OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, JULY 9, 2015

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 1:00 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, Kurfess, Manning, Obhof, Saphire, Sykes, and Wagoner in attendance.

Approval of Minutes:

The minutes of the May 14, 2015 meeting of the committee were approved as amended.

Presentation:

The committee then turned to the issue of grand juries, specifically a proposal for change that was formulated by the Task Force on Community-Police Relations, and was brought to the committee by Senator Sandra R. Williams, who had served on the task force.

"Grand Jury Recommendation by the Ohio Task Force on Community-Police Relations"

Senator Sandra Williams
Task Force Member

Senator Williams introduced the recommendations of the task force, discussing the need for a preliminary hearing system in Ohio. She expressed concern over the lack of transparency in grand jury procedures and unchecked authority of the prosecutor. She argued the Ohio grand jury system is non-transparent, as the proceedings, witnesses, and materials are kept secret. Sen. Williams noted that although indictment rates are high, there has been a refusal to indict police officers in the high-profile deaths of John Crawford, Michael Brown, and Eric Gardner. The discretion given to the prosecutor means he or she can show favoritism toward certain defendants like police officers. Sen. Williams noted the criminal justice system works on the basis of

fairness and trust, and the grand jury is counter to fairness and undermines that trust. She said if Ohio does not want to eliminate grand juries, the state may consider having a special prosecutor who would handle cases involving the police. Sen. Williams noted that it was unclear how much reform of the grand jury system in Ohio would be possible without violating the state constitution.

Chair Abaray then invited questions by committee members.

Committee member Richard Saphire said it is unclear to him whether the accused has a constitutional right to insist on a grand jury or whether the option is with the government. Sen. Williams said usually the accused does not know he is being brought before the grand jury. Mr. Saphire then asked what is the significance of saying a defendant has a right to grand jury if it is all up to the prosecutor whether a grand jury is utilized. Sen. Williams said that, in Ohio, the prosecutor has to go through the grand jury when the crime is a felony. Mr. Saphire asked whether this procedure is statutory, and Sen. Williams answered this is in the Ohio Constitution, at Article I, Section 10. Mr. Saphire said this was not clear from the language of the section, and Chair Abaray suggested that the second speaker to present to the committee, Professor Gregory Gilchrist, might be able to address the question.

Judge Fischer said he understands there are problems, but most of the issues sound statutory. He said Ohio Revised Code Chapter 2939 has not been revised since 1953, asking whether the legislature should be the appropriate body to make the changes. Judge Fischer asked why it would be necessary to throw out the entire system for one issue that, by statute, could be changed. Sen. Williams answered that the legislature could do a few things, but to get rid of the grand jury, a constitutional amendment would be required. She continued, saying, the reforms she advocates are being pursued through several different channels. She said the Legislative Service Commission reviewed the recommendations and said some of them must be undertaken through the Ohio Supreme Court rulemaking authority, but that others could be accomplished legislatively. Sen. Williams said the history of the task force effort to change the grand jury process was that she had sent a letter to Ohio Supreme Court Chief Justice Maureen O'Connor seeking reforms, but was informed that, because the grand jury was constitutional, the Supreme Court could not act. She said the grand jury may be fair in some instances, but in the case of officer-involved shootings, the procedure does not seem fair from the public's viewpoint. Sen. Williams said her effort involves attempting change through all possible options.

"An Introduction to the Grand Jury"

Professor Gregory M. Gilchrist
Associate Professor of Law
University of Toledo College of Law

The committee then heard a presentation by Gregory M. Gilchrist, professor of law at the University of Toledo College of Law, who introduced the committee to the history and function of the grand jury. Prof. Gilchrist said grand juries originally were to protect the people from the over-politicized power of the king. He said the right belongs to the accused, so the accused cannot be prosecuted for an applicable crime unless the charge has gone through a grand jury.

Mr. Saphire asked whether, if a particular defendant or his or her counsel believes the grand jury would not be an appropriate way to proceed, could the defendant waive the grand jury, thereby requiring the state to proceed by presentment (an information), which is a public process. Prof. Gilchrist denied that this would be the case, saying an information involves the prosecutor working solo and then filing with the court, and only at that time does it become public.

