OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, FEBRUARY 11, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 1:40 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, McColley, Mulvihill, Saphire, and Sykes in attendance.

Approval of Minutes:

The minutes of the December 10, 2015 meeting of the committee were approved.

Presentations:

Senator Sandra R. Williams
Senate District 21

Chair Abaray recognized Senator Sandra R. Williams to update the committee on efforts she and other interested parties have undertaken to revise Ohio's grand jury process. Noting the Ohio Constitution currently requires a grand jury indictment in the case of any felony, Sen. Williams said she believes the grand jury process should be removed from the Ohio Constitution. She said she and Senator Charleta Tavares have introduced Senate Joint Resolution 4, a proposal that, if adopted, would require the General Assembly to determine the indictment process. She added that her constituents support the use of a preliminary hearing process, rather than a grand jury investigation, for incidents involving police officer shootings. She said the high-profile nature of these incidents signifies that the public is already aware of the investigation, negating the need for secrecy.

Identifying four recommendations she would like the committee to support, Sen. Williams first suggested the General Assembly should adopt legislation requiring the attorney general to appoint a special prosecutor to investigate and, where necessary, charge a suspect in cases involving a law enforcement officer's use of lethal force against an unarmed suspect. She said these high-profile cases currently are tried by local prosecutors who often have worked closely with the law enforcement officer being investigated. She said she has introduced Senate Bill 258 in order to make this change in the law, saying her proposed legislation is similar to a New York Executive Order as well as New York legislation concerning cases involving the use of lethal force. She said the purpose of her bill is to remove perceived bias and establish an acceptable standard for the investigation of lethal force cases in which a suspect is unarmed.

Sen. Williams additionally advocated the court appointment of an independent grand jury counsel to advise the grand jury on procedures and legal standards. She said this reform could be established either by legislation or by amending the constitution; however, she said amending the constitution is more practical because it would eliminate constant adjustments to the process that are inherent in statutory law. She said this concept derives from a similar provision adopted in a 1978 amendment to the Hawaii Constitution. She said, the Hawaii provision specifically indicates, at Article I, Section 11, that whenever a grand jury is impaneled there shall be an independent counsel appointed as provided by law to advise the jurors, and that the independent counsel will be selected from among licensed attorneys and will not be a public employee. Sen. Williams advocated the grand jury counsel having specific guidelines about interactions with jurors, and that the prosecutor should not be the only source of legal guidance to the jury. She said this would be another way to provide transparency to the process, removing as it does the current ambiguity caused by allowing the prosecutor to be both active participant and referee. Describing how this would work in the grand jury room, Sen. Williams said the prosecutor would be able to present the case and offer his opinion on possible charges that apply, as determined by the evidence provided, but jurors' questions would be answered by the independent counsel, who could explain the proceedings based on law rather than on best trial strategy. 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 would expand the rules and set standards allowing access to grand jury transcripts. She said this practice is being followed in Indiana, which had enacted legislation requiring transcripts to be made available to requesting parties. She said the Indiana law requires the requesting party to make a formal request and pay for the transcript. She added an additional possibility, not used in Indiana, would allow those directly impacted by a grand jury outcome to request the transcript. Sen. Williams suggested the committee could support a request that the Supreme Court create a system and procedure for releasing transcripts in grand jury cases. If there are concerns about witness privacy, Sen. Williams said sensitive information could be redacted. She said current Ohio law is unclear on whether a private citizen or entity could receive a transcript of a grand jury hearing, but that legal research suggests that the transcript may only be available to a defendant who must request a court order, and that only where there is a question about inconsistencies in testimony is the request granted. Sen. Williams said New Hampshire's court rules are an example of clear guidelines for allowing a transcript to be provided.

Sen. Williams' additionally recommended a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise. She noted the Tamir Rice case in Cuyahoga County as an example. In that case, the prosecutor did not ask the grand jury to vote on whether to indict the officers being investigated for using lethal force against an unarmed suspect. She said if an independent panel were created, it could review the actions of the prosecutor in that type of case to determine if proper procedures were followed. Sen. Williams added the independent panel would be useful in cases in which there is a significant question whether the prosecutor is overcharging or undercharging, thus restoring openness to the process. 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 that 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.

