



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Ohio Constitutional Modernization Commission

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 2

ELECTION BY BALLOT

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 2 of the Ohio Constitution concerning the requirement that elections be by ballot. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article V, Section 2 be retained in its current form.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2 reads as follows:

All elections shall be by ballot.

Adopted as part of the 1851 constitution, Section 2 was taken verbatim from Article IV, Section, 2 of the 1802 Constitution, and has never been amended.

The 19th century saw significant changes to the electoral process, particularly concerning the widespread adoption of what became known as the secret, or "Australian," ballot. Proponents of the Australian ballot urged the use of an official ballot that included the names of all the candidates for office, was printed at public expense, was distributed only at polling places, and was marked in secret.¹ In 1888, Massachusetts became the first state to adopt the Australian ballot, and virtually all of the states embraced this reform by the turn of the century.²

Secrecy of the ballot was the most important feature of the Australian ballot, and prior to its adoption Americans used to vote with ballots provided them by political parties, with their

voices (*viva voce*), with their hands, or with their feet.³ Of the many variants of the Australian ballot, in 1891 Ohio chose the party column format, which stayed in place throughout the first half of the 20th century.^{4 5}

Ohio ballot reform in the latter portion of the 19th century addressed corrupt practices that included stuffing ballot boxes, engaging in kick-back schemes, and buying votes, all activities enabled by the fact that voters were not provided a list of candidates, could remove ballots from the polling location, and were not required to place ballots directly into the ballot box.⁶ Upon his election in 1890, Ohio Governor James E. Campbell sought to secure a “free, secret, untrammelled and unpurchased ballot which shall be honestly counted and returned.”⁷ That effort culminated in the General Assembly’s 1891 enactment of the Australian Ballot Law.

Although the Ohio Constitution does not explicitly require a secret ballot, a dispute in the early 20th century about whether voting machines violated Section 2 ultimately resulted in case law holding that the ballot is secret.

In *State ex rel. Karlinger v. Bd. of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 89 N.E. 33 (1909), the Supreme Court of Ohio held the General Assembly lacked the power to adopt a statute permitting the use of voting machines, and that the proposed machines violated Section 2’s requirement that elections be by ballot. Acknowledging conflicting court decisions from around the country, the court expressed skepticism about the reliability of voting machines and the ability of voters to quickly master the machine and cast their vote. *See Id.*, 80 Ohio St. at 488-89, 89 N.E. at 36.

The delegates to the 1912 Ohio Constitutional Convention, taking a more progressive view, proposed an amendment to permit the use of voting machines, but voters rejected the proposal, leaving the question of voting machines unsettled.⁸ In *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 310, 168 N.E. 131, 134 (1929), the Supreme Court of Ohio overruled *Karlinger* and upheld the use of voting machines, holding, as syllabus law, that the term “ballot” “designates a method of conducting elections which will insure secrecy, as distinguished from open or viva-voce voting.”

In reaching this decision, the Court relied on decisions from other states upholding the use of voting machines, as well as an article by Professor John H. Wigmore, who stated that “his search has convinced him that in common usage the term *ballot* has always been used, without an adjective, to express the idea of a vote cast in such a way that its purport is unknown at the time of casting – in short, of ‘secret’ voting.” *See Green, supra*, 121 Ohio St. at 308, 168 N.E. at 134 (citing Wigmore, *Ballot Reform: Its Constitutionality*, 23 *American Law Review* 719, 725 (1889)). Finally, the Court recognized that the meaning of constitutional provisions must be permitted to evolve as new technologies develop.⁹

Amendments, Proposed Amendments, and Other Review

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission) did not recommend a change to Section 2, concluding that the fundamental principle of the secret ballot – that “voters must be permitted to express their views on election matters without fear of retaliation” – is a proper matter for the constitution.

Litigation Involving the Provision

The Supreme Court of Ohio’s only recent opportunity to consider Section 2 involved a criminal case in which the defendant was charged with five counts of ballot tampering. In *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, a county board of elections employee was accused of marking the ballots of nursing home residents in favor of a candidate that was not their preference. When the county prosecutor sought to introduce the allegedly tainted ballots, which had been seized pursuant to a valid warrant, the defendant argued Section 2 required the ballots’ secrecy. In rejecting this argument, the Court first noted that Section 2 “aspires to ballot secrecy, but it is not self-executing.” *Id.* at ¶ 24. The Court then decided the question based on statutory law, concluding that the statutory requirement of ballot secrecy applies only to election proceedings and not to the admission of evidence in a criminal trial, adding, “applying statutory ballot secrecy to preclude using a ballot as evidence of a crime conflicts with a board of elections’ duties to investigate and gather evidence of election irregularities.” *Id.* at ¶ 33.

Presentations and Resources Considered

Engstrom Presentation

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.¹⁰

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, the states began to reform the way they conducted elections by adopting the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated

so that, instead of just a Republican or Democratic party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891. He noted that some states have a constitutional provision that says the ballot must be secret, but Ohio has not constitutionalized this requirement.

Discussion and Consideration

In considering Article V, Section 2, some committee members expressed that embedding the concept of a secret ballot in the state’s foundational document would emphasize the importance of protecting the integrity of the voting process by emphasizing the need for ballots to be secret. Initially, committee members sought to add the word “secret” to Section 2 on the basis that the recommendation would merely constitutionalize a concept that is already accepted under case law.

However, after further consideration, a majority of the committee concluded that, because the requirement is well-established and has been recognized by the Supreme Court of Ohio since the 1920s, it may not be necessary to add the word “secret” to Section 2.

In reaching this conclusion, committee members commented that adding the word “secret” could be interpreted as indicating a greater level of secrecy than is already understood to be the case, potentially permitting an argument that absentee ballots are not appropriate. Other members similarly cautioned that a change could have unintended consequences, such as potentially affecting issues surrounding voter coercion and voter fraud. In the absence of evidence that problems have arisen due to the lack of a provision expressly requiring ballots to be secret, committee members were reluctant to recommend a constitutional change. Ultimately, the committee’s consensus was to leave the section in its present form.

Conclusion

The Bill of Rights and Voting Committee recommends that Article V, Section 2 be retained in its present form.

Date Issued

After considering this report and recommendation on March 9, 2017 and May 11, 2017, the Bill of Rights and Voting Committee voted to issue this report and recommendation on May 11, 2017.

Endnotes

¹ See generally L. E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968); see also Erik J. Engstrom & Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 842-43 (2016).

² See Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 *Brit. J. Pol. Sci.* 1, 9 (2000).

³ See Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, *The New Yorker* (Oct. 13, 2008). Available at: <http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> (last visited Feb. 26, 2017). See also, Eldon Cobb Evans, *A History of the Australian Ballot System in the United States*, 1917.

