



## OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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### MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD  
THURSDAY, JANUARY 12, 2017

#### **Call to Order:**

Vice-chair Patrick Fischer called the meeting of the Judicial Branch and Administration of Justice Committee to order at 12:39 p.m.

#### **Members Present:**

A quorum was present with Vice-chair Fischer and committee members Jacobson, Jordan, Kurfess, McColley, Mulvihill, and Skindell in attendance.

#### **Approval of Minutes:**

The minutes of the November 10, 2016 meeting of the committee were approved.

#### **Presentations and Discussion:**

*Article I, Section 8  
Writ of Habeas Corpus*

Vice-chair Fischer called on Shari L. O'Neill, counsel to the Commission, to provide a review of a draft report and recommendation on Article I, Section 8, relating to the writ of habeas corpus.

Ms. O'Neill said the report and recommendation indicates that Section 8 states the privilege of the writ of habeas corpus shall not be suspended unless, in the case of rebellion or invasion, public safety requires it. She said the report describes that 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, and that habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body." She said the report continues that habeas corpus is a legal concept originating in early English common law, and was a key aspect of the Magna Carta. The report describes that the principle was embodied in a provision for a formal writ, also called "The Great Writ," by which a person wrongfully imprisoned could petition the government for release. As

currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.

Ms. O'Neill said the report outlines the history of the writ, indicating that it is provided for in the United States Constitution as well as having been adopted as part of the first Ohio Constitution in 1802. She said the report and recommendation describes the statutory procedure governing application for a writ of habeas corpus, as well as indicating that the constitution identifies which courts have original jurisdiction over petitions for the writ. The report also discusses the proceedings of the Constitutional Revision Commission in the 1970s, stating that the 1970s Commission's review did not "disclose any significant differences between federal and state interpretations or any reasons to recommend changes in the language," and so recommended no changes. Ms. O'Neill said the report also briefly describes Ohio Supreme Court jurisprudence relating to the section, indicating that courts generally determine petitioners for the writ of habeas corpus have an adequate remedy in the form of an appeal, and thus do not qualify for the writ. The report adds that courts have found the writ to be appropriate when a defendant wishes to challenge the jurisdiction of the sentencing court, and that the writ also may provide a remedy in non-criminal cases, such as in involuntary commitment or child custody matters. Ms. O'Neill concluded her review by indicating the report and recommendation will be completed once the committee concludes its work on that section.

Vice-chair Fischer thanked Ms. O'Neill for the summary, and asked if committee members had questions or comments. There being none, he then asked for remarks on the report and recommendation relating to Article I, Section 12, which prohibits transportation for crime, corruption of blood, or forfeiture of estate.

#### *Article I, Section 12*

##### *Transportation for Crime, Corruption of Blood, Forfeiture of Estate*

Ms. O'Neill said the report indicates that Article I, Section 12 is unchanged since its adoption in 1851 and derives from two separate sections of the 1802 constitution, which provided, at Article VIII, Section 16 that "No ex post facto law, nor any law impairing the validity of contracts, shall ever be made; and no conviction shall work corruption of blood nor forfeiture of estate," and, at Section 17, "That no person shall be liable to be transported out of this State for any offense committed within the State." She continued that the report indicates the section embodies three separate concepts: that criminal suspects not be transferred outside the state for crimes committed in Ohio, that criminal convictions not result in "corruption of blood," and that criminal convictions not cause a forfeiture of estate.

Discussing the report's discussion of transportation for crime, also known as "banishment," she said this was an extreme form of punishment that, historically, could mean death because it separated the individual from the community that provided resources for survival, a practice that most dramatically played out in the use of transportation for crime to send unwanted citizens to British colonies rather than to imprison them. She said the report continues that most courts have held transportation for crime to be illegal, and at least 15 state constitutions forbid banishing residents as punishment for crime.

Ms. O'Neill described that the report discusses "corruption of blood" as relating to an old concept in English law that a criminal act brought about a metaphorical stain or "taint" on the blood of the offender, and justified stripping him of his life, property, or title. She said the report provides additional details about the history of the concept of "parliamentary attainder," which was a way to punish political foes without subjecting them to judicial process. Ms. O'Neill said the report describes that the founders rejected attainder, outlawing it in the United States Constitution. She said the report also notes that, in outlawing "corruption of blood" for criminal convicts, the Ohio Constitution forbids the enactment of laws that serve to extend the punishment of the offender to the beneficiaries of his or her estate.

Ms. O'Neill continued that the report discusses that, like corruption of blood, forfeiture of estate deprives the criminal actor of his property interest, specifically his present ownership rather than his expected inheritance or his anticipated ability to transfer ownership to his heirs. She noted the report's discussion of the purpose of the provision, which is to prevent convicts from having to forfeit their estate.

