce, or to enforce the law. He asked if it would be possible to allow original actions, without amending to clarify the standing issue, basically to allow someone to bring a suit as a public right.

Mr. Steinglass answered that would be one possibility.

Committee member Mark Wagoner asked whether expanded jurisdiction would resolve the problem, and if advisory opinions would be more helpful.

Mr. Sapphire commented there is no obvious outcry in favor of allowing advisory opinions or for expanding original jurisdiction, and that most judges are agnostic about this. He wondered whether legislative leaders and executive leaders might find the proposed change useful, and suggested the committee should try to learn what their views on the topic are.

Mr. Steinglass answered that these are two different concepts. A declaratory judgment action would be available through expanding original jurisdiction, but people in government who may feel a need to get a declaratory judgment can probably do so in the lower courts.

Mr. Jacobson said he is worried about the potential for abuse of advisory opinion power, should it be permitted. He raised the example of a governor calling for a change in the law, but legislative leaders not wanting the change and passing it off to the Supreme Court. He said he could see the different branches fighting among themselves, using the court as a shield. He believes this might be used to try to change the political governing process in a very unhelpful way.

Mr. Wagoner commented that this could be prevented with procedural protections, for instance creating a ninety day window to seek the opinion after legislation is signed. He said this would eliminate a lot of the gamesmanship, and it also could allow an early answer about whether something is constitutional. He said the provision could provide for limited standing. Mr. Wagoner said if the committee could put those protections in place, it would be better for the interested parties to obtain a resolution in that ninety day window, rather than having to wait two and half years.

Chair Abaray asked whether, in states with advisory opinions, supreme courts invite submission of amicus briefs. Mr. Steinglass said there have been many amicus briefs filed in Michigan, which allows advisory opinions, so that questions do not get asked in the dark.

Mr. Mulvihill asked what remedy is available, and what would happen if a record needs be developed.

Mr. Steinglass said the problem is that if litigation does go forward, it ultimately goes to the same court that issued the advice.

Mr. Mulvihill said allowing advisory opinions might affect judicial elections, where an advisory opinion could provoke money thrown at a candidate.

Mr. Steinglass said courts have discretion whether to render an advisory opinion.

Mr. Wagoner observed if the law regards the authority of government to do something, the court can deal with whether it is facially invalid or not.

Chair Abaray cited as an example a case in which she could not develop the record.

Mr. Wagoner commented that an advisory opinion for the legislature would not involve developing whether there is a rational basis. Instead, he said what you will see are structural issues you present to the court.

Mr. Jacobson asked whether a statute, once struck down, could be revived by a subsequent decision.

Mr. Steinglass said striking it does not take it off the books. Mr. Sapphire said whether a statute that has been invalidated by a court, and may have a later effect, is a function of state law, and if the state tried to enforce it, then presumably the effort to do so would be blocked.

Chair Abaray noted that there are some provisions in the Ohio Constitution that have been declared unconstitutional; what should the committee do with these?

Mr. Jacobson wondered, if there was a controversial case and new court personnel are named, would that invalidate the invalidation.

Chair Abaray said she understood Justice Pfeifer to be asking to expand jurisdiction for declaratory judgment actions just for constitutional questions, not for contractual rights of private litigants.

Mr. Sapphire asked whether the committee could hear from the two branches of government as to whether they have an opinion on this. Would this be a useful tool to make government more efficient? If the answer is no, then why pursue it.

Mr. Steinglass offered to reach out to leadership in the General Assembly to gauge their interest.

Mr. Jacobson asked whether the committee could have a version drafted that incorporates narrow specifications for who could bring such an action and under what circumstances.

Mr. Wagoner said he felt that the committee does not need further research.

Chair Abaray asked about other states' original jurisdiction provisions and whether the committee could have some research on this.

Mr. Mulvihill said he is concerned that advisory opinions would have no force and effect so there does not seem to be a point in having them. Mr. Mulvihill said he asked Justice Pfeifer if he really wants advisory opinions and he said no.

Mr. Wagoner said the committee could put restrictions on such a measure because it is writing the rules.

Mr. Mulvihill said he does not think that whatever the committee labels it, the provision needs to have force and effect.

Mr. Saphire commented that as long as there is judicial review, courts will interpret the constitution; having the court rule early, as opposed to later, is a valuable thing. Even if it is an advisory opinion that people do not have to act upon, the ruling would give information to people about our commitment to constitutional government.

Mr. Mulvihill disagreed, saying that although it would give information, it sets up a conflict between branches of government. He said he agrees with Mr. Saphire on the value of early determination, but that he does not agree that the court should be allowed to issue advisory opinions that no one has to pay attention to, which would further set up conflict and create additional problems.

Chair Abaray commented that she is concerned with the lack of an adversarial process and the lack of development of the record.

Mr. Saphire said the experience in Massachusetts would be a good model to look at, and said it would be interesting to see how often these opinions are ignored.

Mr. Steinglass said he will look at the practice in some of the states. He agreed to come up with language that would maintain the discretion in the court, and try to limit the open-endedness of advisory opinions as a discussion piece. He said he would try to answer, in a limited way, if there should be a way to get a more authoritative opinion from state highest court.

Mr. Jacobson asked whether constitutional challenges would be limited to facial or as applied, and Mr. Steinglass said he could address that.

Chair Abaray would like to know if other members of the Supreme Court have comments on Justice Pfeifer's proposal.

Mr. Mulvihill asked whether adopting these changes would really be creating a super legislature, so that any time someone does not agree they go to the Supreme Court.

Committee Discussion:

Mr. Steinglass then turned the committee’s attention to the remainder of Article IV, indicating that Commission staff needs guidance as to what the committee would like to address next. He said the Modern Courts Amendment in 1968 addressed many of the nuts and bolts issues, but there may be other issues that have come up that could be addressed. He has done overviews in other committees and said that such an overview might benefit this committee.

Mr. Sapphire pointed out that the committee also has jurisdiction over some provisions in Article I, and that it had been suggested that the committee could combine meetings of this committee and the Bill of Rights and Voting Committee to deal with the Article I sections.

Mr. Wagoner said he would be interested in seeing a side-by-side analysis of the Federal Rules Enabling Act and Ohio law, specifically, how those rules are adopted as compared to Ohio’s rules of court. He said that in Ohio it is required that there be a resolution of disapproval, and one legislator introduces the rules. He said this can be problematic, and that in the federal system rules approval requires an act of Congress. Mr. Steinglass said that a discussion of that topic could be scheduled.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:00 p.m.

Attachments:

- Notice
- Agenda
- Roll call sheet

Approval:

The minutes of the March 12, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the May 14, 2015 meeting of the committee.

/s/ Janet Gilligan Abaray

/s/ Patrick F. Fischer

Janet Gilligan Abaray, Chair

Judge Patrick F. Fischer, Vice Chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 14, 2015

Call to Order:

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

Members Present:

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

Approval of Minutes:

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

Presentation:

“Standing and Justiciability”

*Michael E. Solimine
Prof. of Law
University of Cincinnati*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Discussion:

Judicial Candidates Solicitation

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

Grand Juries

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

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

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

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

Adjournment:

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

Attachments:

- Notice
- Agenda
- Roll call sheet

Approval:

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

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

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



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD THURSDAY, JULY 9, 2015

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 1:00 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, Kurfess, Manning, Obhof, Saphire, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the May 14, 2015 meeting of the committee were approved as amended.

Presentation:

The committee then turned to the issue of grand juries, specifically a proposal for change that was formulated by the Task Force on Community-Police Relations, and was brought to the committee by Senator Sandra R. Williams, who had served on the task force.

“Grand Jury Recommendation by the Ohio Task Force on Community-Police Relations”

*Senator Sandra Williams
Task Force Member*

Senator Williams introduced the recommendations of the task force, discussing the need for a preliminary hearing system in Ohio. She expressed concern over the lack of transparency in grand jury procedures and unchecked authority of the prosecutor. She argued the Ohio grand jury system is non-transparent, as the proceedings, witnesses, and materials are kept secret. Sen. Williams noted that although indictment rates are high, there has been a refusal to indict police officers in the high-profile deaths of John Crawford, Michael Brown, and Eric Gardner. The discretion given to the prosecutor means he or she can show favoritism toward certain defendants like police officers. Sen. Williams noted the criminal justice system works on the basis of

fairness and trust, and the grand jury is counter to fairness and undermines that trust. She said if Ohio does not want to eliminate grand juries, the state may consider having a special prosecutor who would handle cases involving the police. Sen. Williams noted that it was unclear how much reform of the grand jury system in Ohio would be possible without violating the state constitution.

Chair Abaray then invited questions by committee members.

Committee member Richard Saphire said it is unclear to him whether the accused has a constitutional right to insist on a grand jury or whether the option is with the government. Sen. Williams said usually the accused does not know he is being brought before the grand jury. Mr. Saphire then asked what is the significance of saying a defendant has a right to grand jury if it is all up to the prosecutor whether a grand jury is utilized. Sen. Williams said that, in Ohio, the prosecutor has to go through the grand jury when the crime is a felony. Mr. Saphire asked whether this procedure is statutory, and Sen. Williams answered this is in the Ohio Constitution, at Article I, Section 10. Mr. Saphire said this was not clear from the language of the section, and Chair Abaray suggested that the second speaker to present to the committee, Professor Gregory Gilchrist, might be able to address the question.

Judge Fischer said he understands there are problems, but most of the issues sound statutory. He said Ohio Revised Code Chapter 2939 has not been revised since 1953, asking whether the legislature should be the appropriate body to make the changes. Judge Fischer asked why it would be necessary to throw out the entire system for one issue that, by statute, could be changed. Sen. Williams answered that the legislature could do a few things, but to get rid of the grand jury, a constitutional amendment would be required. She continued, saying, the reforms she advocates are being pursued through several different channels. She said the Legislative Service Commission reviewed the recommendations and said some of them must be undertaken through the Ohio Supreme Court rulemaking authority, but that others could be accomplished legislatively. Sen. Williams said the history of the task force effort to change the grand jury process was that she had sent a letter to Ohio Supreme Court Chief Justice Maureen O'Connor seeking reforms, but was informed that, because the grand jury was constitutional, the Supreme Court could not act. She said the grand jury may be fair in some instances, but in the case of officer-involved shootings, the procedure does not seem fair from the public's viewpoint. Sen. Williams said her effort involves attempting change through all possible options.

“An Introduction to the Grand Jury”

*Professor Gregory M. Gilchrist
Associate Professor of Law
University of Toledo College of Law*

The committee then heard a presentation by Gregory M. Gilchrist, professor of law at the University of Toledo College of Law, who introduced the committee to the history and function of the grand jury. Prof. Gilchrist said grand juries originally were to protect the people from the over-politicized power of the king. He said the right belongs to the accused, so the accused cannot be prosecuted for an applicable crime unless the charge has gone through a grand jury.

Mr. Sapphire asked whether, if a particular defendant or his or her counsel believes the grand jury would not be an appropriate way to proceed, could the defendant waive the grand jury, thereby requiring the state to proceed by presentment (an information), which is a public process. Prof. Gilchrist denied that this would be the case, saying an information involves the prosecutor working solo and then filing with the court, and only at that time does it become public.

Chair Abaray asked whether there is a difference between a presentment and an indictment. Prof. Gilchrist explained that a presentment was originally another way the grand jury could indict, by bringing the charges itself without assistance from a prosecutor. He said that procedure has not happened in at least 100 years, and at the federal level he is not sure it could happen. Prof. Gilchrist added he is not sure it could happen without a U.S. attorney signing off on it. He said this procedure is not used anymore.

Mr. Sapphire described how, in an individual case, if the defendant believes a grand jury is a preferable way to proceed and the prosecutor does not agree, the defendant can insist, but then problems could arise in the context of a grand jury as described by Sen. Williams. He asked whether there is a more public way to proceed other than using the grand jury or presentment. Prof. Gilchrist said no, in Ohio he does not believe there is, but that there is in other states. He said, for example, California developed a preliminary hearing program that was practically a mini trial. He noted that procedure has been changed by the legislature in California because it was seen as burdensome. He added there are a number of states that do this. Senior Policy Advisor Steven H. Steinglass noted that Wisconsin is one of these states. Prof. Gilchrist said that the Ohio language is the same as the federal provision. He said he has not researched Ohio case law on this question, but this language is fairly open, so it is possible the process could be revised without change to the Ohio Constitution. He noted that New York is a good example, indicating that the accused has the right to testify in New York. He said conceivably a change could be implemented under Article I, Section 10. He said that, as to Judge Fischer's question about whether change must be undertaken in the constitution, Prof. Gilchrist said if the committee wanted to drastically change the procedure by statute, the language in the constitution does not seem to allow it.

Prof. Gilchrist then turned to the issue of whether the grand jury system works. He said in its current use the grand jury is not very effective as a shield for the individual citizen. He observed that historically it was, noting that in colonial times it was a tool against royal prosecutors, and colonists refused to issue indictments. Today, he said, the procedure is largely in the control of the prosecution. Despite this, the U.S. Supreme Court continues to insist that the grand jury controls the prosecution rather than being controlled by the prosecution. He said the prosecutor does control what the grand jury sees and hears, and how you do it makes a difference. He said the other reason prosecutors have such control is that trust is a human function. Because grand juries serve for a period of months they could be comprised by people with no experience in the law. In such an instance, he said the jury could be fully guided by the prosecutor, whom they get to know on a day-to-day basis.

Mr. Sapphire asked, if a grand jury believes a prosecutor is acting inappropriately, whether the grand jury has the legal authority to compel the prosecutor to abandon the attempt to indict. Prof. Gilchrist answered practical concerns would matter more than actual authority as the grand jury

can ask follow-up questions and gather information. He said the grand jury has the authority of the court to issue subpoenas, and could issue its own subpoenas without the approval of the prosecutor. He said, technically, the jury needs the approval of the judge, so, as a practical matter, it is only when there is an unfair “fishing expedition” that the judge gets involved.

Mr. Saphire then asked whether, because the jury relies on the prosecutor to do its job, there has to be some affinity or mutual respect between the prosecutor and the grand jury for the jury to be effective. The grand jury also learns the law from the prosecutor, said Prof. Gilchrist, noting the federal government’s prosecution of Lawrence Stevens, the attorney for GlaxoSmithKline, in a case in which, during the grand jury investigation, some jurors asked questions and the prosecutor’s answer was erroneous. [*United States v. Stevens*, 771 F. Supp.2d 556 (D. Md. Mar. 23, 2011).] He said when the judge reviewed the case, he saw the error and dismissed the indictment for that reason. Prof. Gilchrist said that, as a practical matter, it is hard to imagine grand juries doing much without the assistance of the prosecutor’s office.

Prof. Gilchrist noted that in only a tiny fraction of federal criminal cases is a finding of “no indictment” returned. He said that in New York there is a higher instance of no bills, but that states vary. He said it is common for the prosecutor to get indictments when he asks. He noted there is a small number of “no bills,” but it does happen.

Chair Abaray asked whether prosecutors ask the jury what it wants to do, and whether there are cases in which the prosecutor is not asking for an indictment. Prof. Gilchrist said it is possible for a prosecutor to present to a grand jury when he is not actually hoping for an indictment. He said he has no information or idea how often that happens.

Chair Abaray then asked whether, if the prosecutor goes to the grand jury, does he distinguish the separate acts of presenting evidence and asking for indictment. Prof. Gilchrist said no, that in the federal system it is all together. He said it is a professionalized business; FBI is good with the evidence. He noted the prosecution is using the power of the grand jury, but the FBI agent and the prosecutor to decide what to do next.

Committee member Mark Wagoner asked whether there are empirical numbers for the state of Ohio as to how often the grand jury returns an indictment as versus how often the grand jury is used. Prof. Gilchrist said he hasn’t gathered that data. He said one reason the data doesn’t exist is that the grand jury functions in secret. He said the defense attorney is not allowed in with the client. He said only the members of grand jury, the court reporter, the accused, the prosecutor, and the witnesses are in the jury room. Prof. Gilchrist added that witnesses are not sworn to secrecy; they can tell anyone anything they want. He said that, for everyone but the witness, it is a secret proceeding. Prof. Gilchrist said it sounds un-American to be in secret, but that there are reasons for the secrecy.

Mr. Wagoner asked whether the accused has a right to testify. They do not, said Prof. Gilchrist, although it is unusual for a defense attorney to ask. He said when the accused asks, many prosecutors will allow it. He added, “As a prosecutor, I would be worried about how that would look if it is brought out at trial, and so I would allow it as a practical matter.”

Prof. Gilchrist noted that the reasons for secrecy include preventing the accused from knowing about the investigation (flight fear), and also to protect the jurors from undue influence. He added, the concern is about what would happen if everyone knew about the grand jury's business – the jurors might be influenced by neighbors and others, whereas with secrecy they are able to make a decision based only on the evidence.

Mr. Saphire asked whether, if a person learns he is being investigated by the grand jury, he would be free to leave the jurisdiction, further noting that technically the person hasn't been charged yet and would be free to go. Prof. Gilchrist agreed, but said few people are able to leave the jurisdiction because they have knowledge they are being investigated.

Prof. Gilchrist said another reason for secrecy is to protect the safety of witnesses, who could be threatened if their testimony might incriminate. He said a final reason for secrecy is to protect the reputation of the accused, because once someone is accused there is harm, and even if the person is acquitted, it is still an ordeal. He noted that the power of accusation is a powerful tool. Prof. Gilchrist commented that sometimes charges might be made up by a witness, so that, with secrecy, if the grand jury finds no probable cause, the person's reputation is not tarnished.

Describing the vote taken by jurors, Prof. Gilchrist said the standard for whether to indict is "probable cause," which is a low standard. He said 12 out of 15 jurors have to vote to indict. He further stated the rules of evidence do not apply, so that sometimes the prosecution proceeds solely on the testimony of an FBI agent. Prof. Gilchrist observed that the grand jury is a relatively informal procedure. He said the jury is not entitled to receive exculpatory materials, nor is the prosecutor required to present them. He noted there are tactical reasons why the prosecutor would want to present them, but he is not required to do that.

Mr. Saphire commented that the process seems loaded in favor of the prosecutor and, if that is true, given all the aggravation and cost and expense for the accused, it seems to raise some serious concerns about the use of the grand jury, if it is almost a rubber stamp. Mr. Saphire wondered whether Prof. Gilchrist is aware of any state recently that has moved away from the grand jury system to something else. Prof. Gilchrist said he is not aware of that.

Chair Abaray followed by asking whether any states have both a grand jury system and an information system. Prof. Gilchrist said yes but that he doesn't know how that works.

Prof. Gilchrist noted that Mr. Saphire's question raises the idea that, if this is a rubber stamp, why not get rid of the grand jury and allow prosecutors to proceed by information. He said one thing to note is that the *Hurtado* case, from 1884, indicates the states are not bound by Fifth Amendment to the U.S. Constitution, but the court in *Hurtado* was reviewing a California preliminary hearing procedure and found it was consistent with due process. [*Hurtado v. California*, 110 U.S. 516 (1884).] He said he is not sure what would happen if the state eliminated any kind of proceeding at all.

Chair Abaray asked whether any Ohio Supreme Court cases interpret any component as being essential. Prof. Gilchrist said there is an Ohio case requiring grand jury transcripts. He said the rules say there *may* be a court reporter, but the Ohio Supreme Court says there *must* be. Chair

Abaray asked whether that is something the committee should research. Prof. Gilchrist said he has not looked into that. Vice-chair Fischer noted there are several Supreme Court cases on Crim.R. 6(E), the secrecy provision. He said *Organic I* [*In re Special Grand Jury Investigation Concerning Organic Technologies*, 74 Ohio St.3d 30, 656 N.E.2d 329 (1995)] and *Organic II* [*In re Special Grand Jury Investigation Concerning Organic Technologies*, 84 Ohio St.3d 304, 703 N.E.2d 790 (1999)] explicitly adopted the federal process for declassifying the proceedings.

Prof. Gilchrist said that the transcripts become public during trial. In federal court, the transcripts are considered to be Jencks material.¹ When the prosecution calls a witness at trial, the prosecutor has to provide the witness's prior statements to the jury, and must give the transcript of that prior testimony to the defense.

Regarding Jencks material, committee member Jeff Jacobson asked whether, if there was no grand jury process and instead it is just bill of information, there would be less opportunity for the defense to prepare witnesses, and less opportunity to keep the witnesses honest. Prof. Gilchrist agreed that even under a grand jury process that can still happen because a prosecutor can proceed through the use of hearsay. Mr. Jacobson asked whether the defense has any right to see what the witness said. Prof. Gilchrist explained the way it works is that the defense has no right to Jencks material until after the direct examination of the witness. He said usually you get it earlier because the attorneys are collegial. He said it is easy enough for the prosecutor to insulate more fully by calling the witness before the agent.

Mr. Jacobson commented on the saying that a prosecutor could get a grand jury to indict a ham sandwich if he wanted to, asking whether that saying is as true in Ohio as elsewhere. He additionally wondered about whether there are safeguards against abuse of the system by prosecutors. Prof. Gilchrist answered there is nothing helpful on Ohio rates of indictment through the use of the grand jury. As far as the procedural safeguards, he said he doesn't know of any specific ones, but that having a court reporter present helps. He said there are not many formal procedural safeguards, and courts have been reluctant to supervise prosecutorial discretion. He said the question involves the role of the executive branch, and the judiciary doesn't get involved.

Mr. Jacobson asked whether there are ethical considerations. Prof. Gilchrist said that, yes, as attorneys, prosecutors have the same ethical obligations as defense attorneys, and have additional duties as special officers of justice. But, he said, what goes with that is there is no outside power that has the ability to enforce those duties. Mr. Saphire added that to enforce an ethical duty, you have to know about a breach, and so the conduct that is believed unethical has to be brought to light. He said that with secrecy, it is rare that would happen. Nevertheless, Mr. Saphire said, the grand jury itself can check the prosecutor.

Chair Abaray asked whether there should be a different procedure in cases of officer-involved shootings. She asked whether any states distinguish between the process depending on the accused, and whether there would be equal protection issues raised by the concept of having two

¹ The Jencks Act, [18 U.S.C. § 3500](#), requires the prosecutor to produce statements by a prosecution witness, but only after the witness has testified. Under Fed. R. Crim. Pro. 6, Jencks material would include a witness's grand jury testimony, if the witness testified at trial.

different procedures. Prof. Gilchrist said he is not able to answer that, remarking that no other state separates out the class of accused.

Chair Abaray then directed the same question to Sen. Williams, who said she has not seen another state adopting this. She does know there are legislative initiatives being considered by other states, citing research provided to her by the Legislative Service Commission. She said Connecticut and Pennsylvania used the ballot initiative to get rid of the grand jury. In Connecticut, the accused has to go before a judge, while Pennsylvania lets the individual counties determine how to proceed. She further noted that there are 25 states that make use of the grand jury optional.

Mr. Jacobson commented that it seems the only check on the prosecutor is the grand jury itself. He said there may be some self-censorship on the part of the prosecutor. Prof. Gilchrist said there is one other check: it is the prosecutor's office, their bosses, and the policies of each office. He said the U.S. Department of Justice has rigorous policies, and has published an internal rule that they do provide exculpatory matter to the jury even though there is no Supreme Court requirement for this.

Judge Fischer said that, to him, the check is that there is no prosecutor in the room when the jury deliberates and when they vote. Prof. Gilchrist said that is a good point. Judge Fischer said prosecutors do not bring a case unless they think they can get an indictment, and they pick the cases to bring before the grand jury. Prof. Gilchrist agreed, saying one would expect a high rate of indictments because of this practice.

Mr. Saphire asked Prof. Gilchrist where he stands on the issue of whether to keep or eliminate grand juries. Prof. Gilchrist said, as a practitioner, there is not much shield value; he thinks prosecutors get the indictments they want to get. He said, on the whole, based on his research, something like the New York system seems like a good balance. He said that method would maintain the grand jury but would have procedural checks.

Mr. Jacobson noted that the problem people have worried about in the past has not been failure to indict but what to do about the overzealous prosecutor. He said in the last year there have been newer concerns about a failure to indict. He asked whether these are mutually incompatible worries. Prof. Gilchrist said he is not sure the two situations are incompatible. He said the worry about failure to indict is that the game is rigged. He said in a public preliminary hearing setting, rigging the game wouldn't be possible. He said he is not sure a more rigorous procedure is at odds with false no bills.

Representative Emilia Sykes asked what reforms Prof. Gilchrist would recommend. Prof. Gilchrist said he would consider specific ideas from New York's experience with the criminal indictment process. He said they apply the rules of evidence more rigorously in the grand jury, although he is not sure they apply the full rules. He added that New York recognizes a right of the accused to testify, requires a judicial review of the final transcripts after indictments are returned, even having a review for a no indictment. Prof. Gilchrist also said that in New York there is no "double jeopardy" in the grand jury process, meaning that when the prosecutor

presents evidence but the jury refuses to issue an indictment, the prosecutor cannot try again. Ohio, by contrast, allows the prosecutor to keep trying, he said.

Sen. Williams commented that when she met with the Legislative Service Commission staff, she was told it is not clear what could be done statutorily without violating what the grand jury is understood to mean within the Ohio Constitution.

Committee member Charles Kurfess remarked that when he reads the constitutional provision, he thinks one could suggest that prosecutorial control of the grand jury is inconsistent with our constitutional provision. He asked whether there is any reason that a judge could not appoint counsel to advise the grand jury. Prof. Gilchrist said he is unsure what authority the judge would use. He said the grand jury is an independent body, not part of the executive or judiciary branches. Judge Fischer said the grand jury is not an arm of the court, and wondered, so long as *Hurtado* and other cases say the federal constitution doesn't go that far, why wouldn't states be able to create their own version of grand juries. Prof. Gilchrist agreed with this assessment.