⁴ In their introduction to their law review article on ballot formats, Professors Engstrom and Roberts identified a number of state variations in ballot formats.

Some states line candidates in party columns while others list candidates by office. Some states provide for party emblems at the top of the ballot. Others provide a box at the top of the ballot allowing voters to simply cast a straight ticket with one check mark. Moreover, states have varied in how long they have stuck with one type of ballot.

Engstrom & Roberts, *supra*, note 1 at 841.

⁵ Ohio first adopted what is known as the party column format of the ballot, but it switched to the office bloc format in 1949 with the adoption of Article V, Section 2a, of the Ohio Constitution. See, *id.* at 854-56.

⁶ *Australian Ballot*, Ohio History Central, http://www.ohiohistorycentral.org/w/Australian_Ballot [https://perma.cc/F267-AFJQ].

⁷ *Id.*

⁸ The proposed amendment on voting machines provided as follows: “All elections shall be either by ballot or by mechanical device, or both, preserving the secrecy of the vote. Laws may be enacted to regulate the preparation of the ballot and to determine the application of such mechanical device.” Proceedings and Debates of the Constitutional Convention of the State of Ohio, Vol. 2, 1321, 1795, & 1959 (1913).

⁹ The Court stated:

It was manifestly impossible for the framers of the Ohio Constitution to foresee all of the mechanical developments of our modern age. Just as our forefathers in drafting the national Constitution could not foresee the time when the term ‘post roads’ would be applied to airplane traffic – a traffic through air lanes which have not the slightest physical resemblance to the highway, as it has been known from the time of the Egyptians down – so the framers of the Ohio Constitution could not well foresee the time when a voter, by manipulating a lever, could mark either a straight ticket or a split ticket with exactly the same definiteness of individual expression as when he marks the ballot in his hand. However, surely the impress upon the record of a machine is not much farther removed from marking the ballot than the impress upon the key of the typewriter is removal from the actual making of characters of the alphabet by hand. If typewriting is the equivalent of long-hand, how can voting by machine be said essentially to differ, except in its efficiency, from voting by the old system of the ballot?

We think that the constitutional provision was meant merely to relate to the essential secrecy of the indication of the voter’s choice; that this secrecy has been demonstrated to be retained and enhanced by the use of voting machines; that, by the vast weight of authority, the Karlinger Case was an incorrect decision, and therefore we overrule that holding.

Automatic Registering Machine Co., 121 Ohio St. at 310-11, 168 N.E. at 134.

¹⁰ See Engstrom & Roberts, *supra* note 1.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

OHIO CONSTITUTION ARTICLE VII, SECTION 1

SUPPORT FOR PERSONS WITH CERTAIN DISABILITIES

The Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VII, Section 1 concerning public institutions for persons with certain disabilities, specifically, the “insane, blind, and deaf and dumb.” It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission’s Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article VII, Section 1 be changed to modernize outdated language and clarify the state’s commitment to assisting persons with disabilities.

The committee proposes that the current provision be revised to state the following:

Facilities for and services to persons who, by reason of disability, require care or treatment shall be fostered and supported by the state, as may be prescribed by the General Assembly.

Background

Section 1 of Article VII reads as follows:

Institutions for the benefit of the insane, blind, and deaf and dumb, shall always be fostered and supported by the state; and be subject to such regulations as may be prescribed by the General Assembly.

In addressing the topic of public institutions, the delegates to the 1850-51 Constitutional Convention devoted the greater portion of their discussion to the governance of the state correctional system, the purposes of incarceration, and the operation of prison facilities and prison labor programs.¹ Nevertheless, the consensus was that the state should play a role in

assisting persons with disabilities, specifically, those who were “insane,” “blind,” and “deaf and dumb.”

The General Assembly has broad power to create institutions for the benefit of persons with mental or physical disabilities even without the authority in Section 1. Indeed, Ohio had been providing for the care and treatment of the “insane” since the early 1800s.² The new provision, however, created a constitutional mandate that the state address this issue by providing that the institutions in question “shall always be fostered and supported by the state.”

The initial version of Section 1 had respectfully referred to the intended beneficiaries of the institutions being created as “inhabitants of the State who are deprived of reason, or any of the senses * * *.”³ The use of the word “senses,” however, was felt to be too broad and was replaced with language referring to the insane, blind, and deaf and dumb.

Amendments, Proposed Amendments, and Other Review

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission), recommended that Section 1 be retained without change.

The 1970s Commission engaged in extensive discussion, both at the committee and the Commission level, about how to describe the position of the state relative to the needs of persons with disabilities. Acknowledging the evolving state of “legal, and perhaps social, obligations to persons needing care,” the 1970s Commission struggled with how to recognize the state’s commitment as well as how to describe exactly which persons in need of care would be covered by the provision. The 1970s Commission recognized that the original language addressed only “the insane, blind, and deaf and dumb,” while some of the revisions they considered expanded the subject population to others in need of assistance, such as the aged, and the developmentally and mentally disabled. The 1970s Commission additionally wondered whether the word “institutions” should be clarified so as to create an obligation to help in settings outside of a physical facility, or whether the original concept of the state’s creating or funding schools, asylums, or other types of residential facilities should be maintained. The 1970s Commission also was concerned about using language that might suggest the state has an unlimited financial responsibility for the care of such persons. The committee of the 1970s Commission recommended the following language:

Facilities and treatment for persons who, by reason of disability or handicap, require care, treatment, or habilitation shall be fostered by the State. Such persons shall not be civilly confined unless, nor to a greater extent than, necessary to protect themselves or other persons from harm. Such persons, if civilly confined, have a right to appropriate habilitation, treatment, or care.

Although a majority of the 1970s Commission approved this proposal, it failed to achieve the necessary two-thirds support, and therefore did not become a recommendation. As reported by the 1970s Commission, the major objections “appeared to be grounded in the uncertainty of the state’s obligation as a result of the language,” with the result that the inclusion of the phrase

“right to treatment” suggested to some members that the state would be taking on a greater burden than it could assume.

The failure of the recommendation to obtain the supermajority necessary for adoption prompted a minority report that was supported by 17 members of the 1970s Commission. As described by those signing the report, the first sentence of the recommended change states the same principle as the present constitution, allowing for more modern, less stigmatizing language. The minority report further suggested that removing the word “support” from the original provision would indicate that the state was not extending a right to specific services or facilities. The minority report asserted that the second part of its recommendation was a statement of the state’s obligations under federal constitutional, statutory, and case law to provide due process as well as a right to appropriate care, treatment, or habilitation.

