OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Coordinating Committee

Kathleen M. Trafford, Chair
Jo Ann Davidson, Vice-chair

April 13, 2017

Riffe Center for Government and the Arts
Room 1914

OCMC Coordinating Committee

Chair	Ms. Kathleen Trafford
Vice-chair	Ms. Jo Ann Davidson
	Ms. Janet Abaray
	Sen. Bill Coley
	Rep. Hearcel Craig
	Justice Patrick Fischer
	Sen. Kris Jordan
	Mr. Dennis Mulvihill

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

COORDINATING COMMITTEE

THURSDAY, APRIL 13, 2017
12:30 P.M.
RIFFE CENTER FOR GOVERNMENT AND THE ARTS ROOM 1914

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of March 9, 2017

  [Draft Minutes – attached]

IV. Reports and Recommendations

- Article I, Section 10 (The Grand Jury)

  - Review of Report and Recommendation
  - Public Comment
  - Discussion
  - **Possible Action Item: Consideration and Approval**

  [Report and Recommendation – attached]

- Article I, Section 8 (Writ of Habeas Corpus)

  - Review of Report and Recommendation
  - Public Comment
  - Discussion
  - **Possible Action Item: Consideration and Approval**

[Report and Recommendation – attached]

- Recommendation for Gender Neutral Language

  - Review of Report and Recommendation
  - Public Comment
  - Discussion

  [Report and Recommendation – attached]

V. Discussion

- The Record of the Ohio Constitutional Modernization Commission

  Shari L. O'Neill, Interim Executive Director and Counsel

  [Memorandum titled "Reformatting the 2013-2014 Minutes" – attached]

VI. Old Business

VII. New Business

VIII. Public Comment

IX. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
COORDINATING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

Chair Kathleen Trafford called the meeting of the Coordinating Committee to order at 12:33 p.m.

Members Present:

A quorum was present with Chair Trafford, Vice-chair Davidson, and committee members Abaray, Coley, Jordan, and Mulvihill in attendance.

Approval of Minutes:

The minutes of the December 15, 2016 meeting of the committee were approved.

Reports and Recommendations:

Article II, Sections 3, 4, 5, and 11 (Member Qualifications and Vacancies in the General Assembly)

Chair Trafford recognized Shari L. O'Neill, interim executive director and Commission counsel, to provide a review of a report and recommendation for Article II, Sections 3, 4, 5, and 11, as issued by the Legislative Branch and Executive Branch Committee.

Ms. O'Neill described that these sections address the qualifications of members of the General Assembly, as well as providing for filling vacancies in legislative seats. She said the report and recommendation indicates the sections were originally adopted as part of the 1851 constitution, adding that, although they have been subject to several proposals for change since 1851, only some amendments have been approved by the electorate.

She continued that the report indicates Section 3 requires senators and representatives to have lived in their districts for one year prior to their election. She said Section 4, amended in 1973, restricts members of the General Assembly, while serving, from holding any other public office,

except as specified. She described that Section 5 prohibits persons convicted of embezzlement from serving in the General Assembly, and prevents persons holding money for public disbursement from serving until they account for and pay that money into the treasury. Finally, she said the report indicates Section 11 defines how vacancies shall be filled in the Senate and House of Representatives.

After describing the review by the Constitutional Revision Commission in the 1970s, as well as case law related to the section, Ms. O'Neill said the report indicates the committee's conclusion that the revisions in the 1970s adequately addressed any previous concerns, and that the sections continue to appropriately and effectively guide the legislature's organization and operation. Thus, she said the report and recommendation indicates the sections should be retained in their current form.

There being no questions or discussion regarding the sections, Chair Trafford asked for a motion to approve the report and recommendation. Committee member Dennis Mulvihill moved to approve, with Vice-chair Jo Ann Davidson seconding the motion. The committee voted unanimously to approve the report and recommendation for Article II, Sections 3, 4, 5, and 11.

