

OFFICE OF THE PROSECUTING ATTORNEY
FAYETTE COUNTY, OHIO

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March 17, 2017

Senator Bob Peterson
Senate Building
1 Capital Square, 1st Floor
Columbus, OH 43215

RE: Ohio Constitutional Modernization Commission

Dear Bob:

It was nearly six years ago that I was appointed to the position of Fayette County Prosecuting Attorney. During that time I have had an opportunity to learn a lot, and I have had an opportunity to see our government and our Constitutions, both the State and Federal, play out every day. It is with regret that I am writing you this letter, but I was recently notified by the Ohio Prosecuting Attorneys Association that the Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission voted to recommend changes to the Constitution with respect to the manner in which Grand Juries in the State of Ohio conduct their business. The recommendations are enclosed.

As I know that you are a member of the commission, but not the subcommittee involved in reviewing this area, I now write to you to express my extreme opposition to the recommendations. It is my belief that most prosecutors, past and present, around the state do or will have similar feelings upon learning of the recommendations. Prior to making any decisions as a member of the commission, I would urge you to speak to as many current and former prosecutors as possible to discuss the workings of Grand Juries. I would also suggest you seek the opinion of judges, although as you know, judges do not sit in during the meat of the Grand Jury process.

Simply put, the Grand Jury system is not broken and it does not need to be fixed. While even the best systems can be improved upon, the recommendations set forth by the committee, at best will hurt the system, and at worst will cause catastrophic and cataclysmic damage to our system of criminal justice. In viewing the recommendations, the most egregious recommendation made by the committee involves the appointment of independent counsel for the Grand Jury. I, and many of my brethren, see this as a direct attack on prosecutors. It is an

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attack on our ability to be ethical, and an attack on the rights of those that have elected or appointed us to feel comfortable with their decisions. As you are well aware, presently the prosecutor leading the grand jury is the legal advisor of the same. Further, prosecutors are bound by the Ohio Rules of Professional Responsibility, which require us to act ethically. To suggest that we could not advise the grand jury in a given case, and that we would need another attorney to do so suggests that prosecutors are not capable of upholding our respective Oath's of Office, our Oath as attorneys, and that we are unable to follow the rules placed upon us by the Supreme Court of Ohio.

While I can understand that in some high profile cases, the decisions reached by various Grand Juries around the country have not been liked by all members of society, there is simply no need to re-work a system that is over 200 years old due to some perceived problems. Frankly, prosecutors, myself included, have not always done the best job of educating our electorate and children about the Grand Jury process. Misinformation can be the cause of great distrust and can be easily spread. It is up to me as a prosecutor to help properly inform the public about the process, but again, change is not needed here.

It has certainly been alleged, directly or indirectly, that prosecutors have misinformed Grand Juries of the law. No other conclusion can be drawn from the suggestion to require independent counsel to advise a Grand Juror of what the law is. To actually believe that a prosecutor would do the same is preposterous. In seeking an indictment, a misstatement of the law that leads to a successful indictment will only lead to a dismissed case, a lost jury trial, and thousands of wasted taxpayer dollars. On the other hand, a misstatement of the law that would lead a Grand Jury to "no-bill" a case, that is not return an indictment, leads to prosecutors being left to explain the reasons why to the public and the press, all the while being placed squarely in the crosshairs of those that are or have a reason to be upset, our victims and law enforcement personnel. I cannot think of a reason that a Prosecutor would choose either option. We take our jobs seriously, and I ensure that all of those in my office follow the Oaths that we have taken, and we follow our duty of seeking justice.

Seeking justice is the essence of what being a prosecutor is all about. Seeking justice is not about convictions or wins and losses. It is about the truth, and the Grand Jury is the best truth seeking body that we have available. I simply cannot believe that an independent attorney that would not have the duty to "seek justice," is not answerable to the electorate, and is not involved in the process would have the same desire to appropriately advise the Grand Jury of the laws of the State of Ohio.

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Further, what if they are wrong? What if the Prosecutor knows that the independent counsel is misstating the law? By requiring that the attorney be licensed, but not on the public payroll means that the independent counsel would be an attorney that may not normally practice criminal law. It could be a criminal defense attorney that is not bound by the same requirements as prosecutors. It is can be a delightful exercise to wax poetic about a utopian society and making the perfect criminal justice system, but as long as we are appointing a human being to the post of independent advisor to the Grand Jury, we are merely placing another imperfect creation into the system.

