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, Saphire, 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

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Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer

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Judge Patrick F. Fischer, Vice-chair