Article II, Sections 6, 7, 8, 9, 13, and 14 (Conducting Business of the General Assembly)

Chair Trafford continued to recognize Ms. O'Neill for purposes of providing a review of a report and recommendation for Article II, Sections 6, 7, 8, 9, 13, and 14, as issued by the Legislative Branch and Executive Branch Committee.

Ms. O'Neill said the report recommends those sections be retained in their current form. She said Section 6 outlines the powers of each chamber of the General Assembly, requiring each house to be the judge of the election, returns, and qualifications of its own members, setting the number of members for a quorum, allowing each house to prescribe punishment for disorderly conduct, and to obtain information necessary for legislative action, including the power to call witnesses and obtain the production of books and papers. She continued that Section 7 provides for the organization of each house of the General Assembly, allowing the mode of organizing to be prescribed by law, and requiring each house to determine its own rules of procedure and choose its own officers.

Ms. O'Neill said the report indicates that Section 8 governs the calendar of the General Assembly, setting the first Monday of January in the odd-numbered year, or on the succeeding day if the first Monday of January is a legal holiday, and in second regular session on the same date of the following year as the starting date, further allowing for a special session to be convened by a proclamation. She continued that Section 9 requires the two chambers to keep and publish a journal of proceedings, and to record the votes. Ms. O'Neill said the report describes Section 13 as relating to the public nature of the legislative process, requiring open proceedings except where, in the opinion of 2/3s of those present, secrecy is required, while Section 14 controls the ability of either house to adjourn, providing that neither may adjourn for more than five days without the consent of the other.

After describing the review by the Constitutional Revision Commission in the 1970s, as well as case law related to the section, Ms. O'Neill said the report indicates the committee's consensus that the General Assembly have the ability to determine how often it meets, noting that there is nothing in the constitution controlling the legislative calendar. She said the report concludes that the committee saw no need to alter that arrangement, based on its conclusion that the legislature is its own best authority for determining how often and how long it should meet.

There being no questions or discussion regarding the sections, Chair Trafford asked for a motion to approve the report and recommendation. Mr. Mulvihill moved to approve, with Senator Bill Coley seconding the motion. The committee voted unanimously to approve the report and recommendation for Article II, Sections 6, 7, 8, 9, 13, and 14.

Article II, Sections 10 and 12 (Rights and Privileges of the General Assembly)

Chair Trafford continued to recognize Ms. O'Neill for purposes of providing a review of a report and recommendation for Article II, Sections 10 and 12, as issued by the Legislative Branch and Executive Branch Committee.

Ms. O'Neill indicated that the report describes that Section 10 provides a right of legislative members to protest, and to have their objections recorded in the journal. She said Section 12 incorporates the idea that legislative representatives must be able to freely engage in debate, consult with staff and constituents, and travel to and from legislative session without hindrance. Ms. O'Neill said the report and recommendation describes the history of these two provisions, which have their origins in British parliamentary procedure.

Ms. O'Neill continued that the report and recommendation describes the review of a committee of the 1970s Commission, which unsuccessfully recommended repeal of Section 10. She said the report also discusses case law related to Section 12, as well as presentations on legislative privilege by several speakers. Ms. O'Neill said the report finally indicates the committee's discussion and consideration, describing committee members' points of view regarding protecting both the right of protest and the legislative privilege. She said the report expresses the committee's conclusion that Sections 10 and 12 should be retained because they facilitate the need for members to register their dissent or protest in the journal, allow members privately to consult and obtain the advice of staff as they consider policy and prepare legislation, and protect legislators from having to answer in court for speech undertaken in their legislative capacity.

There being no questions or discussion regarding the sections, Chair Trafford asked for a motion to approve the report and recommendation. Ms. Davidson moved to approve, with Committee member Janet Abaray seconding the motion. The committee voted unanimously to approve the report and recommendation for Article II, Sections 10 and 12.

Article V, Section 2a (Names on the Ballot)

Chair Trafford recognized Christopher Gawronski, Legal Intern, for purposes of providing a review of a report and recommendation for Article V, Section 2a, as issued by the Bill of Rights and Voting Committee.