Describing review of the 1970s Commission's recommendation for no change to the provision, Ms. O'Neill said the report indicates there was no Ohio case law on the transportation for crime portion of the provision because the General Assembly has never authorized imposition of banishment. She said the report also notes the 1970s Commission commentary relating to a probate court decision that a statute prohibiting convicted murderers from inheriting from their victims does not violate Article I, Section 12 because the applicable statute does not divest an heir of property but rather merely prevents him inheriting it.

Ms. O'Neill concluded her summary by indicating the report's description of litigation regarding the section, indicating the Supreme Court of Ohio has interpreted Article I, Section 12 on only one occasion since the 1970s, in a case in which the court found the confiscation and sale of personal property under a statute relating to illegal drug activity was not a 'forfeiture' for criminal activity, as that word is used in the constitutional provision, but rather a remedy designed to prevent the continuation of unlawful acts. She indicated that the report and recommendation would be completed once the committee concludes its review.

Vice-chair Fischer asked whether committee members had questions or comments. Committee member Dennis Mulvihill said he was aware of new legislation related to civil forfeiture that Representative Robert McColley sponsored in the 131<sup>st</sup> General Assembly. He asked Rep. McColley to speak further about that legislation.

Rep. McColley said the legislation in question, H.B. 347, addressed the problem that civil forfeiture permitted private property to be taken from a defendant in a civil case without the rights protections that would be afforded a defendant in a criminal prosecution setting. He said civil forfeiture procedure conflicted with other constitutional principles in that the defendant in such a case had no Fifth Amendment rights of due process, no right to an attorney, and no presumption of innocence. He said, in such cases, the defendant, not the plaintiff, had the burden of proof. Rep. McColley described that the legislation enacted changes to Revised Code Chapter 2981 that addressed these shortcomings. He acknowledged the work of Senator Kris Jordan in the Senate in helping pass the bill.

This new law being related to the subject of the report and recommendation, it was agreed that the report would be revised to include information about H.B. 347's changes to the civil forfeiture procedure.

Vice-chair Fischer then asked Ms. O'Neill to provide a summary of the report and recommendation for Article I, Section 15, prohibiting imprisonment for debt.

*Article I, Section 15*

*No Imprisonment for Debt*

Ms. O'Neill indicated that Section 15 prevents persons from being imprisoned for debt in any civil action unless in cases of fraud. She said the report and recommendation describes that the institution known as "debtors' prison" can be traced to early Roman law, when debtors who could not pay were subjected to death, enslavement, imprisonment, or exile. She said the report further discusses the history of debtors' prison in English law and early American practice, as well as the adoption of federal bankruptcy law that alleviated many of the problems surrounding how to address personal debt.

Ms. O'Neill said the report outlines the 1802 Ohio Constitution's prohibition of debtors' prisons, indicating that the prohibition was slightly revised and moved to its current location by the 1851 Constitutional Convention, which included a prohibition on the "mesne process," whereby a debtor could be imprisoned solely on the basis of a creditor's sworn statement that the debt was unpaid, the debtor had engaged in fraudulent concealment of property, or that the debtor was about to abscond.

She continued that the report describes the review of the Constitutional Revision Commission in the 1970s, which recommended no change to the section but noted case law that distinguished between imprisonment for debt and imprisonment for failure to pay alimony or child support, or for the willful failure to pay a tax obligation. She said the report indicates the 1970s Commission acknowledged that Ohio has outlawed imprisonment for failure to pay a fine where the failure was based on indigency.

Describing related litigation, Ms. O'Neill said the report notes that, although multiple Ohio appellate courts have had occasion to interpret Article I, Section 15 since the 1970s, the Supreme Court of Ohio rarely has addressed the section. The report describes several cases in which a child support arrearage was found not to constitute "debt" as that term is used in Section 15, and mentions cases indicating that alimony obligations and property division orders also do not qualify as "debts" within the purview of Section 15. She said the report would be completed once the committee concludes its review.

Vice-chair Fischer thanked Ms. O'Neill for her presentation, and indicated that the committee would continue its work on these sections at future meetings.

*Article I, Section 10  
Grand Jury Process*

Turning to the committee's review of the grand jury process, Vice-chair Fischer asked for the committee's views on the current status of that review and whether any changes would be recommended.

Committee member Jeff Jacobson said it would be important for the chair of the committee to be present for a vote. He said while the chair's views may not represent those of a majority of the committee, something like the Hawaii system of providing a grand jury legal advisor, in his view, has great merit and would not do violence to the ability of the prosecutor to prosecute the case to have a grand jury legal advisor.