Litigation Involving the Provision

In re Hamil, 69 Ohio St.2d 97, 437 N.E.2d 317 (1982), invited the Supreme Court of Ohio to consider whether a state agency serving the mentally ill was required to cover the cost of care of a juvenile at a private psychiatric facility. In that case, the juvenile court found a 13-year-old charged with delinquency to be a mentally ill person in need of hospitalization at a state facility. When the superintendent at the state facility determined a more appropriate placement was at a private facility, the court ordered the juvenile’s private placement and further ordered that the state would be responsible for the full expense of his care, with reimbursement by his parents to the extent of their insurance coverage and ability to pay. On appeal, the Court held the juvenile court had acted beyond the scope of its jurisdiction in ordering the state to pay the cost of care of a juvenile in a private psychiatric hospital.

Acknowledging Article VII, Section 1’s requirement that state institutions of this kind “shall always be fostered and supported,” the Court interpreted this mandate as indicating the state’s “strong responsibility to care for citizens placed in its public institutions.” *Id.*, 69 Ohio St.2d at 99, 431 N.E.2d at 318. However, the Court found, “no justification exists * * * for imposing a similar duty upon the state to care for persons confined to privately operated facilities over which the state has no control.” *Id.* The Court additionally observed that, historically, the phrase “benevolent institution” has been used to refer to state-owned and operated institutions, not private institutions. *Id.*, 69 Ohio St.2d at 100, 431 N.E.2d at 318.

The Court rejected the parents’ argument that a substantial portion of the expenses would be paid by insurance, so that the state’s burden would be light. Instead, the Court reasoned that a decision solely based on the cost to the state would have negative repercussions, since in other cases the state would be called upon to “absorb the entire cost of treatment at an expensive private institution.” *Id.*, 69 Ohio St.3d at 104, 437 N.E.2d at 321.

Presentations and Resources Considered

Kirkman Presentation

On September 8, 2016, the committee heard a presentation by Michael Kirkman, who is executive director of Disability Rights Ohio, on the history of Article VII, Section 1, relating to “Institutions for the Insane, Blind, and Deaf and Dumb.”

Mr. Kirkman noted the word “institution” is ambiguous because an institution can be a physical place or a service, among other things. He added that the language of the section is not self-executing, requiring action by the General Assembly.

Describing the history of the state’s involvement in the care of the mentally disabled, Mr. Kirkman said the earliest attempts to provide care reflected a lack of understanding. He noted that, in the 1800s, reformers Benjamin Rush and Dorothea Dix led campaigns to provide more humane treatment to mentally ill persons. He said during that period, twenty states expanded the number of mental hospitals. He noted that, prior to the passage of Section 1 in 1851, Ohio had provided for the care and treatment of the insane, although most responsibility fell to charities, counties, and churches. After 1851, the state population grew, and there came a need for the state to sponsor asylums to provide more humane treatment to the mentally ill. He said there was no scientific evidence that Dix’s asylum model actually had a therapeutic value, but many believed asylums helped.

Mr. Kirkman commented that, as time went on, these institutions changed for the worse. Further problems were related to the philosophy behind the Eugenics Movement in the early 20th century, which regarded “feble-mindedness” as being genetic, and which was viewed as justification for mandatory sterilization. Mr. Kirkman noted examples of persons or groups who were institutionalized or sterilized solely because of race or economic status rather than due to actual mental incapacity.

Mr. Kirkman remarked that, in the 1960s, attitudes changed, and the field of psychiatry adopted new views on treating and institutionalizing the mentally ill. He said during that period the mental hospital was replaced with community care and neighborhood clinics. In the 1980s, he said, law evolved to the point where the state is now required to provide training to people in commitment, and the mentally ill are afforded equal protection and due process rights under the Fourteenth Amendment to the United States Constitution.

He commented there has been a significant depopulation of state hospitals since the 1980s, with the unfortunate result that many mentally disabled persons became homeless or were imprisoned. He further noted that assistance to that population is now governed by the Americans with Disabilities Act (ADA), which focuses on services in the community rather than institutionalization.

He said Ohio currently has six psychiatric hospitals with a total of 1,067 beds. He said as many as 70 percent of this population has been committed as a result of a criminal proceeding.

Mr. Kirkman emphasized that the language used to describe those with psychiatric disabilities is a “major focus in the mental health world.” He said the word “insane” is offensive and discriminatory, with the current trend in the Ohio Revised Code being to identify people first and the disability second.

Mr. Kirkman suggested that, because Ohio does not operate any institution for the “blind” or the “deaf and dumb,” and because the trend is away from institutionalizing the mentally incapacitated, Article VII, Section 1 could be eliminated. As further support, he noted that funding state institutions takes away from community-based services. He said eliminating the section would not affect treatment of persons in the criminal justice system because treatment for those persons is required by the U.S. Constitution and derives from the inherent authority of the state to prescribe criminal laws.

Addressing the phrase “deaf and dumb” in Section 1, Mr. Kirkman said that the deaf community does not like the word “dumb,” and that many do not consider themselves as having a disability but rather that they simply have a different language. He said the main point is the deaf and blind are integrated into society now and are not institutionalized.

Mr. Kirkman described that the inherent authority to use public funds to assist the disabled lies with the general authority to provide for the general welfare of people in the state. But, he acknowledged, taking this language out could be viewed by some as eliminating a backstop.

Colker Presentation

On January 12, 2017, Ruth Colker, professor of law at the Ohio State University Moritz College of Law, presented to the committee in relation to the committee’s review of Article VII, Section 1. Prof. Colker indicated her first recommendation would be to repeal Section 1 as unnecessary. Failing that, she said, her second recommendation would be to recommend new language that would meet the underlying purpose of the original section, but would be more respectful and consistent with other provisions. She said, in this regard, she would recommend changing the language to state:

The state shall always foster and sustain services and supports for people with disabilities who need assistance to live independently; these services and supports will, to the maximum extent possible, be provided in the community, rather than in institutions.

Prof. Colker said, in formulating this language, she consulted with members of the disability rights community. She said the revision is more respectful, and offers a more functional definition of disability. She said another goal was to have the section be more consistent with modern notions under federal law and the United States Constitution.

Addressing the terms used in the current section to describe persons with disabilities, Prof. Colker said the disability rights community prefers “person first” language, thus persons with psychiatric impairment would not be described as “the insane.” She said the thinking behind this word choice is that disability status is only one aspect of personhood. She added that descriptors

such as “insane” or “deaf or dumb” are not used. Instead, such persons would be described as being individuals with psychiatric, speech, sensory, visual, or intellectual impairments. Describing definitions that have been used at the federal level, she said no one definition would serve the purpose, and that the federal government has chosen different functional definitions depending on the context.