Judge Fischer said he does not see it as a constitutional problem, saying "If you get past whether we want [a grand jury] or not, then the rest is legislative."

Prof. Gilchrist said if someone wanted an alternative procedure, then it is a constitutional question. But the process is not constitutional, said Judge Fischer.

Mr. Saphire asked Sen. Williams whether she had heard from prosecutors, defense attorneys, or others during the task force proceedings. Sen. Williams said the task force did not hear from those parties. Mr. Saphire suggested it might be interesting to hear from organizations whose members are involved in the process.

Chair Abaray agreed, saying the committee should put more resources into getting this input in order to assist its deliberations. Sen. Williams added that Franklin County Prosecutor Ron O'Brien was on the task force, and he provided insight into the recommendation to have a judge oversee all grand juries. She added that the task force also heard from some people who had served on grand juries who said they accepted what the prosecutor said because they did not have a lot of information.

Mr. Saphire wondered whether grand juries know they can disregard the prosecutor, and, if they do not, do they defer to the prosecutor without knowing they do not have to. Prof. Gilchrist suggested it might be useful to look at what courts around the state do to educate grand jurors.

Mr. Wagoner said there is often a video presented in order to prepare and educate petit jurors, but that he does not know if anything similar exists for a grand jury. Executive Director Steven C. Hollon answered he is not aware of courts using a video of this type.

Chair Abaray asked Sen. Williams if she thought having a judge involved in the process would help. Sen. Williams said that judges run for office and are supported by prosecutors, unions, and police. She said having a judge involved might make the process more transparent, but it is still problematic.

Chair Abaray recalled an incident from her practice in which there was a rumor of an investigation by a grand jury of a former client. She said the client was never called before a grand jury, and the possible accusations were not publicized, with the result that his reputation was not ruined. She said that is the flip side of the concern. She asked Sen. Williams if she had any thoughts on the protective effect of the grand jury process in that type of situation.

Sen. Williams agreed the anonymity of the potentially accused person can be an issue, but when there is an officer-involved shooting everyone knows who the officer is. She said if the incident is made public by the media, people know. Sen. Williams noted the belief among some in Cuyahoga County, based on recent incidents, that prosecutors can destroy people just by bringing an investigation to the grand jury. She said prosecutors may not say they want an indictment to be returned.

Mr. Sapphire asked Mr. Steinglass whether the Constitutional Revision Commission in the 1970s made a formal proposal about grand juries. Mr. Steinglass said they did recommend eliminating the grand jury but nothing happened in the General Assembly. Mr. Steinglass said he would do further research and advise the committee if there is more information on this. Sen. Williams said the Legislative Service Commission found those recommendations, noting there were five recommendations made, but the General Assembly did not act on any of them.

Mr. Jacobson said there seems to be a compelling reason to make this more of a constitutional concern. He said "We could defer but there are plenty of reasons to include more safeguards." He said, at the same time, he is concerned that the issue of the moment is being used to eliminate a long term positive protection for the accused. Mr. Jacobson said the committee should not want to get rid of the protections of the grand jury for the individual in order to address current issues. He speculated this is what motivated people in the past. He said the idea of involving a judge who could be there and/or review an indictment, might be something around which there could be more consensus. Mr. Jacobson added that the committee should be searching for a balance. Chair Abaray agreed and said she wants to emphasize the committee is here because it respects the judiciary. She does not want to imply the committee distrusts the judiciary to perform its function. She said one role of the committee should be to address this lack of comfort for citizens, but that the committee also should uphold the role of the judiciary.

Mr. Steinglass said that in the 1970s, the Constitutional Revision Commission recommended the repeal of the grand jury language, and then recommended a new Article I, Section 10a, along with a substitute set of provisions. He said the 1970s Commission had four goals: the first being they favored the information or complaint as the primary method, but permitted either the accused or the state to demand a grand jury hearing. The second goal was to grant every person accused of a felony the right to a grand jury. The third goal was to require the prosecutor to reveal exculpatory evidence. Finally, he said, the fourth goal of the 1970s Commission is that they wanted to permit any witness appearing before a grand jury to have counsel present. Mr. Steinglass said staff would send a copy of the 1970s Commission's final recommendation to the committee members.

Mr. Wagoner suggested the next steps for the committee could be to get prosecutors, defense attorneys, and judges to present about their experiences. He also recommended obtaining input from the Ohio Judicial Conference.

Mr. Jacobson observed that the choice given in the 1970s recommendation was for the prosecutor to use the grand jury, or to have the prosecutor or the accused opt for a preliminary hearing.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:30 p.m.

Approval:

The minutes of the July 9, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the December 10, 2015 meeting of the committee.

/s/ Janet Gilligan Abaray

Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer

Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD THURSDAY, DECEMBER 10, 2015

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:40 p.m.

Members Present:

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

Approval of Minutes:

The minutes of the July 9, 2015 meeting of the committee were approved as amended.

Presentation:

Chair Abaray then turned the committee's attention to the ongoing consideration of the issue of the use of grand juries in Ohio, as provided in Article I, Section 10. She introduced two members of the Ohio Prosecuting Attorneys Association, Michael T. Gmoser, prosecuting attorney for Butler County; and Morris J. Murray, prosecuting attorney for Defiance County, who were present to provide their perspective on the use of grand juries in criminal prosecutions.

"The Grand Jury Process"

*Michael T. Gmoser
Prosecuting Attorney
Butler County, Ohio*

*Morris J. Murray
Prosecuting Attorney
Defiance County, Ohio*

Mr. Gmoser spoke first, indicating that 98 percent of felony prosecutions in the criminal division of his office begin with a grand jury indictment, as opposed to a bill of information. He remarked that law is an evolutionary institution, but there are some aspects of law that should be a constant. He said the grand jury process should be a constant, and is provided for under federal law in the United States Constitution. He added that the grand jury process is an Ohio institution that has changed very little over the years because it is based on the principle that no person shall be held to answer for a serious crime without a grand jury indictment, and that the process requires secrecy. Mr. Gmoser acknowledged that whenever there is an issue that demands transparency, the institutions that demand secrecy come under attack and that is only natural. But, he said, transparency is not a good thing when it comes to charging someone as opposed to trying someone. He cautioned the committee that it could do damage if it acts in favor of transparency, because the secrecy in the grand jury process benefits the guilty as well as the innocent.

Mr. Gmoser said he first wanted to emphasize that prosecutors do not, in the main, indict innocent people if they can avoid it. He said prosecutors have to be accountable to the public and do not want to try cases they cannot win. He said, unlike the popular saying, there is nothing to be gained by “indicting a ham sandwich,” adding that might be true as an exception to the rule, “but we should not change the whole system because of it.” He said secrecy prevents the innocent person from being maligned and abused based on improper charges. He said prosecutors have an interest in protecting suspects from the condemnation of public disclosure. He remarked that the other function he finds essential to the operation of his office is the use of the grand jury as a tool to obtain information in a private, secret way. He said prosecutors use the grand jury for investigatory purposes, so that, if the process becomes transparent, it will prevent opportunities for disclosure of crime.

He explained the end result of a grand jury proceeding is a charging instrument that results in a court proceeding in which the defendant has all the protections afforded a criminal defendant. At the time a criminal charge is brought, the accused has a right to the evidence, but he said this does not mean the evidence should be given to the defense before or during grand jury proceedings. Mr. Gmoser concluded his presentation by asking the committee to “protect a vital institution of our state” by making no modifications that will eliminate the confidential nature of the grand jury process.

Chair Abaray explained that an issue the committee has been asked to address, which was raised by communications from Sen. Sandra Williams and Ohio Supreme Court Chief Justice Maureen O’Connor, is whether there are any changes or recommendations that would help the public gain confidence in the grand jury system. She said, when things are done in secret, that requires trust, and if trust is eroded, that has a negative effect. She asked Mr. Gmoser whether he had any suggestions for ways to improve the process, beginning, specifically with a practice used in other states, such as Pennsylvania and New York. Chair Abaray described that, in those states, grand jury proceedings are recorded by a court reporter and then, at the end of the proceeding, are reviewed by a judge who signs off that the process was properly done. Chair Abaray wondered whether Mr. Gmoser is familiar with this practice and what his opinion is of it.

Mr. Gmoser responded that prosecutors are against that practice. He said this kind of oversight, particularly a method that uses a commission to review the proceedings, can create problems because if a controversy arises the public then wants to fire the commission. He said, regardless, the successful operation of the system always depends on the quality of the prosecutor, calling prosecutors “the most ethically-oriented people we have in our society dealing with criminal law.” He said, as prosecutor, he is able to identify problems and knows how the system should work. He added having another layer of oversight would complicate speedy trial requirements. He said oversight would be impossible in the larger counties, maybe possible in smaller counties, but in little communities everyone knows everyone’s business anyway. He said that is not a workable solution, adding that judges already are involved; every grand jury is instructed by a judge about its duties. He said if the committee would want to require the prosecutor to inform members of the grand jury that it is their jury and not the prosecutor’s grand jury, he would be okay with that because he already does that. He said he insures the grand jury’s independence, and that the grand jury never is told what it must do. He does inform the grand jury of the law, what the complicating factors are, and what the details of the case are, and if that practice were institutionalized by a law requiring it he would amenable to that. He added that the proceedings are recorded and transcripts are made. He said these are the practices he would suggest, rather than an additional layer of oversight.

Chair Abaray explained that the role of the Commission is to look into issues, and that the committee is not advocating a position.

Committee member Richard Saphire noted that one fifth of the states allow judicial review, wondering whether Mr. Gmoser is familiar with the experience in other states. Mr. Gmoser replied that he is not in a position to comment on that.

Senator Larry Obhof commented that the grand jury process provides fairness to the would-be defendant, meaning that if someone is not actually charged with a crime, all the things that could be said in that room could taint how that person is viewed publicly. Mr. Gmoser agreed, saying that is the secrecy that is required. He said that could be devastating for the person who is being investigated but not charged. He said justice comes first for the prosecutors, but not for defense attorneys, whose role is to defend their client.

Committee member Jeff Jacobson said he has no issue with secrecy, acknowledging that there is a danger to people who have not or may not be charged in having rumors become a matter for public conversation. But, he said, that is not the end of the story. He wondered whether Mr. Gmoser was familiar with a situation that developed in Wisconsin, in which a prosecutor decided to go after certain people for activity that was not actually criminal, with the result that multiple incidents of prosecutorial abuse and harassment of citizens occurred before two rulings by the state supreme court stopped the abuse of process. Mr. Jacobson said this all occurred because the prosecutor started with a theory that was not the law, then told the grand jury what the law is and was wrong. Mr. Jacobson wondered how oversight could have been helpful in preventing that abuse of the system.

Mr. Gmoser said the fact that the incident was publicized is evidence that the system works. He said an extra layer of oversight would not prevent unethical activity that perverts the system.

Mr. Jacobson followed up, asking, “if a prosecutor decides to investigate what is not a crime and tells the grand jury it is a crime, who can tell the grand jury that he is wrong?” He added that a system that would allow oversight in certain instances could prevent abuses. He commented, “someone could have died as result of those activities [in Wisconsin], and yet no one could challenge the prosecutor’s interpretation of the law within the context of that investigation.”

Mr. Gmoser answered that one size would not fit all, and that it would be impossible to establish specific categories that a judge would be able to look at. He said he would not want to see oversight required just because of a problem in Wisconsin. Mr. Jacobson continued that there was also a similar instance at Duke University, to which Mr. Gmoser replied that this is not that big of a problem if only two cases illustrate it.

Committee member Dennis Mulvihill asked whether Mr. Gmoser always asks the grand jury to return an indictment. Mr. Gmoser replied that he never asks the grand jury to return an indictment, and that he also informs assistant prosecutors that they should never ask the grand jury to do that. He said he suspects many prosecutors do it the same way. He said he may recommend one charge as versus another, but he never tells them they must do something. Mr. Gmoser said he tells the grand jury “here is the grocery list of offenses; your duty is to find probable cause, not proof.” He added that the grand jury gets that instruction from a judge before they hear it from him. He said, if all the evidence that is ever produced in a case has been heard by the grand jurors, and in their minds the case will never arise above a probability, and they are convinced the case will not be proved beyond a reasonable doubt, he is not going to proceed. He said some juries will indict anyway, but in that situation he goes to the judge and asks for the case to be *nolle prosequi*.

Mr. Mulvihill asked how often the grand jury reaches a conclusion that Mr. Gmoser does not think is justified. Mr. Gmoser answered that this occurs less than 10 percent of the time.

Chair Abaray then recognized Morris J. Murray, prosecutor for Defiance County. Mr. Murray began by emphasizing that the grand jury process is “absolutely critical” to the fair and efficient administration of justice. He then read from the jury instructions that are provided to grand jurors at the time they are sworn by the judge. The instructions describe the grand jury as an “ancient and honored institution,” indicating that jurors take an oath in which they promise to keep secret everything that occurs in the grand jury room, both during their service and afterward. The instructions further describe a two-fold purpose for secrecy, one being that it protects the reputation of the person under investigation, and the other being that a person who learns he or she is being investigated could then have the opportunity to escape. The instructions go on to describe the meaning and purpose of a criminal indictment, to describe the process by which information will be presented to the jurors, and to set out the requirements that must be met before an indictment is handed down. The instructions also caution the jurors that they must be fair and unbiased, must recognize that hearsay evidence is unreliable, and that, as the sole judges of the facts, are not to be influenced by the prosecutor in deciding whether to approve an indictment. The instructions describe that the jury’s deliberations will be conducted outside the presence of others. Finally, the instructions state: “In the field of crime your authority for

investigation is almost unlimited. It must, however, be directed by honest and conscientious motives to determine if a person or persons should be charged with a specific crime.”

Mr. Murray commented that grand jurors take these instructions to heart. He emphasized that prosecutors do not seek to indict innocent people and do not pursue cases in which it is clear that there is no probable cause. He noted that, on the other hand, if grand jurors decide a true bill should be returned, a prosecutor is obligated to pursue the case, even if it is difficult or controversial. Mr. Murray reiterated the importance of secrecy to the process because it protects the privacy of persons subject to a grand jury proceeding. He concluded by stating that the grand jury process is “not broken” but accomplishes the objectives set forth in the grand jury instructions.

Chair Abaray recognized Mr. Saphire, who asked whether jurors get the instructions in writing. Mr. Murray answered that the instructions are available in writing if the jurors want them. Mr. Saphire said he agreed that the instructions are comprehensive and give a juror a sense of responsibility, but said he wonders if jurors listening to instructions being read would have the ability to understand. Mr. Murray said he is not sure if jurors fully comprehend all they hear, but, based upon what jurors say and the kinds of questions they ask, he does believe that they understand the instructions. He added, “while there are examples of bad cases, when you consider the hundreds of thousands of cases nationwide, our batting average is pretty good.”

Mr. Murray continued that law enforcement investigation is the first step, with the second step being the prosecutor’s review of the evidence. He said there is an element of prosecutorial discretion, and a prosecutor has to determine if a case is even worthy of a grand jury proceeding. He noted that confidentiality comes into play for a lot of good reasons. He said high profile cases can cause people to want to try to fix something that is not broken, adding that “very little, if anything, needs to be done” with regard to Ohio’s process.

Chair Abaray asked whether the grand jury instructions are required in Ohio. Mr. Murray answered that there are rules and statutory requirements regarding instructions that he believes are fairly consistent throughout the state. Chair Abaray then commented that the more the public can be informed about the grand jury process, the more it might benefit society as a whole. Mr. Murray replied that this is a good point, and that public servants could improve public education about the grand jury process.

Chair Abaray said she had heard jurors are allowed to consider evidence that is actually hearsay within hearsay, wondering how commonly that occurs. Mr. Murray noted that the instructions caution jurors that hearsay can be unreliable. He said, as a practical matter, he might have 15 to 20 cases that need review by a grand jury, so that for expediency he may present hearsay through a process that has the investigating officer reading a witness statement, for example. He said he might want the witness there in some cases, but that isn’t always necessary, adding it would bog down the process to always require a live witness, or, alternately, to simply say the grand jury cannot consider hearsay.

Mr. Mulvihill asked about the close relationship between police and prosecutors. He said some public criticism now arises out of that close relationship when a police officer is under suspicion,

and that there is an appearance of a conflict of interest. He said his more specific question is whether, where there is a conflict of interest, there should be a separate body to investigate officers.

Mr. Murray said cases may already be publicized before a prosecutor even gets the file. He said he would prefer that as little as possible be in the media about a high-profile case. Regarding the prosecutor's relationship with the police department, he said the process requires working daily with police officers. If the people he works with get in trouble or are accused of wrongdoing, he said he does not handle that case. He said he does not think an oversight commission, or other review would help, but, rather, "we just need common sense." He said he would get special prosecutor to handle the case if it involves police officer conduct.

Mr. Mulvihill wondered whether it might be easier to have an independent body that would investigate police officers or public officials. Mr. Murray said he has no problem with people who are unconnected with the case from handling the matter. He said any attorney can be a special prosecutor, although usually it is someone with experience. He said, like all attorneys, prosecutors are required to avoid the appearance of conflict and impropriety. He said he would never stay on a case in which he has a conflict.

Committee member Charles Kurfess asked how often grand juries change. Mr. Murray said jurors serve for four months. Mr. Kurfess then asked whether there should be a limit on how many times a prosecutor takes the same case to a grand jury in an effort to continue to try for an indictment. He wondered if, barring additional evidence, there should be a limit. Mr. Murray answered that he can count on one hand the times he has taken a case back to a grand jury, and in those instances it was because there was new evidence. He said he does not want to tie the prosecutor's hands from a public perspective. He said, as an example, sometimes witnesses recant or tell a new story, or a child witness changes his or her testimony. He said he hopes the public elects prosecutors who are competent and ethical. He said he does not know how one could put a check on that.

Mr. Kurfess asked whether, in those instances, the second grand jury should be advised that the case already has been heard. Mr. Murray said if he were to say that, he would be unable to avoid a discussion of the evidence that was presented on the previous occasion, or to avoid the question of why there was no indictment after the previous hearing.

Mr. Kurfess asked how the prosecutor decides whether to invite the accused to appear before the grand jury. Mr. Gmoser answered that he has had the accused come before the grand jury in certain cases, specifically cases such as date rape, in which he thinks it is important for the jurors to hear both sides of the story. Mr. Murray answered that sometimes counsel will ask to let the defendant testify, and sometimes the defendant wants to.

Mr. Kurfess commented that the grand jury process is the least understood by the public of all parts of the criminal procedure.

Mr. Gmoser noted that petit jurors in his county get written instructions, but that the grand jurors do not. He said he tells them the instructions, because he does not believe they get the full

import of the instruction at the time they are sworn. Mr. Kurfess said that, when he was a judge, he always gave written copies of the instructions.

Mr. Kurfess then asked about the substantive difference between a grand jury indictment and a preliminary hearing procedure. Mr. Murray answered the preliminary hearing process is often happening at an earlier stage, where there has been an investigation that blows up in a hurry. He said the presentation of a minimal amount of testimony is the same, but much more comprehensive information is presented to a grand jury. Mr. Gmoser said preliminary hearings are handled by municipal prosecutors. Mr. Murray added that it is often new prosecutors who handle preliminary hearings.

Mr. Kurfess asked whether there is any substantial difference between the federal grand jury procedure and Ohio grand jury procedures. Mr. Gmoser said the federal procedure is extremely guarded. Mr. Murray said, in the federal system, access to testimony is easier after the grand jury process has concluded. He said, in Ohio, prosecutors provide a transcript of grand jury testimony if the defendant testifies, and sometimes provide the transcript of the testimony of an accusing witness, but other than that they do not provide a transcript.

Mr. Kurfess invited the prosecutors' observations as to the purpose gleaned from the constitutional provision.

Mr. Gmoser said a grand jury is a device that protects the administration of justice and the fairness of the system, and is a form of due process protecting all rights across the board. Mr. Murray added the protections include protecting those who might be falsely accused.

Mr. Jacobson said it is a problem to focus on prosecutors' potential conflict of interest in regard to law enforcement, as prosecutors also may work closely with others such as the attorney general. Mr. Jacobson asked whether there are phases in a grand jury presentation, and whether, when the prosecution has presented its evidence, the jurors are given general or specific instructions about the case.

Mr. Murray said jurors are told the code section and the elements of the crime, and then are told they need to decide whether the information they have heard satisfies the elements of that crime. Mr. Jacobson followed up, asking whether a prosecutor could suggest one crime but not name the other potential crimes the evidence might support. He said he wondered if those instructions at the end of the presentation should be what should be transcribed and reviewed by a judge.

Mr. Gmoser answered that a judge is not going to sit as a second prosecutor and examine what the first prosecutor did. Mr. Jacobson clarified that he is not asking to check sufficiency, but is asking whether what was said as an instruction was fair and legitimate, and not a violation of someone's rights. He asked "what is wrong with the suggestion that someone who has unchecked power for a short amount of time could, in theory, abuse that power?"

Mr. Gmoser answered that no prosecutors do what Mr. Jacobson is suggesting could happen. He said the idea of a judge reviewing the final instructions to the jurors would not work and is not a good idea. Mr. Murray clarified regarding the instruction, saying if a prosecutor misinstructs, the

check on the process is what happens after that. He said he does not think the statistics will support that the process needs to be changed. He said there are a lot of cases that do not result in an indictment.

Mr. Jacobson continued, suggesting that if prosecutors do not want a judge to review their actions, why not provide the defendant a copy of the instructions so if there is something wrong it can be brought to someone's attention. Mr. Gmoser said prosecutors get a charge from the police, but sometimes the charge should be less or should be more, and this is why the charges are not always the same. He explained it is in the discretion of the prosecutor to decide the charge, and in doing so, the prosecutor ends up owning the case. He added, if the prosecutor loses the case, it is on the prosecutor.

Mr. Jacobson said he admits the system generally works, but wondered what percentage of cases is subject to a plea bargain. He explained that the fact of indictment is enough to force a plea, and because a defendant pleads guilty does not mean the original charge was fair. Mr. Murray said most prosecutors are telling the jury: "here is the evidence, here are the potential offenses," and they will offer the grand jury the opportunity to charge one or more offenses and some may be higher level of crimes than the circumstances warrant. He said, there is a necessity for that plea bargaining process to happen, but the grand jury gets the first look at it. Mr. Gmoser added "just because we plea bargain does not mean the charge was not well founded."

Mr. Mulvihill asked who provides answers if jurors have questions. Mr. Murray said the jury instructions notify jurors they can ask the court, adding the prosecutor is by statute the legal advisor to the grand jury. Mr. Mulvihill asked whether Mr. Murray recommends to the grand jury what the indictment should be, based on what the evidence shows. Mr. Murray said the procedure is not like in a trial. He said, in the grand jury he is saying "here is the evidence, here are your options." He said he tries to be as literal as possible.

Chair Abaray noted that a failure to indict was of concern in some of the police shooting cases. She wondered if, in situations where everyone knows about the incident, there has been consideration to releasing to the public the jury instruction or the charges. Mr. Gmoser said prosecutors would not consider doing so. He said the public trust issue would not be solved by giving a tutorial to the public. He added, in Butler County, every police shooting goes to a grand jury, but some counties do not require those cases to go to the grand jury. He said he always takes it to the grand jury when police are involved.

Mr. Kurfess asked whether the prosecutors always allow jurors the possibility of charging a lesser-included offense. Mr. Gmoser said that depends. He gave an example of a murder of a two-year-old year old child in which the suspect was indicted for felony murder but also for involuntary manslaughter. He said the two crimes have very different penalties, but he charged both ways because he did not want an argument with the court and the defense about whether one is a lesser-included offense of the other. Mr. Murray answered that sometimes the defense does not want a compromise option, and that the decision goes back to the strength of the evidence.

Chair Abaray thanked the prosecutors for their presentations.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:10 p.m.

Approval:

The minutes of the December 10, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the February 11, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray _____

Janet Gilligan Abaray, Chair

/s/ Patrick Fischer

Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, FEBRUARY 11, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 1:40 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, McColley, Mulvihill, Saphire, and Sykes in attendance.

Approval of Minutes:

The minutes of the December 10, 2015 meeting of the committee were approved.

Presentations:

Senator Sandra R. Williams
Senate District 21

Chair Abaray recognized Senator Sandra R. Williams to update the committee on efforts she and other interested parties have undertaken to revise Ohio's grand jury process. Noting the Ohio Constitution currently requires a grand jury indictment in the case of any felony, Sen. Williams said she believes the grand jury process should be removed from the Ohio Constitution. She said she and Senator Charleta Tavares have introduced Senate Joint Resolution 4, a proposal that, if adopted, would require the General Assembly to determine the indictment process. She added that her constituents support the use of a preliminary hearing process, rather than a grand jury investigation, for incidents involving police officer shootings. She said the high-profile nature of these incidents signifies that the public is already aware of the investigation, negating the need for secrecy.

Identifying four recommendations she would like the committee to support, Sen. Williams first suggested the General Assembly should adopt legislation requiring the attorney general to appoint a special prosecutor to investigate and, where necessary, charge a suspect in cases involving a law enforcement officer's use of lethal force against an unarmed suspect. She said these high-profile cases currently are tried by local prosecutors who often have worked closely with the law enforcement officer being investigated. She said she has introduced Senate Bill 258 in order to make this change in the law, saying her proposed legislation is similar to a New York Executive Order as well as New York legislation concerning cases involving the use of lethal force. She said the purpose of her bill is to remove perceived bias and establish an acceptable standard for the investigation of lethal force cases in which a suspect is unarmed.

