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