Sen. Williams acknowledged there are many ways to provide transparency in the process, but the four recommendations she noted would be reforms that would "remove the current unfettered control prosecutors currently have over grand jurors," and would bring about a reviewable process. She concluded by emphasizing that the current grand jury system is in need of reform, and urged the committee to recommend goals and parameters for improvements to the system.

Sen. Williams then answered the committee's questions. Committee member Jeff Jacobson said he shares some of Sen. Williams' concerns about the grand jury process. He said the Hawaii model would be worth a further review, and wondered whether the committee could obtain additional research and possibly hear from someone with knowledge of that system, specifically how it has operated and whether there have been any complications. Chair Abaray noted a staff memorandum discussing the Hawaii model, referencing research by Professor Thaddeus Hoffmeister at the University of Dayton School of Law.[1]

Mr. Jacobson said he also likes the concept of having a judge review the grand jury transcript. He said he is not sure the transcript should have to be made public, but a system in which someone could review the proceedings to determine if something inappropriate happened would provide protection, even if one is concerned about breaking the secrecy or exposing witnesses to unnecessary risk. Mr. Jacobson added he appreciates Sen. Williams' efforts and expressed support for having the committee spend some time with her proposals.

Sen. Williams noted that the staff of the Senate Democratic Caucus, as well as the Legislative Service Commission, have researched her proposals. She said the options that she has put forth

[1] Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield,* 98 J. Crim. L. & Criminology 1171 (2007-08).

are one way to have secrecy while at the same time offering some sense of transparency. Chair Abaray said that, in addition to Hawaii, the systems used in New York or Pennsylvania should also be considered.

Mr. Saphire said, other than the notion of a general counsel, it is unclear to him which of the other proposals merit a constitutional amendment, as opposed to Supreme Court rules or legislative action. Sen. Williams responded that all proposals could be the subject of statutes enacted by the General Assembly, but it would be better for the change to be embedded in the constitution so that the procedure is not changed when someone decides they do not like it or there is a new General Assembly.

Mr. Saphire asked whether any states require special prosecutors in law enforcement use-of-excessive-force situations. Sen. Williams said she would try to find out the answer to that question. Mr. Saphire said the notion of having a general counsel is interesting and that he agrees with Mr. Jacobson on that point. Mr. Saphire asked whether Sen. Williams agrees that if general counsel is appointed the prosecutor should be in the room, but the jury could decide whether to direct its questions to the general counsel or to the prosecutor. Sen. Williams said the special counsel should be the only one describing the legal parameters to the grand jury because it is best to have an independent person providing the law. She noted an incident in Wisconsin in which the prosecutor gave false information to the grand jury, saying the assistance of an independent counsel could have prevented that situation.

Committee member Dennis Mulvihill asked whether Sen. Williams believes the grand jury process is most questionable when the subject of the investigation is a public official or police officer, or whether the problem is broader. Sen. Williams said the problem occurs in all cases. She said when there is a process in which a prosecutor can allege numerous charges just to scare the subject into accepting a plea, having a judicial panel to review that procedure would make the system more transparent and would reduce the number of persons in the criminal justice system.

Mr. Mulvihill said, in his experience, the process of appointing a special prosecutor in high profile cases does not help because a special prosecutor is no more unbiased than the local police. He said he would have concerns about using special prosecutors because they come with the same bias as the local prosecutor, adding the problem goes all the way up to the attorney general and the Bureau of Criminal Investigations. Mr. Mulvihill said he thinks that, in addition to grand jury reform, the committee might want to consider requiring a special office that has no relationship with any police force to investigate high profile cases. He asked whether, if no other change is made, Sen. Williams would advocate making an exception to the secrecy rule. Sen. Williams said she agrees having a special prosecutor probably will not rid the system of problems. But, she said, coupling a requirement for a special prosecutor with a preliminary hearing process that is open to the public might make the system more transparent. She said, when it comes to investigations of public officials and law enforcement, the transcript should be made available, because public officials should be held to a higher standard.

Chair Abaray asked whether Sen. Williams has considered requiring the grand jury instructions to be docketed, as well as docketing any law that was provided to the grand jury, so that the

public could review what information was provided to the grand jury. Sen. Williams said she sees no problem with that information being made available to the public.