Mr. Gawronski described that the report explains the general background of Article V, Section 2a, indicating that it was proposed by initiative in 1949 and was intended to bar straight-party voting by emphasizing the candidates for office, rather than their political parties, by using an office-bloc format. He said the report indicates the provision was subsequently amended twice to clarify how rotation of names on ballots is to occur. Mr. Gawronski continued that the report describes two presentations on the section: one by Matthew Damschroder, assistant secretary of state, who described the current procedure for rotating names on Ohio ballots, and a second presentation by Professor Erik Engstrom, who discussed the history of ballots in Ohio and noted Ohio is the only state to prescribe name rotation on ballots by constitutional provision rather than statute.

Mr. Gawronski said the report indicates the committee's sense that the current section provides the necessary flexibility to the General Assembly to provide for the specifics of name rotation based on the needs of new voting methods and technologies. Thus, he said, the report indicates the committee recommends that Article V, Section 2a be retained in its present form.

There being no questions or discussion regarding the sections, Chair Trafford asked for a motion to approve the report and recommendation. Mr. Mulvihill moved to approve, with Sen. Coley seconding the motion. The committee voted unanimously to approve the report and recommendation for Article V, Section 2a.

Presentation and Discussion:

"Gender Neutral Language in State Constitutions"
Christopher Gawronski – Legal Intern
Moritz College of Law
Ohio State University

Noting the committee has taken on the task of determining how to remove gender-specific language from the constitution, Ms. Trafford continued to recognize Mr. Gawronski for the purposes of presenting 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 the 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 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 specific 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.

Mr. Gawronski having concluded his remarks, Chair Trafford asked committee members for their views. Mr. Mulvihill agreed the committee should do something, and said a single amendment would allow the change wherever it is needed in the constitution because it would deal with one subject. He recommended that the committee offer a list of the sections requiring attention to the General Assembly, noting two memoranda by Senior Policy Advisor Steven H. Steinglass that identified those sections.

Ms. Abaray commented that, in terms of future language, the Constitutional Revision and Updating Committee is including a requirement for gender neutral language in the initiative and referendum sections of Article II.

Ms. Davidson noted that language has to come through the Legislative Service Commission (LSC) when a joint resolution is introduced in the General Assembly.

Mr. Mulvihill said there is a distinction between a General Assembly amendment and a citizen initiative, noting that LSC is not involved in the initiated amendment process.

Mr. Mulvihill moved that the committee make a recommendation regarding gender neutral language, and that a report and recommendation include citation to all of the sections of the constitution requiring attention. The motion was seconded by Ms. Davidson.

Ms. Abaray noted that the report should reference gender-based “language,” rather than “nouns” or “pronouns.”

Chair Trafford asked staff to prepare a report and recommendation for the committee’s review at its next meeting.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 1:06 p.m.

Approval:

The minutes of the March 9, 2017 meeting of the Coordinating Committee were approved at the April 13, 2017 meeting of the committee.

_____
Kathleen M. Trafford, Chair

_____
Jo Ann Davidson, Vice-chair

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, and that a new provision, Section 10b, be adopted 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 and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.*
>
> *(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. Shimozono 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. Shimozono 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 and April 13, 2017, the committee voted to issue this report and recommendation on April 13, 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. Helmholz, *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).

This page intentionally left blank.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION ARTICLE I, SECTION 8

WRIT OF HABEAS CORPUS

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 8 of the Ohio Constitution concerning the writ of habeas corpus. The committee issues this report 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 8 be retained in its present form.

Background

Article I, Section 8 reads as follows:

> The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it.

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.

Habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body."[1] Originating in early English common law, the concept that persons should not be imprisoned contrary to law was a key aspect of the Magna Carta.[2] Eventually, this 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.[3] As currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.[4]

From its appearance in the Magna Carta, the writ was preserved in various parliamentary enactments, and most notably was memorialized in the Habeas Corpus Act of 1679.[5]

The writ was incorporated as part of the Northwest Ordinance of 1787, in which Article 2 stated:

> The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offenses, where the proof shall be evident or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land; and, should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed.[6]

Given this history, it was natural that the writ found a home in the United States Constitution in 1789, albeit not as part of the Bill of Rights (which was added later as a set of amendments), but at Article I, Section 9.[7] It reads:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

When the first Ohio Constitution was adopted in 1802, the writ was described in the Bill of Rights, then located in Article VIII. Section 12 of Article VIII of the first Ohio Constitution provides:

> That all persons shall be bailable by sufficient sureties, unless for capital offenses where the proof is evident or the presumption great; and the privilege of the writ of habeas corpus shall not be suspended unless, when in case of rebellion or invasion, the public safety may require it.[8]

Like the U.S. Constitution, the 1802 Ohio Constitution used the phrase "may require," a construction that initially survived the 1851 revision process.[9] However, when the provision was later reported by the convention's Committee on Revision, Arrangement and Enrollment, the phrase was changed to remove the word "may." [10] The proceedings of the convention do not reveal that there was debate on this change. As adopted, the original, signed 1851 constitution states: "The privilege of the writ of habeas corpus shall not be suspended, unless, in cases of rebellion or invasion, the public safety require it."[11] This is the wording that now appears in the Ohio Constitution as published by the secretary of state and the General Assembly.[12]

In addition to changing the manner of reference to when the writ may be suspended, delegates to the Ohio Constitutional Convention of 1851 reorganized the Bill of Rights, placing it in Article I, separating the writ of habeas corpus from the requirement of bail, and placing provision for the writ in Section 8.[13]

The statutory procedure governing application for a writ of habeas corpus is set out in R.C. Chapter 2725, allowing, at R.C. 2725.01, anyone who is "unlawfully restrained of his liberty, or entitled to the custody of another, of which custody such person is unlawfully deprived" to prosecute a writ of habeas corpus to inquire into the cause of the imprisonment, restraint, or deprivation. The statutes also describe which courts may grant the writ, what an application for the writ must contain, when the writ either is not allowed or is properly granted, and the procedural rules for considering and granting a writ.

As described in the Ohio Constitution, original jurisdiction over petitions for a writ of habeas corpus is assigned to the Supreme Court of Ohio by Article IV, Section 2(B)(1)(c), and to the Ohio courts of appeals by Article IV, Section 3(B)(1)(c). Although no specific constitutional provision allows for the original jurisdiction of the state common pleas and probate courts, Article IV, Section 4(B) assigns to the General Assembly the ability to provide by law for "original jurisdiction over all justiciable matters," while Section 4(C) creates and provides for a probate division, thus indicating that a writ of habeas corpus may also be entertained by those courts. In fact, R.C. 2725.02 provides that the writ "may be granted by the supreme court, court of appeals, court of common pleas, probate court, or by a judge of any such court."

Amendments, Proposed Amendments, and Other Review

The Constitutional Revision Commission in the 1970s (1970s Commission), in considering whether to recommend changes to Section 8, noted that the Constitutional Convention of 1874 unsuccessfully proposed adding language that would expressly permit the General Assembly to provide by law for suspension of the writ.[14] The 1970s Commission concluded that its review did not "disclose any significant differences between federal and state interpretations nor any reasons to recommend changes in the language," and so recommended no changes.[15]

Litigation Involving the Provision

Despite that myriad federal court cases address the writ as provided in the U.S. Constitution, relatively few Supreme Court of Ohio decisions address Article I, Section 8 of the Ohio Constitution, and still fewer hold a writ to be the appropriate remedy. The primary question for the reviewing court is whether the applicant possesses an adequate remedy in the ordinary course of law. Courts generally determine that 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. *See, e.g. Drake v. Tyson-Parker*, 101 Ohio St.3d 210, 2004-Ohio-711, 803 N.E.2d 811; *Jackson v. Wilson*, 100 Ohio St.3d 315, 2003-Ohio-6112, 798 N.E.2d 1086 (a writ of habeas corpus is not available to a petitioner having an adequate remedy at law by appeal to raise his claims of unlawful imprisonment). Nor is the writ available to test the validity of an indictment or other charging

instrument, or to raise claims of insufficient evidence. *Galloway v. Money*, 100 Ohio St.3d 74, 2003-Ohio-5060, 796 N.E.2d 528.