Prof. Colker emphasized considering the kind of assistance the state is saying it wants to provide. Noting federal case precedent, she said the United States Supreme Court and Congress have adopted the concept that people with disabilities should be integrated into communities as much as possible. She cited an example as being that the Individuals with Disabilities Education Act (IDEA) provides that states must have procedures assuring, to the maximum extent appropriate, that children with disabilities are educated with children who are not disabled, and that special or separate placement occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary assistance cannot be achieved satisfactorily. She said this has been the preference since 1975, and suggests a default principle that persons with disabilities be placed in an integrated environment.

Noting Section 1’s use of the word “institutions,” Prof. Colker said this word choice suggests a preference for an institutional setting, a concept that is no longer the prevailing view. She said she tried to craft language that would indicate an understanding that, aspirationally, the state would try to place people in a community setting, rather than have the default be placing them in institutions.

She said this approach is also reflected in the Americans with Disabilities Act, which was passed in 1990. Citing the case of *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), she said the ADA is violated when people who are able to live in the community are placed in institutions because, as the U.S. Supreme Court concluded, unjustified isolation is discrimination based on disability. She noted that principle is stated in the Court’s finding that there is a presumption of deinstitutionalization, and that states are required to provide community-based treatment for persons with mental disabilities when it is determined “that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.” *Olmstead* at 607.

Addressing whether her suggested language could be interpreted as creating a fundamental right, Prof. Colker said that would depend on what doctrine or rule of law applies. She said she relied on the language in the *Olmstead* decision indicating the resources of the state are a consideration. She said, as a result, her recommendation would be to describe the state’s obligation as being “to the maximum extent possible.” She said the definition of a fundamental right does not mean limitless support, but rather means a court would develop a pragmatic rule that is flexible. She said one goal in changing Section 1 would be to maintain the principle articulated in the current provision that the state should be doing something for people who cannot live without assistance.

Prof. Colker said the current language indicates the state only has an obligation to support people who are in an institutional setting. She said from a policy perspective that is wrong, and is also unconstitutional and illegal.

Asked whether, if Ohio did not have Section 1, the standard would be found in state law, Prof. Colker said eliminating Section 1 would not have a significant impact because *Olmstead* already requires the state to provide for the disabled. She said a constitution is aspirational, and that keeping and refining the obligation set out in Section 1 would continue that aspirational goal using language that is respectful and modern.

Discussing her recommendation that the provision be changed to include the phrase “assistance to live independently,” Prof. Colker said it is important to recognize that each individual might need a different level of assistance. As to whether the proposed language would create an obligation the state could not fulfill in a budget crisis, Prof. Colker said the current provision mandates state support that would be important to maintain in any revision. She said, if rewriting the provision is not an option, her preference would be to delete it.

Pizzuti Presentation

Also on January 12, 2017, Marjory Pizzuti, who is president and chief executive officer of Goodwill Columbus, appeared before the committee to provide her organization’s perspective on the state’s support of people with disabilities. She said her organization serves more than 77,000 individuals, with 85 percent of those persons having a disadvantaging condition such as long-term unemployment, incarceration, low educational attainment, and physical or intellectual disabilities. She said Goodwill chapters throughout Ohio are partners and providers of services through many state agencies, including Opportunities for Ohioans with Disabilities, and the Ohio Departments of Aging, Jobs and Family Services, Developmental Disabilities, Rehabilitation and Corrections, and Mental Health and Addiction Services. She said her organization seeks to provide support to individuals with disabilities, and to assure that all citizens can be full and active participants in the community.

Addressing current Section 1, Ms. Pizzuti said the commitment to community-based integration may be fundamentally at odds with the intent of Section 1, which specifically references “institutions.” She said Section 1 raises three issues: the wording used, the appropriateness of continuing to include a provision that focuses on institutionalizing people with disabilities, and the fundamental question of whether any reference to a specific population should be included anywhere in the Ohio Constitution.

With regard to the terminology used to describe persons with disabilities, Ms. Pizzuti said the current section is not only offensive but inappropriate based on the current understanding of illness and disabilities. She said, while this language was relevant at the time of adoption, it has no place in current or future revisions of the Ohio Constitution. However, she recognized that an attempt to revise the terminology is difficult and ultimately would not resolve the problem because society’s perception of individuals with disabilities continues to evolve.

Ms. Pizzuti continued that the movement toward community integration has been reflected in the downsizing of the state’s institutional facilities, the increase in competitive integrated employment, and the transition into community-based settings. She said this is an intentional

and widely-acknowledged paradigm shift for the full integration of individuals with physical and intellectual disabilities into communities.

Acknowledging the good intentions of the drafters of Section 1 to protect and serve individuals with disabilities, she said the previous practice of institutionalizing people with disabilities has given way to policies that favor community-based support.

Ms. Pizzuti said there is a more fundamental question of whether a need to foster and support individuals with disabilities has a place in the constitution, and, if so, where it should be placed. She said it is possible such a “general welfare” statement could be incorporated in the Bill of Rights or the Preamble. She said Article VII, Section 1 provides an important voice for individuals with disabilities, although the notion of institutionalization and the language used is obsolete. She encouraged the committee to work toward balancing the need to modernize the language with the need to reaffirm the spirit of the intent of the provision, which is to provide assistance that “fosters and supports” opportunities for individuals with disabilities.

Hetrick Presentation

Finally, on January 12, 2017, the committee heard a presentation by Sue Hetrick, executive director of the Center for Disability Empowerment, to provide her agency’s perspective on potential changes to Section 1. Ms. Hetrick described that her agency operates a center for independent living, and that such facilities have been around since the 1970s. She said the concept that persons with disabilities, with assistance, could be integrated into the community corresponded with the civil rights movement. She said her organization emphasizes consumer control, and that 51 percent of the board of directors is comprised of persons who are disabled.

Ms. Hetrick said disability is regarded as a neutral difference, meaning that it results from the interaction of the individual with his or her environment, rather than from other causes. She said, despite the emphasis on integrating persons into the community, Ohio continues to have a culture of institutions, maintaining schools for the deaf and for the blind, as well as nursing facilities sometimes being mental health institutions. She said any congregate setting can be an institution. However, she said, under *Olmstead*, if the appropriate supports and services are in place segregation is not necessary.

Asked whether, if Section 1 is not revised, it should be removed or kept as is, Ms. Hetrick remarked that, if the constitution is to provide sections protecting gender and religion, there should be a section acknowledging and protecting persons with disabilities. Thus, she said, if revision is not an option she would prefer that the section be left as is.

Discussion and Consideration

While all committee members agreed that the current references to “the insane” and the “deaf and dumb,” are outdated and disrespectful, there was concern that alternate language may overly broaden the scope of the state’s responsibility by expanding the population to be served.