Chair Abaray asked whether there is a difference between a presentment and an indictment. Prof. Gilchrist explained that a presentment was originally another way the grand jury could indict, by bringing the charges itself without assistance from a prosecutor. He said that procedure has not happened in at least 100 years, and at the federal level he is not sure it could happen. Prof. Gilchrist added he is not sure it could happen without a U.S. attorney signing off on it. He said this procedure is not used anymore.

Mr. Saphire described how, in an individual case, if the defendant believes a grand jury is a preferable way to proceed and the prosecutor does not agree, the defendant can insist, but then problems could arise in the context of a grand jury as described by Sen. Williams. He asked whether there is a more public way to proceed other than using the grand jury or presentment. Prof. Gilchrist said no, in Ohio he does not believe there is, but that there is in other states. He said, for example, California developed a preliminary hearing program that was practically a mini trial. He noted that procedure has been changed by the legislature in California because it was seen as burdensome. He added there are a number of states that do this. Senior Policy Advisor Steven H. Steinglass noted that Wisconsin is one of these states. Prof. Gilchrist said that the Ohio language is the same as the federal provision. He said he has not researched Ohio case law on this question, but this language is fairly open, so it is possible the process could be revised without change to the Ohio Constitution. He noted that New York is a good example, indicating that the accused has the right to testify in New York. He said conceivably a change could be implemented under Article I, Section 10. He said that, as to Judge Fischer's question about whether change must be undertaken in the constitution, Prof. Gilchrist said if the committee wanted to drastically change the procedure by statute, the language in the constitution does not seem to allow it.

Prof. Gilchrist then turned to the issue of whether the grand jury system works. He said in its current use the grand jury is not very effective as a shield for the individual citizen. He observed that historically it was, noting that in colonial times it was a tool against royal prosecutors, and colonists refused to issue indictments. Today, he said, the procedure is largely in the control of the prosecution. Despite this, the U.S. Supreme Court continues to insist that the grand jury controls the prosecution rather than being controlled by the prosecution. He said the prosecutor does control what the grand jury sees and hears, and how you do it makes a difference. He said the other reason prosecutors have such control is that trust is a human function. Because grand juries serve for a period of months they could be comprised by people with no experience in the law. In such an instance, he said the jury could be fully guided by the prosecutor, whom they get to know on a day-to-day basis.

Mr. Saphire asked, if a grand jury believes a prosecutor is acting inappropriately, whether the grand jury has the legal authority to compel the prosecutor to abandon the attempt to indict. Prof. Gilchrist answered practical concerns would matter more than actual authority as the grand jury

can ask follow-up questions and gather information. He said the grand jury has the authority of the court to issue subpoenas, and could issue its own subpoenas without the approval of the prosecutor. He said, technically, the jury needs the approval of the judge, so, as a practical matter, it is only when there is an unfair "fishing expedition" that the judge gets involved.

Mr. Saphire then asked whether, because the jury relies on the prosecutor to do its job, there has to be some affinity or mutual respect between the prosecutor and the grand jury for the jury to be effective. The grand jury also learns the law from the prosecutor, said Prof. Gilchrist, noting the federal government's prosecution of Lawrence Stevens, the attorney for GlaxoSmithKline, in a case in which, during the grand jury investigation, some jurors asked questions and the prosecutor's answer was erroneous. [*United States v. Stevens,* 771 F. Supp.2d 556 (D. Md. Mar. 23, 2011).] He said when the judge reviewed the case, he saw the error and dismissed the indictment for that reason. Prof. Gilchrist said that, as a practical matter, it is hard to imagine grand juries doing much without the assistance of the prosecutor's office.

Prof. Gilchrist noted that in only a tiny fraction of federal criminal cases is a finding of "no indictment" returned. He said that in New York there is a higher instance of no bills, but that states vary. He said it is common for the prosecutor to get indictments when he asks. He noted there is a small number of "no bills," but it does happen.