Representative Robert McColley said he likes the special counsel idea, asking whether that person would have to be someone with experience in the criminal law area, such as a former prosecutor or defense attorney. He also wondered how Hawaii resolves conflicts of interest, such as where counsel appointed by the court may wish to continue appearing in cases before that court. Sen. Williams said she does not have any specific information on that, but she would envision that the special counsel in that courtroom should not be practicing there and that it has been suggested that the person come from an entirely different part of the state and have no involvement with that prosecutor or courtroom. She said she would suggest that rule because it would promote transparency.

Rep. McColley wondered about the practical effect of requiring special counsel to have no connection to the court or county in question. He said the idea of having 88 different counsels, one for each county, all over the state would be difficult to carry out, particularly in rural areas. Sen. Williams suggested one solution might be to have special counsel be someone who doesn't practice law at all, such as a law professor.

Chair Abaray noted the memorandum in the meeting materials contains further information about the process in Hawaii, specifically that the special counsel is a short-term appointment, and is a local attorney who must be unaffiliated with the state.

Representative Emilia Sykes offered the example of visiting judges or senior judges, who are retired but will sit for other judges. She said that may be a source of persons who could provide the special counsel service. She asked whether Sen. Williams' proposal regarding obtaining the grand jury transcript is limited to the situation in which there is actually an indictment, or whether the transcript could be obtained when there is a "no bill." Sen. Williams said the transcript could be obtained in either case.

Chair Abaray said she was assuming that if there is public interest but no indictment is returned a transcript would be available. Sen. Williams said that is correct, noting that in the Tamir Rice case the public has expressed an interest in knowing what evidence was presented to the grand jury.

Timothy S. Young
Ohio Public Defender

Chair Abaray then recognized Attorney Timothy S. Young, Ohio Public Defender.

Mr. Young said the relevant question is not whether Ohio should have grand juries, for the reason that grand juries are "a vital and important step in the criminal justice process." He continued that, when used correctly, a grand jury protects the innocent as well as being a first step in the prosecution of those who have committed crimes. 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.

Noting that government is based on checks and balances, and that many governmental entities are subject to oversight, Mr. Young said the rest of the criminal justice system is transparent, with trials being adversarial, in public, and overseen by a judicial officer. In addition, he said, error correction is built into the system with appellate and post-conviction processes. However, he observed, "there is no error correction for a grand jury process that has gone wrong or been misused."

Discussing the legal basis for the grand jury process, Mr. Young described that the Ohio Constitution is silent on the issue of secrecy, which, instead, is addressed in R.C. 2939.01 through 2939.24, as well as Crim.R. 6(E). He said secrecy applies both to the jurors' deliberations and votes, and to the evidence and testimony that were presented to them.

Although the concept of secrecy is now codified, Mr. Young indicated it originally arose out of the common law, and was intended to protect the reputation of the accused, to prevent the escape of a person whose indictment may be contemplated, to insure the freedom of the grand jury in its deliberations, to prevent interference with witness testimony, and to encourage witness disclosure of evidence.

Discussing whether secrecy is still needed after an indictment has been issued, Mr. Young indicated that, at that point, there are no more privacy interests to protect. He said, despite this, prosecutors and legal precedent maintain a continuing need for secrecy, and will block a defendant's effort to obtain the names and testimony of witnesses who appeared before the grand jury. Mr. Young indicated that, in such an instance, a defendant can only obtain this information by demonstrating a particularized need for the evidence, a standard that he said is "nearly impossible" to meet. He said defendants cannot give detailed descriptions of what they need access to when they have not been allowed to know the content of the transcript. He added that he does not advocate that the entire transcript necessarily be provided, but that the witnesses' testimony should be available if there is inconsistency.

Mr. Young said his conclusion is that no policy is being served by this practice. He remarked, "if justice is the ultimate goal, then there is no supportable rationale for maintaining the secrecy of witness testimony before a grand jury when that same witness is in court giving testimony on the same matter," adding that fewer wrongful convictions would result if attorneys could confront and cross-examine witnesses regarding any differences between their trial testimony and their grand jury testimony.