Sen. Williams additionally advocated the court appointment of an independent grand jury counsel to advise the grand jury on procedures and legal standards. She said this reform could be established either by legislation or by amending the constitution; however, she said amending the constitution is more practical because it would eliminate constant adjustments to the process that are inherent in statutory law. She said this concept derives from a similar provision adopted in a 1978 amendment to the Hawaii Constitution. She said, the Hawaii provision specifically indicates, at Article I, Section 11, that whenever a grand jury is impaneled there shall be an independent counsel appointed as provided by law to advise the jurors, and that the independent counsel will be selected from among licensed attorneys and will not be a public employee. Sen. Williams advocated the grand jury counsel having specific guidelines about interactions with jurors, and that the prosecutor should not be the only source of legal guidance to the jury. She said this would be another way to provide transparency to the process, removing as it does the current ambiguity caused by allowing the prosecutor to be both active participant and referee. Describing how this would work in the grand jury room, Sen. Williams said the prosecutor would be able to present the case and offer his opinion on possible charges that apply, as determined by the evidence provided, but jurors' questions would be answered by the independent counsel, who could explain the proceedings based on law rather than on best trial strategy. Sen. Williams added that the independent counsel would be selected by the presiding judge of the local common pleas court, and the length of service of the counsel would be determined by law.

Sen. Williams also recommended that the General Assembly or Supreme Court would expand the rules and set standards allowing access to grand jury transcripts. She said this practice is being followed in Indiana, which had enacted legislation requiring transcripts to be made available to requesting parties. She said the Indiana law requires the requesting party to make a formal request and pay for the transcript. She added an additional possibility, not used in Indiana, would allow those directly impacted by a grand jury outcome to request the transcript. Sen. Williams suggested the committee could support a request that the Supreme Court create a system and procedure for releasing transcripts in grand jury cases. If there are concerns about witness privacy, Sen. Williams said sensitive information could be redacted. She said current Ohio law is unclear on whether a private citizen or entity could receive a transcript of a grand jury hearing, but that legal research suggests that the transcript may only be available to a defendant who must request a court order, and that only where there is a question about inconsistencies in testimony is the request granted. Sen. Williams said New Hampshire's court rules are an example of clear guidelines for allowing a transcript to be provided.

Sen. Williams' additionally recommended a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise. She noted the Tamir Rice case in Cuyahoga County as an example. In that case, the prosecutor did not ask the grand jury to vote on whether to indict the officers being investigated for using lethal force against an unarmed suspect. She said if an independent panel were created, it could review the actions of the prosecutor in that type of case to determine if proper procedures were followed. Sen. Williams added the independent panel would be useful in cases in which there is a significant question whether the prosecutor is overcharging or undercharging, thus restoring openness to the process. She said this recommendation would retain the need for secrecy while allowing review if there is a question whether the prosecutor is conducting the investigation in good faith.

Sen. Williams acknowledged that the secrecy component has been an integral part of the grand jury process, but said modern realities demand that there be some way to review the proceedings in cases in which there is significant public interest, where the public may feel justice is being circumvented, or where motives are viewed as politically expedient. She said when it comes to high profile cases, the secrecy of the process and, in many cases, the evidence presented, no longer retains the need to be secret. She said the current grand jury system in Ohio operates without any mechanism to review the process.

Sen. Williams acknowledged there are many ways to provide transparency in the process, but the four recommendations she noted would be reforms that would "remove the current unfettered control prosecutors currently have over grand jurors," and would bring about a reviewable process. She concluded by emphasizing that the current grand jury system is in need of reform, and urged the committee to recommend goals and parameters for improvements to the system.

Sen. Williams then answered the committee's questions. Committee member Jeff Jacobson said he shares some of Sen. Williams' concerns about the grand jury process. He said the Hawaii model would be worth a further review, and wondered whether the committee could obtain additional research and possibly hear from someone with knowledge of that system, specifically how it has operated and whether there have been any complications. Chair Abaray noted a staff memorandum discussing the Hawaii model, referencing research by Professor Thaddeus Hoffmeister at the University of Dayton School of Law.¹

Mr. Jacobson said he also likes the concept of having a judge review the grand jury transcript. He said he is not sure the transcript should have to be made public, but a system in which someone could review the proceedings to determine if something inappropriate happened would provide protection, even if one is concerned about breaking the secrecy or exposing witnesses to unnecessary risk. Mr. Jacobson added he appreciates Sen. Williams' efforts and expressed support for having the committee spend some time with her proposals.

Sen. Williams noted that the staff of the Senate Democratic Caucus, as well as the Legislative Service Commission, have researched her proposals. She said the options that she has put forth

¹ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. Crim. L. & Criminology 1171 (2007-08).

are one way to have secrecy while at the same time offering some sense of transparency. Chair Abaray said that, in addition to Hawaii, the systems used in New York or Pennsylvania should also be considered.

Mr. Saphire said, other than the notion of a general counsel, it is unclear to him which of the other proposals merit a constitutional amendment, as opposed to Supreme Court rules or legislative action. Sen. Williams responded that all proposals could be the subject of statutes enacted by the General Assembly, but it would be better for the change to be embedded in the constitution so that the procedure is not changed when someone decides they do not like it or there is a new General Assembly.

Mr. Saphire asked whether any states require special prosecutors in law enforcement use-of-excessive-force situations. Sen. Williams said she would try to find out the answer to that question. Mr. Saphire said the notion of having a general counsel is interesting and that he agrees with Mr. Jacobson on that point. Mr. Saphire asked whether Sen. Williams agrees that if general counsel is appointed the prosecutor should be in the room, but the jury could decide whether to direct its questions to the general counsel or to the prosecutor. Sen. Williams said the special counsel should be the only one describing the legal parameters to the grand jury because it is best to have an independent person providing the law. She noted an incident in Wisconsin in which the prosecutor gave false information to the grand jury, saying the assistance of an independent counsel could have prevented that situation.

Committee member Dennis Mulvihill asked whether Sen. Williams believes the grand jury process is most questionable when the subject of the investigation is a public official or police officer, or whether the problem is broader. Sen. Williams said the problem occurs in all cases. She said when there is a process in which a prosecutor can allege numerous charges just to scare the subject into accepting a plea, having a judicial panel to review that procedure would make the system more transparent and would reduce the number of persons in the criminal justice system.

Mr. Mulvihill said, in his experience, the process of appointing a special prosecutor in high profile cases does not help because a special prosecutor is no more unbiased than the local police. He said he would have concerns about using special prosecutors because they come with the same bias as the local prosecutor, adding the problem goes all the way up to the attorney general and the Bureau of Criminal Investigations. Mr. Mulvihill said he thinks that, in addition to grand jury reform, the committee might want to consider requiring a special office that has no relationship with any police force to investigate high profile cases. He asked whether, if no other change is made, Sen. Williams would advocate making an exception to the secrecy rule. Sen. Williams said she agrees having a special prosecutor probably will not rid the system of problems. But, she said, coupling a requirement for a special prosecutor with a preliminary hearing process that is open to the public might make the system more transparent. She said, when it comes to investigations of public officials and law enforcement, the transcript should be made available, because public officials should be held to a higher standard.

Chair Abaray asked whether Sen. Williams has considered requiring the grand jury instructions to be docketed, as well as docketing any law that was provided to the grand jury, so that the

public could review what information was provided to the grand jury. Sen. Williams said she sees no problem with that information being made available to the public.

Representative Robert McColley said he likes the special counsel idea, asking whether that person would have to be someone with experience in the criminal law area, such as a former prosecutor or defense attorney. He also wondered how Hawaii resolves conflicts of interest, such as where counsel appointed by the court may wish to continue appearing in cases before that court. Sen. Williams said she does not have any specific information on that, but she would envision that the special counsel in that courtroom should not be practicing there and that it has been suggested that the person come from an entirely different part of the state and have no involvement with that prosecutor or courtroom. She said she would suggest that rule because it would promote transparency.

Rep. McColley wondered about the practical effect of requiring special counsel to have no connection to the court or county in question. He said the idea of having 88 different counsels, one for each county, all over the state would be difficult to carry out, particularly in rural areas. Sen. Williams suggested one solution might be to have special counsel be someone who doesn't practice law at all, such as a law professor.

Chair Abaray noted the memorandum in the meeting materials contains further information about the process in Hawaii, specifically that the special counsel is a short-term appointment, and is a local attorney who must be unaffiliated with the state.

Representative Emilia Sykes offered the example of visiting judges or senior judges, who are retired but will sit for other judges. She said that may be a source of persons who could provide the special counsel service. She asked whether Sen. Williams' proposal regarding obtaining the grand jury transcript is limited to the situation in which there is actually an indictment, or whether the transcript could be obtained when there is a "no bill." Sen. Williams said the transcript could be obtained in either case.

Chair Abaray said she was assuming that if there is public interest but no indictment is returned a transcript would be available. Sen. Williams said that is correct, noting that in the Tamir Rice case the public has expressed an interest in knowing what evidence was presented to the grand jury.

Timothy S. Young
Ohio Public Defender

Chair Abaray then recognized Attorney Timothy S. Young, Ohio Public Defender.

Mr. Young said the relevant question is not whether Ohio should have grand juries, for the reason that grand juries are "a vital and important step in the criminal justice process." He continued that, when used correctly, a grand jury protects the innocent as well as being a first step in the prosecution of those who have committed crimes. However, he said, the unfettered, unchecked secrecy in the process sets it apart from the rest of the justice system and society's basic ideals relating to government.

Noting that government is based on checks and balances, and that many governmental entities are subject to oversight, Mr. Young said the rest of the criminal justice system is transparent, with trials being adversarial, in public, and overseen by a judicial officer. In addition, he said, error correction is built into the system with appellate and post-conviction processes. However, he observed, “there is no error correction for a grand jury process that has gone wrong or been misused.”

Discussing the legal basis for the grand jury process, Mr. Young described that the Ohio Constitution is silent on the issue of secrecy, which, instead, is addressed in R.C. 2939.01 through 2939.24, as well as Crim.R. 6(E). He said secrecy applies both to the jurors’ deliberations and votes, and to the evidence and testimony that were presented to them.

Although the concept of secrecy is now codified, Mr. Young indicated it originally arose out of the common law, and was intended to protect the reputation of the accused, to prevent the escape of a person whose indictment may be contemplated, to insure the freedom of the grand jury in its deliberations, to prevent interference with witness testimony, and to encourage witness disclosure of evidence.

Discussing whether secrecy is still needed after an indictment has been issued, Mr. Young indicated that, at that point, there are no more privacy interests to protect. He said, despite this, prosecutors and legal precedent maintain a continuing need for secrecy, and will block a defendant’s effort to obtain the names and testimony of witnesses who appeared before the grand jury. Mr. Young indicated that, in such an instance, a defendant can only obtain this information by demonstrating a particularized need for the evidence, a standard that he said is “nearly impossible” to meet. He said defendants cannot give detailed descriptions of what they need access to when they have not been allowed to know the content of the transcript. He added that he does not advocate that the entire transcript necessarily be provided, but that the witnesses’ testimony should be available if there is inconsistency.

Mr. Young said his conclusion is that no policy is being served by this practice. He remarked, “if justice is the ultimate goal, then there is no supportable rationale for maintaining the secrecy of witness testimony before a grand jury when that same witness is in court giving testimony on the same matter,” adding that fewer wrongful convictions would result if attorneys could confront and cross-examine witnesses regarding any differences between their trial testimony and their grand jury testimony.

Mr. Young said another area where secrecy is not needed is in the case of police shootings or where a public official is accused of wrongdoing related to his or her official duties. He said maintaining secrecy in those cases frustrates the general public as well as arguably violating the defendant’s right to confront trial witnesses with prior sworn statements to the grand jury. He said, in these high-profile cases, the public already knows about the incident from media reports, as well as knowing the identity of the persons involved. He said, in those instances, “there are no viable privacy interests to protect that outweigh the public’s valid interest in these types of proceedings.” He further noted that secrecy involving government officials can cause public distrust in government, and undermines notions of fairness in the justice system.

Mr. Young also emphasized the importance of distancing the local prosecutor from involvement in the presentment of a high-profile law enforcement or public official case to the grand jury. He said the issue is not whether the prosecutor can be unbiased, but whether a perception of bias is created. He said the standard of avoiding the appearance of impropriety is the guiding principle in those cases. He added, because it is necessary for the prosecutor to have a close working relationship with law enforcement, the local prosecutor in such cases is easily subject to accusations of bias and favoritism. Thus, he said, a process that creates an independent investigating authority is needed in those cases. To address this issue, Mr. Young suggested that if the case involves a police shooting, the local prosecutor should not conduct the proceedings, which, instead could be undertaken by a retired judge, whose experiences and knowledge as well as disconnection from the local electorate, would allow the grand jury investigation to be conducted in an impartial manner.

Mr. Young recommended the following reforms to the grand jury process:

- The grand jury should remain as part of the criminal justice system;
- After indictment, protection of the testimony of trial witnesses is no longer necessary, so that their testimony should be made available to the court and counsel;
- The secrecy requirement should be eliminated in cases involving the conduct of a public official in the performance of official duties; and
- In the case of a police shooting, a separate independent authority should be charged with the investigation and presentation of the matter to the grand jury.

Having concluded his remarks, Mr. Young then answered the committee's questions.

Mr. Saphire noted that the committee has heard from two prosecutors who say the system works fine. He asked Mr. Young why he believes the system is working well. Mr. Young answered that, in his career, there have been instances when a client was not indicted, but that the people's reputation in their private lives is important. He said if the grand jury process is replaced by a preliminary hearing process, the accusations have been made public. He noted there are "he said/she said cases," in which there is no overwhelming proof; for instance if someone is accused of sexual misconduct. He noted there are wide-ranging implications in that situation, and for that reason it makes sense to have a grand jury in our system of justice.

Chair Abaray asked for clarification about witness statements versus actual testimony, wondering if defense attorneys get access to transcribed witness statements in the current system. Mr. Young said they are supposed to get them, and his presumption is that they do, noting that he rarely gets summary statements that come out later that are slightly different. He said if the witness actually testifies before the grand jury, and an indictment results, there is little or no reason why that should not be transcribed and provided to court and counsel. Chair Abaray followed up, asking whether Mr. Young is suggesting that the transcript would be available live in the grand jury room or whether it would be made available later. Mr. Young said the transcript would be provided later.

Mr. Mulvihill asked about the idea of having a retired judge conduct the proceeding, wondering who would do the investigation that the retired judge would rely on. He said his concern is that the investigation process in a police shooting incident is inherently flawed, with officers not wanting to delve deeply with witnesses who may provide inculpatory evidence. Mr. Young said there are a number of options, including investigators in his office, in the attorney general office, or in a private investigation business, and that a fund could be set aside to have them do the investigation. Mr. Mulvihill said he is not confident that attorney general provides unbiased investigations. Mr. Young said he tends to agree there is a concern, but he would be less concerned if investigators were working at the direction of a retired judge. He said he would hope at that point the retired judge would object if the investigation shows signs of bias.

Chair Abaray asked Mr. Young's opinion of the special counsel concept used in Hawaii, wondering if Mr. Young also had opinions of systems used in New York and Pennsylvania. Mr. Young said he is less familiar with other states' processes, but his concern with using special counsel is what would occur if a question arises and the special counsel is not immediately available. He said if that system is adopted, counsel would have to be available whenever the grand jury is in session. He noted that "error correction in our system is a good thing. We will make mistakes, but it is about error correction."

Committee Discussion:

Chair Abaray then asked committee members to provide their impressions of the proposals for changing the grand jury procedure, and to give guidance on questions meriting further research.

Mr. Mulvihill said he is concerned that there is a great potential for abuse of the process. He observed that when police officers are investigated the system can be abused, for the reason that human nature can prevent law enforcement from being objective when it investigates law enforcement. He said he would support further discussion of how to conduct a grand jury investigation when law enforcement is being investigated. He said he likes the Hawaii concept, as well as Mr. Young's point about transparency being needed once the person is indicted. He said he also likes Sen. Williams' point about transparency being needed even when a person is not indicted.

Chair Abaray wondered whether there would be an equal protection issue if a transcript is released in one situation but not another. Mr. Mulvihill said he is not sure that releasing the transcript is violative of the rights of the person under investigation. He said if the prosecutor can release the transcript when it serves the prosecution, and the decision is not made on the basis of secrecy, there is no concern about violating the rights of the suspect.

Rep. McColley said the proposals are all interesting concepts, adding he appreciates what Mr. Young said regarding inconsistent statements after the indictment. He said he is in favor of keeping the grand jury in some form, but he is still trying to digest what that form should be.

Mr. Saphire said he is not sure he has heard enough criticism suggesting the solution to the problem is the abolition of the grand jury. He said there are issues that need to be addressed, adding he likes the concept of having an independent source of legal advice. He commented that

the two prosecutors who testified to the committee claimed they were independent legal advisors to the grand jury, but that he has a fair amount of skepticism about that. He said the idea of having an independent legal advisor available to the grand jury is interesting to him. He said although the idea of increasing transparency is interesting, he wonders if changes should be made through constitutional revision, as opposed to legislative reform. He said he is open to proposals or formulations of constitutional language that would address secrecy issues, but Supreme Court involvement in playing a more active role might be helpful. He said requiring transcripts is also a good idea, but he is not sure constitutional revision is the best way to do that. Except for the Hawaii experience, he said he is not sure whether other states have reformed their procedures at the constitutional versus the nonconstitutional level. He said it might be good to see some proposals with some actual language. He concluded he is still thinking about how to address this, but has no concrete ideas right now.

Judge Pat Fischer said he is leaning toward the views expressed by Mr. Sapphire, and that he has not heard anything that rises to the level of a constitutional dimension. He noted the proposals could come about through action by the General Assembly; for example proposals two and three by Mr. Young and proposals two, three, and four by Sen. Williams could be addressed by amending Crim.R. 6(D) and (E). He added Mr. Young's proposal number four would have to be done by statute. He said he does not believe these changes rise to the level of the constitution, but could be done more easily by going through the General Assembly or the Supreme Court rulemaking procedures, which would allow more flexibility for change. He noted that secrecy matters, and this is why the grand jury exists. He said other issues, specifically the availability of transcripts, can be dealt with by court rules. He said "we are at a level where we do not need to alter the state constitution to reach changes that people will want."

Clarifying his position, Mr. Sapphire noted he is not averse to constitutional change, but does not want to codify all issues in constitutional language. He said there might be ways to deal with issues in constitutional language. He said he would be willing to consider something like the Hawaii proposal, but he would benefit from more research on the question.

Chair Abaray said it is not necessary or imperative to change the constitution, but that she agrees with Mr. Sapphire that there may be some issues important enough that the committee would want to propose that they be put into the constitution. She added the specifics then could be addressed by the legislature. She noted her concern, which arose after hearing from the two prosecutors who presented to the committee, that there is no standard for uniformity in how any given grand jury is charged or instructed in the state. She said it sounds like county prosecutors can make their own rules. She said, in her view, there are certain things that should happen the same way, for example, there is a requirement that a civil jury have the same jury instruction on what the law is; so this should be true in the criminal area as well.

Mr. Sapphire asked Sen. Williams whether she is offering the Hawaii approach as a model for the committee to consider. He said he would encourage her, if she thinks changes are suitable for constitutional amendment, to bring forward specific proposals for constitutional amendments. Sen. Williams said she would continue to work on this. Mr. Sapphire noted he would follow up with Prof. Hoffmeister regarding the Hawaii experience to see if more information might be made available to the committee.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:54 p.m.

Approval:

The minutes of the February 11, 2016 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the June 9, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray

Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer

Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE FOR THE MEETING HELD THURSDAY, JUNE 9, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:50 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, Kurfess, Sapphire, Skindell, and Sykes in attendance.

Approval of Minutes:

The minutes of the February 11, 2016 meeting of the committee were approved.

Presentation:

*“Grand Jury Legal Advisor”
Professor Thaddeus Hoffmeister
University of Dayton, School of Law*

Chair Abaray announced the committee would be continuing to consider the right to a grand jury hearing as provided in Article I, Section 10. She introduced Professor Thaddeus Hoffmeister of the University of Dayton School of Law, who was present to describe the role of the grand jury legal advisor as used in Hawaii.

Prof. Hoffmeister testified that the grand jury legal advisor (GJLA) is a licensed attorney who neither advocates on behalf of nor represents anyone appearing before the grand jury, but serves as counsel to the grand jurors. The role of the GJLA is to provide grand jurors with unbiased answers to their questions, legal or otherwise.

He noted, historically, the grand jury was an independent body, and the prosecutor had a limited role in the process. He said when communities were small and crimes were simple, the grand jurors were actually more knowledgeable than the prosecutor regarding both the law and the controversies giving rise to the investigations.

Later, when the population grew and prosecutors became more specialized, the courts allowed the prosecutor to play a larger role in educating the grand jury. Prof. Hoffmeister said, in Ohio, the grand jury is instructed that one of the duties of the prosecutor is to address any questions of law. The grand jury is specifically instructed by the court to follow the advice of the prosecutor. He said, further, grand jurors are instructed that while they may call for additional instructions from the court, the information provided by the prosecutor “will probably be sufficient.” With the prosecutor taking the role of both presenter of evidence and advisor of law, Prof. Hoffmeister observed the balance of power is reconfigured to greatly favor the prosecutor. He emphasized, under this model, the grand jury no longer carries out its role as an independent body, promoting fairness and justice in the community, but is viewed as the arm of the prosecution.

Prof. Hoffmeister further explained that, historically, the grand jury facilitated community involvement in the criminal justice process, acting as the bulwark between the accused and the government. Deciding not only questions of probable cause, the grand jury also has the ability to decide the wisdom of criminal laws or their applicability to certain behaviors and situations, as traditionally, the grand jury has the power to fail to indict even on the finding of probable cause. While it is the petit jury that makes the final determination of guilt, it is the grand jury’s determination of probable cause that ultimately starts the criminal justice process. He said the evolution of the role of the prosecutor has caused the grand jury to lose its traditional independence.

Prof. Hoffmeister advocated that introducing a GJLA to the process is one possible solution to restoring grand jury independence. He said the GJLA could be appointed by a common pleas judge who would also be responsible for settling any disputes between the GJLA and the prosecutor, which rarely arise. The GJLA’s main job would be to support grand jurors in their determination of whether to issue an indictment. The GJLA would also be called on to research and respond to questions posed by the grand jurors. However, he noted there is no duty for the GJLA to present exculpatory evidence or to advise witnesses. He said the proposed GJLA typically serves for one or two year terms and is present during all grand jury proceedings.

He also noted the GJLA can assist prosecutors because better informed grand jurors will be more likely to scrutinize the evidence and the law. He explained that informed grand jurors are better able to screen cases and alert prosecutors to situations that may result in a not guilty verdict at trial. Prof. Hoffmeister said the grand jury, with the aid of the GJLA, will assist the prosecutor in testing different legal theories, both correcting and improving the prosecutor’s case. In addition, the credibility of the indictment will be strengthened, improving the prosecutor’s hand in approaching plea deals that more accurately reflect pending charges. Finally, he said a more independent grand jury allows the prosecutor to avoid the appearance of impropriety which currently plagues the process.

Chair Abaray thanked Prof. Hoffmeister for his presentation, asking whether committee members had questions.

Committee member Jeff Jacobson asked how long the GJLA system has been used in Hawaii and in the military. Prof. Hoffmeister said Hawaii has used the system since the late 1970s, and the military, depending on which branch, has been using it since the mid-1960s.

Mr. Jacobson noted the recent controversy over a failure to indict police officers, noting that in the past the concern had been with over-indicting, rather than under-indicting. He wondered if the GJLA would make prosecutors more circumspect.

Prof. Hoffmeister said he has not seen a study that answers that question. He said he has not seen that military prosecutors have been limited in their ability to go forward. He observed the presence of a GJLA “works around the edges,” meaning that prosecutors do not ignore facts, or obfuscate things, but rather, the biggest benefit of having someone else in the room is that the prosecutor has to run a tighter ship and be more prepared. He said, because the grand jury process is the only one done in secret, having a neutral person in the room will require the government to bring stronger cases. He emphasized the importance of that fact because, he said, very few cases go to trial because the indictment usually produces a plea deal.

Mr. Jacobson noted the bigger problem is the over-indictment designed to produce plea bargains; calling that practice “a power grab by the prosecutor to ensure he does not have to go to trial.” Mr. Jacobson asked how the process works with a legal advisor in the room, wondering if the legal advisor can ask questions.

Prof. Hoffmeister said the GJLA can neither ask questions nor get jurors to ask questions. He said they take their role as a neutral party very seriously. He said they are simply there to observe and to answer questions. He said the GJLA is not with the jurors when they deliberate, and that, if the GJLA disagrees with the prosecutor regarding a legal interpretation, the common pleas judge has to decide the issue. However, he said, that is rare.

Prof. Hoffmeister continued, saying it is easy for the prosecutor to testify or comment on facts, but the GJLA only answers questions. He said the prosecutor is not allowed to testify and will not do that if the GJLA is in the room. He said the GJLA can answer legal questions, and would identify hearsay when he sees it, where the prosecutor might not.

Chair Abaray noted that, in his law review article, Prof. Hoffmeister said the federal court grand jury is the arm of the prosecution.¹ She wondered if that is also true in Ohio.

Prof. Hoffmeister said, similarly to the federal system, over time the Ohio grand jury became an adjunct or arm of the government. He said, because the grand jury does not have the resources or the knowledge to be independent, by nature the grand jury is more inclined to rely on the prosecutor.

Chair Abaray asked if there are other safeguards in Hawaii that Ohio does not have and what remedy there is if problems arise.

¹ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. Crim. L. & Criminology 1171 (2007-08).