Chair Abaray asked whether prosecutors ask the jury what it wants to do, and whether there are cases in which the prosecutor is not asking for an indictment. Prof. Gilchrist said it is possible for a prosecutor to present to a grand jury when he is not actually hoping for an indictment. He said he has no information or idea how often that happens.

Chair Abaray then asked whether, if the prosecutor goes to the grand jury, does he distinguish the separate acts of presenting evidence and asking for indictment. Prof. Gilchrist said no, that in the federal system it is all together. He said it is a professionalized business; FBI is good with the evidence. He noted the prosecution is using the power of the grand jury, but the FBI agent and the prosecutor to decide what to do next.

Committee member Mark Wagoner asked whether there are empirical numbers for the state of Ohio as to how often the grand jury returns an indictment as versus how often the grand jury is used. Prof. Gilchrist said he hasn't gathered that data. He said one reason the data doesn't exist is that the grand jury functions in secret. He said the defense attorney is not allowed in with the client. He said only the members of grand jury, the court reporter, the accused, the prosecutor, and the witnesses are in the jury room. Prof. Gilchrist added that witnesses are not sworn to secrecy; they can tell anyone anything they want. He said that, for everyone but the witness, it is a secret proceeding. Prof. Gilchrist said it sounds un-American to be in secret, but that there are reasons for the secrecy.

Mr. Wagoner asked whether the accused has a right to testify. They do not, said Prof. Gilchrist, although it is unusual for a defense attorney to ask. He said when the accused asks, many prosecutors will allow it. He added, "As a prosecutor, I would be worried about how that would look if it is brought out at trial, and so I would allow it as a practical matter."

Prof. Gilchrist noted that the reasons for secrecy include preventing the accused from knowing about the investigation (flight fear), and also to protect the jurors from undue influence. He added, the concern is about what would happen if everyone knew about the grand jury's business – the jurors might be influenced by neighbors and others, whereas with secrecy they are able to make a decision based only on the evidence.

Mr. Saphire asked whether, if a person learns he is being investigated by the grand jury, he would be free to leave the jurisdiction, further noting that technically the person hasn't been charged yet and would be free to go. Prof. Gilchrist agreed, but said few people are able to leave the jurisdiction because they have knowledge they are being investigated.

Prof. Gilchrist said another reason for secrecy is to protect the safety of witnesses, who could be threatened if their testimony might incriminate. He said a final reason for secrecy is to protect the reputation of the accused, because once someone is accused there is harm, and even if the person is acquitted, it is still an ordeal. He noted that the power of accusation is a powerful tool. Prof. Gilchrist commented that sometimes charges might be made up by a witness, so that, with secrecy, if the grand jury finds no probable cause, the person's reputation is not tarnished.

Describing the vote taken by jurors, Prof. Gilchrist said the standard for whether to indict is "probable cause," which is a low standard. He said 12 out of 15 jurors have to vote to indict. He further stated the rules of evidence do not apply, so that sometimes the prosecution proceeds solely on the testimony of an FBI agent. Prof. Gilchrist observed that the grand jury is a relatively informal procedure. He said the jury is not entitled to receive exculpatory materials, nor is the prosecutor required to present them. He noted there are tactical reasons why the prosecutor would want to present them, but he is not required to do that.

Mr. Saphire commented that the process seems loaded in favor of the prosecutor and, if that is true, given all the aggravation and cost and expense for the accused, it seems to raise some serious concerns about the use of the grand jury, if it is almost a rubber stamp. Mr. Saphire wondered whether Prof. Gilchrist is aware of any state recently that has moved away from the grand jury system to something else. Prof. Gilchrist said he is not aware of that.

Chair Abaray followed by asking whether any states have both a grand jury system and an information system. Prof. Gilchrist said yes but that he doesn't know how that works.