In considering how to phrase the state’s involvement in fostering and supporting care, committee members indicated a concern that state resources could be stretched beyond capacity if the constitutional provision were written or interpreted as requiring limitless support. Committee members also expressed concern that use of the term “disability” may be vague, preferring language to allow the General Assembly to determine which conditions will be subject to the provision.

The committee discussed whether the reference to “institutions” indicates that the state has an obligation to provide physical facilities, or whether, more broadly, it suggests a state obligation to accommodate the needs of persons with disabilities, whatever those needs may require. Committee members observed that the current trend is away from institutionalizing persons in need of care. Instead, for example, mentally ill persons often benefit from community-based treatment. In addition, children with vision or hearing impairments, with appropriate assistance, can attend public schools. Some members expressed support for a change that would indicate the state would provide support “to the maximum extent appropriate,” which would allow the creation of facilities for persons requiring an institutional setting.

Some committee members expressed that Section 1 could be removed without eliminating the General Assembly’s authority to enact laws assisting the subject populations. However, members acknowledged that a recommendation to repeal Section 1 should not be interpreted as suggesting that the state should no longer foster programs that support the disabled. In the end, the committee decided against recommending repeal of the section.

Conclusion

The Education, Public Institutions, and Local Government Committee concludes that Article VII, Section 1 should be replaced with the following language:

Facilities for and services to persons who, by reason of disability, require care or treatment shall be fostered and supported by the state, as may be prescribed by the General Assembly.

Date Issued

After formal consideration by the Education, Public Institutions, and Local Government Committee on April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 2017.

Endnotes

¹ An analysis of this debate, including a table of the participating delegates and an excerpt of the proceedings, is contained in a memorandum provided to the Committee. *See* O’Neill, Article VII (Public Institutions) at the 1851 Constitutional Convention (August 23, 2016). The discussion, in full, may be found in Ohio Convention Debates, pages 539-49, available at <http://quod.lib.umich.edu/m/moa/aey0639.0002.001?view=toc> (last visited Aug. 23, 2016).

² See Eagle and Kirkman, Ohio Mental Health Law, Section 1.11 (2nd Ed. Banks-Baldwin). *See generally* Kirkman, “Fostering” Institutions and People with Disabilities (Sept. 8, 2016) (presentation to the Ohio Constitutional Modernization Commission).

³ As originally introduced, Section 1 provided as follows:

The Institutions for the benefit of these classes of the inhabitants of the State who are deprived of reason, or any of the senses, shall always be fostered and supported by the State, and be regulated by law so as to be open to all classes alike, subject only to reasonable restrictions.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE EDUCATION, PUBLIC INSTITUTIONS, AND LOCAL GOVERNMENT COMMITTEE

OHIO CONSTITUTION ARTICLE VII, SECTIONS 2 AND 3

DIRECTORS OF PUBLIC INSTITUTIONS

The Education, Public Institutions, and Local Government Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VII, Sections 2 and 3 concerning directors of public institutions. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article VII, Sections 2 and 3 be repealed as obsolete.

Background

Sections 2 and 3 of Article VII read as follows:

Section 2

The directors of the penitentiary shall be appointed or elected in such manner as the General Assembly may direct; and the trustees of the benevolent, and other state institutions, now elected by the General Assembly, and of such other state institutions, as may be hereafter created, shall be appointed by the governor, by and with the advice and consent of the Senate; and upon all nominations made by the governor, the question shall be taken by yeas and nays, and entered upon the journals of the Senate.

Section 3

The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified.

Origin of Sections 2 and 3

In creating provisions about public institutions, the delegates to the 1850-51 Constitutional Convention were plowing new ground; no similar article or provisions were a part of the 1802 Constitution. While one apparent goal was to express support and provide for “benevolent institutions,” understood as facilities for persons with diminished mental capacity as well as for the blind and deaf, the greater portion of the discussion centered on the governance of the state correctional system, the purposes of incarceration, and the operation of prison facilities and prison labor programs.¹

Addressing proposals for Section 2, delegates immediately focused on whether directors of the penitentiary should be selected by the General Assembly, appointed by the governor, or directly elected by voters.² Some delegates supported allowing the General Assembly to make this determination. Others expressed that the rationale given for involving the governor – that the General Assembly had become unpopular – was not supported by fact, and, in any event, was not sufficient justification to have voters approve “every small office in the state.”

Other delegates expressed that the importance of the role of directors of the penitentiary meant they should be elected, with one delegate, Daniel A. Robertson of Fairfield County, having previously supported that position in his previous role as a member of the New York Constitutional Convention in 1837, where he advocated the popular election of all public officers.³ In fact, requiring all state offices to be elective had been a key plank in the platform of reforms advocated by Samuel Medary and others as justification for voting to hold the 1850-51 convention.⁴

Some delegates supported allowing the governor to appoint, with a requirement for obtaining the advice and consent of the Senate as a compromise measure.

Delegates then returned to the issue of how directors should be selected. G.J. Smith, a Warren County attorney, offered an amendment that would add at the close of Section 2 the words “and the question upon all nominations made by the Governor shall be taken by yeas[] and nays and entered upon the journal of the senate,” which delegates approved.

D.P. Leadbetter, a Holmes County farmer, then proposed Section 3 to address how vacancies would be filled, as follows:

The governor shall have power to fill all vacancies that may occur in the offices created by this article of the Constitution, until their successor in office shall be elected and qualified, or until the meeting of the ensuing legislature, and the successor confirmed and qualified.⁵

This addition was adopted, and the committee reported both sections back to the convention.

The discussions of Sections 2 and 3 resulted in provisions that assigned roles to the General Assembly and the governor in selecting penitentiary and benevolent institution directors, and provided a procedure for filling director vacancies in penitentiaries and benevolent institutions.

While a significant portion of the discussion dealt with the purposes of incarceration and compensation for prison labor, these topics did not culminate in a recommendation.

Although Sections 2 and 3 may seem overly concerned with how the officers of the institutions are selected, in 1850-51, a concern about legislative overreaching, as well as a related desire to elevate the role of the voter, heightened delegates' interest in the topic.⁶ Indeed, a large part of the delegates' discussion about public institutions centered on which branch of government should control and regulate these institutions.

Aside from expressing general support for public institutions, the convention delegates' primary goal seems to have been to address the election-versus-appointment issue. The meandering discussion allowed delegates to express opinions on crime and punishment, racial segregation, and political power, but the discourse never ripened into a substantive policy statement or consensus for an approved recommendation. While one delegate attempted to expand the concept of "public institutions" to include a provision related to prison labor, his proposal was rejected. No other delegate appears to have attempted to propose a new amendment.

Relationship to Statutory Law

The provisions in Article VII, Sections 2 and 3 are not self-executing, and the General Assembly has adopted more detailed statutory provisions.