Prof. Hoffmeister said just the mere presence of the GJLA cleaned up a lot of problems. He said one GJLA was bothered by what the prosecutor was doing, told him and he stopped. He said in that instance, the prosecutor was taking an informal approach, being too familiar with the jurors, and the GJLA pointed out that conduct and changes were made. He said the GJLA can approach the prosecutor and if the problem is not solved, he can raise the issue with the judge.

Committee member Richard Saphire noted there are a variety of issues and problems relating to grand juries, and different proposals for reform. He said he finds this proposal interesting. He said the committee had presentations by two prosecutors and the Ohio public defender, none of whom advocated for legal advisor. He said because it is not that prevalent of a practice, there is not much data on what the GJLA ought to be. He wondered, if Ohio were to adopt this reform, whether it should be constitutionalized, and whether the specific responsibilities of the GJLA should be described in the constitution, in statute, or in a Supreme Court rule.

Prof. Hoffmeister said he has not thought about that. He said he would be hesitant to get into specifics in a constitution. He said he would be deferential to the Supreme Court to spell out the guidelines, but that he could see arguments for going another route.

Mr. Saphire asked, if Prof. Hoffmeister had the responsibility as a member of a Supreme Court task force, or as a judge supervising criminal process in the court, how he would define or describe the role of the GJLA.

Prof. Hoffmeister said a job description for a GJLA might say the person must have a criminal law background, would need to be able to attend grand jury hearings on a regular basis, would need to be on call for that purpose, and would serve a term of one or two years. He said whether the job is full time would depend on the jurisdiction, because he is not sure rural counties can keep a GJLA employed full time. He said, depending on the locale, a court may need several GJLAs. He said Hawaii does not require the GJLAs to be there all the time, instead using an on-call system. He said he advocates that person staying in the jury room the entire time, but would have to think about the role they would play. He said the GJLA might ride the circuit in some of the rural counties, but that, in any event, the GJLA could not be in this position and have another job in the government.

Judge Patrick Fischer asked which branch of government Prof. Hoffmeister believes the Ohio grand jury is part of.

Prof. Hoffmeister noted most authorities believe it belongs in the judicial branch. He said Justice Antonin Scalia once said it is the fourth branch of government. Prof. Hoffmeister said it is judiciary, but the prosecution has such sway that it is in theory only that the grand jury is part of the judiciary.

Judge Fischer asked whether the GJLA is permitted to discuss matters with the grand jurors while the prosecutor is in the room. Prof. Hoffmeister said that is how it works. Judge Fischer then asked whether there is an attorney-client relationship between the grand jury and the legal

advisor, to which Prof. Hoffmeister said the GJLA role is to advise the grand jury, but there is no attorney-client relationship.

Judge Fischer wondered if the position of legal advisor necessarily needs to be in the constitution. Prof. Hoffmeister said that question is beyond the scope of his expertise, but if the role is constitutionalized, it increases the likelihood that it cannot be removed by the next person who disagrees.

Judge Fischer wondered who would have standing to raise a claim if the GJLA is in the constitution but a county refused to allow a GJLA or pay for it.

Prof. Hoffmeister suggested the defendant would raise it as a claim, to which Judge Fischer replied that this suggests the attorney-client relationship is between the legal advisor and the defendant.

Prof. Hoffmeister continued that the defendant would argue to dismiss the indictment. Mr. Sapphire added the defendant could also state a due process claim.

Committee member Charles Kurfess said the role of the grand jury has been a concern to him ever since he was a common pleas judge. He said he used to give the grand jury copies of the statutes applicable to what they would hear until the prosecutor refused to let him know the details of the cases coming up, even though the prosecutor gave that information to the press. He said the grand jury needs counsel because it has a lot of options when a case is presented, and he is not confident that all of those options are made available to jurors. As an example, he said it may be a simple thing to bring a case of felonious assault, but then the issue might be whether the charge should be aggravated felonious assault. He said that information may not be given to the grand jury, but they ought to be able to ask about it. He said the grand jury needs counsel, and that could be a part-time attorney who is available every time they need it. He said the grand jury should be the judge's grand jury, rather than the prosecutor's. Mr. Kurfess said he objects to the grand jury meeting in the suite of prosecutor offices, a practice that sends the wrong message. He concluded, "if it takes a constitutional provision to give the grand jury counsel, then so be it."

Prof. Hoffmeister commented that it is difficult in the grand jury to get access to records, to raise concerns, and that some judges will hold off a decision on a problem at the grand jury stage until after determination of guilt or innocence. Prof. Hoffmeister said, because it is very difficult to fix problems with the grand jury process, it is good to address those problems on the front end, and the GJLA would go a long way toward that.

Mr. Kurfess said the constitution is clear the grand jury is an established entity for the protection of the accused. He said he was not satisfied when he asked the prosecutors who appeared before the committee if they have looked at the constitution recently to see what the function is and they answered it is just due process. Mr. Kurfess said he disagrees with that view, rather, he believes the purpose of the grand jury in many cases has been usurped beyond its constitutional purpose.

Chair Abaray said she too was disturbed by the testimony of the two prosecutors. She said what struck her was the inconsistency, in that each prosecutor has the discretion to approach the grand

jury process according to his or her own preference. She asked if the grand jury advisor would have authority to report to the court if there were improprieties, or if their role is strictly to answer questions by grand jury members.

Prof. Hoffmeister answered that a good example of a question that the grand jury may ask is whether the defendant can testify and why he is not here to tell his side of the story. He said a GJLA can explain that to the jury.

Chair Abaray said that decision may be within the prosecutor's discretion, but nobody knows about it. She added, if there is not some ability to make some kind of findings, no one would find out.

Mr. Jacobson noted those are two different matters, but that the GJLA may have a duty as officer of court to report impropriety to the judge. Judge Fischer noted that is the reason he asked about the attorney-client relationship.

Mr. Jacobson said he is getting more persuaded about the value of the GJLA. He said it may not be needed all of the time, but possibly in capital cases or serious felonies, the GJLA could be of real value. He said having them present through every step of a capital case for every bit of testimony would make him feel better about the process by which an indictment was arrived at. He noted the grand jury would not know prosecutorial misconduct when they see it.

Chair Abaray noted there may be a difference between prosecutorial misconduct and prosecutorial discretion, but the grand jurors do not have enough knowledge to discern.

Mr. Saphire commented that one reason he was interested in the job description for the GJLA is that, under current practice, it is not clear whether the grand jury itself can go directly to the judge with a question or whether the question has to go through the prosecutor. He noted, if there is a dispute on a matter of law between the prosecutor and the grand jury advisor, there should be a way to resolve that dispute. He wondered if the GJLA has the legal standing to take that dispute to the judge.

Mr. Kurfess said when he was a judge, the first grand jury he ever had, and at the first meeting the grand jury had, the foreman came to him at lunch and said jurors heard this testimony and have not returned an indictment, but the prosecutor wants to bring more testimony. The foreman asked if the jury had to allow the prosecutor to do so. Mr. Kurfess told the foreman "you are running this jury, it is your decision." He said the jury did not take more testimony, but the prosecutor took it to another grand jury and got his indictment. He recalled another instance in which the prosecutor filed a motion asking to release testimony to the investigating officer to assist in the investigation. He said that practice ignored the secrecy obligation. He said the fact that type of request would come out of a prosecutor's office disturbed him greatly.

Chair Abaray asked whether there could be a procedure whereby the court appoints the GJLA and that person is a representative of the court, keeping it in the judiciary.

Mr. Kurfess observed that the court is the entity that has the responsibility to see that the constitutional protections with the grand jury are fulfilled in that judge's court. Judge Fischer commented that the common pleas judge theoretically controls the grand jury, wondering if a GJLA could effectively be a magistrate for the judge and sit in, and report to the judge.

Prof. Hoffmeister said the GJLA in Hawaii is independent, adding the challenge of the grand jury is to protect the citizens' rights but also to investigate people. He said the question becomes when to step in when the grand jury is performing its investigatory role. He said the GJLA is simply an advisor, rather than overseeing how the prosecutor does his or her job.

Chair Abaray asked whether the use of this process in Hawaii has created a better public perception of the grand jury process. Prof. Hoffmeister answered in the affirmative, saying it is surprising that more jurisdictions have not adopted the practice.

Senior Policy Advisor Steven H. Steinglass asked about the cost of the Hawaii system.

Prof. Hoffmeister said the real question is how the role is defined. He said the GJLA can be available on call or there for all times. He said if the GJLA is to attend every proceeding, costs will go up. He observed that when grand jurors have served for a while, they have enough experience to feel more comfortable in the process, to ask questions, and to not be as accepting of what the prosecutor tells them, meaning they may not need a GJLA as often. He said the cost would vary based on the situation.

Mr. Sapphire wondered, if the legal advisor is not in the room and a question arises, whether the prosecutor stops the proceedings and calls the judge. If that is the practice, it could create inefficiencies. He said having the GJLA in the room during the entire period is necessary because of that problem.

Prof. Hoffmeister said the grand jury process is more free-flowing than the trial process. He said if there is a GJLA on call or in the courthouse, questions can be answered fairly quickly.

Chair Abaray wondered if an approach could be to use a GJLA only in certain cases, such as capital cases, or to allow a GJLA at the discretion of the court.

Mr. Sapphire asked whether there is any reason why a common pleas judge could not do this now. Judge Fischer said he is not sure about that.

Mr. Kurfess said he thinks the judge has access to the grand jury proceedings if necessary. He said, if that is the case, it seems that individual counsel to the grand jury is almost the judge's representation. Judge Fischer commented that the argument is the GJLA should be independent.

Mr. Sapphire wondered what the committee's next step would be. He said the issue is worth serious consideration and wondered if staff could draft some proposals.

Chair Abaray commented that Executive Director Steven C. Hollon has a decision tree that provides different options for the committee's consideration. She said the committee could work

its way through the different options, determine what the consensus is, and formalize its questions.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:02 p.m.

Approval:

The minutes of the June 9, 2016 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the July 14, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, JULY 14, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 11:05 a.m.

Members Present:

A quorum was present with Chair Abaray, and committee members Jacobson, Jordan, McColley, Sapphire, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the June 9, 2016 meeting of the committee were approved.

Discussion:

Article I, Section 10 Grand Jury Process

Chair Abaray indicated the committee would be continuing its consideration of potential changes to the grand jury process as provided for in Article I, Section 10, asking committee members to provide input on the issue. She continued that it would be helpful to hear from a criminal defense attorney who has experience with the grand jury system, and that she has reached out to a criminal defense attorney who could attend the committee's next meeting.

Chair Abaray directed the committee's attention to a report prepared by the Supreme Court of Ohio's Task Force to Examine Improvements to the Ohio Grand Jury System, indicating the report had just been issued. She noted a summary on page four of the report indicating the task force was recommending that the attorney general be granted exclusive authority to investigate and prosecute lethal use-of-force cases involving law enforcement.

Chair Abaray then asked each committee member to provide opinions of the various grand jury reform concepts that had been presented to the committee.

Chair Abaray began by offering her own analysis of the topic. She said there are some concepts about which the committee seems to have a consensus, for instance that there is concern about the grand jury being a tool of the prosecutor. She said the purpose of the grand jury historically, which was to protect the accused from false accusation by the government, is thwarted if the grand jury is controlled by the prosecutor, raising the question whether the system has any use. She said there are many states that do not use the grand jury system, but rather just use an information process. She said having a grand jury advisor makes sense. She further noted she does not favor separating out a class of potentially accused persons who would be treated differently in the grand jury system because she is not sure how that could be justified. She said, “if the whole point here is to have a process that the public can trust, then in modern society that comes from transparency and accountability.” She added the accountability derives from the prosecutor having to run for office, and that if the prosecutor loses the public trust that will be addressed in the next election. She said the use of special prosecutors is problematic because a special prosecutor is likely to be a friend of the prosecutor. She wondered if the information system would be a viable alternative, and said she would like more information comparing the information system with the grand jury indictment system.

Committee member Jeff Jacobson said there are two different issues that are conflated together. He said one issue involves the appropriate way to deal with police use-of-force, indicating he is not sure he finds that to be a constitutional question but rather a policy question. He said he likes the idea of the attorney general having authority to investigate and prosecute such cases, but said that is a legislative idea. He noted his other issue is that, despite examples of overzealous prosecution, he does not want to get rid of the grand jury system. He said he is strongly interested in the grand jury advisor system used in Hawaii. He said the presence of a lawyer who is not the prosecutor would be a helpful “guardrail” against anyone’s temptation to abuse the system. He indicated the presence of an attorney who is responsible to the grand jury and not the prosecutor would be helpful, providing assurance that the process would not be subject to abuse.

Chair Abaray asked Mr. Jacobson if he thought the legal advisor should be available in every case or only in certain types of cases, to which Mr. Jacobson replied that he did not think the advisor was necessary in every case.

Representative Robert McColley acknowledged some interesting changes were discussed, but he is not sure that any change would rise to the level of a constitutional amendment. He said he is not in favor of eliminating the grand jury altogether, noting that while some people view the grand jury system as giving the prosecutor too much power, without a grand jury the prosecutor can “absolutely get whatever charge he wants.” He said, while the grand jury provides only minimal safeguards against prosecutorial misconduct, it at least provides some protection. He said, while testimony before the committee supported that there are reasons the grand jury proceeding should be secret, he is concerned about inconsistent statements by witnesses who say one thing in the grand jury, but change their testimony at trial. He said, in that instance, there is usefulness in looking into whether prior inconsistent statements made during the grand jury hearing should be available to impeach a witness in a criminal trial. He said that is the best idea

he has taken away from what he has heard, but that does not rise to the level of changing the constitution.

Chair Abaray asked Rep. McColley whether he would be in favor of a grand jury advisor. Rep. McColley said he has no strong opinion on that, but ultimately he would like to think errors in the grand jury process could be corrected by the court system, where a criminal trial requires a high burden of proof to meet the standard of guilt beyond a reasonable doubt. He said the defense attorney would be sure the prosecutor would have to meet constitutional requirements at trial. He said he can see the benefit of a grand jury advisor but is not sure that is something that should be on the ballot for voter approval in order to amend the constitution.

Committee member Richard Saphire said the only speaker the committee heard who recommended abolishing the grand jury was Senator Sandra Williams. He noted both the state public defender and the prosecutors have argued for retaining the system. He said the idea of a grand jury advisor is the most interesting idea the committee heard, noting there are many advantages to having a grand jury advisor. But, he said, if the committee wants to consider writing a grand jury advisor provision into the constitution, it would have to consider ancillary questions such as how that system would work, and what happens in rural or small counties where it is not practical to have a full-time grand jury advisor. He said that raises the question of how detailed such a provision should be and whether the organizational details should be left to the General Assembly. He said the committee has heard some discussion about the concern over lack of transparency, noting the prosecutors argue transparency can undermine the protective function of the grand jury, resulting in the trial of a person in the press before indictment even occurs. But, he noted, on the other hand, there have been suggestions that it might be a good idea for judges to be more involved in the supervision of grand juries to prevent abuse by prosecutors. He said he is not sure the transparency issue can be constitutionalized. He wondered whether there is any prohibition on the creation of a grand jury advisor under current law, noting the Supreme Court or the common pleas courts may be able to institute this practice without a constitutional provision allowing it. But, he concluded, of the ideas presented, the grand jury advisor idea warrants the most support for inclusion in the constitution.

Chair Abaray asked how states that lack a grand jury requirement obtain criminal indictments.

Senior Policy Advisor Steven H. Steinglass said the prosecutor goes before the judge in open court and the judge makes the probable cause determination. Chair Abaray said she believes that is the system being proposed by Sen. Williams. Mr. Saphire said Article I, Section 10, which reads, in part, that “no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury,” is not written in a way that suggests this is a right of a defendant, but more as an obligation of the state. But, he said, under current practice, the defendant can waive having to appear before a grand jury. He asked whether, in that case, the state would indict through an information process.

Speaking from the audience, John Murphy, executive director of the Ohio Prosecuting Attorneys Association, answered Mr. Saphire’s question in the affirmative.

Mr. Murphy continued that, if the accused waives a grand jury hearing, the prosecutor files an indictment in court, and there is no opportunity for the defendant to contest that charge other

than a motion to dismiss the indictment. He said, unless the defendant files a motion to dismiss that is based on a valid legal reason for dismissal, the process moves on to the trial phase or the defendant enters into a plea agreement.

Chair Abaray, seeking clarification, asked whether the defendant has an opportunity at a hearing to challenge whether there is probable cause. Mr. Murphy said there must be a legal reason to do so. She continued, asking whether, in states that solely use the information process there is an opportunity to challenge the indictment, and Mr. Murphy said he does not know about other states.

Chair Abaray noted that a grand jury indictment can affect whether the accused enters into a plea agreement, whereas in an information situation there is an opportunity to challenge probable cause. She asked whether an information system provides more protection against a coerced plea. Mr. Murphy said he does not know the process in other states, but would presume there is some kind of hearing in an information process.

Mr. Jacobson noted the concept of providing a transcript of the grand jury hearing, saying he thinks that could be helpful, not for public consumption but later for the defense. He said although the transcript could be reviewed by the judge, that would create extra work for the court. He added, if defense attorneys could have access, they could identify any problems with the grand jury proceedings.

Senator Kris Jordan said his instinct is to keep the grand jury process. He acknowledged the argument that prosecutors have too much control, but said the process offers protection for individual rights. He said the changes being considered would be statutory, and so he would not favor either eliminating the grand jury from the constitution or making changes that could be accomplished statutorily.

Chair Abaray asked Mr. Murphy whether a system allowing the accused to challenge probable cause for the indictment provides more protection for individual rights than a grand jury proceeding. Mr. Jacobson asked whether there is some point in the information process where a probable cause hearing must be held.

Mr. Murphy said there is a preliminary hearing that must be held within a certain period of time after arrest. He said prosecutors often indict before the preliminary hearing, which eliminates the need for a preliminary hearing. He said, then, an arraignment is held to provide the opportunity to plea.

Chair Abaray asked whether, through a preliminary hearing, the accused has the right to challenge the evidence. Mr. Murphy said the defense then can cross-examine state witnesses.

Mr. Steinglass said in states that use an information process, the preliminary hearing is where the probable cause determination is made.

Rep. McColley asked Mr. Murphy whether a preliminary hearing occurs after arrest when someone is caught committing an offense, noting that, in his experience, a preliminary hearing can occur even when the accused is bound over to a grand jury. Mr. Murphy said, if the

preliminary hearing process occurs, then the accused can be bound over to the grand jury afterward. He added that a grand jury is used for a long investigation, or where the prosecutor does not want to expose the victim to a public cross-examination before the trial. He said it may be a fairly simple case such as rape but it is to the advantage of the victim to take the evidence directly to the grand jury and not expose the victim to the preliminary hearing process.

Mr. Saphire noted the preliminary hearing is not brought to bear unless or until someone has been arrested, but a grand jury can indict someone who has not been charged or arrested. He asked how frequently the process works that way, where the grand jury is investigating and considering charging someone who has not been arrested. Mr. Murphy said the cases where the person has not been arrested are a distinct minority, usually occurring in a case in which the prosecutor's office or some investigative body has been carrying on an investigation for some period of time.

Representative Emilia Sykes, asked to be permitted to offer her input at a future meeting.

Committee member Mark Wagoner said he supports retaining the grand jury system. He noted Article I, Section 10 leaves the details to statute, and, in fact, R.C. Chapter 2939 offers many details relating to the process. He said it is appropriate for those details to be left to the legislature, and that it is outside of the committee's prerogative to recommend constitutional change in that regard. He commented that none of the Supreme Court task force recommendations called for constitutional change. He said he is intrigued by the idea of an attorney advisor to the grand jury, but nothing in the constitution prohibits that. He concluded that he is comfortable with the current language of the constitution, noting it is outside the committee's charge to engage in policy considerations. But, he said, he does not think any good ideas are prohibited by the constitution, and if the legislature wants to enact law to improve the system the current language allows that.

Chair Abaray noted what she called the "flip side of the policy argument," meaning that, if the committee recommends a revision that could be couched as "policy," it could become an affirmative requirement. She said it is within the ability of the Constitutional Modernization Commission to make affirmative recommendations for constitutional amendments that would advance a particular policy.

Mr. Saphire noted it still is unclear whether the legislature has the power to make a change under the current constitutional provision. He said if he were confident that the legislature or the Supreme Court or common pleas court had authority to allow an attorney advisor, he would be less inclined to recommend amending the constitution. He concluded that he thinks a grand jury legal advisor is a good idea and the legislature might be persuaded, but he is not sure the legislature has the power to do it.

Mr. Steinglass said the General Assembly has broad plenary power to enact legislation, and could establish such a system. He said prosecutors are created by statute, so that logic suggests the General Assembly could create an independent advisor role.

Mr. Wagoner said the issue brings back the earlier question about whether the grand jury is an individual right or a state obligation. He said it invites mischief if the constitution is changed,

because then one could argue a violation of constitutional rights if an attorney advisor is not provided during the grand jury hearing. He said he views the grand jury requirement as an individual right against the power of the state. He said he advocates letting the legislative process work.

Mr. Saphire said, on the other hand, Professor Thaddeus Hoffmeister, who spoke to the committee at its May 12, 2016 meeting, said the Hawaii attorney advisor system works well, and that research suggested no practical problems have arisen. He said Hawaii is the only state that has constitutionalized that practice, and that Prof. Hoffmeister surmised this is a good idea that has not received much publicity.

Mr. Wagoner said he views the constitutional provision as providing for the grand jury as an individual right and that a provision allowing for an advisor simply would be procedural.

Chair Abaray asked whether the committee had any views on whether there should be a change that would distinguish law enforcement use-of-force cases.

Mr. Jacobson said such a distinction does not belong in constitution because categorizing different types of cases could have unintended consequences. However, he said, he can see there being wisdom in the General Assembly considering that question.

Chair Abaray then asked for public comment. Mr. Murphy remarked that the attorney advisor idea is unworkable. He said the grand jury process is accusatory, not adjudicatory. He said that does not mean there should not be some guidance, but, as a practical matter, the attorney advisor is likely to be a prosecutor or former prosecutor or a defense lawyer, someone with knowledge of the criminal justice system. He said he does not think it will work for that person to be advising the grand jury, and that such a system creates conflicts that should not be there.

Chair Abaray asked about the concept of making a transcript of proceedings available, such as the procedure used in New York.

Mr. Murphy said he is not familiar with that practice, but that this is a separation of powers issue. He said prosecutors are the executive branch, and the judge is in the judicial branch. He said the judge should not be reviewing charges before they are filed in the court because those are executive decisions. Asked whether the grand jury is considered to be part of the executive branch or the judicial branch, Mr. Murphy said it is a hybrid, but has more of a judicial function.

Chair Abaray asked Mr. Murphy's opinion of the concept of having a judge review a grand jury hearing transcript, and Mr. Murphy said he would have to think about that question.

Chair Abaray said her plan for the next meeting is to have a criminal defense attorney address the group, asking whether the committee would like more information on how the grand jury advisor process works in the Hawaii procedure.

Mr. Saphire wondered if it would be useful to have staff put together a proposed formulation of a new constitutional provision. He said that might help show how a new provision would fit into the current organization of Section 10, or could show how the amendment could be freestanding.

He said that might help committee members decide whether it is worth going forward with a recommended change.

Chair Abaray said she would like to hear more practical information about how the grand jury advisor works in Hawaii.

Mr. Wagoner noted he is comfortable with the current language and would not vote to change it. He said he is not sure the committee should continue to consider grand jury reform at another meeting if the votes are not there. As for a new topic for the committee to consider, he said he would recommend looking at the structure of the judiciary. He said the committee has not delved into the Modern Courts Amendment, specialized dockets, court consolidations, and other topics related to the functioning of the state court system. He said there are constitutional provisions that inhibit reorganization of court system, and he would like the committee to consider those issues. He noted the committee may want to consider whether commercial dockets should be provided for in the constitution, as well as considering reorganizing the county and municipal court organizational system.

Mr. Jacobson suggested the committee could both conclude its consideration of the grand jury process and begin to address Mr. Wagoner's topics at its next meeting. He said it is important to see if there is a consensus regarding grand juries once the committee has more information, but that the organization of the court system also could be addressed.

Chair Abaray noted that, in the absence of some members, she did not want to bring the grand jury question to a vote today. She said she will work on an agenda for the next meeting, which will take place in September.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:12 p.m.

Approval:

The minutes of the July 14, 2016 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the September 8, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray

Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer

Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE FOR THE MEETING HELD THURSDAY, SEPTEMBER 8, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:36 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, Jordan, Kurfess, Mulvihill, Sapphire, Skindell, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the July 14, 2016 meeting of the committee were approved.

Discussion:

Article I, Section 10 Grand Jury Process

Chair Abaray began the meeting by noting that Nancy Brown, director and advocacy committee chair for the Ohio League of Women Voters, who had attended many of the committee's meetings, has moved out of state. Chair Abaray acknowledged the service of Ms. Brown, saying she would be missed.

Chair Abaray announced that the committee would be continuing its discussion of the grand jury process, specifically, whether to recommend any changes to Article I, Section 10.

Committee member Richard Sapphire asked whether Professor Thaddeus Hoffmeister of the University of Dayton College of Law, who was present to assist the committee, could clarify some aspects of the grand jury procedure.

Professor Hoffmeister said the right to a grand jury hearing in the United States Constitution is one of the few rights that have not been incorporated in the states, noting a majority of states do not have a grand jury, with some states allowing the prosecutor to file an information. Professor Hoffmeister said an information is the equivalent of a criminal complaint. He said, in Ohio, the citizen has right to a grand jury hearing unless he has already been indicted.