Prof. Gilchrist noted that Mr. Saphire's question raises the idea that, if this is a rubber stamp, why not get rid of the grand jury and allow prosecutors to proceed by information. He said one thing to note is that the *Hurtado* case, from 1884, indicates the states are not bound by Fifth Amendment to the U.S. Constitution, but the court in *Hurtado* was reviewing a California preliminary hearing procedure and found it was consistent with due process. [*Hurtado v. California*, 110 U.S. 516 (1884).] He said he is not sure what would happen if the state eliminated any kind of proceeding at all.

Chair Abaray asked whether any Ohio Supreme Court cases interpret any component as being essential. Prof. Gilchrist said there is an Ohio case requiring grand jury transcripts. He said the rules say there *may* be a court reporter, but the Ohio Supreme Court says there *must* be. Chair

Abaray asked whether that is something the committee should research. Prof. Gilchrist said he has not looked into that. Vice-chair Fischer noted there are several Supreme Court cases on Crim.R. 6(E), the secrecy provision. He said *Organic I* [*In re Special Grand Jury Investigation Concerning Organic Technologies,* 74 Ohio St.3d 30, 656 N.E.2d 329 (1995)] and *Organic II* [*In re Special Grand Jury Investigation Concerning Organic Technologies,* 84 Ohio St.3d 304, 703 N.E.2d 790 (1999)] explicitly adopted the federal process for declassifying the proceedings.

Prof. Gilchrist said that the transcripts become public during trial. In federal court, the transcripts are considered to be Jencks material.[1] When the prosecution calls a witness at trial, the prosecutor has to provide the witness's prior statements to the jury, and must give the transcript of that prior testimony to the defense.

Regarding Jencks material, committee member Jeff Jacobson asked whether, if there was no grand jury process and instead it is just bill of information, there would be less opportunity for the defense to prepare witnesses, and less opportunity to keep the witnesses honest. Prof. Gilchrist agreed that even under a grand jury process that can still happen because a prosecutor can proceed through the use of hearsay. Mr. Jacobson asked whether the defense has any right to see what the witness said. Prof. Gilchrist explained the way it works is that the defense has no right to Jencks material until after the direct examination of the witness. He said usually you get it earlier because the attorneys are collegial. He said it is easy enough for the prosecutor to insulate more fully by calling the witness before the agent.

Mr. Jacobson commented on the saying that a prosecutor could get a grand jury to indict a ham sandwich if he wanted to, asking whether that saying is as true in Ohio as elsewhere. He additionally wondered about whether there are safeguards against abuse of the system by prosecutors. Prof. Gilchrist answered there is nothing helpful on Ohio rates of indictment through the use of the grand jury. As far as the procedural safeguards, he said he doesn't know of any specific ones, but that having a court reporter present helps. He said there are not many formal procedural safeguards, and courts have been reluctant to supervise prosecutorial discretion. He said the question involves the role of the executive branch, and the judiciary doesn't get involved.

Mr. Jacobson asked whether there are ethical considerations. Prof. Gilchrist said that, yes, as attorneys, prosecutors have the same ethical obligations as defense attorneys, and have additional duties as special officers of justice. But, he said, what goes with that is there is no outside power that has the ability to enforce those duties. Mr. Saphire added that to enforce an ethical duty, you have to know about a breach, and so the conduct that is believed unethical has to be brought to light. He said that with secrecy, it is rare that would happen. Nevertheless, Mr. Saphire said, the grand jury itself can check the prosecutor.

Chair Abaray asked whether there should be a different procedure in cases of officer-involved shootings. She asked whether any states distinguish between the process depending on the accused, and whether there would be equal protection issues raised by the concept of having two

[1] The Jencks Act, 18 U.S.C. § 3500, requires the prosecutor to produce statements by a prosecution witness, but only after the witness has testified. Under Fed. R. Crim. Pro. 6, Jencks material would include a witness's grand jury testimony, if the witness testified at trial.

different procedures. Prof. Gilchrist said he is not able to answer that, remarking that no other state separates out the class of accused.