Mr. Young said another area where secrecy is not needed is in the case of police shootings or where a public official is accused of wrongdoing related to his or her official duties. He said maintaining secrecy in those cases frustrates the general public as well as arguably violating the defendant's right to confront trial witnesses with prior sworn statements to the grand jury. He said, in these high-profile cases, the public already knows about the incident from media reports, as well as knowing the identity of the persons involved. He said, in those instances, "there are no viable privacy interests to protect that outweigh the public's valid interest in these types of proceedings." He further noted that secrecy involving government officials can cause public distrust in government, and undermines notions of fairness in the justice system.

Mr. Young also emphasized the importance of distancing the local prosecutor from involvement in the presentment of a high-profile law enforcement or public official case to the grand jury. He said the issue is not whether the prosecutor can be unbiased, but whether a perception of bias is created. He said the standard of avoiding the appearance of impropriety is the guiding principle in those cases. He added, because it is necessary for the prosecutor to have a close working relationship with law enforcement, the local prosecutor in such cases is easily subject to accusations of bias and favoritism. Thus, he said, a process that creates an independent investigating authority is needed in those cases. To address this issue, Mr. Young suggested that if the case involves a police shooting, the local prosecutor should not conduct the proceedings, which, instead could be undertaken by a retired judge, whose experiences and knowledge as well as disconnection from the local electorate, would allow the grand jury investigation to be conducted in an impartial manner.

Mr. Young recommended the following reforms to the grand jury process:

- The grand jury should remain as part of the criminal justice system;
- After indictment, protection of the testimony of trial witnesses is no longer necessary, so that their testimony should be made available to the court and counsel;
- The secrecy requirement should be eliminated in cases involving the conduct of a public official in the performance of official duties; and
- In the case of a police shooting, a separate independent authority should be charged with the investigation and presentation of the matter to the grand jury.

Having concluded his remarks, Mr. Young then answered the committee's questions.

Mr. Saphire noted that the committee has heard from two prosecutors who say the system works fine. He asked Mr. Young why he believes the system is working well. Mr. Young answered that, in his career, there have been instances when a client was not indicted, but that the people's reputation in their private lives is important. He said if the grand jury process is replaced by a preliminary hearing process, the accusations have been made public. He noted there are "he said/she said cases," in which there is no overwhelming proof; for instance if someone is accused of sexual misconduct. He noted there are wide-ranging implications in that situation, and for that reason it makes sense to have a grand jury in our system of justice.

Chair Abaray asked for clarification about witness statements versus actual testimony, wondering if defense attorneys get access to transcribed witness statements in the current system. Mr. Young said they are supposed to get them, and his presumption is that they do, noting that he rarely gets summary statements that come out later that are slightly different. He said if the witness actually testifies before the grand jury, and an indictment results, there is little or no reason why that should not be transcribed and provided to court and counsel. Chair Abaray followed up, asking whether Mr. Young is suggesting that the transcript would be available live in the grand jury room or whether it would be made available later. Mr. Young said the transcript would be provided later.

Mr. Mulvihill asked about the idea of having a retired judge conduct the proceeding, wondering who would do the investigation that the retired judge would rely on. He said his concern is that the investigation process in a police shooting incident is inherently flawed, with officers not wanting to delve deeply with witnesses who may provide inculpatory evidence. Mr. Young said there are a number of options, including investigators in his office, in the attorney general office, or in a private investigation business, and that a fund could be set aside to have them do the investigation. Mr. Mulvihill said he is not confident that attorney general provides unbiased investigations. Mr. Young said he tends to agree there is a concern, but he would be less concerned if investigators were working at the direction of a retired judge. He said he would hope at that point the retired judge would object if the investigation shows signs of bias.

Chair Abaray asked Mr. Young's opinion of the special counsel concept used in Hawaii, wondering if Mr. Young also had opinions of systems used in New York and Pennsylvania. Mr. Young said he is less familiar with other states' processes, but his is concern with using special counsel is what would occur if a question arises and the special counsel is not immediately available. He said if that system is adopted, counsel would have to be available whenever the grand jury is in session. He noted that "error correction in our system is a good thing. We will make mistakes, but it is about error correction."

Committee Discussion:

Chair Abaray then asked committee members to provide their impressions of the proposals for changing the grand jury procedure, and to give guidance on questions meriting further research.