Describing the preliminary hearing process, Professor Hoffmeister said in that setting the accused is entitled to have counsel present and has an opportunity to cross-examine prosecution witnesses and put on witnesses in his own defense. Professor Hoffmeister said the grand jury was conceived as a way to buffer the citizen from the government and to have community conscience in the criminal justice process. He said the issue is important today because so often criminal cases do not go to trial. He said using a grand jury is one of the few examples of how the community can be involved in the process. He said a big difference between a grand jury hearing and a preliminary hearing is that the preliminary hearing is presided over by a judge, and is open to the public and is adversarial, while the grand jury process involves the community and is closed.

Mr. Saphire asked whether an individual who is arrested and charged has a right to proceed by preliminary hearing and waive the grand jury. Professor Hoffmeister said a person who is already indicted has lost the right to a preliminary hearing.

Mr. Saphire asked whether someone who has not been charged but has been notified they are under investigation can insist that there be a grand jury in order to proceed. Professor Hoffmeister answered that the government is always going to have to get an indictment absent a waiver by the defendant of the grand jury. He added that, if the prosecution does not indict within ten days of charging there has to be a grand jury unless it is waived. He said a preliminary hearing is very rapid fire, adding there is benefit to the defense and the prosecution to have the preliminary hearing, especially if it is a sensitive case, because it lets people see the evidence. He said a preliminary hearing can facilitate a plea bargain.

Committee member Charles Kurfess asked what the issue is before the court at the preliminary hearing. Professor Hoffmeister said the question is whether there is probable cause for the charge to go forward.

Mr. Kurfess asked if the court makes a ruling, and what alternatives are available to the court at the preliminary hearing. Professor Hoffmeister said the court does make a ruling, and there are a number of alternatives available, including finding probable cause and, if the hearing is in municipal court, binding the person over for trial in common pleas court.

Professor Hoffmeister continued that most states use preliminary hearings, some use the grand jury, and some allow the filing of an information, but even there a judge is required to agree there is probable cause. He commented that “by waiving a grand jury you are agreeing there is a true bill.”

Mr. Saphire wondered whether an accused who waives the grand jury submits to indictment. Professor Hoffmeister said the accused who waives under the federal system improves his

position for sentencing. He said the more an accused can show he cooperated, the better his sentencing is likely to go.

Mr. Saphire asked whether, by waiving his right to grand jury, the defendant is incriminating himself. Professor Hoffmeister said he would not go that far, saying the defendant is strategically deciding what rights he will exercise that are going to benefit him at the end of the day. He added, "If you go to trial they will impose a 'trial tax'."

Mr. Saphire said he is less inclined to believe the grand jury has any value to a defendant. Professor Hoffmeister commented that it does have value if the grand jury truly operates as it has historically, but if a defense attorney advises the client he is likely to be indicted, the defendant is likely to waive. He said that is the scenario if there is only one attorney in the room, because the prosecutor is the only person in the room and there is less pressure to present a compelling case.

Committee member Dennis Mulvihill asked how often the prosecutor recommends a particular indictment rather than leaving the question open-ended. Professor Hoffmeister answered that one of the challenges is a lack of data on that question. He said, outside Hawaii, he does not know how many jurisdictions allow another attorney to be present. He said it may depend on the prosecutor and how strictly the prosecutor follows the rules. He added the prosecutors are much more hands-on than just allowing the grand jury to consider the question alone. He said the prosecutor gives direction, guiding the jurors because there is no one else they can turn to.

Chair Abaray then recognized Attorney Kenneth J. Shimosono, a grand jury legal advisor in Hawaii, who was available via telephonic conference call to answer the committee's questions on the grand jury process in his state.

Mr. Saphire asked Mr. Shimosono how he would characterize the relationship between the prosecutor and the grand jury legal advisor, wondering whether, if jurors pose a question to the prosecutor and are not satisfied with the answer, they can pose the same question to the advisor.

Mr. Shimosono said the relationship is generally professional and cordial. As a legal advisor to the grand jury, he said he recognizes that he has to wear a different hat than he does when he is defending. He said most grand jury counsel are former prosecutors who are now defense attorneys, or they are defense attorneys. He said, in his experience, the relationship has never been antagonistic, and that prosecutors recognize he is not there to influence the jury's decision.

Mr. Saphire asked how the grand jury advisor would handle a question that already had been asked of the prosecutor. Mr. Shimosono said he has not been in that situation, and that, for the most part, the jury does not really question the prosecutor but rather questions the witnesses. He said it is the prosecutor's decision to present evidence as he sees fit, and the jury's questions are directed to the witnesses. He said he has had jurors say afterward they wish the prosecutor had done a better job but they are not telling the prosecutor that.

Judge Patrick Fischer asked if there an attorney-client relationship between the legal advisor and the grand jury. Mr. Shimosono said he would not disclose the jury's questions to the prosecutor so he would believe they have an attorney-client relationship. He said his understanding is that the advisor is there to advise the grand jury, but the grand jury is not the client in the traditional

sense. He noted an attorney-client relationship encompasses a broad range of considerations; for instance, there can be a conflict of interest if the grand jury legal advisor is later asked to represent one of the jurors in a legal proceeding.

Judge Fischer followed up, asking whether the legal advisor owes a duty to the grand jury or to the target of the investigation. Mr. Shimozone said the duty is owed to the jurors and not to the defendant. Judge Fischer wondered who has standing to object if the prosecutor interferes with the legal advisor's access to the grand jury. Mr. Shimozone said he would expect the jurors would notify the legal advisor that they wanted to ask a question but were not allowed. He said, in that instance, everyone goes in front of the administrative judge and puts it on the record in a hearing. But, he said, to his knowledge that has never happened. Judge Fischer asked to whom the legal advisor owes a constitutional duty, to which Mr. Shimozone replied it is not specifically to the defendant but rather to the grand jury.

Committee member Mark Wagoner asked what would happen if the legal advisor provided a wrong answer, left out an element of the offense, or misinterpreted the law, resulting in the grand jury moving forward with an indictment. Mr. Shimozone said the remedy would be for the defense counsel to look at the transcript to see if there were improprieties, and, if so, the defense could file a motion to dismiss the indictment. But, he said, the error has to be material and, if the defendant were found guilty, the issue would be preserved for appeal.

Mr. Mulvihill asked if it is automatic for the defendant to get access to a transcript of the grand jury hearing. Mr. Shimozone said the defendant has to request the transcript, but no one challenges the request. He said supplying the transcript is "more of a given," so that the defendant requests the transcript from the court reporters' office and they pull the video and make a transcript. Or, he said, the defense can watch the video and see if there is an issue, and then ask for the hearing to be transcribed so it can be submitted to the court.

Mr. Mulvihill noted that, in Ohio, the defendant is not entitled to grand jury testimony unless he can show grounds exist for dismissal of the indictment, a rule that seems impossible because it requires the defendant to show something happened when, without access to a transcript, it is impossible to know what happened. Mr. Shimozone remarked that he saw that Ohio rule and was surprised by it.

Mr. Mulvihill asked how frequently Mr. Shimozone uses the grand jury transcript to impeach a prosecution witness who may have changed his story. Mr. Shimozone said the transcript is a tremendous asset to the defense because any time a person gives a version of the facts he will not give the exact same version each time. So, he continued, that is a useful tool for the defense. He said "Not only are we looking to see if there is anything wrong with what was presented, but just knowing what was presented is a tremendous benefit to the defense." He added, if the prosecutor has the benefit of knowing what was presented to the grand jury, the defense also should know.

Mr. Mulvihill asked whether the legal advisor gets a transcript of the grand jury's deliberation. Mr. Shimozone said the legal advisor is only allowed to see the presentation of witnesses and questions by the grand jury to the witnesses and to grand jury counsel. He said the deliberations are not recorded.

Chair Abaray asked if the transcript is free. Mr. Shimozone said there is a charge but if the defendant is indigent, the public defender's office will pay for the transcript. He said the reason there is a cost is that the court reporter must be paid. He said this can be costly, so what defense counsel often does is get a copy of the recording of the hearing and then only request the key parts.

Chair Abaray asked whether the legal advisor is immune for actions taken during grand jury proceedings. Mr. Shimozone said he would believe so, but has not been told that specifically. He said legal advisors are paid by the state, but are independent contractors, so he is not sure if they have complete immunity. He said he is not aware that the issue has been raised. He said even if the legal advisor is not immune, the state attorney general would step in to defend in that situation, similar to what occurs in relation to the public defender.

Mr. Saphire asked whether the duties and responsibilities of the legal advisor are set out in statutes or court rule. Mr. Shimozone said they are set out in statute, and also court rule. He said grand jury legal advisors receive a binder with information about the process, setting forth the powers of the grand jury, Hawaii rules of penal procedure, the duties of the legal advisor, related case law, and procedural rules, as well as a copy of the constitutional provision and statutory references to the grand jury legal advisor.

Mr. Saphire asked how many separate criminal jurisdictions exist in Hawaii, noting that Ohio has 88 counties, each with a separate common pleas court. Mr. Saphire wondered how Mr. Shimozone might structure a grand jury legal advisor system in a state with that many jurisdictions. Mr. Shimozone said Hawaii has five circuits, each with its own criminal administrative judge, and that judge selects the counsel. He said he would assume if there are 88 districts and all are separate, then each would have its own judge and each would have its own legal advisor. He said the chief justice of the Hawaii Supreme Court relies on the recommendation of the the criminal administrative judge when he appoints.

Chair Abaray asked whether Mr. Shimozone has information on what prompted Hawaii to put this in the constitution, and whether the system is viewed as being effective. Mr. Shimozone said he does not know about the history of the provision, although he speculated that it is because Hawaii has a very strong interest in privacy and due process, and so has a more liberal constitution. He said the state expands privacy rights where the federal law is the floor.

As far as the effectiveness of the system, Mr. Shimozone said having the grand jury legal advisor is helpful because it improves the process to have someone there who is more neutral. He said it also may help the grand jurors feel more comfortable that they are getting an unbiased view, so that they have more confidence in the process. He said they have found grand jurors take their duties seriously and they get better at performing their role as the year progresses. He said once the jury catches on to how things work they have fewer questions.

Chair Abaray noted an issue in Ohio concerns the secrecy of the process, with some distrusting the grand jury because they believe the prosecutor is steering the results. She asked whether having the grand jury legal advisor in Hawaii has helped create more confidence. Mr. Shimozone said he thinks it helps but he is not sure because they have not done it any other way. He said he

is not sure the general public in Hawaii even knows there is a grand jury legal advisor present, and that they have not had a lot of high profile cases.

Professor Hoffmeister asked Mr. Shimozono whether, if Mr. Shimozono were advising a jurisdiction about adopting the system, whether he would recommend they do it exactly like Hawaii or whether he would recommend some changes. Mr. Shimozono said he would recommend not adopting the system in its entirety. He said one thing that would make a difference is to require the grand jury counsel to sit through the entire proceedings to get a better grasp of what is going on. He said, under Hawaii's current system, in which the legal advisor is not always in the room, the jury may not realize something is improper and so would not bring it to the legal advisor's attention. He said, as a defense attorney, he would prefer that cases be brought through a preliminary hearing process. He said he has not seen abuse with the grand jury process, but, generally speaking, there was not a huge problem when he was a public defender, although sometimes there was a little more hearsay evidence than he thought was appropriate.

John Murphy, executive director of the Ohio Prosecuting Attorneys Association, who was in the audience, asked Mr. Shimozono whether jurors ask questions of the witnesses. Mr. Shimozono said jurors will do this, although the practice is not extensive.

Mr. Murphy said the prosecutor is in the room and does a basic examination of witnesses, suggesting that, in Ohio, it is the prosecutor's function to explain the law. Mr. Shimozono explained that, in Hawaii, the prosecutor gives jurors a sheet of paper that has the charge on it, without much detail. Then, he said, the prosecutor puts on evidence. But, he added, the prosecutor does not explain the law. He said, in some cases, the law is straightforward so there is not much to explain. Usually, the role of the legal advisor is to explain a legal phrase that the jury does not understand. He said many times, if not most times, the legal advisor does not get asked any questions. He said, in four out of five sessions he may not get a single question.

There being no further questions for Mr. Shimozono, Chair Abaray thanked him for his time.

Chair Abaray then requested staff to provide the committee with the Hawaii constitutional provision regarding the grand jury legal advisor so that the committee might consider it. Mr. Saphire added the committee would benefit from taking a close look at the current content of Article I, Section 10.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:00 p.m.

Approval:

The minutes of the September 8, 2016 meeting of the Judicial Branch and Administration of Justice Committee were approved at the November 10, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 10, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:36 a.m.

Members Present:

A quorum was present with Chair Abaray and committee members Jordan, Kurfess, McColley, Mulvihill, and Wagoner in attendance.

Approval of Minutes:

The minutes of the September 8, 2016 meeting of the committee were approved.

Discussion:

Article I, Section 10 Grand Jury Process

Chair Abaray recognized Morris Murray, Defiance County prosecutor, who was present on behalf of the Ohio Prosecuting Attorneys Association to provide additional perspective on the question of whether to change the grand jury process in Ohio as provided in Article I, Section 10.

Mr. Murray referenced his previous presentation to the committee in December 2015 relating to potential reform of the grand jury process. He expressed continued support for the concept that the grand jury process "is a time honored and important piece of the criminal justice system not only in Ohio, but throughout the country."

Mr. Murray continued that his experience with grand juries convinces him that grand juries take their oath seriously. Although the result of their deliberations is sometimes met with scorn and

skepticism, he said jurors are instructed that if the evidence does not meet the probable cause standard they should not return an indictment.

Mr. Murray explained that prosecutors receive investigatory files from law enforcement agencies and review those investigations to make a preliminary assessment of the legal sufficiency to proceed. He emphasized that the statutory, ethical, and professional obligation of a prosecuting attorney is not simply to seek a conviction, but to seek justice. He said prosecutors are sworn officers of the court expected to comply with the ethical considerations and disciplinary rules established to ensure that lawyers conduct themselves professionally.

Mr. Murray noted that Ohio prosecutors have “grave concerns” about some of the proposals under consideration. He said removing or diminishing the confidentiality of grand jury proceedings jeopardizes the purpose of the grand jury, and would remove an important protection for persons who are investigated but not ultimately indicted. He said confidentiality also protects witnesses from retribution or intimidation whether cases go forward or not.

Commenting on the possibility of using a grand jury legal advisor, Mr. Murray said the Ohio Prosecuting Attorneys Association is opposed to this concept because it adds a layer to the process. He said prosecutors, by nature of the process, are expected to provide instructions of law to the grand jury, providing evidence that provides proof of the essential elements of the criminal violations. He said prosecutors must understand the rules of evidence, and how information may be impacted by those rules. He said prosecutors have nothing to gain by submitting inadmissible evidence to a grand jury, or from withholding evidence that may prove or disprove allegations because all information is available during the trial. In addition, he said, grand juries are instructed that they have the option to obtain further instructions or legal advice from the court, if they require it. He said adding an advisor attorney makes no sense, adds expense and bureaucracy, and “honestly is a bit of an affront to prosecuting attorneys.”

Mr. Murray said if the concern is that prosecutors will pursue cases and seek indictments where they should not, or fail to prosecute cases that should be prosecuted, the use of an advisor attorney will not address those concerns.

Mr. Murray having concluded his remarks, Chair Abaray invited the committee to ask questions.

Committee member Dennis Mulvihill, identifying himself as a civil attorney, said it is rare to go to trial in civil case where there is no opportunity to depose witnesses and have transcripts available. He asked what would be the problem with providing a defendant who is subsequently indicted and prosecuted a copy of the grand jury transcript.

Mr. Murray said, if a grand jury witness is intended to be called as a trial witness, no one can argue that the transcript should not be available. But, he said, the problem is that much of the testimony presented to grand jury may not lead to admissible evidence. He said there is value to the confidentiality of investigations, for example, there is a risk for destruction of evidence. He said an example might be that of a domestic violence investigation, in which there might be a teenage witness who has disclosed information confidentially. He said there might be some value in hearing what the witness has to say, but no intention to use that child as a witness at trial. He said the issue becomes whether that information might lead to something else. He

remarked that criminal investigation involves trying to develop leads, recognizing that not all information will be usable. He said his concern is that he wants to be able to put lay witnesses on so jurors can hear what they have to say.

Mr. Mulvihill said if the evidence is not admissible the judge will not let it in, so he is not sure that is an impediment to letting the defense have the transcript. Also, he said, he did not understand Mr. Murray's statement that providing transcript might lead to the destruction of evidence.

Regarding admissibility, Mr. Murray said a judge will not evaluate that until that point in the process, but if it is not ultimately a part of the state's case, there is some value to protecting the confidentiality of that information.

Mr. Mulvihill suggested the retribution issue is true of all witnesses. He said his concern is that the outcome of a criminal trial may be to incarcerate someone for many years, yet that person has no access to that information to prepare their defense. He said to insure a fair process if a person is indicted and tried, it is fair to let the defendant know what people have testified to under oath.

Mr. Murray disagreed, saying there is a great motivation to destroy evidence in criminal cases. He said it is also important to limit exposure to retribution against the grand jury witnesses, a concern similar to that which protects confidential informants.

Mr. Mulvihill asked whether a confidential informant typically testifies in front of a grand jury and remains confidential. Mr. Murray said an informant could testify and remain confidential at the same time.

Representative Robert McColley asked whether, if a witness makes statements to the grand jury that will be used later, Mr. Murray would agree to a change that would allow that witness's statements to be available for impeachment purposes. Rep. McColley also asked whether a constitutional amendment would be needed to effectuate that purpose or whether it could be done by statute.

Mr. Murray said if a grand jury witness will be called during the trial, it is reasonable to disclose that witness's statement. He said regarding other, collateral information, there is great concern about that during a grand jury investigation. He said such a change would be substantive, and, if desired, could be done statutorily.

Committee member Charles Kurfess asked what is the court's role regarding grand juries.

Mr. Murray said the court's role is as a "legal advisor," which implies that, ultimately, the judge gives legal advice and answers questions about the law. He said the court provides instructions to the grand jury indicating that ordinarily the prosecutor's advice is sufficient, and that if the grand jury needs more information the court will provide it.

Mr. Kurfess continued, asking how the grand jury is able to pose questions to the judge. Mr. Murray said normally there is a process where the prosecutor fields an informal request.

Mr. Kurfess commented that, when he was a judge, the prosecutor would ask the court to release the testimony of a grand jury witness for the purpose of giving that testimony to an investigative officer to assist him in his investigation. Mr. Murray said he cannot imagine that situation, but if a prosecutor wants a transcript that is the right way to do it. Mr. Kurfess said he felt that situation was “off the wall.”

Mr. Kurfess asked when and to what extent the prosecutor should also present to the grand jury the possibility of lesser included offenses, and give the applicable statute. Mr. Murray said, historically, that is a legal and tactical decision of prosecutors, and if there is an obvious lesser included offense and the prosecutor wants the grand jury to make that analysis, the prosecutor provides the elements and asks the grand jury to consider that offense. He said sometimes that decision is made by a judge later on. Mr. Kurfess said to even open the door the lesser included offense has to be suggested to the grand jury. Mr. Murray said if the case goes to trial, the defense counsel does not want the lesser included offense in there.

There being no further questions from the committee, Chair Abaray summarized the current status of the committee’s consideration of the issue. She said the issue was first presented as a concern about how the secrecy component of the grand jury process creates public concern. So, she said, one issue is how to address the public confidence issue. She said the second issue is whether there are ways to improve fairness, such as by allowing the defense to obtain transcripts or by having uniform instructions to the jurors. She said those types of requirements do not have to be in the constitution, but that the committee should ask whether there is anything that is so important that it should be included in the constitution.

Regarding the transparency issue, Chair Abaray said she shares the opinion of Ken Shimozone, the Hawaii grand jury legal advisor who provided information to the committee at a previous meeting, that having an independent attorney available to assist the grand jury would improve confidence in the system. She said she would like to recommend that the committee consider the Hawaii model.

Rep. McColley asked, as a practical matter, how an attorney legal advisor position might work, particularly in small rural counties.

Committee member Mark Wagoner said he agrees with Rep. McColley regarding the administrative concerns surrounding an attorney legal advisor. He added that, structurally, he views the grand jury as a protection for the individual against the power of the state. He said requiring an attorney legal advisor in the constitution would create a constitutional right and could create mischief. He said he does think there is a role for a legislative debate on the question, and it would occur in the context of budgetary issues. He said he is reluctant to see that requirement put into the constitution.

Mr. Mulvihill asked how many grand juries are convened in Mr. Murray’s county at the same time. Mr. Murray said it varies by county, but in his county the grand jury sits for a part term of four months, and only convenes when needed, which is about every other week. In larger counties, he said, the grand jury sits about three days a week. John Murphy, executive director of the Ohio Prosecuting Attorneys Association, who was in the audience, added that Cuyahoga County runs two grand juries simultaneously.

Chair Abaray then formally moved for the committee to recommend adoption of the Hawaii model of having an attorney legal advisor available to the grand jury.

Mr. Kurfess said he is not sure having an attorney legal advisor is a constitutional issue. He wondered whether a court already has authority to appoint counsel for the grand jury.

Mr. Murray answered that a court does not currently have that ability to appoint an attorney for that purpose, but can appoint a special prosecutor.

Mr. Kurfess wondered if a court could appoint a special prosecutor to advise the grand jury, and Mr. Murray answered that that may be possible but it is not clear.

Mr. Kurfess said when he was a judge, after a grand jury served its term he would discuss their service with them. He said it is an eye opener for a citizen to sit on a grand jury. He said jurors would always say there were things they wish they had known. He said if counsel were present the jurors could raise those questions during the hearing.

Chair Abaray asked whether Mr. Kurfess wanted to second the motion.

Mr. Kurfess answered that there are ways of addressing this matter that the committee has not considered. He said the first question is whether the committee wants to address the issue, and then the committee should decide how. He said he would be interested in moving that direction further, but he is not sure it is the will of the committee.

Chair Abaray withdrew the motion until the next meeting, saying that committee members who were not present will want to weigh in on the question.

Presentation:

“Proposal to Amend Article IV, Section 5(B) of the Ohio Constitution”

Richard S. Walinski, Attorney at Law

Mark Wagoner, Commission Member

Chair Abaray recognized Richard Walinski, attorney and former Commission member, as well as committee member Mark Wagoner, to present their proposal to amend Article IV, Section 5(B), which provides:

The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the Supreme Court. The Supreme Court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

The proposed amendment would add the following sentence at the end of the subsection:

The General Assembly may change rules promulgated hereunder by introducing a bill (1) that states in its preamble specifically that it is the legislature's purpose to create a substantive right and (2) that is enacted into law as provided in Article II, Section 16.

Mr. Walinski began by commenting that a void has existed in the Ohio Constitution since the Modern Courts Amendment was adopted in 1968, specifically in Article IV, Section 5(B). He said the proposed amendment would fill the void by making permanent in the Ohio Constitution the current holdings by the Ohio Supreme Court that attempt to address the void.

Describing the section, Mr. Walinski said the constitution allows the Supreme Court to promulgate rules of practice and procedure. He said prior to adoption of the Modern Courts Amendment that authority resided with the General Assembly under Article II, Section 1.

Mr. Walinski continued that, in granting that rulemaking power to the Court, Section 5(B) adds one attribute to the power, and one limitation. The attribute is that a court-promulgated rule supersedes all laws then in effect that conflict with the court-promulgated rule, while the restriction is that a court-promulgated rule may not "abridge, enlarge, or modify a substantive right." He said beyond that, Section 5(B) is silent about the allocation of rulemaking power as between the Court and the legislature.

Mr. Walinski said the most important matter about which the section is silent is whether the General Assembly may legislate on a matter of "practice and procedure" after a court-promulgated rule takes effect. He said, as a result of this silence, the Supreme Court has considered dozens of cases in which it attempted to divine an answer, and has answered the question in two contradictory ways.

Mr. Walinski said the Court's first answer was that the General Assembly is prevented from legislating on a matter of practice or procedure once the court has successfully promulgated a rule on the matter.¹ He noted that, more recently, the Court has held that the General Assembly may enact legislation on a matter of practice or procedure even if it conflicts with an existing court rule.² He noted that, in announcing the second interpretation, the Court did not overrule the first, and the first interpretation has not been overruled in any case applying the second interpretation.

¹ *Rockey v. 84 Lumber*, 66 Ohio St.3d 221, 611 N.E.2d 789 (1993).

² *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, 840 N.E.2d 1062.

Mr. Walinski observed that, although inconsistent interpretations do not usually require amending the constitution, this is an instance that does. The reason for this, according to Mr. Walinski, is that if the content of Section 5(B) were statutory law, the provision giving authority to the Supreme Court would easily be harmonized with the General Assembly's plenary legislative authority under Article II, Section 1. In that instance, he said, a reviewing court might reason that the statute authorizes legislative authority except to the extent that the amendment clearly places authority in the Court. He indicated that option for filing the void through a statute is not available when interpreting a constitution, at least not in a lasting form.

Mr. Walinski indicated that common law rules for interpretation and construction stand on a different footing when applied to interpretation of statutes than to the interpretation of constitutions. He said the rules work particularly well when applied to legislation and similar forms of positive law because the rules ultimately rest on the recognition that the originating legislative body is always free to adjust a statute to correct or to otherwise respond to judicial interpretation. He added that, because that ease of correcting the source document does not exist regarding judicial interpretation of a constitution, rules of interpretation that are based on the existence of that ease have little meaning to the interpretation of constitutional texts.

Mr. Walinski stated that an attempt to fill the hole in Section 5(B) solely through the common law lasts only until the Court focuses on a different rule of interpretation that supports the opposite inference. He emphasized his view that the question of where Section 5(B) leaves legislative authority after the Court promulgates a rule of practice or procedure is currently unresolvable because there is not enough firm ground in the present language to support a definitive ruling.