Article VII, Section 2 references "directors of the penitentiary" but does not create that role. The phrasing of Article VII, Section 2 suggests that the referenced positions already exist. Thus, its primary purpose, as well as that of Section 3, is not to create the roles but to describe how the roles are to be filled.

Under current statutory law, the most analogous position to that of the "directors of the penitentiary" is possibly the director of the department of rehabilitation and correction, a statutory department head role identified in R.C. 121.03, at subsection (Q). R.C. Chapter 5120 relates to the Department of Rehabilitation and Correction (DRC), providing under R.C. 5120.01 that the director is the executive head who has the power to prescribe rules and regulations, and who holds legal custody of inmates committed to the DRC. While R.C. Chapter 5145 generally concerns "the penitentiary," its current focus is on details related to managing the prison population, rather than the role of the director of the penitentiary.

In relation to Article VII, Section 3, R.C. 3.03 provides specific instructions for the governor's exercise of the power to appoint to fill a vacancy in office, with the advice and consent of the Senate.⁷

Amendments, Proposed Amendments, and Other Review

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission), recommended the repeal of Sections 2 and 3, finding them to be obsolete. As the committee of the 1970s Commission noted, the sections derived from a time when nearly all appointing power was vested in the legislature, so that the provisions were deemed necessary to allow a transfer of that

power to the governor, with the advice and consent of the Senate. However, the 1970s Commission observed that the office of the directors of the penitentiary is no longer in existence. The Commission report further noted that, by the 1970s, the only state institution that could be considered a “benevolent institution,” the Ohio Soldiers’ and Sailors’ Orphans’ Home, was governed by a statutory five-member board of trustees appointed by the governor with the advice and consent of the Senate. Thus, neither Section 2 nor Section 3 was deemed to be necessary for the state to carry out functions related to the incarceration of prisoners or the support of state “benevolent institutions.”

Litigation Involving the Provision

In re Hamil, 69 Ohio St. 2d 97, 437 N.E.2d 317 (1982), invited the Supreme Court of Ohio to consider whether a “benevolent institution” included a private psychiatric facility. In that case, the juvenile court found a 13-year-old charged with delinquency to be a mentally ill person in need of hospitalization at a state facility. When the superintendent at the state facility determined a more appropriate placement was at a private facility, the court ordered the juvenile’s private placement and further ordered that the state would be responsible for the full expense of his care, with reimbursement by his parents to the extent of their insurance coverage and ability to pay. On appeal, the Court held the juvenile court had acted beyond the scope of its jurisdiction in ordering the state to pay the cost of care of a juvenile in a private psychiatric hospital.

Acknowledging Article VII, Section 1’s requirement that state institutions of this kind “shall always be fostered and supported,” the Court interpreted this mandate as indicating the state’s “strong responsibility to care for citizens placed in its public institutions.” *Id.*, 69 Ohio St. 2d at 99, 431 N.E.2d at 318. However, the Court observed that, historically, the phrase “benevolent institution” has been used to refer to state-owned and operated institutions, not private institutions. *Id.*, 69 Ohio St. 2d at 100, 431 N.E.2d at 318. Therefore, the Court found, “no justification exists * * * for imposing a similar duty upon the state to care for persons confined to privately operated facilities over which the state has no control.” *Id.*, 69 Ohio St. 2d at 99, 431 N.E.2d at 318.

Presentations and Resources Considered

Furderer Presentation

On March 9, 2017, the committee heard a presentation by Darin Furderer, who is a corrections analyst at the Correctional Institution Inspection Committee, on the leadership arrangements for correctional facilities and the use of the term “director.”

Mr. Furderer noted the title of “director” is not used to refer to the head of the penitentiary. He added that the DRC currently uses the term “warden” to refer to a person in charge of an adult correctional facility, and the Department of Youth Services uses the term “superintendent” to refer to a person in charge of a youth correctional facility.

Discussion and Consideration

The Committee noted that the governor appoints a “director” of DRC, who is the head of the department rather than the head of the penitentiary. The DRC director then appoints the persons who run the correctional facilities.

Committee members agreed the sections appear to be obsolete, noting that they focus on who appoints the heads of these institutions, an issue that has been settled for a long time and is not relevant to any present procedure.

Conclusion

The Education, Public Institutions, and Local Government Committee concludes that Article VII, Sections 2 and 3 are no longer relevant and should be repealed.

Date Issued

After formal consideration by the Education, Public Institutions, and Local Government Committee on April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 2017.

Endnotes

¹ An analysis of this debate, including a table of the participating delegates and an excerpt of the proceedings, is contained in a memorandum provided to the Committee. See O’Neill, Article VII (Public Institutions) at the 1851 Constitutional Convention (August 23, 2016). The discussion, in full, may be found in Ohio Convention Debates, pages 539-49, available at <http://quod.lib.umich.edu/m/moa/aey0639.0002.001?view=toc> (last visited Aug. 23, 2016).

² As originally introduced, Section 2 provided as follows:

The Directors of the Penitentiary, and the Trustees of the Benevolent Institutions, now elected by the General Assembly of the State, with such others as may be hereafter created by subsequent Legislative enactment shall, under this constitution, be appointed by the Governor, by and with the advice and consent of the Senate.

³ See David M. Gold, *Judicial Elections and Judicial Review: Testing the Shugerman Thesis*, 40 Ohio N. L. Rev. 39, 51 (2013).

⁴ See Barbara A. Terzian, *Ohio’s Constitutional Conventions and Constitutions*, in *The History of Ohio Law* 40, 52 (Michael Les Benedict and John F. Winkler, eds., 2004).

⁵ Currently, Section 3 provides: “The governor shall have power to fill all vacancies that may occur in the offices aforesaid, until the next session of the General Assembly, and, until a successor to his appointee shall be confirmed and qualified.”

⁶ As Steinglass and Scarselli note: “Over the course of five decades under the first constitution * * * the people began to see the legislature as the source of many, if not most, of the problems of government, and the new constitution reflected this general distrust of legislative power. * * * [T]he new constitution took the

appointment power away from the General Assembly. All key executive branch officers became elected officials, as did all judges.” Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 35 (2nd prtg. 2011).