Mr. Mulvihill said he is concerned that there is a great potential for abuse of the process. He observed that when police officers are investigated the system can be abused, for the reason that human nature can prevent law enforcement from being objective when it investigates law enforcement. He said he would support further discussion of how to conduct a grand jury investigation when law enforcement is being investigated. He said he likes the Hawaii concept, as well as Mr. Young's point about transparency being needed once the person is indicted. He said he also likes Sen. Williams' point about transparency being needed even when a person is not indicted.

Chair Abaray wondered whether there would be an equal protection issue if a transcript is released in one situation but not another. Mr. Mulvihill said he is not sure that releasing the transcript is violative of the rights of the person under investigation. He said if the prosecutor can release the transcript when it serves the prosecution, and the decision is not made on the basis of secrecy, there is no concern about violating the rights of the suspect.

Rep. McColley said the proposals are all interesting concepts, adding he appreciates what Mr. Young said regarding inconsistent statements after the indictment. He said he is in favor of keeping the grand jury in some form, but he is still trying to digest what that form should be.

Mr. Saphire said he is not sure he has heard enough criticism suggesting the solution to the problem is the abolition of the grand jury. He said there are issues that need to be addressed, adding he likes the concept of having an independent source of legal advice. He commented that

the two prosecutors who testified to the committee claimed they were independent legal advisors to the grand jury, but that he has a fair amount of skepticism about that. He said the idea of having an independent legal advisor available to the grand jury is interesting to him. He said although the idea of increasing transparency is interesting, he wonders if changes should be made through constitutional revision, as opposed to legislative reform. He said he is open to proposals or formulations of constitutional language that would address secrecy issues, but Supreme Court involvement in playing a more active role might be helpful. He said requiring transcripts is also a good idea, but he is not sure constitutional revision is the best way to do that. Except for the Hawaii experience, he said he is not sure whether other states have reformed their procedures at the constitutional versus the nonconstitutional level. He said it might be good to see some proposals with some actual language. He concluded he is still thinking about how to address this, but has no concrete ideas right now.

Judge Pat Fischer said he is leaning toward the views expressed by Mr. Saphire, and that he has not heard anything that rises to the level of a constitutional dimension. He noted the proposals could come about through action by the General Assembly; for example proposals two and three by Mr. Young and proposals two, three, and four by Sen. Williams could be addressed by amending Crim.R. 6(D) and (E). He added Mr. Young's proposal number four would have to be done by statute. He said he does not believe these changes rise to the level of the constitution, but could be done more easily by going through the General Assembly or the Supreme Court rulemaking procedures, which would allow more flexibility for change. He noted that secrecy matters, and this is why the grand jury exists. He said other issues, specifically the availability of transcripts, can be dealt with by court rules. He said "we are at a level where we do not need to alter the state constitution to reach changes that people will want."

Clarifying his position, Mr. Saphire noted he is not averse to constitutional change, but does not want to codify all issues in constitutional language. He said there might be ways to deal with issues in constitutional language. He said he would be willing to consider something like the Hawaii proposal, but he would benefit from more research on the question.

Chair Abaray said it is not necessary or imperative to change the constitution, but that she agrees with Mr. Saphire that there may be some issues important enough that the committee would want to propose that they be put into the constitution. She added the specifics then could be addressed by the legislature. She noted her concern, which arose after hearing from the two prosecutors who presented to the committee, that there is no standard for uniformity in how any given grand jury is charged or instructed in the state. She said it sounds like county prosecutors can make their own rules. She said, in her view, there are certain things that should happen the same way, for example, there is a requirement that a civil jury have the same jury instruction on what the law is; so this should be true in the criminal area as well.

Mr. Saphire asked Sen. Williams whether she is offering the Hawaii approach as a model for the committee to consider. He said he would encourage her, if she thinks changes are suitable for constitutional amendment, to bring forward specific proposals for constitutional amendments. Sen. Williams said she would continue to work on this. Mr. Saphire noted he would follow up with Prof. Hoffmeister regarding the Hawaii experience to see if more information might be made available to the committee.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:54 p.m.

Approval:

The minutes of the February 11, 2016 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the June 9, 2016 meeting of the committee.

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

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