OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee

Janet Gilligan Abaray, Chair
Hon. Patrick F. Fischer, Vice-chair

September 8, 2016

Ohio Statehouse
Room 017

OCMC Judicial Branch and Administration of Justice Committee

Chair	Ms. Janet Abaray
Vice-chair	Judge Patrick Fischer
	Mr. Jeff Jacobson
	Sen. Kris Jordan
	Mr. Charles Kurfess
	Rep. Robert McColley
	Mr. Dennis Mulvihill
	Mr. Richard Saphire
	Sen. Michael Skindell
	Rep. Emilia Sykes
	Mr. Mark Wagoner

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

THURSDAY, SEPTEMBER 8, 2016
1:30 P.M.
OHIO STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of July 14, 2016

  [Draft Minutes – attached]

IV. Reports and Recommendations

- None scheduled

V. Presentations

- "Hawaii Grand Jury Legal Advisors"

  Ken Shimozono, Esq.
  Honolulu, Hawaii

- "Follow-up Questions on Grand Juries"

  Professor Thaddeus Hoffmeister
  University of Dayton, School of Law

VI. Committee Discussion

- Article I, Section 10 – Grand Juries

  The committee chair will lead discussion regarding what steps the committee wishes to take regarding the preparation of a report and recommendation on the topic of grand juries as set out in Article I, Section 10 of the Ohio Constitution.

  [Memorandum by Shari L. O'Neill titled "The Committee's Consideration of Grand Jury Reform," dated June 24, 2016 – attached]

VII. Next Steps

- Planning Worksheet

  The committee chair will lead discussion regarding the next steps the committee wishes to take in preparation for upcoming meetings.

  [Planning Worksheet – attached]

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

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 no 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.

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Janet Gilligan Abaray, Chair

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Judge Patrick F. Fischer, Vice-chair

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Kenneth J. Shimozono, Esq.

Kenneth J. Shimozono is a founding partner of Takemoto & Shimozono, LLC with over 21 years of courtroom experience. He was born and raised in Honolulu and graduated from St. Louis High School. Ken then attended the University of Hawaii and went on to graduate from Oregon State University in 1991. Thereafter, he obtained his Doctor of Jurisprudence from Willamette University - College of Law in 1994, where he was a Member of the Order of Barristers.

Ken began his legal career at the Hawaii Supreme Court where he clerked for the Honorable Justice Paula A. Nakayama. In 1995, he began his career in criminal defense at the Office of the Public Defender, where he became a Senior Trial Attorney. Ken successfully represented and defended thousands of clients charged with crimes ranging from DUI to Murder.

In 2005, Ken and his law partner Myron H. Takemoto founded the law firm of Takemoto & Shimozono, LLC. He lives in Honolulu with his wife and two children. Ken enjoys surfing, soccer, spending time with his family, and coaching his kids' sports team.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Janet Abaray, Vice-chair Patrick Fischer, and Members of the Judicial Branch and Administration of Justice Committee**

CC: **Steven C. Hollon, Executive Director**

FROM: **Shari L. O'Neill, Counsel to the Commission**

DATE: **June 24, 2016**

RE: **The Committee's Consideration of Grand Jury Reform**

To assist the Judicial Branch and Administration of Justice Committee in its review of the grand jury portion of Article I, Section 10, this memorandum is designed to describe the committee's review of the question of grand jury reform, to summarize grand jury reform legislation currently pending in the Ohio General Assembly, and to describe the work of the 1970s Ohio Constitutional Revision Commission relating to grand jury reform.

The Judicial Branch and Administration of Justice Committee's Work on Grand Juries

The committee began its consideration of the grand jury in July 2015, hearing from Senator Sandra Williams, a member of the Governor's Task Force on Community-Police Relations, on recommending changes to Ohio's grand jury process.

Senator Williams discussed 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. Sen. Williams noted that although indictment rates are high, there has been a refusal 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. 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.

The committee also heard a presentation about grand juries by Professor Gregory M. Gilchrist of the University of Toledo College of Law. Prof. Gilchrist 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. Because grand juries serve for a period of months they 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.

In December 2015, the committee heard presentations by two county prosecutors, who provided 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." 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.

The committee also heard from Morris Murray, prosecutor for Defiance County, who 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.

In February 2016, Senator Williams again presented to the committee, outlining legislation she has introduced related to the use of grand juries. Identifying recommendations she would like the committee to support, Sen. Williams 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.

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 advocated for the grand jury counsel having specific guidelines about interactions 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 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. 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 possibility would be to 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 recommended a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise, a useful procedure 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.

Also in February 2016, the committee heard from State Public Defender Tim Young, who 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:

- 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.

Most recently, 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 Hawaiian 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 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.

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.

Committee members asked Prof. Hoffmeister how the use of such an advisor could improve the grand jury indictment procedure. Prof. Hoffmeister said having the advisor present "works around the edges" because it prevents prosecutors from ignoring facts, and requires them to run a tighter ship. He said the grand jury process is the only one done in secret, so by having a neutral person in the room the government is required to bring stronger cases. He emphasized the importance of that fact, because he said very few felony cases go to trial due to the indictment usually producing a plea deal.

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.

Pending Legislation Relating to Grand Juries

Four different pieces of legislation related to grand juries are now pending in the General Assembly.