Chair Abaray then directed the same question to Sen. Williams, who said she has not seen another state adopting this. She does know there are legislative initiatives being considered by other states, citing research provided to her by the Legislative Service Commission. She said Connecticut and Pennsylvania used the ballot initiative to get rid of the grand jury. In Connecticut, the accused has to go before a judge, while Pennsylvania lets the individual counties determine how to proceed. She further noted that there are 25 states that make use of the grand jury optional.

Mr. Jacobson commented that it seems the only check on the prosecutor is the grand jury itself. He said there may be some self-censorship on the part of the prosecutor. Prof. Gilchrist said there is one other check: it is the prosecutor's office, their bosses, and the policies of each office. He said the U.S. Department of Justice has rigorous policies, and has published an internal rule that they do provide exculpatory matter to the jury even though there is no Supreme Court requirement for this.

Judge Fischer said that, to him, the check is that there is no prosecutor in the room when the jury deliberates and when they vote. Prof. Gilchrist said that is a good point. Judge Fischer said prosecutors do not bring a case unless they think they can get an indictment, and they pick the cases to bring before the grand jury. Prof. Gilchrist agreed, saying one would expect a high rate of indictments because of this practice.

Mr. Saphire asked Prof. Gilchrist where he stands on the issue of whether to keep or eliminate grand juries. Prof. Gilchrist said, as a practitioner, there is not much shield value; he thinks prosecutors get the indictments they want to get. He said, on the whole, based on his research, something like the New York system seems like a good balance. He said that method would maintain the grand jury but would have procedural checks.

Mr. Jacobson noted that the problem people have worried about in the past has not been failure to indict but what to do about the overzealous prosecutor. He said in the last year there have been newer concerns about a failure to indict. He asked whether these are mutually incompatible worries. Prof. Gilchrist said he is not sure the two situations are incompatible. He said the worry about failure to indict is that the game is rigged. He said in a public preliminary hearing setting, rigging the game wouldn't be possible. He said he is not sure a more rigorous procedure is at odds with false no bills.

Representative Emilia Sykes asked what reforms Prof. Gilchrist would recommend. Prof. Gilchrist said he would consider specific ideas from New York's experience with the criminal indictment process. He said they apply the rules of evidence more rigorously in the grand jury, although he is not sure they apply the full rules. He added that New York recognizes a right of the accused to testify, requires a judicial review of the final transcripts after indictments are returned, even having a review for a no indictment. Prof. Gilchrist also said that in New York there is no "double jeopardy" in the grand jury process, meaning that when the prosecutor

presents evidence but the jury refuses to issue an indictment, the prosecutor cannot try again. Ohio, by contrast, allows the prosecutor to keep trying, he said.

Sen. Williams commented that when she met with the Legislative Service Commission staff, she was told it is not clear what could be done statutorily without violating what the grand jury is understood to mean within the Ohio Constitution.

Committee member Charles Kurfess remarked that when he reads the constitutional provision, he thinks one could suggest that prosecutorial control of the grand jury is inconsistent with our constitutional provision. He asked whether there is any reason that a judge could not appoint counsel to advise the grand jury. Prof. Gilchrist said he is unsure what authority the judge would use. He said the grand jury is an independent body, not part of the executive or judiciary branches. Judge Fischer said the grand jury is not an arm of the court, and wondered, so long as *Hurtado* and other cases say the federal constitution doesn't go that far, why wouldn't states be able to create their own version of grand juries. Prof. Gilchrist agreed with this assessment.

Judge Fischer said he does not see it as a constitutional problem, saying "If you get past whether we want [a grand jury] or not, then the rest is legislative."

Prof. Gilchrist said if someone wanted an alternative procedure, then it is a constitutional question. But the process is not constitutional, said Judge Fischer.

Mr. Saphire asked Sen. Williams whether she had heard from prosecutors, defense attorneys, or others during the task force proceedings. Sen. Williams said the task force did not hear from those parties. Mr. Saphire suggested it might be interesting to hear from organizations whose members are involved in the process.

Chair Abaray agreed, saying the committee should put more resources into getting this input in order to assist its deliberations. Sen. Williams added that Franklin County Prosecutor Ron O'Brien was on the task force, and he provided insight into the recommendation to have a judge oversee all grand juries. She added that the task force also heard from some people who had served on grand juries who said they accepted what the prosecutor said because they did not have a lot of information.