Mr. Walinski described that the proposed amendment permanently resolve the issue by inserting language that reflects the Court's second, currently controlling interpretation. He said the decision to follow that interpretation was not arbitrary, but, rather, was based on the view that the first interpretation turns on a blurred distinction between substance and procedure. He continued that the proposed amendment follows the historical basis of Modern Courts Amendment, which is modeled after the federal Rules Enabling Act of 1934.³ Mr. Walinski noted that the Court's second interpretation establishes a relationship between the General Assembly and the Court's rulemaking authority that fairly parallels the relationship that the Rules Enabling Act created between Congress and the Supreme Court of the United States. He concluded that the proposal is built simply on (1) the historical fact that the text of Section 5(B) is modeled after the Rules Enabling Act; and (2) the proposition that any positive law – whether a constitutional provision or a statute – that purports to transfer rulemaking power out of the legislature and to a court cannot intelligibly separate those powers based on the false dichotomy between “substance” and “procedure.”

Mr. Walinski said Congress has several options when it disagrees with rules promulgated by the U.S. Supreme Court. He said the Ohio General Assembly's only option is to issue a concurrent resolution of disapproval, a remedy that was tested when the Court promulgated the Ohio Rules of Evidence. He said, in 1977, one person from the office of the attorney general said they were bad rules, arguing they were not within Supreme Court authority to promulgate. The General

³ Ch. 651, Pub.L. 73-415, 48 Stat. 1064, enacted June 19, 1934, 28 U.S.C. § 2072.

Assembly unanimously concurred in a resolution of disapproval, and the dispute evolved into an “evidence war.” He said the General Assembly considered a statute purporting to do what the federal government did with the Federal Rules of Evidence. He said Ohio ended up with the opposite result from what occurred with Congress.

Chair Abaray expressed that the Ohio Rules of Evidence are identical to the Federal Rules of Evidence.

Mr. Walinski and Mr. Wagoner disagreed, noting Rule 102 is different and has been given an expansive interpretation. They also noted that Rule 301 is different.

Chair Abaray expressed her view that Section 5(B) does not need to be fixed. She said the only problem she has encountered as a trial lawyer is that someone filing a complaint has to know to look at the statutory requirements as well as the rules. Mr. Wagoner said the point of the proposal is not to debate the rules of procedure but rather to discuss the structure of state government. Mr. Walinski said if there were no problem there would not have been more than 36 cases addressing conflicts between a statute and a rule.

Mr. Mulvihill asked whether there is any dispute in case law that practice and procedure are reserved to the Court and substance is reserved to the General Assembly. He said he understands there may be a dispute about what constitutes a rule of practice and procedure, but wonders if there is dispute that, whatever those words mean, the General Assembly cannot enact rules of practice and procedure.

Mr. Walinski said that since *Lovelady*, and in *Havel v. Villa St. Joseph*, the interpretation of the Modern Courts Amendment is that procedure is a subset of rights if the legislature chooses to make a procedure a matter of right for the parties.⁴ He said the holding nevertheless is that a perfectly valid rule that is indisputably within the Court’s authority can be altered by the General Assembly into a right of the litigating parties. He said prior to 2007, substance and procedure were allocated to separate branches of government.

Mr. Mulvihill asked whether, if the proposal were adopted, a rule enacted by the General Assembly would be subject to judicial review. Mr. Walinski answered if the statute is litigable the Court will hear it. He said the question is not whether it is substantive or procedural, but whether the General Assembly subjectively intended to make the possible procedural issue a right for one party or other. He added, if it is a right, it is within the General Assembly’s authority.

Mr. Mulvihill followed up, asking whether the Court could review that initial decision. Mr. Walinski said that does not matter, because under the new doctrine a procedural matter is under the General Assembly’s authority if it cloaks it in terms of a right.

Mr. Mulvihill asked whether the recommendation is to constitutionalize the *Havel* decision. Mr. Walinski said this is what is being recommended.

⁴ *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

Mr. Mulvihill, going back to an earlier point, suggested the issue about substance versus procedure is raised in many constitutional provisions. Mr. Wagoner said the nuance is that the court is proposing the rule; in the end it becomes the court deciding that question that is the imbalance. He said that is what the proposal is trying to address.

Mr. Mulvihill suggested that constitutionalizing *Havel* could invite the General Assembly to meddle into court rules by stamping something as being substantive. Mr. Wagoner noted that, in the federal system, authority is delegated to the court and once the court decides something is procedural, the debate is over.

But, said Mr. Mulvihill, if the court determines a rule is procedural rather than substantive, the court could strike it down. Mr. Walinski replied that the current rule is that procedure becomes a legitimate subject of legislation if the General Assembly intends to vest someone with a right to a remedy in the courts regarding that procedural matter.

Mr. Mulvihill provided an example, saying that, in the rules of evidence, there is a requirement that before a doctor can provide expert testimony in a medical negligence case the doctor must spend a certain percentage of time in clinical practice. He said there is a different percentage of time required under a corresponding statute. He said courts have always interpreted the requirement as being procedural, and required litigants to follow the evidence rule. But, he said, if the General Assembly amended the current statute and inserted the word “substantive,” and that were challenged, the proposed amendment would prevent the court from using the rule to determine if the physician is qualified to testify. Mr. Walinski said that question would no longer be material because of *Lovelady* and *Havel*. He said those two rules are incompatible.

Mr. Wagoner said the proposed amendment would put the determination in the constitution, as opposed to having the governmental branch that is directly involved make that decision.

Mr. Mulvihill asked, assuming the proposal were adopted, if the General Assembly changed the percentage requirement for an expert witness, it would remove the court’s authority to decide whether that requirement is procedural or substantive. Mr. Walinski agreed, saying that is because it becomes immaterial. He continued, saying if the General Assembly satisfies the two steps first announced in *Lovelady* and *Havel* for how the General Assembly may permissibly make a procedure a right, it can change the procedural matter because they are making it a right.

Mr. Mulvihill said currently anything that comes out of the General Assembly is subject to judicial review, but that would change if the proposal is adopted. Mr. Walinski said that is true because the question would no longer be procedural.

Mr. Mulvihill expressed that the proposal would resolve which branch of government gets to make the decision as between procedural and substantive, saying the proposal would give that role to the General Assembly. Mr. Walinski agreed, but said the proposal tracks how the dispute would be resolved in the federal system.

Chair Abaray expressed a concern that the proposal looks like a power struggle between the Supreme Court and the legislature. Mr. Walinski said that power struggle has been going on

since *Rockey v. 84 Lumber*. He said the Court has thrown out statutory provisions that it perceives as violating the Modern Courts Amendment.

Chair Abaray asked whether Mr. Walinski and Mr. Wagoner have presented the proposal to the Supreme Court. Mr. Walinski said they have not discussed it with the Court. Mr. Wagoner said the conversation has been out there, which is why they brought the proposal to the Commission.

Mr. Mulvihill said he does not favor transferring the authority to the General Assembly.

Mr. Wagoner commented that the committee may be viewing the issue through the current political environment, which he said can change. He said he and Mr. Walinski are looking at it from a structural standpoint, and trying to protect the Supreme Court from getting too involved in policy.

Mr. Mulvihill said, in his view, this is constitutionalizing a current political problem, which is that the General Assembly is engaged in the mischief and the court is not checking that as it should.

Chair Abaray said she shares that concern, but is also concerned that if something is passed that is in conflict, that would prevent Supreme Court from resolving the conflict.

Mr. Kurfess commented that the proposal is what is actually currently available to the legislature by practice now. He said he concurs with the observation that the proposal shifts to the legislature what the Court can do. Mr. Kurfess added that there is a practical question of what would happen if the legislature puts this proposed constitutional amendment before the public.

There being no further questions, Chair Abaray thanked Mr. Walinski and Mr. Wagoner for their presentation.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:39 p.m.

Approval:

The minutes of the November 10, 2016 meeting of the Judicial Branch and Administration of Justice Committee were approved at the January 12, 2017 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, JANUARY 12, 2017

Call to Order:

Vice-chair Patrick Fischer called the meeting of the Judicial Branch and Administration of Justice Committee to order at 12:39 p.m.

Members Present:

A quorum was present with Vice-chair Fischer and committee members Jacobson, Jordan, Kurfess, McColley, Mulvihill, and Skindell in attendance.

Approval of Minutes:

The minutes of the November 10, 2016 meeting of the committee were approved.

Presentations and Discussion:

*Article I, Section 8
Writ of Habeas Corpus*

Vice-chair Fischer called on Shari L. O'Neill, counsel to the Commission, to provide a review of a draft report and recommendation on Article I, Section 8, relating to the writ of habeas corpus.

Ms. O'Neill said the report and recommendation indicates that Section 8 states the privilege of the writ of habeas corpus shall not be suspended unless, in the case of rebellion or invasion, public safety requires it. She said the report describes that the Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution, and that habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body." She said the report continues that habeas corpus is a legal concept originating in early English common law, and was a key aspect of the Magna Carta. The report describes that the principle was embodied in a provision for a formal writ, also called "The Great Writ," by which a person wrongfully imprisoned could petition the government for release. As

currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.

Ms. O'Neill said the report outlines the history of the writ, indicating that it is provided for in the United States Constitution as well as having been adopted as part of the first Ohio Constitution in 1802. She said the report and recommendation describes the statutory procedure governing application for a writ of habeas corpus, as well as indicating that the constitution identifies which courts have original jurisdiction over petitions for the writ. The report also discusses the proceedings of the Constitutional Revision Commission in the 1970s, stating that the 1970s Commission's review did not "disclose any significant differences between federal and state interpretations or any reasons to recommend changes in the language," and so recommended no changes. Ms. O'Neill said the report also briefly describes Ohio Supreme Court jurisprudence relating to the section, indicating that courts generally determine petitioners for the writ of habeas corpus have an adequate remedy in the form of an appeal, and thus do not qualify for the writ. The report adds that courts have found the writ to be appropriate when a defendant wishes to challenge the jurisdiction of the sentencing court, and that the writ also may provide a remedy in non-criminal cases, such as in involuntary commitment or child custody matters. Ms. O'Neill concluded her review by indicating the report and recommendation will be completed once the committee concludes its work on that section.

Vice-chair Fischer thanked Ms. O'Neill for the summary, and asked if committee members had questions or comments. There being none, he then asked for remarks on the report and recommendation relating to Article I, Section 12, which prohibits transportation for crime, corruption of blood, or forfeiture of estate.

Article I, Section 12

Transportation for Crime, Corruption of Blood, Forfeiture of Estate

Ms. O'Neill said the report indicates that Article I, Section 12 is unchanged since its adoption in 1851 and derives from two separate sections of the 1802 constitution, which provided, at Article VIII, Section 16 that "No ex post facto law, nor any law impairing the validity of contracts, shall ever be made; and no conviction shall work corruption of blood nor forfeiture of estate," and, at Section 17, "That no person shall be liable to be transported out of this State for any offense committed within the State." She continued that the report indicates the section embodies three separate concepts: that criminal suspects not be transferred outside the state for crimes committed in Ohio, that criminal convictions not result in "corruption of blood," and that criminal convictions not cause a forfeiture of estate.

Discussing the report's discussion of transportation for crime, also known as "banishment," she said this was an extreme form of punishment that, historically, could mean death because it separated the individual from the community that provided resources for survival, a practice that most dramatically played out in the use of transportation for crime to send unwanted citizens to British colonies rather than to imprison them. She said the report continues that most courts have held transportation for crime to be illegal, and at least 15 state constitutions forbid banishing residents as punishment for crime.

Ms. O'Neill described that the report discusses "corruption of blood" as relating to an old concept in English law that a criminal act brought about a metaphorical stain or "taint" on the blood of the offender, and justified stripping him of his life, property, or title. She said the report provides additional details about the history of the concept of "parliamentary attainder," which was a way to punish political foes without subjecting them to judicial process. Ms. O'Neill said the report describes that the founders rejected attainder, outlawing it in the United States Constitution. She said the report also notes that, in outlawing "corruption of blood" for criminal convicts, the Ohio Constitution forbids the enactment of laws that serve to extend the punishment of the offender to the beneficiaries of his or her estate.

Ms. O'Neill continued that the report discusses that, like corruption of blood, forfeiture of estate deprives the criminal actor of his property interest, specifically his present ownership rather than his expected inheritance or his anticipated ability to transfer ownership to his heirs. She noted the report's discussion of the purpose of the provision, which is to prevent convicts from having to forfeit their estate.

Describing review of the 1970s Commission's recommendation for no change to the provision, Ms. O'Neill said the report indicates there was no Ohio case law on the transportation for crime portion of the provision because the General Assembly has never authorized imposition of banishment. She said the report also notes the 1970s Commission commentary relating to a probate court decision that a statute prohibiting convicted murderers from inheriting from their victims does not violate Article I, Section 12 because the applicable statute does not divest an heir of property but rather merely prevents him inheriting it.

Ms. O'Neill concluded her summary by indicating the report's description of litigation regarding the section, indicating the Supreme Court of Ohio has interpreted Article I, Section 12 on only one occasion since the 1970s, in a case in which the court found the confiscation and sale of personal property under a statute relating to illegal drug activity was not a 'forfeiture' for criminal activity, as that word is used in the constitutional provision, but rather a remedy designed to prevent the continuation of unlawful acts. She indicated that the report and recommendation would be completed once the committee concludes its review.

Vice-chair Fischer asked whether committee members had questions or comments. Committee member Dennis Mulvihill said he was aware of new legislation related to civil forfeiture that Representative Robert McColley sponsored in the 131st General Assembly. He asked Rep. McColley to speak further about that legislation.

Rep. McColley said the legislation in question, H.B. 347, addressed the problem that civil forfeiture permitted private property to be taken from a defendant in a civil case without the rights protections that would be afforded a defendant in a criminal prosecution setting. He said civil forfeiture procedure conflicted with other constitutional principles in that the defendant in such a case had no Fifth Amendment rights of due process, no right to an attorney, and no presumption of innocence. He said, in such cases, the defendant, not the plaintiff, had the burden of proof. Rep. McColley described that the legislation enacted changes to Revised Code Chapter 2981 that addressed these shortcomings. He acknowledged the work of Senator Kris Jordan in the Senate in helping pass the bill.

This new law being related to the subject of the report and recommendation, it was agreed that the report would be revised to include information about H.B. 347's changes to the civil forfeiture procedure.

Vice-chair Fischer then asked Ms. O'Neill to provide a summary of the report and recommendation for Article I, Section 15, prohibiting imprisonment for debt.

Article I, Section 15
No Imprisonment for Debt

Ms. O'Neill indicated that Section 15 prevents persons from being imprisoned for debt in any civil action unless in cases of fraud. She said the report and recommendation describes that the institution known as "debtors' prison" can be traced to early Roman law, when debtors who could not pay were subjected to death, enslavement, imprisonment, or exile. She said the report further discusses the history of debtors' prison in English law and early American practice, as well as the adoption of federal bankruptcy law that alleviated many of the problems surrounding how to address personal debt.

Ms. O'Neill said the report outlines the 1802 Ohio Constitution's prohibition of debtors' prisons, indicating that the prohibition was slightly revised and moved to its current location by the 1851 Constitutional Convention, which included a prohibition on the "mesne process," whereby a debtor could be imprisoned solely on the basis of a creditor's sworn statement that the debt was unpaid, the debtor had engaged in fraudulent concealment of property, or that the debtor was about to abscond.

She continued that the report describes the review of the Constitutional Revision Commission in the 1970s, which recommended no change to the section but noted case law that distinguished between imprisonment for debt and imprisonment for failure to pay alimony or child support, or for the willful failure to pay a tax obligation. She said the report indicates the 1970s Commission acknowledged that Ohio has outlawed imprisonment for failure to pay a fine where the failure was based on indigency.

Describing related litigation, Ms. O'Neill said the report notes that, although multiple Ohio appellate courts have had occasion to interpret Article I, Section 15 since the 1970s, the Supreme Court of Ohio rarely has addressed the section. The report describes several cases in which a child support arrearage was found not to constitute "debt" as that term is used in Section 15, and mentions cases indicating that alimony obligations and property division orders also do not qualify as "debts" within the purview of Section 15. She said the report would be completed once the committee concludes its review.

Vice-chair Fischer thanked Ms. O'Neill for her presentation, and indicated that the committee would continue its work on these sections at future meetings.

*Article I, Section 10
Grand Jury Process*

Turning to the committee's review of the grand jury process, Vice-chair Fischer asked for the committee's views on the current status of that review and whether any changes would be recommended.

Committee member Jeff Jacobson said it would be important for the chair of the committee to be present for a vote. He said while the chair's views may not represent those of a majority of the committee, something like the Hawaii system of providing a grand jury legal advisor, in his view, has great merit and would not do violence to the ability of the prosecutor to prosecute the case to have a grand jury legal advisor.

Committee member Charles Kurfess commented that, based on his experience as a judge, he feels strongly that the grand jury needs something it currently lacks, and that the Hawaii system comes the closest to what he would like to do. He said, while he is not sure that a constitutional change is necessary, the legislature may not feel as strongly that Ohio needs a grand jury legal advisor and so may not wish to enact legislation providing it. Mr. Kurfess continued that his experience in working with grand juries is that they need something beyond the assistance provided by the prosecutor in terms of good solid legal advice. He noted a problem he had as a judge trying to get the grand jury the appropriate statutes. When he asked the prosecutor to provide what was needed, he was told the prosecutor could not provide the statutes, although the prosecutor told the press a week beforehand what he was planning to show the grand jury. Mr. Kurfess said nothing the committee has heard from the prosecutors has changed his view on this. He observed that the grand jury is a new experience for jurors, who have not been exposed to the process through media or television shows. He said jurors are going into a process that is totally new to them, they probably did not know it existed, and it takes them several sessions to get acclimated to what they can and cannot do. As a result, he said, they need good legal advice, and it is not enough to say the prosecutor is there to fill that role. He said he is not sure the issue requires a constitutional amendment, but it needs attention.

Mr. Mulvihill said he shares the concerns expressed by Mr. Kurfess, and would add that someone who is indicted is not provided with the transcripts that led to the indictment. He said he understands the rationale given by the prosecutors who testified to the committee, but he understood the prosecutors to be expressing they would be agreeable to allowing a defendant access to the grand jury transcript of witness testimony under some circumstances. Mr. Mulvihill said he has no sense that there is fairness in the system, and that it is fundamentally unfair and maybe even violates due process and the confrontation clause to deny the defendant the transcript. Mr. Mulvihill said he is not sure this concern rises to the level of requiring a constitutional amendment.

Rep. McColley said he does not see anything that would rise to the level of amending the constitution. He said prior inconsistent statements should be available to defense counsel, to use in defense of the client, and that is just fundamental fairness. He said that requirement could be something that is pursued legislatively.

Mr. Jacobson said the committee has two choices. If it wants to amend the constitution, it could recommend language that would require a system like Hawaii's. He said, alternately, the committee could explicitly authorize the General Assembly to enact such legislation. Whether necessary or not, that recommendation would send a strong signal. He said the committee could also recommend providing right of the defendant to have access to transcripts as part of the due process rights of a criminally-charged individual. He said there have been court decisions regarding the right to a transcript. He said all three of these possibilities would be worth acting on. He said a big concern about not allowing access to a transcript is that no one outside the grand jury room knows what instructions the prosecutor gave to the grand jury about what the law means. He said there are examples, not necessarily in Ohio, of miscarriage of the indictment power. He said either there should be access to a transcript afterward, or there should be a grand jury legal advisor who can tell the grand jury what the law is.

The committee having concluded its discussion, Vice-chair Fischer asked Steven C. Hollon, executive director, about the committee's next course of action. Mr. Hollon said the committee should determine what it would like to do with Article I, Sections 8, 12, and 15, giving a sense of how the reports and recommendations should be completed.

Rep. McColley said that, rather than simply approving the report and recommendation for Section 12 as being for "no change," he would like to see the committee review the civil forfeiture law in more detail, possibly considering whether to recommend a change to the section.

Mr. Jacobson moved that the committee recommend no change to Article I, Sections 8 and 15, and that the committee hear additional testimony and discuss civil forfeiture before voting on Article I, Section 12. Mr. Mulvihill seconded this motion.

Rep. McColley elaborated that the changes to civil forfeiture law are part of a movement across the country that is responsive to the rise of the use of civil forfeiture since the 1980s. He said the consensus is that if criminal wrongdoing is alleged, the person should be subject to criminal due process, yet the civil forfeiture context does not entitle someone to those protections.

Mr. Mulvihill asked whether the idea is that the constitutional provision as it reads now is not being applied by the courts, or whether the issue is that the provision needs to be stronger. Rep. McColley said he is not sure courts are misapplying the section, but rather just thinks it is a bad law, and that it has been extended beyond what the scope of the principles of justice would permit. He says the topic is ripe for discussion on the constitutionality of taking property civilly.

Senator Mike Skindell said he appreciates the work of Rep. McColley on this issue. He said a major flaw in civil forfeiture laws has been the ability of law enforcement agencies to use those seized assets to fund equipment for the agency, so the national reports on state civil forfeiture laws has strongly recommended that law enforcement not be allowed to use those funds in that way, and to have the assets go to another entity. Rep. Skindell said that is something that the General Assembly legislation addressed. Rep. Skindell noted, overall, that the committee should consider anything that can be done in the constitution to increase fairness. He said he would also emphasize there is no allegation in Ohio that any prosecutors or law enforcement agency has abused the grand jury process, but there is concern.

There being no further discussion regarding the motion to recommend no change to Article I, Sections 8 and 15, the unanimous sense of the committee was that no change is necessary to those sections. Thus, the committee generally consented to the motion.

With regard to recommending changes to the grand jury process, Vice-chair Fischer said there are three possible options that have been suggested. He said the first would be to recommend abolishing the grand jury altogether, which he does not think has support. The committee generally agreed that there is consensus that abolishment is not a possibility.

He said a second question is whether the committee wishes to recommend a section requiring the creation of a grand jury legal advisor, which some members support but he is not sure there is consensus on that question. He said a third question is whether the committee wishes to recommend that the accused be given the right to a copy of the transcript of grand jury witness testimony. Vice-chair Fischer asked for additional input from the committee, so as to give staff further guidance on completing the report and recommendation.

Mr. Jacobson agreed that Vice-chair Fischer properly summarized the status of the committee's work. He added that the issue of an independent counsel for the grand jury has gradations. He said the independent counsel idea could face opposition from people who do not like it. He said he is not necessarily comfortable with the idea of saying the power to appoint a grand jury legal counsel is already there, but is more comfortable in making it clear the power is there even if we do not demand that it happen.

Sen. Skindell said the committee should look at whether having a grand jury legal advisor instills a level of fundamental fairness that rises to the level of putting it into the constitution. He said the issue of access to the transcript is an issue of fundamental fairness, and it can be argued the issue of having independent counsel also goes to that level. He said the topic deserves greater conversation.

Mr. Jacobson said he does not believe the committee requires further testimony on the grand jury question, and thinks it would be better to be presented with draft language, both on the grand jury legal advisor and on the issue of requiring transcripts. He said the language could require that a grand jury transcript be prepared and available.

Vice-chair Fischer suggested that the committee and staff consult a task force report recently prepared by the Supreme Court of Ohio.

Mr. Mulvihill asked about the view of the Ohio Prosecuting Attorneys Association (OPAA) on the transcript question. John Murphy, executive director of the OPAA, who was in the audience, commented that his organization has not taken a position on that particular issue. He said the state has adopted "open file discovery," in which prosecutors have to turn over everything they have, including statements outside the grand jury. He said the OPAA might be amenable to providing transcripts so long as the provision is drafted so as to protect witnesses who need protection.

Rep. McColley said there could be an in camera disclosure of witnesses by the prosecution after the grand jury has concluded. He said, in the event any of the grand jury witnesses are called, the judge at least would know who is on the list and who is not. He said this would allow there to be an independent party to say who was in the grand jury and who was not.

Mr. Murphy said prosecutors do provide a witness list to the defendant.

Rep. McColley said the witness list is not provided as a cross reference. He said his point is there needs to be a system where someone other than the prosecutor knows who the witnesses were, so that if the defense has an objection the judge would know how to rule.

Mr. Jacobson said he concurs with that concern, but that he is personally concerned about what the prosecutor says to the grand jury. He said the committee has discussed whether there should be a judge there. He said requiring a transcript could allow the defense the opportunity to see the prosecutor's instructions to the grand jury, providing protection.

Vice-chair Fischer said he considers this to be a procedural matter and should be the subject of a rule change because it is very specific.

Mr. Jacobson disagreed, saying it is not procedural if one is providing the right to a transcript instead of the right to the testimony.

Sen. Skindell said the provision could read that either the legislature or the court would enact a law or rule requiring that a transcript be provided under certain circumstances.

Vice-chair Fischer called on Mr. Murphy to provide additional comments. Mr. Murphy said the OPAA is opposed to having a grand jury legal advisor in the grand jury room. He said it is not to any prosecutor's advantage to misrepresent what the law is, and there is no point in getting an indictment that is unprosecutable based on a faulty statement of the law.

Mr. Kurfess mentioned that the committee has not yet addressed a suggestion that judicial elections occur in odd-numbered years. He said, to consider that issue, the committee should hear from the secretary of state and the Ohio Judicial Conference. Vice-chair Fischer said the committee could put that topic on the agenda for a future meeting.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 1:30 p.m.

Approval:

The minutes of the January 12, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the March 9, 2017 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:45 p.m.

Members Present:

A quorum was present with Chair Abaray and committee members Jacobson, Jordan, Kurfess, McColley, Mulvihill, Sapphire, and Skindell in attendance.

Approval of Minutes:

The minutes of the January 12, 2017 meeting of the committee were approved.