Committee member Charles Kurfess commented that, based on his experience as a judge, he feels strongly that the grand jury needs something it currently lacks, and that the Hawaii system comes the closest to what he would like to do. He said, while he is not sure that a constitutional change is necessary, the legislature may not feel as strongly that Ohio needs a grand jury legal advisor and so may not wish to enact legislation providing it. Mr. Kurfess continued that his experience in working with grand juries is that they need something beyond the assistance provided by the prosecutor in terms of good solid legal advice. He noted a problem he had as a judge trying to get the grand jury the appropriate statutes. When he asked the prosecutor to provide what was needed, he was told the prosecutor could not provide the statutes, although the prosecutor told the press a week beforehand what he was planning to show the grand jury. Mr. Kurfess said nothing the committee has heard from the prosecutors has changed his view on this. He observed that the grand jury is a new experience for jurors, who have not been exposed to the process through media or television shows. He said jurors are going into a process that is totally new to them, they probably did not know it existed, and it takes them several sessions to get acclimated to what they can and cannot do. As a result, he said, they need good legal advice, and it is not enough to say the prosecutor is there to fill that role. He said he is not sure the issue requires a constitutional amendment, but it needs attention.

Mr. Mulvihill said he shares the concerns expressed by Mr. Kurfess, and would add that someone who is indicted is not provided with the transcripts that led to the indictment. He said he understands the rationale given by the prosecutors who testified to the committee, but he understood the prosecutors to be expressing they would be agreeable to allowing a defendant access to the grand jury transcript of witness testimony under some circumstances. Mr. Mulvihill said he has no sense that there is fairness in the system, and that it is fundamentally unfair and maybe even violates due process and the confrontation clause to deny the defendant the transcript. Mr. Mulvihill said he is not sure this concern rises to the level of requiring a constitutional amendment.

Rep. McColley said he does not see anything that would rise to the level of amending the constitution. He said prior inconsistent statements should be available to defense counsel, to use in defense of the client, and that is just fundamental fairness. He said that requirement could be something that is pursued legislatively.

Mr. Jacobson said the committee has two choices. If it wants to amend the constitution, it could recommend language that would require a system like Hawaii's. He said, alternately, the committee could explicitly authorize the General Assembly to enact such legislation. Whether necessary or not, that recommendation would send a strong signal. He said the committee could also recommend providing right of the defendant to have access to transcripts as part of the due process rights of a criminally-charged individual. He said there have been court decisions regarding the right to a transcript. He said all three of these possibilities would be worth acting on. He said a big concern about not allowing access to a transcript is that no one outside the grand jury room knows what instructions the prosecutor gave to the grand jury about what the law means. He said there are examples, not necessarily in Ohio, of miscarriage of the indictment power. He said either there should be access to a transcript afterward, or there should be a grand jury legal advisor who can tell the grand jury what the law is.

The committee having concluded its discussion, Vice-chair Fischer asked Steven C. Hollon, executive director, about the committee's next course of action. Mr. Hollon said the committee should determine what it would like to do with Article I, Sections 8, 12, and 15, giving a sense of how the reports and recommendations should be completed.

Rep. McColley said that, rather than simply approving the report and recommendation for Section 12 as being for "no change," he would like to see the committee review the civil forfeiture law in more detail, possibly considering whether to recommend a change to the section.

Mr. Jacobson moved that the committee recommend no change to Article I, Sections 8 and 15, and that the committee hear additional testimony and discuss civil forfeiture before voting on Article I, Section 12. Mr. Mulvihill seconded this motion.

Rep. McColley elaborated that the changes to civil forfeiture law are part of a movement across the country that is responsive to the rise of the use of civil forfeiture since the 1980s. He said the consensus is that if criminal wrongdoing is alleged, the person should be subject to criminal due process, yet the civil forfeiture context does not entitle someone to those protections.

Mr. Mulvihill asked whether the idea is that the constitutional provision as it reads now is not being applied by the courts, or whether the issue is that the provision needs to be stronger. Rep. McColley said he is not sure courts are misapplying the section, but rather just thinks it is a bad law, and that it has been extended beyond what the scope of the principles of justice would permit. He says the topic is ripe for discussion on the constitutionality of taking property civilly.