⁷ R.C. 3.03 provides:

When a vacancy in an office filled by appointment of the governor, with the advice and consent of the senate, occurs by expiration of term or otherwise during a regular session of the senate, the governor shall appoint a person to fill such vacancy and forthwith report such appointment to the senate. If such vacancy occurs when the senate is not in session, and no appointment has been made and confirmed in anticipation of such vacancy, the governor shall fill the vacancy and report the appointment to the next regular session of the senate, and, if the senate advises and consents thereto, such appointee shall hold the office for the full term, otherwise a new appointment shall be made. A person appointed by the governor when the senate is not in session or on or after the convening of the first regular session and more than ten days before the adjournment sine die of the second regular session to fill an office for which a fixed term expires or a vacancy otherwise occurs is considered qualified to fill such office until the senate before the adjournment sine die of its second regular session acts or fails to act upon such appointment pursuant to section 21 of Article III, Ohio Constitution.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE COORDINATING COMMITTEE

OHIO CONSTITUTION

GENDER-NEUTRAL LANGUAGE

The Coordinating Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding the incorporation of gender neutral language in the Ohio Constitution. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that gender-specific language currently in the constitution be replaced with gender-neutral language, if appropriate, as part of one comprehensive amendment.

Background

The constitution currently contains numerous examples of gender-specific nouns and pronouns used in situations where a gender-neutral word would be appropriate. This language is scattered throughout multiple articles and sections of the constitution. There are a few examples of both genders (e.g., "he or she") being used in more recent constitutional amendments, but its usage is inconsistent.

In 1975, the issue of gender-specific language in the constitution was raised to the Ohio Constitutional Revision Commission (1970s Commission) by the National Organization for Women.¹ However, the Education and Bill of Rights Committee of the 1970s Commission did not believe there was a "demonstrated need" to change gender-specific language:

Changes for the sake of modernizing language or spelling, omitting obsolete provisions, rearranging, and similar matters are not recommended. A proposal to change sex-specific words – for the most part, the use of the masculine gender – to neutral words or to rewrite the sections involved so that references to a particular gender could be eliminated was rejected.²

Also during the 1970s, the issue of gender-specific language was raised to the Task Force for the Implementation of the Equal Rights Amendment (Task Force).³ The primary purpose of the Task Force, established by Governor John Gilligan in 1974,⁴ was to review the Revised Code and recommend both language and substantive adjustments to accomplish the purpose of making the effect of state law equal for both men and women.⁵ While the Task Force did recommend gender-specific language changes for the Revised Code,⁶ it did not discuss the Ohio Constitution at all, likely due to the fact that the 1970s Commission was operating simultaneously.

Presentations and Resources Considered

Steinglass Memoranda

The committee received two memoranda from Senior Policy Advisor Steven H. Steinglass identifying gender-specific words currently in the text of the Ohio Constitution.

The first memo, dated September 26, 2016, identified where gender-specific pronouns occur in various provisions of the constitution. Additionally, the memo described two possible approaches to changing gender-specific language to be gender-neutral. The first approach was for the General Assembly to create a single, comprehensive amendment that proposes changes to the specific wording, and to submit the amendment to the voters. The second approach was to delegate the responsibility for making the specific language changes to a particular entity. The memo provided the example of Vermont, which delegated this task to its Supreme Court.

The second memo, dated October 18, 2016, supplemented the September memo by adding examples of gender-specific nouns and suggesting specific wording changes to make both the pronouns and nouns gender-neutral.

Gawronski Presentation

On March 9, 2017, Christopher Gawronski, legal intern for the Commission, presented to the committee on the topic of how other states have addressed a need to provide gender neutral language in their state constitutions.

Mr. Gawronski indicated that, since 1974, numerous states have attempted to adjust the language of their constitutions in order to make some or all of the constitutional provisions gender-neutral. He said 13 such attempts made it to ballot, where ten passed and three were defeated. Describing how the constitutional language was changed, Mr. Gawronski said states have approached the task in three basic ways. He said some states use a legislative proposal, by which the legislature proposes specific gender-neutral language amendments to the constitution to be approved by voters. He said other states have made the changes through a constitutional convention or commission process, in which the legislature or citizens created a body to generally revise the constitution, including gender-neutral language, for approval by voters. Finally, he said, gender neutralization has been accomplished by delegation, by which states have proposed a constitutional amendment that delegates the task of revising the constitution to be gender-neutral to an existing office or entity without additional voter approval.

Further describing the process, Mr. Gawronski said that, in states following the legislative proposal approach, the legislature proposed the specific gender-neutral language as a constitutional amendment in accordance with the amendment procedures of their constitutions. He noted in some states only the language in certain sections of the constitution, rather than the whole constitution, was addressed in conjunction with other changes being made in those sections. In all cases, he said the proposed changes required voter approval.

Mr. Gawronski described that the states using the convention or commission approach did not accomplish the change through legislative proposal, but rather drafted new language to be gender neutral, and the substitute provisions were adopted as a part of the task of rewriting the constitution or proposing a series of substantive changes.

He said two states have approached the process of updating constitutional language by proposing to delegate the responsibility to a particular state office or entity: the state supreme court (Vermont) or the secretary of state (Nebraska). He noted that, in both cases, the delegation was proposed as a constitutional amendment that needed to be approved by the voters. Once approved, the specified office or entity would be responsible for making non-substantive language changes purely for the purpose of replacing gendered language with gender-neutral language and publishing a revised constitution without further approval from the voters.

Discussion and Consideration

In considering the general issue of how to make the constitution's language gender-neutral, the committee first decided to separate the question of changing current constitutional language from ensuring that future constitutional amendments maintain gender-neutrality. The committee assigned the question of ensuring that future amendments are gender-neutral to the Constitutional Revision and Updating Committee as part of its discussion on the initiative process. After additional consideration, the committee decided to retain for itself the question of how to address changing the current constitutional language to be gender-neutral.

After receiving the memos and presentation, the committee felt that a single, comprehensive amendment would be the best approach to making changes to the current constitutional language. Committee members pointed out that the existing gender-specific language includes both nouns and pronouns that require modification. The committee agreed to provide a list of examples of existing gender-specific language as part of its report and recommendation (see Attachment A).

Some members were concerned with the mechanics of proposing a single amendment due to the single-subject rule for amendments, and the requirement for notice and publication of all proposed amendments. The committee was assured that a single amendment to change all gender-specific language would be considered a single subject, even though it would mean a modification to multiple sections of the constitution. However, the publication of all modified sections might be required, which may result in significant costs.

Members also discussed the general approach to be taken to selecting replacement language, wondering, for example, whether "he" would simply be replaced with "he or she." It was pointed out that the Legislative Service Commission (LSC) would be drafting the amendment for

consideration by the General Assembly, so the suggestion was made to allow LSC to propose the specific language for the amendment using the same approach that it uses in drafting language for the Revised Code.

Conclusion

The Coordinating Committee concludes that all instances of gender-specific language in the constitution should be replaced with gender-neutral language as part of a single, comprehensive amendment.

Date Issued

After formal consideration by the Coordinating Committee on April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 2017.

Endnotes

¹ Ohio Constitutional Revision Commission (1970-1977), Proceedings / Research, Vol. 8, at 4374-4378, <http://www.lsc.ohio.gov/ocrc/v8%20pgs%203850-4328%20judiciary%204329-4394%20education-bill%20of%20rights.pdf> (last visited Apr. 4, 2017).