Turning to other practical considerations, who is going to pay for this independent counsel? Where would they come from? Looking at Fayette County, I find it hard to believe that we could find someone qualified for the position that would be interested in the same. Following the Ohio Rules of Professional Conduct any attorney that would have advised the Grand Jury would not be able to represent the defendants indicted in those cases. Who else would be interested? I find it hard to believe that the rates paid for the position would entice private counsel to be interested. Two of our contractually paid public defenders already come from out of county. Are we to be left with an inexperienced attorney that is looking for a paycheck, or a person looking to supplement retirement income?

Additionally, at this time Hawaii is the only state in the union to have an independent counsel for their Grand Jury process. Hawaii could not be less like Ohio, and while it could be a great idea to copy their weather, the simple fact that the remaining contiguous 48 and Alaska have not adopted this asinine idea has to be worth something, does it not?

The recommendation regarding the release of witness testimony is slightly less serious than the provision regarding independent counsel, but it is analogous to determining the manner in which you wish to die. It is still extremely damaging to the grand jury process and must not be approved by the Commission. One of the foundational bedrock principles of Grand Jury is that the proceeding is secret. To those on the outside and those in the press, I can see how this is troubling and difficult to understand. Again, those in my position need to do a better job of education in this regard.

That being said, those that are called as witnesses at Grand Jury are many times willing to be fully and completely honest, because they know that their testimony will not be released. Presently, I have the ability to tell a witness to the Grand Jury to tell the truth, all of it, and not to

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worry about it getting out. I can recall several instances where family members may not have wanted an individual to be indicted and attempted to influence the testimony of the victim. However, I am able to promise victims that whatever they tell the grand jury is between themselves, I, God, if he or she believes in the same, and the grand jurors – so long as it was the full and complete truth. If we are required to release this testimony to the defendants, then I cannot make that promise. If I can't make that promise, how many violent criminals go free? Further, these types of statements apply most directly to the most violent of criminals. Rapists, sexual assailants, and perpetrators of domestic violence are among those that have the most control over their victims, and whose victims face the most challenges in coming forward to testify. The promise of secrecy is one way that we can assist them in coming forward.

For those that would say, this somehow impacts a suspects rights or a defendants' right to a fair trial, I would say that that is pure poppycock. The prosecutor again is bound by the Ohio Rules of Professional Conduct. A later statement that is inconsistent with Grand Jury testimony must be raised by the prosecutor at trial. Again, the amount of distrust levied at prosecutors by those in our profession and that viewing our profession is staggering. If the public does not trust that their prosecutor is ethical or truth seeking, they will see that they are no longer a prosecutor by exercising their rights at the ballot box.

Bob, I apologize for the length of this letter, but as I hope you can tell, this is an issue of utmost importance to the administration of justice in your home county and around the State of Ohio. I have appreciated your service to our State, and I believe you have voted for what you believe will be best for Ohio during your time at the Statehouse. In tapping into our collective agricultural roots, I would merely submit that those supporting changes to the Grand Jury system are no different than members of the Humane Society of the United States ("HSUS") or People for the Ethical Treatment of Animals ("PETA") advocating changes to animal agriculture. Just as no one cares for their livestock more than the farmers that raise them, no one is more concerned with the discovery of truth, and the importance of fairness in the criminal justice system than Prosecuting Attorneys. The complaints levied against prosecutors when prosecutors try to defend this system are no different than those levied against farmers when they try to defend agriculture.

Again, prior to voting on this subject, please speak to prosecutors, judges, court personnel and those involved in the process. Speakers, critics, university professors can pontificate about issues the Grand Jury has, but they are not involved in it, and as such their recommendations must be taken with a grain of salt. Sadly, to this point, I believe the committee has listened to

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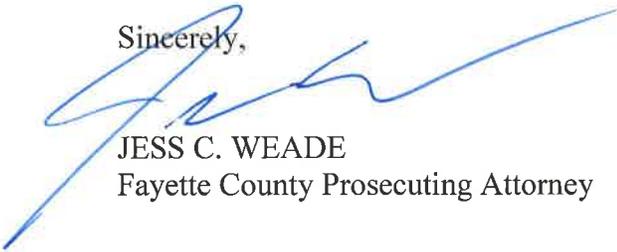
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them, and dismissed the words of those involved. I would be happy to discuss this with you, or any other member of the commission at any time. Please feel free to contact me at the office, or via my cell phone, which I believe you have, but I will forward to your office.

Thank you.

Sincerely,



JESS C. WEADE
Fayette County Prosecuting Attorney

pc: Office Correspondence
OPAA
Judge David Bender
Judge Steven Beathard
Sheriff Vernon Stanforth
Fayette County Commissioners



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.