Senator Mike Skindell said he appreciates the work of Rep. McColley on this issue. He said a major flaw in civil forfeiture laws has been the ability of law enforcement agencies to use those seized assets to fund equipment for the agency, so the national reports on state civil forfeiture laws has strongly recommended that law enforcement not be allowed to use those funds in that way, and to have the assets go to another entity. Rep. Skindell said that is something that the General Assembly legislation addressed. Rep. Skindell noted, overall, that the committee should consider anything that can be done in the constitution to increase fairness. He said he would also emphasize there is no allegation in Ohio that any prosecutors or law enforcement agency has abused the grand jury process, but there is concern.

There being no further discussion regarding the motion to recommend no change to Article I, Sections 8 and 15, the unanimous sense of the committee was that no change is necessary to those sections. Thus, the committee generally consented to the motion.

With regard to recommending changes to the grand jury process, Vice-chair Fischer said there are three possible options that have been suggested. He said the first would be to recommend abolishing the grand jury altogether, which he does not think has support. The committee generally agreed that there is consensus that abolishment is not a possibility.

He said a second question is whether the committee wishes to recommend a section requiring the creation of a grand jury legal advisor, which some members support but he is not sure there is consensus on that question. He said a third question is whether the committee wishes to recommend that the accused be given the right to a copy of the transcript of grand jury witness testimony. Vice-chair Fischer asked for additional input from the committee, so as to give staff further guidance on completing the report and recommendation.

Mr. Jacobson agreed that Vice-chair Fischer properly summarized the status of the committee's work. He added that the issue of an independent counsel for the grand jury has gradations. He said the independent counsel idea could face opposition from people who do not like it. He said he is not necessarily comfortable with the idea of saying the power to appoint a grand jury legal counsel is already there, but is more comfortable in making it clear the power is there even if we do not demand that it happen.

Sen. Skindell said the committee should look at whether having a grand jury legal advisor instills a level of fundamental fairness that rises to the level of putting it into the constitution. He said the issue of access to the transcript is an issue of fundamental fairness, and it can be argued the issue of having independent counsel also goes to that level. He said the topic deserves greater conversation.

Mr. Jacobson said he does not believe the committee requires further testimony on the grand jury question, and thinks it would be better to be presented with draft language, both on the grand jury legal advisor and on the issue of requiring transcripts. He said the language could require that a grand jury transcript be prepared and available.

Vice-chair Fischer suggested that the committee and staff consult a task force report recently prepared by the Supreme Court of Ohio.

Mr. Mulvihill asked about the view of the Ohio Prosecuting Attorneys Association (OPAA) on the transcript question. John Murphy, executive director of the OPAA, who was in the audience, commented that his organization has not taken a position on that particular issue. He said 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 the OPAA might be amenable to providing transcripts so long as the provision is drafted so as to protect witnesses who need protection.

Rep. McColley said there could be an in camera disclosure of witnesses by the prosecution after the grand jury has concluded. He said, in the event any of the grand jury witnesses are called, the judge at least would know who is on the list and who is not. He said this would allow there to be an independent party to say who was in the grand jury and who was not.

Mr. Murphy said prosecutors do provide a witness list to the defendant.

Rep. McColley said the witness list is not provided as a cross reference. He said his point is there needs to be a system where someone other than the prosecutor knows who the witnesses were, so that if the defense has an objection the judge would know how to rule.

Mr. Jacobson said he concurs with that concern, but that he is personally concerned about what the prosecutor says to the grand jury. He said the committee has discussed whether there should be a judge there. He said requiring a transcript could allow the defense the opportunity to see the prosecutor's instructions to the grand jury, providing protection.

Vice-chair Fischer said he considers this to be a procedural matter and should be the subject of a rule change because it is very specific.

Mr. Jacobson disagreed, saying it is not procedural if one is providing the right to a transcript instead of the right to the testimony.

Sen. Skindell said the provision could read that either the legislature or the court would enact a law or rule requiring that a transcript be provided under certain circumstances.

Vice-chair Fischer called on Mr. Murphy to provide additional comments. Mr. Murphy said the OPAA is opposed to having a grand jury legal advisor in the grand jury room. He said it is not to any prosecutor's advantage to misrepresent what the law is, and there is no point in getting an indictment that is unprosecutable based on a faulty statement of the law.

Mr. Kurfess mentioned that the committee has not yet addressed a suggestion that judicial elections occur in odd-numbered years. He said, to consider that issue, the committee should hear from the secretary of state and the Ohio Judicial Conference. Vice-chair Fischer said the committee could put that topic on the agenda for a future meeting.

### **Adjournment:**

With no further business to come before the committee, the meeting adjourned at 1:30 p.m.

**Approval:**

The minutes of the January 12, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the March 9, 2017 meeting of the committee.

/s/ Janet Gilligan Abaray  
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer  
Justice Patrick F. Fischer, Vice-chair