Reports and Recommendations:

Article I, Section 8 (Writ of Habeas Corpus)

After describing a report and recommendation indicating the committee's view that Article I, Section 8, regarding the writ of habeas corpus, should be retained in its present form, Chair Abaray asked for a motion to issue the report. Senator Mike Skindell moved for the committee to issue the report, with committee member Jeff Jacobson seconding the motion. The committee voted unanimously to issue the report and recommendation.

Article I, Section 15 (No Imprisonment for Debt)

The committee also considered a report and recommendation relating to Article I, Section 15, prohibiting imprisonment for debt. Committee member Richard Sapphire asked about the portion of the provision that allowed imprisonment for debt in cases of fraud. He said he was not aware the committee had discussed this aspect of the provision, indicating that he would like to have research that would help the committee understand how imprisonment for debt in the case of

fraud could be permitted. Chair Abaray agreed that information would be important for the committee's consideration of the issue, and said the committee would defer voting on the report and recommendation until more could be learned about that part of the section.

Article I, Section 10 (The Grand Jury)

Chair Abaray then turned the committee's attention to two versions of a report and recommendation relating to the grand jury process as contained in Article I, Section 10. One version recommends no change to the provision, while the other version indicates that the grand jury portion of Section 10 would be lifted out and placed in its own section, Section 10b. Additionally, the version prescribes an amendment that would create the position of "grand jury legal advisor" to be present to assist the grand jury with its questions, as well as providing a right of the accused to the record of grand jury testimony of any witness who is called to testify at trial.

Mr. Saphire moved for the committee to adopt the version advocating a change to the grand jury provision. Mr. Jacobson seconded the motion. Chair Abaray then opened the floor for discussion.

Representative Robert McColley said he agrees with the principle that the accused should have a right to a transcript of grand jury testimony, but is opposed to having it in the constitution. He said this could be done statutorily. He said a grand jury legal advisor sounds good on paper, but in practice would be difficult to implement, particularly in small counties.

Committee member Dennis Mulvihill said it is fundamentally unfair for witnesses to present evidence against someone who is not permitted access to that testimony. He said he supports a provision that makes it a fundamental right for the accused to have access to the grand jury witness transcripts, adding he has no problem enshrining that concept in the constitution. With regard to the grand jury legal advisor concept, Mr. Mulvihill said he does not know how that would work, and is unsure of putting it in the constitution.

Mr. Jacobson said he agrees with the grand jury witness transcript principle, indicating it is an important constitutional right to be able to confront one's accuser. He said it should be enshrined in the constitution and not left to the whims of the legislature. He said he does not doubt the legislature's commitment to doing the right thing, but he knows other considerations get in the way. He said he feels the same way about the grand jury legal advisor concept, saying the fact it would be difficult to implement should not affect whether to adopt the provision. He said there have been incidents involving a prosecutor with an agenda who abuses his power in order to get an indictment. He said abuse is more likely when the grand jury gets all of its information about the law from the prosecutor. He said he believes the difficulty of implementing this idea is more than justified by the protection that it would give to all Ohioans.

Chair Abaray said the topic came up because secrecy in the grand jury process, essential to the rights of the accused, causes distrust with the public. She said there is no accountability, so she was attracted to the legal advisor proposal because it gives the public and the accused the assurance there is an independent person overseeing the proceedings.

Mr. Sapphire said he agrees with Mr. Mulvihill and Mr. Jacobson regarding access to grand jury witness transcripts. He said a grand jury legal advisor program would be difficult to implement, particularly in rural counties. However, he said, there are ways to accomplish something if it is important enough, and he believes this is important enough to put in the constitution.

Mr. Mulvihill asked whether a plan could be for the grand jury to have independent counsel available if they ask for it. Mr. Jacobson said that would not work because the grand jury would not know when they need assistance.

Senator Kris Jordan said he thinks the constitution should protect civil liberties and basic rights, agreeing that being able to confront one's accuser is a basic right. He said the grand jury witness transcript idea is clearly justified to be in the constitution. He asked whether there are other remedies for someone who is wrongfully indicted.

Chair Abaray noted that the prosecutor is immune for decisions made regarding whether to prosecute someone. Mr. Jacobson added there is no way to restore the accused's reputation once an improper indictment has been issued. Mr. Mulvihill noted there is a tort of malicious prosecution, but once the person is indicted that cause of action goes away unless the accused shows the process was manipulated, which he said is virtually impossible to show.

Mr. Sapphire added the accused cannot bring an action under 42 U.S.C. Section 1983 because of prosecutorial immunity, and there would be no damages. Mr. Mulvihill wondered if there is an Ohio tort cause of action outside of the Section 1983 context. Chair Abaray noted there are cases in which prosecutors went far beyond what was legal, and there was no remedy.

Rep. McColley said he understands the point of having an independent counsel in the room, but does not think it is necessary because the grand jury proceeding is not adversarial.

Mr. Jacobson said the proposed amendment giving the accused the right to grand jury witness testimony does not create a right to the entire proceeding, so to the extent there is a false statement of the law or the prosecutor uses the grand jury process as a fishing expedition the accused will not be able to find out how the prosecutor got the information. He said the proposed provision is an attempt to retain secrecy where, for example, witnesses do not come forward at trial. He said the proposal attempts to provide some sort of protection without making it all public.

Committee member Charles Kurfess said he thinks grand juries need their own counsel, providing examples of situations in which the grand jury could use assistance in understanding the possible charges. He said the grand jury ought to know what the possible charges are, and that is why he thinks the independent counsel is important.

Chair Abaray asked if the committee was ready to vote on the report and recommendation, wondering if they should vote on the proposal as written.

Mr. Jacobson asked to divide the question, indicating that committee members could vote on whether to recommend a grand jury legal advisor, and whether to recommend a right to the grand jury witness testimony. He said if one or both are approved, then the committee would vote on

the entire report and recommendation, and if neither stay in, the motion to approve the report and recommendation could be withdrawn and the committee could vote on whether to approve the version of the report and recommendation that recommends no change.

Chair Abaray then called for a roll call vote on whether to recommend the creation of a role for a grand jury legal advisor, as indicated in the proposed amendment as follows:

(B) Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons admitted to the practice of law in this State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

The roll call vote was as follows:

Abaray – yea
Jacobson – yea
Jordan – yea
Kurfess – yea
McColley – nay
Mulvihill – yea
Saphire – yea
Skindell – yea

The motion passed, by a vote of seven in favor, one opposed, and two absent.

Chair Abaray then called for a roll call vote on whether to recommend that the accused have a right to the record of the grand jury testimony of any witness who is called to testify at trial, as indicated in the proposed amendment as follows:

(C) A record of all grand jury proceedings shall be made, and the accused shall have a right to the record of the grand jury testimony of any witness who is called to testify at the trial of the accused; but provision may be made by law regulating the form of the record and the process of releasing any part of the record.

The roll call vote was as follows:

Abaray – yea
Jacobson – yea
Jordan – yea
Kurfess – yea
McColley – nay
Mulvihill – yea
Saphire – yea
Skindell – yea

The motion passed, by a vote of seven in favor, one opposed, and two absent.

Chair Abaray then called for a roll call vote on whether to recommend that the committee issue the full report and recommendation for change to the grand jury portion of Article I, Section 10.

The roll call vote was as follows:

Abaray – yea
Jacobson – yea
Jordan – yea
Kurfess – yea
McColley – nay
Mulvihill – yea
Saphire – yea
Skindell – yea

The motion passed, by a vote of seven in favor, one opposed, and two absent.

Chair Abaray announced that, because the report and recommendation was for a change, it would be subject to a second presentation and vote at the next meeting of the committee.

Presentations and Discussion:

“Civil Asset Forfeiture”

Robert Alt

The Buckeye Institute

Chair Abaray introduced Robert Alt, president and CEO of the Buckeye Institute, to present on the topic of civil forfeiture in connection with the committee’s consideration of Article I, Section 12 (Transportation for Crime, Corruption of Blood, and Forfeiture of Estate).

Mr. Alt said the phrases “corruption of blood or forfeiture of estate” have their origin before the birth of the country, noting that in early England when a person was adjudged guilty he became a “taint,” or dead in the eyes of the law. He said, as a result of being sentenced to death, all of the felon’s property was forfeited to the government and additionally he suffered corruption of blood, meaning he could no longer inherit and no inheritance could pass through him.

Mr. Alt continued that Ohio and other states rejected the notion that the government could strip a person of all he owned for a crime that did not relate to his property, also rejecting the notion of corruption of blood. He said inherent in the prohibition against civil asset forfeiture is the concept of protection of rights of property. However, he said civil asset forfeiture allows law enforcement to take property without first obtaining a criminal conviction.

Mr. Alt said, ironically, what has grown to be a symbol of government abuse originated out of a deep respect for the law, noting the practice of civil forfeiture grew out of the exigencies of 18th century maritime law, which required asset forfeiture processes because the owners of

confiscated ships were unavailable, rather than because the government could not prove that a crime had been committed.

Describing recently-enacted House Bill 347, Mr. Alt said the legislation was a great step forward toward restoring property rights, but more could be done. He said the law raised the standard from preponderance of the evidence to clear and convincing evidence, made civil asset forfeiture an *in personam* action, and limited civil asset forfeiture to criminal proceeds in amounts greater than \$15,000. However, he said, civil proceedings do not afford the same constitutional protections as a criminal trial.

Mr. Alt noted a concurring opinion by Justice Clarence Thomas in the recent United States Supreme Court case of *Leonard v. Texas*, 580 U.S. ____ (2017), in which Justice Thomas expressed concerns about whether civil asset forfeiture violated the Due Process Clause of the Fourteenth Amendment. He said the U.S. Supreme Court has justified the constitutionality of civil asset forfeiture based on the historical use of it at the time of the founding. He indicated Justice Thomas, an originalist, dug deeper into the historical use, and found that the court's approval of civil asset forfeiture may be misguided for at least two reasons: first, that the historical uses of forfeiture laws were much narrower than they are now, and were limited to cases where the owner was unavailable. Second, he said, Justice Thomas opined that forfeiture may be procedurally civil but it is criminal in nature and does not afford the same constitutional protections a criminal trial would provide.

Mr. Alt said civil asset forfeiture is not justified even by resort to the harsh English practices of forfeiture of estate. He noted corruption of blood and forfeiture of estate were only permitted after sentencing, which was when a taint had attached, adding it cannot be justified where a person is available by resorting to practices historically used when a person was unavailable.

Mr. Alt concluded that, while Section 12 does not prohibit civil asset forfeiture, a decent respect for principles of due process and property rights should prohibit it.

Mr. Alt having concluded his remarks, Chair Abaray invited questions. She asked whether Mr. Alt was recommending that Article I, Section 12 be revised to strengthen the prohibition.

Mr. Alt said courts have interpreted Section 12 in such a way as to protect innocent owners. He said the provision would not apply to asset forfeiture related to criminal conviction where the property is an instrumentality of the crime. As a matter of policy, he said he would argue asset forfeiture should be limited to the context of a criminal conviction.

Rep. McColley said he agrees with Mr. Alt's assessment, asking that the committee discuss the issue because both the Ohio and United States Constitutions have provisions respecting private property rights, particularly when someone is accused of a crime. He said under the old law a prosecutor could accuse someone of committing a crime but not level criminal charges. The prosecutor could then file a civil suit and use that civil suit to take the person's property. He said the person would not have criminal protections in that setting because it is a civil case. He added it is worth noting that when the Ohio Judicial Conference was asked to opine on the original bill which abolished civil forfeiture completely, they unanimously voted to strip it for many of these reasons.

Chair Abaray asked Rep. McColley whether he thinks the new law covers the concern about civil forfeiture, or whether the constitution should be changed. Rep. McColley said the new law addresses what to do about the unavailable defendant or if the property is unclaimed. He said, in that instance, the law provides ways to take cash if it is unclaimed. He said an *in personam* action is allowed when the amount of proceeds, which is property or cash, obtained through the commission or alleged commission of a crime, is in excess of \$15,000. He said civil forfeiture is now prohibited in any amount in a case in which a defendant is present and willing to defend himself in court. He said there are still some instances in which the civil forfeiture process could continue as it has in the past, but it would have to be an *in personam* action.

Mr. Alt emphasized that, in a case where an amount less than \$15,000 is sought as a forfeited asset, the new law does not prohibit the state from seizing and getting title, but the state must first get a criminal conviction.

Rep. McColley indicated seizure and forfeiture are different. He said seizure is the initial taking of property by law enforcement based on a belief it was involved in the commission of a crime. He continued that forfeiture is the judicial proceeding that follows, in which the state is seeking to take permanent title to the assets that were seized. He said H.B. 347 is not aimed at law enforcement, so the standard for seizure is still probable cause because quick decisions sometimes need to be made. Instead, what the law changes is that, in the case where law enforcement has the assets, they are brought under the temporary title of the state, allowing the state to slow down and allow due process in the judicial proceeding.

Chair Abaray asked whether the idea of amending the constitution came up during the legislative hearing process. Rep. McColley said it came up a few times in committee. He noted a U.S. Supreme Court case in which civil forfeiture was challenged and the Court held it is the prerogative of the state to decide what the laws are. Noting the *Leonard* case, *supra*, Rep. McColley said, although the case is a denial of a writ of certiorari, it indicates Justice Thomas has doubts about the current breadth of civil asset forfeiture, suggesting that the decision invites a challenge to civil asset forfeiture in the U.S. Supreme Court.

Committee member Dennis Mulvihill asked whether the committee would entertain an effort to amend the constitution.

Rep. McColley said he would like to see language developed that would say an individual's assets could not be forfeit absent a criminal conviction unless that individual is unavailable or the property is unclaimed. He said he thinks that would be worth discussing. He said the more he delved into this topic, the more he realized that "this smells wrong." He said the Fifth Amendment and private property rights are put in conflict because someone would have to give up Fifth Amendment rights in order to protect property rights.

Mr. Saphire commented that the individual also would be put in a position where the money subject to forfeiture is money he or she might have used in his or her defense.

Rep. McColley noted that a colleague represented an indigent criminal defendant in a case where money was seized. He said the accused got an acquittal but Ohio law allowed for criminal and

civil cases to be filed simultaneously. He said the colleague wanted to help the client get back the money, but the client could not afford to pay attorney fees to do so.

Mr. Sapphire wondered if civil asset forfeiture could be used to coerce a plea. Rep. McColley said when civil and criminal actions are filed simultaneously the new law requires the civil case to be stayed pending the outcome of the criminal proceeding. He said, in one case the prosecutor filed criminal and civil charges, realized he did not have the facts necessary to pursue the criminal charges, and dropped them to proceed with the civil forfeiture.

Chair Abaray wondered whether a new section would be needed to deal with civil asset forfeiture, since Section 12 deals with forfeiture in relation to a criminal conviction.

Rep. McColley said his suggestion would be to make it an expansion of the existing provision. He said a revision would expressly state that the due process protections of criminal proceedings would take precedence. He said, under civil forfeiture, the state could only take proceeds, instrumentalities, and contraband, rather than the full estate.

Chair Abaray suggested that if there is particular language Rep. McColley would like to have the committee consider, he could present it at the next meeting.

Chair Abaray noted a request by Vice-chair Fischer that the discussion of a proposal to amend Article IV, Section 5(B) be postponed until the committee's next meeting. The committee agreed to wait to discuss that topic.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:00 p.m.

Approval:

The minutes of the March 9, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the April 13, 2017 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE FOR THE MEETING HELD THURSDAY, APRIL 13, 2017

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 9:44 a.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Holmes, Jacobson, Kurfess, McColley, Mulvihill, Saphire, and Skindell in attendance.

Approval of Minutes:

The minutes of the March 9, 2017 meeting of the committee were approved.

Reports and Recommendations:

Article I, Section 10 (The Grand Jury)

Chair Abaray provided a second presentation of a report and recommendation for change to the grand jury portion of Article I, Section 10.

She said the report describes the committee's recommendation that Article I, Section 10 of the Ohio Constitution be amended to remove the reference to the grand jury, and that a new provision, Section 10b, be adopted. She said the report proposes new language that would require the presence of an independent legal counsel in the grand jury room who would be available to advise the members of the grand jury regarding matters brought before it. She said the report also sets out a proposed requirement that a record of all grand jury proceedings be made, and provides the criminally accused the right to a transcript of the grand jury testimony of any witness who is called to testify at the trial of the accused.

Chair Abaray continued that the report sets out the current provision, describes its history, discusses its review by the 1970s Ohio Constitutional Revision Commission, outlines relevant litigation, and lists the many presentations the committee received on the history, purpose, and operation of the grand jury system.

She said the report also encapsulates the committee's discussions about the grand jury process, and summarizes committee members' different views. She said the report proposes to lift the grand jury provision out of Section 10, and place it in its own section in order to improve clarity and make it easier in the future to amend either existing Section 10 or new Section 10b.

Chair Abaray described that, at the committee's March meeting, members of the committee had voted to proceed with the recommendation as set out in the report by a seven-to-one margin. She briefly described the history of the committee's review of the issue, noting a letter from Supreme Court of Ohio Chief Justice Maureen O'Connor recommending that the Commission take up the question, as well as correspondence and early testimony by Senator Sandra Williams, who, in 2015, participated in Governor John Kasich's Ohio Task Force on Community and Police Relations, a group that made recommendations for change to the grand jury process.

Chair Abaray also outlined the presentations the committee heard regarding the grand jury process, including from several county prosecutors, professors, and the public defender. She noted presentations by Professor Thaddeus Hoffmeister of the University of Dayton and Hawaii attorney Ken Shimozono who both spoke about the grand jury legal advisor system in Hawaii.

Chair Abaray having concluded the second presentation of the report and recommendation, she asked whether there was a motion to proceed separately on the two proposed changes to the grand jury procedure. Committee member Jeff Jacobson so moved, with committee member Richard Saphire seconding the motion.

Chair Abaray then recognized Franklin County Common Pleas Judge Stephen L. McIntosh, who was present to provide his perspective on the grand jury system and the proposed changes.

Judge McIntosh explained that he had led the Supreme Court of Ohio's Grand Jury Task Force, a body appointed by Chief Justice Maureen O'Connor in 2016 to examine the grand jury system and make recommendations with a goal of increasing public confidence in the grand jury process.

Judge McIntosh continued that some of the recommendations of the task force included instructing the public about what a grand jury does, as well as emphasizing the independence of the grand jury. He said the task force discussed making sure the judge, rather than the prosecutor, instructs the jury, and that the instructions be written. One recommended change already made is in the sample instructions, indicating that anytime grand jurors have questions they can ask the prosecutor and the court. He said the task force wanted grand jurors to feel comfortable asking questions to the court and the court would respond to those questions.

He said two areas the group focused on were grand jury secrecy, and who is responsible for prosecuting cases involving law enforcement use-of-force.

He said the task force discussed the independent counsel concept, but the discussions were different in that the focus was on giving the independent counsel more responsibility than the committee is proposing, with the result that a recommendation was not adopted. He said the task force also discussed allowing grand jurors to ask questions of witnesses with the prosecutor out of the room, but then had concerns that this might invite improper questions, such as the race of the defendant, the race of the victim, or the criminal record of the defendant. He said for that reason they ultimately decided not to make that recommendation.

As to grand jury secrecy, Judge McIntosh described the conclusion of the task force that, in certain situations, the transcript should be made available to the defendant. He said the group concluded that the grand jury transcript should be made available only in situations where there is already public knowledge of the incident, such as where there is a police-involved shooting, or a public official is being charged. He said the reason for that conclusion is that, in all police-involved shootings, the media reports the incident and the public already knows who the officers are. He added it is the same situation when public officials are investigated. He said those are the cases in which, when the grand jury comes back with a no-bill, the public wants to know the details. He said those are the two situations in which they thought the disclosure of the proceedings in the grand jury would be most appropriate.

Regarding who would be handling the prosecution of the case, he said the task force would give exclusive jurisdiction to the attorney general's office. He said the reason is that it would enhance public confidence in the grand jury process for those high profile cases. He said they discussed getting a prosecutor from a contiguous county, but then were concerned the public would see this as picking a friendly party. He said they also discussed having a pool of prosecutors, perhaps retired prosecutors, who could be tapped, but decided not to go in that direction because it could take weeks to select someone to conduct an investigation, so the task force ultimately decided that plan is not workable. He said they met with members of the attorney general's office to discuss these ideas, and their conclusions were the same as the task force's. He said the attorney general's office already is involved with a percentage of the police shooting cases, so the task force had confidence in the attorney general's ability to do so.

He said the task force thought in terms of public confidence, allowing the attorney general's office and the Bureau of Criminal Investigations to do the investigation. They thought that would be appropriate instead of having local law enforcement be involved in the investigative aspect in those special cases.

Committee member Dennis Mulvihill asked if Judge McIntosh has statistics regarding how many of the 35 law enforcement use-of-force fatality cases in 2015 were investigated by the attorney general's office as opposed to local prosecutors. Judge McIntosh said he is not sure, noting that, out of the 35, only five or six were an issue as it related to the officer's conduct. Mr. Mulvihill followed up, noting a conversation he had with the attorney general related to how often the attorney general's office has gotten an indictment when it is involved in these types of cases. Mr. Mulvihill said the attorney general's office was unable to answer his question, and wondered if Judge McIntosh was aware of any statistics regarding how often the attorney general obtains an indictment in such cases. He said he questions how independent the attorney general's investigation is if cases are sent to that office but no indictment is ever obtained, but he noted

that it is difficult to analyze that question because each case is different. Judge McIntosh said that information about the actual number of cases and the number of indictments did not come to the task force, but rather they simply considered the question of how to increase public confidence in the process, and whether there would be greater public confidence if a case were removed from the local prosecutor.

Mr. Mulvihill asked, in the task force proposal, whether attorney general investigations would be brought to a grand jury in the local county or in Columbus. Judge McIntosh said the grand jury would be local.

In relation to the concept of a grand jury legal advisor, Mr. Saphire asked what responsibilities the task force considered assigning to an independent counsel in the grand jury room. Judge McIntosh said the task force considered having that person be permitted to ask questions as well as answer them, but they never got to the point where they considered whether they would adopt the process if the person had less responsibility. He said the task force was concerned about whether that recommendation would result in the grand jury proceeding essentially being a mini-trial. He added that his own concern about the grand jury legal advisor is the financial aspect. He said, in Franklin County, there is a grand jury five days a week. He said he found the recommendation interesting, but noted that the independent counsel would have to be present all the time to allow the advisor to get the context of any questions that are asked.

Chair Abaray asked whether the task force recommended any changes to the Ohio Constitution. Judge McIntosh said the task force only looked at rule and statutory changes.

Chair Abaray also asked whether there is a current requirement that a grand jury witness transcript be made. Judge McIntosh said that is not currently a requirement. He said there is a requirement that a record be kept, and the proceedings are recorded but not transcribed unless there is a particularized need. Chair Abaray asked whether that practice is different in each county. Judge McIntosh said some counties may still have stenography, but in his court they record.

Chair Abaray noted that currently there is no constitutional right for the accused to get a transcript of the grand jury witness testimony. She asked whether that transcript even necessarily exists if the prosecutor has not requested it. Judge McIntosh said there is a record but not a transcript. He said, in looking at the committee's recommendation regarding the transcript, it is his understanding that if a witness is called at trial, then a transcript must be made available for the defense to use. He said, if that is what the recommendation means, then prior to trial the prosecution must allow the defense to have the transcript of the grand jury testimony of all witnesses the prosecution anticipates will testify at trial.

Clarifying, Chair Abaray asked whether, currently, if the testimony is not transcribed it does not get turned over in discovery. Judge McIntosh said that is correct.

Representative Glenn Holmes asked whether the task force did not move forward with the grand jury legal advisor idea because the role as they perceived it was too extensive. Judge McIntosh said the discussion was about having another person in the room other than the prosecutor. He

said that person's responsibility would be to answer questions as well as to ask questions, so the task force was concerned about the process turning into a mini-trial.

Committee member Charles Kurfess asked about whether a prosecutor also should be required to advise the grand jury other offenses that might be related to the factual pattern. Judge McIntosh said currently grand jurors should be presented with all potential charges that could be filed. He said that is supposed to be done as part of the instructions and it is his understanding that that type of instruction is given in Franklin County.

There being no further questions for Judge McIntosh, Chair Abaray thanked him for his testimony.

Chair Abaray then recognized Paul Dobson, Wood County prosecutor and president of the Ohio Prosecuting Attorneys Association.

Responding to Mr. Kurfess's previous question, Mr. Dobson said it is important for prosecutors to be cautious in suggesting potential charges because they could be accused of overcharging. He said potential charges should be those that prosecutors reasonably believe are appropriate.

Regarding the constitutional changes proposed in the report and recommendation, Mr. Dobson said, in addition to the prosecutors, members of the law enforcement community also are concerned about the proposed changes. He said the worry is that police officers as witnesses are affected by this recommendation.

Mr. Dobson continued that Hawaii is the only state to have a grand jury legal advisor role, and has had it since 1974. He said in 43 years no other state has adopted this practice. He said states have a variety of ways to commence a case. He said in Hawaii a prosecutor can proceed by presentment to grand jury or by preliminary hearing to a judge.

He added that, in Hawaii, there is no political process for the election of judges, rather they are appointed. He added that the population of Hawaii is little bigger than the population of Cincinnati. He said the chief of the Hawaii Supreme Court is the administrative judge for all judges down the line. He noted other differences, including that Hawaii has a longer period of time in which to bring a case to trial. He said this impacts the grand jury legal advisor concept because in Wood County and smaller counties there is only a grand jury twice a month.

He said while there is obvious concern about the power of government, a process that has been tested in only one state where the system is different than Ohio is not something that should be placed in the constitution.