- House Bill 380, sponsored by multiple representatives from both parties, would amend Revised Code Sections 2930.01, 03, 04, and 2901.45, to require law enforcement agencies to adopt written policies regarding the investigation of deaths directly resulting from the use of a firearm by a law enforcement officer, requiring a criminal investigation of such deaths, and requiring the formation of a pool of independent investigators who would prepare a report of their findings. The bill further requires the report to be released to the public if the prosecutor determines there is no basis for a prosecution or if a grand jury returns a "no bill." The investigatory procedure required by the bill would be administered by the Attorney General's office, specifically relying on the database of law enforcement investigators qualified to investigate officer-involved deaths as specified by the Ohio Peace Officer

Training Commission. HB 380 was introduced on October 22, 2015, and is pending before the House Judiciary Committee.

- Senate Bill 258, sponsored by Senator Sandra Williams and Senator Charleta Tavares, would enact Revised Code Section 109.021 to establish the duties and authority of the Attorney General to investigate and prosecute cases relating to the death of a person caused by a peace officer. The bill requires the Attorney General to investigate the death of an unarmed person caused by a peace officer engaged in the officer's duties, who may also investigate if there is a significant question whether the person is armed and dangerous. If the Attorney General's investigation results in a decision to proceed, the bill requires the evidence to be referred to a grand jury or a special grand jury, and allows the Attorney General and any assistant AG to act as prosecutor. If an indictment is returned, the AG is given sole responsibility to prosecute the case. The attorney general is also required to provide a report to the governor or the governor's designee if the AG declines to refer evidence to a grand jury subsequent to the investigation, or if the grand jury declines to return an indictment. Introduced on January 13, 2016, the bill has been referred to the Senate State and Local Government Committee.

- Senate Joint Resolution 4, also sponsored by Senators Williams and Tavares, proposes to amend Article I, Section 10 of the Ohio Constitution to eliminate the requirement that a felony only be prosecuted on the presentment or indictment by a grand jury. That resolution, if adopted, would remove the first sentence of Article I, Section 10. SJR 4 was offered on February 10, 2016, and is pending before the Senate Government Oversight and Reform Committee.

- Senate Joint Resolution 6, sponsored by Senator Williams, would amend Article I, Section 10 of the Ohio Constitution to allow the prosecutor in a felony case to elect to prosecute upon a finding of probable cause by a court following a hearing rather than solely upon an indictment by a grand jury. That resolution, if adopted, would add language to the first sentence of Article I, Section 10 in order to provide an option for the prosecutor to either use the grand jury indictment process or to ask a court to hold a hearing to determine whether there is probable cause to charge the individual with a crime. This resolution was offered on March 17, 2016 and is pending before the Senate Government Oversight and Reform Committee.

The Ohio Constitutional Revision Commission

The 1970s Commission created a special "Committee to Study the Grand Jury and Civil Trial Juries" for the purpose of looking at 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.[1]

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

[1] A "presentment" is a charging document 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. An "information" is a charging document filed by the prosecutor and challenged by the accused at a preliminary hearing. If a judge determines at the preliminary hearing that there is not sufficient probable cause to bind the defendant over for trial, then the prosecution does not proceed. 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.

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.

Conclusion

In discussing possible reforms, committee members have expressed a variety of views, including that any changes should be statutory. Some members of the committee have expressed an interest in pursuing the Hawaii approach of having a neutral grand jury legal advisor present during the hearing. Other possibilities for reform being considered by the committee include requiring judicial oversight, requiring an independent prosecutor to handle cases involving investigations of law enforcement, and requiring a transcript of proceedings to be made available.

It is hoped that this review of the committee's work thus far, as well as information regarding current proposals for reform now pending in the General Assembly and reforms that were proposed in the 1970s, will assist the committee as it determines potential recommendations to the full Commission. Staff is prepared to offer additional research and assistance as needed.

Judicial Branch and Administration of Justice Committee

Planning Worksheet
(Through July 2016 Meetings)

Article I – Bill of Rights (Select Provisions)

Sec. 5 – Trial by jury (1851, am. 1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 8 – Writ of habeas corpus (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 9 – Bail (1851, am. 1997)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec.10 – Trial for crimes; witness (1851; am. 1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 10a – Rights of victims of crime (1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 12 – Transportation, etc. for crime (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 14 – Search warrants and general warrants (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 15 – No imprisonment for debt (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 16 – Redress for injury; due process (1851; am. 1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 19a – Damages for wrongful death (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article IV - Judicial

Sec. 1 – Judicial power vested in court (1851, am. 1883, 1912, 1968, 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Organization and jurisdiction of Supreme Court (1851, am. 1883, 1912, 1944, 1968, 1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Organization and jurisdiction of court of appeals (1968, am. 1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – Organization and jurisdiction of common pleas court (1968, am. 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 5 – Powers and duties of Supreme Court; rules (1968, am. 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 6 – Election of judges; compensation (1968, am. 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 13 – Vacancy in office of judge, how filled (1851, am. 1942)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 15 – Changing number of judges; establishing other courts (1851, am. 1912))							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

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Sec. 17 – Judges removable (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 18 – Powers and jurisdiction of judges (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 19 – Courts of conciliation (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. [21] 22 – Supreme Court commission (1875)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd 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 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

October 13

November 10

December 8