



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