He said his organization also opposes the proposal because the grand jury legal advisor would have to be a full-time person, but that person would have to be a government employee. Mr. Dobson said the proposal transforms the grand jury from its real job into a mini-trial.

Chair Abaray commented regarding Mr. Dobson's point about judges being appointed in Hawaii. She said the committee has looked at how judges are selected in Ohio, but did not reach a consensus on a new proposal. However, she said the committee's consensus is that the judiciary

is independent; and that, in Ohio, judges are not tainted by politics regardless of the fact they are elected. Mr. Jacobson added that judges are not free from politics merely because they may be appointed.

Representative Robert McColley said he agrees with Mr. Dobson's points, expressing that the grand jury legal advisor concept would be unworkable in Ohio. He said in some counties there are not enough attorneys to tap for the role. Rep. McColley asked whether Mr. Dobson would oppose a statutory change that would simply say the grand jury witness transcripts can be made available only for impeachment purposes.

Mr. Dobson said that specific issue has not been addressed by his association, but as a county prosecutor he does not see a problem with it. He said former Crim.R. 16(B)(1)(g) required that, if the witness testified at trial, the court would order an in camera inspection of that person's grand jury testimony to see if it was substantially different. If it was, the court would allow the defense attorney to cross examine the witness regarding the inconsistency. He said the current standard is an almost unworkable standard for a defense attorney to meet because the defense attorney has to show a particularized need for the testimony.

Mr. Mulvihill said, as a civil attorney, it is inconceivable to him that the prior testimony is not available to the defense attorney for impeachment purposes when in a criminal setting the defendant is at risk of losing life or liberty. He said if the grand jury witness testimony is completely consistent with the witness's trial testimony, the secrecy component is lost because the witness has already revealed everything. He added, if there is no more secrecy interest because the witness is testifying to the same issues at trial, it suggests the transcripts ought to be given to the defense.

Mr. Dobson answered one reason behind the secrecy is the person who testifies in trial will not necessarily have testified as to all the facts comprising their testimony in front of the grand jury, because the grand jury is a separate investigative body. The grand jurors' questions may subsequently be determined to have resulted in answers that are not admissible at trial.

Mr. Mulvihill noted that the judge could deal with that issue at trial, and that, in the civil context, there are questions that are asked in depositions that result in evidence that cannot be admitted at trial and the judge addresses that. Mr. Dobson continued that is why a rule similar to Crim.R. 16(B)(1)(g) is a better option as opposed to simply handing all the transcripts to the defense. Mr. Dobson said if witnesses know all of their statements will be handed over to the defense it would have a chilling effect on their testimony.

Mr. Mulvihill followed up, asking what rule Mr. Dobson would suggest. Mr. Dobson said that, similarly to Crim.R. 16(B)(1)(g), the court would analyze the witness's statement and would determine whether there was an inconsistent statement. Mr. Mulvihill wondered if that would occur in camera with the lawyers present. He said he worries about the workability of that method, and whether the judge would have to take a break after each witness to review what that witness had said during the grand jury proceeding.

Chair Abaray said another problem is that both defense counsel and the judge may be unaware that a statement is inconsistent because only the prosecutor knows all of the evidence that was

presented to the grand jury. She said that is why it is vital to allow defense counsel to see what the actual testimony was because the judge will not know all the facts of the case. Mr. Dobson disagreed, saying the judge will know. Chair Abaray said the judge will not get to see all the testimony.

Mr. Jacobson commented that he was not aware that Hawaii had two procedures to obtain a charge, but he thinks that fact actually supports the point of having an independent legal advisor. He said the preliminary hearing process in Hawaii involves a judge. He said the point of having an independent advisor is much the same thing in that it provides an alternative to taking the prosecutor's word for what the law is. In addition, he said, states are laboratories of democracy and often do independent things without any other experience, but the fact one state has done this for 43 years is important when the committee has not heard the practice is not working in Hawaii. He said no major problem has been found through any of the committee's research. He said, from that perspective he draws a different conclusion than Mr. Dobson.

Rep. Holmes commented that he was a grand jury foreman for a while, and thought he had a good relationship with everyone involved in the process. He wondered if Mr. Dobson feels that he shares a good relationship with the grand jury. Mr. Dobson answered affirmatively, saying he and his staff share an excellent relationship with the grand jury.

Chair Abaray noted there is no reason to assume the grand jury legal advisor would have to be from the same county. She said details of their compensation and other practical considerations could be addressed by the General Assembly.

Mr. Mulvihill asked Mr. Dobson whether he recommends a specific charge to the grand jury. Mr. Dobson said the prosecutor has to identify potential charges to the jurors, and he recommends what the indictment should be.

Mr. Kurfess asked whether there is any reason a preliminary hearing could not provide Ohio's system of justice with everything a grand jury does. Mr. Dobson said a preliminary hearing would not provide the same thing. He said a preliminary hearing reduces the number of indictments because victims and other witnesses will not testify in an open proceeding. He said he does not know what the preliminary hearing system in Hawaii looks like, but that, in Ohio, secrecy and citizen input in the grand jury are important to the process.

There being no further questions, Chair Abaray suggested the committee proceed with the vote.

Senator Mike Skindell suggested the proposed new language exclude the requirement that the grand jury legal advisor not be a public employee, as well as remove the statement that the term and compensation of the grand jury legal advisor be provided by law. He explained that it is inherent that the legislature will spell out the terms and compensation of the grand jury advisor so that does not need to be stated. He said the goal is to keep the constitution simple and leave out unnecessary wording. He added he thinks it should be left to the legislature to determine whether the advisor is to be a public employee. He said the legislature may allow in some instances for multiple counties to go together and have a contracted person but in a larger county may want to have someone who is a public employee.

Mr. Jacobson moved to amend by striking everything in paragraph (B) after the word “state.” Sen. Skindell seconded the motion.

Mr. Saphire said he had practical concerns regarding small counties, but said that the change suggested by Sen. Skindell regarding allowing the legislature to determine whether the advisor would be a public employee resolved that issue. However, he said he would like to retain the proposal directing that the legislature address terms and compensation. Mr. Jacobson disagreed, saying in other contexts the legislature has the inherent authority to address terms and compensation for other offices and positions throughout the state.

Chair Abaray then called for a vote on the pending motion, which was to edit the proposed amendment to remove the requirements that the grand jury legal advisor not be a public employee and the direction that the General Assembly set the terms and compensation for the advisor. The motion passed by voice vote.

Mr. Jacobson noted that the committee’s recommendation would be both with regard to existing Section 10, in that it would lift out the grand jury portions of that section; and with regard to creating a new section, Section 10b, that would incorporate the grand jury portions of Section 10 and add the two new recommendations regarding the grand jury legal advisor and the requirement of a transcript.

Chair Abaray called for a vote. Mr. Jacobson moved to approve the adoption of the proposal for Sections 10 and 10b. Mr. Mulvihill asked whether the proposal was for a single vote or for two separate votes. Mr. Jacobson said if someone wants to vote separately on the sections they can ask for a division of the vote. Mr. Mulvihill said because that was how it was voted on last time, he would like to request consistency in the division. Mr. Mulvihill then seconded the motion. Chair Abaray then asked for discussion.

Justice Fischer said he objects to the two proposed changes to the constitution because they would fundamentally change the Ohio criminal legal system. He said some changes recommended in the Supreme Court’s Grand Jury Task Force Report would make similar improvements, but because they would not be constitutionalized they could be easily changed. He said the changes in the committee’s report and recommendation turn a nonadversarial process into an adversarial process, which would not be good for many reasons, especially for the grand jurors who will wonder who to look to for advice – the judge instructing them, the prosecutor meeting with them, or the independent legal advisor. He said all of the questions or concerns can be taken care of by the judge, who is independent from the prosecutor.

Justice Fischer continued that he believes the recommendations would undermine and significantly change the reason to have grand juries, which is for investigative purposes, and especially for secrecy. He said the transcript requirement would negatively impact testimony in child, rape, and sexual assault cases, as well as public corruption cases. He said there would be less cooperation from independent witnesses because their testimony is more easily publicized. He added if the recommended changes are made by statute and rule, they can be altered, but if they are in the constitution it will be hard to get them out. He said he will vote against the report and recommendation, not just because of day-to-day implementation problems but because there are bigger issues involved.

Mr. Saphire said if he were persuaded that the addition of grand jury legal advisor would fundamentally transform the nature of the grand jury process to make it an adversarial one he would vote against it, but he does not think it has happened that way in Hawaii. He said the advisor is there to answer questions, and he does not see how that makes it more adversarial than it otherwise would be. He added, with respect to the transcript proposal, there is a need to balance the chilling effect that provision would have on testimony with the right of the defendant who is facing the full weight of the state's authority and needs to have due process of law.

Mr. Kurfess suggested that the committee hear from judges on the matter. He said the committee should hear from a representative of the Ohio Judicial Conference before making a decision. He said, to the extent there are problems with the grand jury, it is because judges have paid little or no attention to the function of the grand jury.

Justice Fischer asked why the common pleas judge could not answer the questions from the jury, instead of having a grand jury legal advisor. Mr. Saphire wondered if questions are frequent whether that would be disruptive of the process. Mr. Jacobson added that the judge does not sit in the room; it is what happens when the judge is not in the room that may trigger the need for someone to be present. He said a prosecutor is less likely to come in and say more than they should if there is someone else there with a law degree whose job it is to at least advise.

Mr. Mulvihill said the discussion informs him the committee is not ready to vote. Chair Abaray and Mr. Jacobson disagreed, saying they are ready to vote.

Rep. McColley moved to table, and Justice Fischer seconded the motion. Rep. McColley said there is no discussion on a motion to table.

Mr. Saphire said one reason to table is so he can have in front of him the proposal they are voting on.

Mr. Mulvihill asked what the motion to table means, wondering if it means the committee will talk about the issue at the next meeting. Mr. Jacobson said there are two different things – taking it off the table in the General Assembly means a motion to postpone indefinitely. He said it is different than saying a motion to postpone until a time certain, such as next meeting.

Rep. McColley clarified that his motion is to table the discussion until the next meeting. Mr. Jacobson said that is a debatable motion. He said he does not think the committee will get enough additional information to be valuable and urged the committee to vote no on the motion to postpone.

Sen. Skindell asked regarding how to start the process of getting a judicial conference review. Justice Fischer said there are various committees in the conference and this issue would go to a particular committee, probably the committee dealing with criminal procedure. He suggested providing the proposed language to the conference.

Chair Abaray said the committee was asked to look at this issue by Chief Justice O'Connor and has had public discussions of the topic for two years. She said the Supreme Court has been well

aware of the debate. She then called the question as to whether to postpone. The motion passed by voice vote with three opposed.

Discussion:

Chair Abaray then drew the committee's attention to a proposal by Attorney Richard Walinski and committee member Mark Wagoner to amend Article IV, Section 5(B), which was brought to the committee in November 2016. She said the proposal was to change the rulemaking authority of the Supreme Court. She said the Court has provided a letter opposing the proposal, which has been distributed to the committee. She noted that Justice Fischer has expressed opposition to the proposal. She said that Mr. Wagoner indicated to her that he and Mr. Walinski would like to withdraw the proposal. She said unless someone on the committee wants to advocate for that proposal, she would like to suggest the committee vote to close that issue. Mr. Mulvihill moved to close the issue, with Justice Fischer seconding the motion. By voice vote, the committee unanimously voted to close the issue.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:18 a.m.

Approval:

The minutes of the April 13, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the May 11, 2017 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 11, 2017

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:07 a.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Holmes, Jacobson, Kurfess, Mulvihill, Sapphire, and Skindell in attendance.

Approval of Minutes:

The minutes of the April 13, 2017 meeting of the committee were approved.

Reports and Recommendations:

Article I, Section 10 (The Grand Jury)

Chair Abaray began the meeting by drawing the committee's attention to a report and recommendation regarding the grand jury portion of Article I, Section 10. She said the draft in front of the committee modified the description of what is being recommended by specifically indicating the reference to the grand jury is being removed from current Section 10 and placed in its own separate section, numbered "10b." In addition, she said the new draft describes that the new Section 10b would have three separate parts consisting of the original language, a requirement for a grand jury legal advisor, and a requirement that a transcript of grand jury witness testimony be provided to the accused.

She asked for a motion to proceed with regard to the committee's recommendation. Committee member Jeff Jacobson so moved, with committee member Dennis Mulvihill seconding the motion. The committee then proceeded to discuss the report and recommendation.

Committee member Charles Kurfess said he has concerns about a portion of the proposed amendment that indicates that the grand jury legal counsel will be appointed pursuant to statute. He said, considering the controversy over the issue itself, he can see that, if it were adopted, the same controversy would arise in the legislature in terms of who would appoint the legal advisor and how that would be accomplished. He said “One of the big issues is whose grand jury is it? It is the court’s grand jury so we should specifically say that.”

Mr. Jacobson, accommodating Mr. Kurfess’s concern, asked whether it would help to strike the phrase “as provided by law,” and instead “as provided by the presiding judge.” Mr. Kurfess said that would help, or perhaps “as provided by the court.”

Mr. Mulvihill raised a question of which court, noting that many counties have more than one court. Mr. Kurfess said a grand jury is the province of the common pleas court.

Mr. Mulvihill wondered whether the language should we say “by the judge overseeing the grand jury.”

Vice-chair Patrick Fischer said this is generally in the jury instructions.

Mr. Jacobson said it is probably sufficient to say “by the court,” and Mr. Kurfess agreed.

Representative Glenn Holmes asked whether, if a grand jury is convened by the court, the counsel is actually independent.

Mr. Kurfess said he does not know why the word “independent” is used.

Mr. Jacobson explained the goal is for the legal advisor to be independent of the prosecutor, and that the advisor should be available to the grand jury if it needs explanation.

Mr. Kurfess said it is the court’s appointed counsel, and for that reason is independent. He noted that courts appoint counsel for many different purposes. Mr. Jacobson wondered if the word “independent” should be removed.

Rep. Holmes said “independent” speaks to the person being outside, or separate.

Mr. Jacobson said he will second the motion made by Mr. Kurfess to amend proposed Section 10b, part (B), by striking “as provided by law” and inserting “as appointed by the court.”

Chair Abaray asked if there were objections to the motion. There being none, she announced the motion passed.

Addressing the merits of the recommendation, Justice Fischer commented that the committee has received letters from the Ohio Judicial Conference, the Ohio Prosecuting Attorneys Association, and the Buckeye Sheriffs Association. He said their objections to the proposal go back to what was in the minutes from the last meeting, but the discussion about the use of the words “independent” and “court” illustrate the problems with the proposal. He said he is concerned that it unclear who the legal advisor is meant to represent. Further, he asked who has a

constitutional right if something goes wrong, or if the legal counsel gives bad advice and the person is wrongfully indicted. He said it is also a question whether privilege attaches to the advice given by the counsel, and whether grand jurors have a right to waive the privilege. He said the proposal is “an attack on the court.” He said the current jury instructions read that, at any time a grand jury may contact the court with questions. He said he does not see a reason for putting these concepts in the constitution, and that the proposal could be made part of statute or court rule.

Mr. Jacobson said he disagrees with that view. He said, procedurally, the proposal is not amending the constitution of Ohio and not posing the question directly to the voters. Instead, he said the committee is taking the first step in what would be a long process. He said “the fact that not every detail is completely settled is a problem that inures to every proposal,” and it is impossible to know when adopting a new constitutional provision how courts will interpret it or how legislatures will do their necessary work to implement it. He continued that the proposed amendment is important because it recognizes there are problems with the current system. He said it would be great if the legislature or the Supreme Court would address the issues by statute or rule, but the nice thing about making this recommendation is that the committee is starting a long process that may allow the court to act to obviate the need for it. He said it is important to reassure those who have concerns about what happens in the grand jury room when the only legal opinion presented is one that has an outcome that the prosecutor is trying to achieve. Mr. Jacobson said the rule allowing jurors to ask the court is a good rule, but jurors do not always do that.

Chair Abaray said, for the record, she does not believe anyone on the committee is attacking the judiciary or trying to criticize prosecutors. She said “Our goal has been to have checks and balances and to have the public have more confidence in the grand jury system because there is an inherent difficulty in a transparent government with a procedure that has such secrecy.” She said the committee has put forth this proposal as a tool to help improve confidence in the grand jury system, and she believes that is everyone’s motivation.

Justice Fischer said he agrees, but his point is there are some things that are important but not necessary to enshrine in the constitution. He said, for example, the right to counsel for a defendant is in the constitution and that is important. But, he said, as a commission we are supposed to recommend ways to improve the constitution and he does not believe this proposal reaches that height. He noted a task force in the Ohio Supreme Court that reviewed the grand jury system for months, and rejected a similar proposal.

Mr. Kurfess said the grand jury instructions follow the statute and the rules, so that if the constitution is changed the instructions will change. He said his experience as a judge often gives him some degree of doubt or question about a lot of instructions. He commented that, when he became a judge he learned the grand jury instructions specifically said the grand jury shall not consider the indirect evidence, but, in reality, that is almost all of what the grand jury hears.

Mr. Kurfess continued that the existing grand jury provision is not in the constitution as a procedural matter, but rather as a protection to citizens – for individual defendants or those seeking to be charged. He said he can only recall one time as a judge when a foreman came to

him with a question. He said “We may tell them they can do it when they are sitting there but it does not have a lot of meaning to the grand jury.” He said he views the proposed amendment as a way for counsel to be present to assist rather than waiting for the judge to be asked.

Rep. Holmes said, looking at this constitutionally, the constitution was bred through ideals. He said if the General Assembly were to make a law in contrast with a constitutional provision, the Supreme Court would overturn it. He said placing this concept in the constitution is important when looking at the justice system, which requires justice for all. He said having the legal advisor does not constrain the court or the judge in any way.

Senator Mike Skindell asked whether the vote on the proposal would be divided so as to consider the grand jury legal advisor and the transcript of witness testimony issues separately.

Chair Abaray asked if members felt the need to divide the vote. There being no objections, she indicated there would be one vote on the amendment as proposed.

A roll call vote was taken, with the following result:

Abaray – yea
Fischer – nay
Holmes – yea
Mulvihill – yea
Kurfess – yea
Jacobson – yea
Skindell – yea
Saphire – yea

Chair Abaray announced that the motion to issue the report and recommendation for amendments to Article I, Section 10 passed, with seven in favor, one opposed, and three absent.

Discussion:

Chair Abaray then asked how the committee would like to proceed regarding the issue of civil asset forfeiture, noting a proposal introduced by Representative Robert McColley. She noted Rep. McColley was not available to address the committee and wondered whether the committee wished to proceed or whether it would be preferable to wait until Rep. McColley could be present. Members generally agreed that it would be acceptable to wait to discuss that issue.

Committee member Richard Saphire said the proposal is interesting but, given the current status of the Commission’s future, observed the committee would not be able to move through a report and recommendation.

Chair Abaray it would be premature to have a report and recommendation, noting the committee had heard from a speaker on the topic, but had not had any other information or an opportunity to discuss the subject.

Mr. Jacobson suggested the committee could attempt to make a record for the future, indicating the chair could ask for a report and if there is a meeting next month the committee could get to the position of having a first vote.

Mr. Saphire agreed, noting even if the committee is unable to wrap up a topic it could leave a record of topics for a future commission to consider.

Chair Abaray, explaining for the record, indicated that Rep. McColley had offered an amendment to Article I, Section 12 that would add new section that would state as follows:

No person shall have their property forfeited to the state on the basis or allegation of a crime without a criminal conviction, unless a conviction against the person is unattainable by reason of death or inability to bring the person within jurisdiction of the court.

Chair Abaray asked if committee members had other new business.

Noting the termination of the Commission, whenever it is, Mr. Kurfess said he is satisfied that the committee would conclude its business in an orderly fashion and will take the time necessary to wrap up topics, even if it requires one or two extra sessions. He said he is in favor of one or two special meetings to allow this.

Mr. Saphire said the committee spent the better part of two years on the topic of judicial selection. He said they had many meetings and presenters, and reviewed a lot of research. He recalled the committee actually voted with respect to the process that it would use, and for a variety of reasons, the issue died. He said, in the interest of preserving the record, it would be important to have a draft recommendation.

Chair Abaray said staff would be putting minutes in the form of a summary report. She said, at the next meeting the committee could give a wrap up.

Mr. Jacobson said he is still opposed to any changes to the judicial selection process in Ohio, and that, if the committee seeks to record its review of that topic, he would prepare the arguments for the other side.

Mr. Saphire said he is not suggesting a proposal to be voted on, but rather to leave a report because someone might find the information and perspectives to be useful.

Chair Abaray recalled that the committee moved on because it wanted to wait to see how the elections in the Supreme Court went to see if there were different problems. She said "We were also looking at the impact of Supreme Court decisions on the financing of judicial elections; wanted to wait but didn't pick it up again."

Mr. Saphire said he has a distinct recollection the committee voted on how to proceed, and that the consensus was that they should describe the best possible elective system and the best possible selection system. He said they considered that the ideas might not be adopted, but should be forwarded to the Commission for consideration.

Chair Abaray agreed it would be good for the record to present those ideas to the Commission.

Mr. Jacobson disagreed, stating that, “by suggesting what changes we would make to an elected system you are starting with premise there is something wrong with current system and we would have to debate what changes there were for that.” He said he recalls the discussion to be that if they did not move to another topic he would move to postpone indefinitely. He said he understands that was a direction they voted for earlier, but he disagrees. He commented “It is elitism to take the decision of choosing judges away from the electorate.” He said he objects to a document that would outline a perfect system. He said those who believe the system works are not in favor of what the proposals could be.

Justice Fischer said the committee is supposed to prepare a list of issues that a future group might wish to look into. He said, if the Commission is done June 30, then the committee cannot do more than that.

Mr. Kurfess said the one area he would like to explore is the suggestion originating with Chief Justice O’Connor, which is to move judicial elections to odd-numbered years. He said he can think of some positives and some questions, and would like to hear the views of the secretary of state and the Ohio Judicial Conference on that. He said, based on the attention judicial candidates get, that issue deserves some exploring.

Mr. Jacobson said that system would not encourage votes from rural Ohioans because only the cities have issues on the ballot in odd-numbered years to attract voters.

Chair Abaray suggested that the committee’s next meeting would be a wrap up meeting, and would include discussion of these items.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:49 a.m.

Approval:

The minutes of the May 11, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the June 8, 2017 meeting of the full Commission.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Justice Patrick F. Fischer, Vice-chair

Appendix 3

Judicial Branch and Administration of Justice Committee

Status of Assigned Constitution Sections

Status of Assigned Constitution Sections

When Commission created its subject matter committees, it charged each committee with the responsibility for reviewing certain assigned sections of the Ohio Constitution. In turn, each committee maintained a planning worksheet to track its progress in addressing each of its assigned sections. The following document is the final planning worksheet for this committee. It indicates all of the sections for which the committee was responsible and the final status of its reports on those sections. The status is based on the approval steps required in the OCMC Rules of Procedure and Conduct.

The status categories indicated on the worksheet are as follows:

Draft Status	The current status of a draft report & recommendation
Committee 1 st Pres.	First presentation to the committee of the draft report & recommendation
Committee 2 nd Pres.	Second presentation to the committee
Committee Approval	Approval by the committee of the report & recommendation
CC Approval	Approval by the Coordinating Committee
OCMC 1 st Pres.	First presentation to the Commission
OCMC 2 nd Pres.	Second presentation to the Commission
OCMC Approved	Adopted by the Commission

Judicial Branch and Administration of Justice Committee

Planning Worksheet (Through June 2017 Meetings)

Article I – Bill of Rights (Select Provisions)

Sec. 5 – Trial by jury (1851, am. 1912)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 8 – Writ of habeas corpus (1851)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	3.9.17	N/A	3.9.17	4.13.17	4.13.17	N/A	4.13.17

Sec. 9 – Bail (1851, am. 1997)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec.10 – Trial for crimes; witness (1851; am. 1912)

Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	3.9.17	4.13.17	5.11.17	5.11.17	5.11.17		

Sec. 10a – Rights of victims of crime (1994)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 12 – Transportation, etc. for crime (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed							

Sec. 14 – Search warrants and general warrants (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 15 – No imprisonment for debt (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	3.9.17						

Sec. 16 – Redress for injury; due process (1851; am. 1912)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 19a – Damages for wrongful death (1912)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Article IV - Judicial

Sec. 1 – Judicial power vested in court (1851, am. 1883, 1912, 1968, 1973)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 2 – Organization and jurisdiction of Supreme Court (1851, am. 1883, 1912, 1944, 1968, 1994)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 3 – Organization and jurisdiction of court of appeals (1968, am. 1994)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 4 – Organization and jurisdiction of common pleas court (1968, am. 1973)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 5 – Powers and duties of Supreme Court; rules (1968, am. 1973)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 6 – Election of judges; compensation (1968, am. 1973)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 13 – Vacancy in office of judge, how filled (1851, am. 1942)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 15 – Changing number of judges; establishing other courts (1851, am. 1912))							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 17 – Judges removable (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 18 – Powers and jurisdiction of judges (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. 19 – Courts of conciliation (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	11.13.14	1.15.15	1.15.15	2.12.15	2.12.15	4.9.15	4.9.15

Sec. 20 – Style of process, prosecution, and indictment (1851)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved

Sec. [21] 22 – Supreme Court commission (1875)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved
Completed	11.13.14	1.15.15	1.15.15	2.12.15	2.12.15	4.9.15	4.9.15

Sec. 23 – Judges in less populous counties; service on more than one court 1965)							
Draft Status	Committee 1 st Pres.	Committee 2 nd Pres.	Committee Approval	CC Approval	OCMC 1 st Pres.	OCMC 2 nd Pres.	OCMC Approved