The writ is appropriate, however, to challenge the jurisdiction of the sentencing court. One example is *Johnson v. Timmerman-Cooper*, 93 Ohio St.3d 614, 2001-Ohio-1803, 757 N.E.2d 1153, in which the petitioner was an unarmed minor who was present during a robbery-homicide. After she was bound over for trial as an adult pursuant to the mandatory bindover provision in R.C. 2151.26, she petitioned for habeas corpus relief based on uncontroverted evidence that her circumstances did not meet the statutory bindover requirement that she be armed at the time of the incident. The Supreme Court of Ohio agreed, holding that the sentencing court "patently and unambiguously lacked jurisdiction to convict and sentence her on the charged offenses when she had not been lawfully transferred to that court," and voiding the conviction and sentence. *Id.*, 100 Ohio St.3d at 617.

The writ also may provide a remedy in non-criminal cases, such as in involuntary commitment or child custody matters. *See, e.g., In re Fisher*, 39 Ohio St.2d 71, 313 N.E.2d 851; *Pegan v. Crawmer*, 76 Ohio St.3d 97, 1996-Ohio-419, 666 N.E.2d 1091.

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Discussion and Consideration

At its meeting on January 12, 2017, the committee briefly discussed Article I, Section 8 before concluding that the long history of the writ of habeas corpus, as well as the similarities between Ohio's provision and its counterpart in the U.S. Constitution and other states, indicates that no change should be recommended.

Conclusion

The Judicial Branch and Administration of Justice Committee concludes that Article I, Section 8 should be retained in its current form.

Date Issued

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

Endnotes

[1] Bryan A. Garner, *A Dictionary of Modern Legal Usage* 395 (2d ed. 1995).

[2] Art. 39, *in* Sources of Our Liberties 17 (R. Perry & J. Cooper eds. 1959), as cited in *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

[3] Dallin H. Oaks, *Habeas Corpus in the States: 1776-1865*, 32 U. Chi. L.Rev. 243 (1965).

[4] *Habeas Corpus*, Black's Law Dictionary (10th ed. 2014).

[5] 31 Car. 2, c.2, 27 May 1679, available at: http://press-pubs.uchicago.edu/founders/documents/a1_9_2s2.html (last visited Dec. 21, 2016).

[6] Northwest Ordinance of 1787, as reprinted in Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 et seq. It may be found online at: Journals of the Continental Congress, 1774-1789, 32:334 (Worthington C. Ford, et al., eds., 1904-37); Ordinance of 1787: The Northwest Territorial Government, Act of July 13, 1787, http://uscode.house.gov/browse/frontmatter/organiclaws&edition=prelim (last visited Dec. 21, 2016), and additionally is available at: The Avalon Project, *Northwest Ordinance; July 13, 1787*, Lillian Goldman Law Library, Yale Law School (2008), http://avalon.law.yale.edu/18th_century/nworder.asp (last visited Dec. 21, 2016).

[7] Additional history regarding the writ of habeas corpus may be found in *Boumediene v. Bush*, 553 U.S. 723 (2008).

[8] Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments* 92 (Cleveland, Arthur H. Clark Co. 1912).

[9] *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio. 1850-51*, 2 vols. (Columbus: S. Medary, 1851), 231.

[10] *Id.* at 806, 826.

[11] Ohio History Connection Archives, Image of Original First Page of the Ohio Constitution of 1851. Available at: http://cdm16007.contentdm.oclc.org/cdm/ref/collection/p267401coll32/id/16791 (last visited Dec. 21 2016).