² Ohio Constitutional Revision Commission (1970-1977), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 10 (Apr. 15, 1976), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (last visited Mar. 30, 2017).

³ *A Report by the Ohio Task Force for the Implementation of the Equal Rights Amendment* (1975).

⁴ *Id.* at vi.

⁵ *Id.*

⁶ *Id.* at viii-xvii (summary of the Task Force's recommendations).

Examples of Gender-Specific Language in the Ohio Constitution

Art.	Sec.	Gender-specific term	Location of term within current constitutional provision
I	1	men	All men are, by nature, free and independent, * * *
I	7	men, his	<ul style="list-style-type: none"> All men have a natural and infeasible right * * * No person shall be compelled * * * against his consent * * * No religious test * * * on account of his religious belief * * *
I	10	his, him, himself	<ul style="list-style-type: none"> * * * attendance of witnesses in his behalf * * * * * * but his failure to testify * * * * * * cause of the accusation against him * * * * * * be a witness against himself * * *
I	11	his	Every citizen may freely speak, write, and publish his sentiments on all subjects, * * *
I	16	him, his	All courts shall be open, and every person, for an injury done him in his land, * * *
II	1g	his, himself, he	<ul style="list-style-type: none"> * * * after his name the date of signing and his place of residence. * * * or township of his residence. * * * the street and number, if any, of his residence * * * * * * written in ink, each signer for himself. To each part of such petition * * * that he witnessed * * *
II	4	he	<ul style="list-style-type: none"> No member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, * * * No member of the general assembly shall, during the term for which he was elected, or for one year * * *, during the term for which he was elected.
II	5	he	No person hereafter convicted of an embezzlement * * *, until he shall have accounted for, and paid such money into the treasury.
II	11	he	<ul style="list-style-type: none"> No person shall be elected * * *, unless he meets the qualifications set forth in this Constitution * * * * * * for the term for which he was so elected.
II	15	his	(E) * * * forthwith to the governor for his approval.
II	16	he, his, him	<ul style="list-style-type: none"> If the governor approves an act, he shall sign it, * * * If he does not approve it, he shall return it with his objections in writing * * * * * * after being presented to him, it becomes law in like manner as if he had signed it * * * * * * after such adjournment, it is filed by him, with his objections * * *

			<ul style="list-style-type: none"> • * * * every bill not returned by him to the house of origin that becomes law without his signature.
II	20	his	* * * salary of any officer during his existing term * * *
II	33	material men	Laws may be passed to secure to mechanics, artisans, laborers, sub-contractors and material men , their just dues * * *
II	35	workmen	For the purpose of providing compensation to workmen and their dependents, * * *
II	37	workmen	* * * for workmen engaged on any public work * * *
III	1b	him	The lieutenant governor shall perform such duties in the executive department as are assigned to him by the governor and as are prescribed by law.
III	2	his	The auditor of state shall hold his office for a term of two years from the second Monday of January, 1961 to the second Monday of January, 1963 and thereafter shall hold his office for a four year term.
III	6	he	He may require information, in writing, * * *
III	7	he	He shall communicate at every session, by message, to the general assembly, the condition of the state, and recommend such measures as he shall deem expedient.
III	9	he	In case of disagreement between the two houses, in respect to the time of adjournment, he shall have power to adjourn the general assembly to such time as he may think proper, but not beyond the regular meetings thereof.
III	10	he	He shall be commander-in-chief of the military and naval forces of the state, except when they shall be called into the service of the United States.
III	12	him	There shall be a seal of the state, which shall be kept by the governor, and used by him officially; and shall be called "The Great Seal of the State of Ohio."
III	20	his	* * * with his message to the General Assembly.
IV	5	him	(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification * * *
IV	6	his, he	(A) (3) * * *, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located * * * (C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, * * * computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled.
IV	13	he	In case the office of any judge shall become vacant, before the

			expiration of the regular term for which he was elected, * * *.
IV	23	he	* * * until the end of the term for which he was elected.
V	1	he	* * * shall cease to be an elector unless he again registers to vote.
V	2a	his	* * * in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.
V	7	his	Each candidate for such delegate shall state his first and second choices for the presidency, but the name of no candidate for the presidency shall be so used without his written authority.
V	9	he or she	* * * a person who is elected to an office in a regularly scheduled general election and resigns prior to the completion of the term for which he or she was elected, shall be considered to have served the full term in that office.
VII	3*		* * * until a successor to his appointee shall be confirmed and qualified.
VIII	2b*	he, his	<ul style="list-style-type: none"> • * * * and he shall make the transfer of one million dollars each month to the World War II compensation * * * • * * * the tax lists of his county for the year in which such levy is made and shall place same for collection on the tax duplicates of his county * * * • * * * if such deceased person's death was service-connected and in line of duty, his survivors as hereinbefore designated, * * *
VIII	2d*	his	<ul style="list-style-type: none"> • * * * the tax lists of his county for the year in which such levy is made and shall place the same for collection on the tax duplicates of his county * * * • * * * by the Veterans Administration of the United States government, his survivors as herein designated, * * *
VIII	2j	his	<ul style="list-style-type: none"> • * * * result of injuries or illness sustained in Vietnam service his survivors as herein designated, * * * • * * * and receiving a bonus of an equal amount upon his being released or located.
VIII	9	his	* * * transmit the same with his regular message, * * *
XI	12	he	Repealed eff. Jan. 1, 2021
XIII	3	him or her	* * * but in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her * * *
XIII	5	men	* * * which compensation shall be ascertained by a jury of twelve men , in a court of record, as shall be prescribed by law.

* These sections have been recommended for repeal by other committees

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION ARTICLE I, SECTION 10

THE GRAND JURY

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

Recommendation

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

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

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

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

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

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

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

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

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

Background

Article I, Section 10 reads as follows:

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

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

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



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

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

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

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

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

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

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



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

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

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

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

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



Amendments, Proposed Amendments, and Other Review

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

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

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

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

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

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



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

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

Litigation Involving the Provision

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

Presentations and Resources Considered

Williams Presentations

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

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

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



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

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

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

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

Gilchrist Presentation

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

Gmoser and Murray Presentations

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

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

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

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

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

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

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

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

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

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

Young Presentation

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

Hoffmeister Presentation

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

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

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

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

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

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

Shimozono Presentation

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

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

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

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



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

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

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

Discussion and Consideration

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

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

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

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



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

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

Conclusion

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

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

Date Issued

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



Endnotes

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

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

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

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

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

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

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

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

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

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

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



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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

June 8

July 13

August 10

September 14

October 12

November 9

December 14