Mr. Saphire wondered whether grand juries know they can disregard the prosecutor, and, if they do not, do they defer to the prosecutor without knowing they do not have to. Prof. Gilchrist suggested it might be useful to look at what courts around the state do to educate grand jurors.

Mr. Wagoner said there is often a video presented in order to prepare and educate petit jurors, but that he does not know if anything similar exists for a grand jury. Executive Director Steven C. Hollon answered he is not aware of courts using a video of this type.

Chair Abaray asked Sen. Williams if she thought having a judge involved in the process would help. Sen. Williams said that judges run for office and are supported by prosecutors, unions, and police. She said having a judge involved might make the process more transparent, but it is still problematic.

Chair Abaray recalled an incident from her practice in which there was a rumor of an investigation by a grand jury of a former client. She said the client was never called before a grand jury, and the possible accusations were not publicized, with the result that his reputation was not ruined. She said that is the flip side of the concern. She asked Sen. Williams if she had any thoughts on the protective effect of the grand jury process in that type of situation.

Sen. Williams agreed the anonymity of the potentially accused person can be an issue, but when there is an officer-involved shooting everyone knows who the officer is. She said if the incident is made public by the media, people know. Sen. Williams noted the belief among some in Cuyahoga County, based on recent incidents, that prosecutors can destroy people just by bringing an investigation to the grand jury. She said prosecutors may not say they want an indictment to be returned.

Mr. Saphire asked Mr. Steinglass whether the Constitutional Revision Commission in the 1970s made a formal proposal about grand juries. Mr. Steinglass said they did recommend eliminating the grand jury but nothing happened in the General Assembly. Mr. Steinglass said he would do further research and advise the committee if there is more information on this. Sen. Williams said the Legislative Service Commission found those recommendations, noting there were five recommendations made, but the General Assembly did not act on any of them.

Mr. Jacobson said there seems to be a compelling reason to make this more of a constitutional concern. He said "We could defer but there are plenty of reasons to include more safeguards." He said, at the same time, he is concerned that the issue of the moment is being used to eliminate a long term positive protection for the accused. Mr. Jacobson said the committee should not want to get rid of the protections of the grand jury for the individual in order to address current issues. He speculated this is what motivated people in the past. He said the idea of involving a judge who could be there and/or review an indictment, might be something around which there could be more consensus. Mr. Jacobson added that the committee should be searching for a balance. Chair Abaray agreed and said she wants to emphasize the committee is here because it respects the judiciary. She does not want to imply the committee distrusts the judiciary to perform its function. She said one role of the committee should be to address this lack of comfort for citizens, but that the committee also should uphold the role of the judiciary.

Mr. Steinglass said that in the 1970s, the Constitutional Revision Commission recommended the repeal of the grand jury language, and then recommended a new Article I, Section 10a, along with a substitute set of provisions. He said the 1970s Commission had four goals: the first being they favored the information or complaint as the primary method, but permitted either the accused or the state to demand a grand jury hearing. The second goal was to grant every person accused of a felony the right to a grand jury. The third goal was to require the prosecutor to reveal exculpatory evidence. Finally, he said, the fourth goal of the 1970s Commission is that they wanted to permit any witness appearing before a grand jury to have counsel present. Mr. Steinglass said staff would send a copy of the 1970s Commission's final recommendation to the committee members.

Mr. Wagoner suggested the next steps for the committee could be to get prosecutors, defense attorneys, and judges to present about their experiences. He also recommended obtaining input from the Ohio Judicial Conference.

Mr. Jacobson observed that the choice given in the 1970s recommendation was for the prosecutor to use the grand jury, or to have the prosecutor or the accused opt for a preliminary hearing.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:30 p.m.

Approval:

The minutes of the July 9, 2015 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the December 10, 2015 meeting of the committee.

/s/ Janet Gilligan Abaray

Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer

Judge Patrick F. Fischer, Vice-chair