[12] The Ohio General Assembly provides a copy of the current constitution at: https://www.legislature.ohio.gov/laws/ohio-constitution (last visited Dec. 21, 2016); the Ohio Secretary of State provides a copy of the current constitution at: https://www.sos.state.oh.us/sos/upload/publications/election/Constitution.pdf (last visited Dec. 21, 2016).

[13] A discussion of the history of the writ of habeas corpus in the Ohio Constitution may be found in Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution*, 97-98 (2nd prtg. 2011).

[14] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 25 (Apr. 15, 1976), available at: http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf, (last visited Dec. 21, 2016).

[15] *Id.*

This page intentionally left blank.

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 _____, the committee voted to issue this report and recommendation on _____.

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).

ATTACHMENT A

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	• All men have a natural and indefeasible right * * * • No person shall be compelled * * * against his consent * * * • No religious test * * * on account of his religious belief * * *
I	10	his, him, himself	• * * * 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	• * * * 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	• 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	• 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	• 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 * * *

			• * * * 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	• * * * 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	• * * * 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	• * * * 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

This page intentionally left blank.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: **Chair Kathleen Trafford, Vice-chair Jo Ann Davidson, and Members of the Coordinating Committee**

FROM: **Shari L. O'Neill, Interim Executive Director and Counsel to the Commission**

DATE: **April 5, 2017**

RE: **Correcting the Record of the Constitutional Modernization Commission**

At the instruction of former Executive Director Steven C. Hollon, I reviewed the 2013-14 minutes for all committees of the Constitutional Modernization Commission, creating revised sets of minutes that conform to our current format, attempt to fill gaps in the record, and correct any errors.

In relation to filling gaps in the record, it is possible that Commission members may be able to share with staff documents that we do not have in our office.

In preparing the corrected version, I adopted the following philosophy:

- To avoid changing the substance of what was recorded, except to clarify some statements that were confusing (where it was clear the note taker was unclear on the subject matter), to eliminate the passive voice, and streamline phrases (i.e. "made a motion to," instead of "moved"; "held discussion" instead of "discussed.")

- To fix typos and spelling errors, and to check and correct the names and job titles of all presenters.

- To use our adopted method of referencing committee chairs, vice-chairs, and members.

- Where possible, to accurately document when minutes were approved, and who attended the meetings.

- To impose uniformity in the names of the committees, references to dates, page layout, etc.

In some cases, committee chairs provided reports. These were used a few times when there did not appear to be any minutes.

Frequently, I came across:

- Multiple meetings without quorums, and then when there was a quorum there was no indication that old minutes were approved.

- Meetings where there was no roll call sheet, so we don't know who attended.

- Meetings where someone asked previous minutes to be revised, but I couldn't verify that the minutes had been revised.

I noted these and other issues in the drafts, highlighted in yellow.

This project raises a question whether, if the Commission were to approve new sets of minutes, it would be rewriting history. I raised this concern with a Legislative Service Commission staff member who noted that, when LSC comes across this situation, the agency creates a corrected document but keeps the original document for archival purposes.

The core content of the original minutes remains the same, with about 80 percent of the changes being purely cosmetic, and the other 20 percent being grammar and clarification changes to make the minutes easier to read and more understandable.

Procedurally, the question arises whether the minutes need to be presented to the entire committee for a second approval, or whether they simply may be signed by the chair and vice-chair. As I mentioned, some minutes are derived from chair reports and some were not approved at the time they were prepared, so those minutes may need to be presented. As far as the other sets of minutes, the question of whether the committee needs to approve could be decided by the committee chairs.

There have been some membership changes that may make it difficult to get signatures. A decision must be made about whether to allow substitute signatures where former chairs or vice-chairs are no longer with the Commission.

The purpose of this project is to have all sets of minutes conform to each other and to the minutes staff began to prepare when we came on board in 2014, with the goal of leaving a more complete record for future constitutional revision efforts. The original documents would not be destroyed but would be retained as an attachment to the corrected sets.

I present this topic for the Coordinating Committee's review, discussion, and guidance.

This page intentionally left blank.

This page intentionally left blank.

This page intentionally left blank.

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14