



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee

**Janet Gilligan Abaray, Chair
Hon. Patrick F. Fischer, Vice-chair**

July 14, 2016

**Ohio Statehouse
Room 018**

OCMC Judicial Branch and Administration of Justice Committee

Chair Ms. Janet Abaray
Vice-chair Judge Patrick Fischer
 Mr. Jeff Jacobson
 Sen. Kris Jordan
 Mr. Charles Kurfess
 Rep. Robert McColley
 Mr. Dennis Mulvihill
 Mr. Richard Saphire
 Sen. Michael Skindell
 Rep. Emilia Sykes
 Mr. Mark Wagoner

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

THURSDAY, JULY 14, 2016

11:00 A.M.

OHIO STATEHOUSE ROOM 018

AGENDA

- I. Call to Order
- II. Roll Call
- III. Approval of Minutes
 - Meeting of June 9, 2016
[Draft Minutes – attached]
- IV. Reports and Recommendations
 - None scheduled
- V. Presentations
 - None scheduled
- VI. Committee Discussion
 - Article I, Section 10 – Grand Juries

The committee chair will lead discussion regarding what steps the committee wishes to take regarding the preparation of a report and recommendation on the topic of grand juries as set out in Article I, Section 10 of the Ohio Constitution.

[Memorandum by Shari L. O’Neill titled “The Committee’s Consideration of Grand Jury Reform,” dated June 24, 2016 – attached]

[Memorandum by Shari L. O’Neill and Bryan B. Becker titled “Supplemental Memorandum Regarding the Use of Grand Juries in the United States,” dated January 26, 2016 – attached]

[Memorandum by Shari L. O’Neill and Bryan B. Becker titled “History and Use of Grand Juries,” dated July 2, 2015 – attached]

VII. Next Steps

➤ Planning Worksheet

The committee chair will lead discussion regarding the next steps the committee wishes to take in preparation for upcoming meetings.

[Planning Worksheet – attached]

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE FOR THE MEETING HELD THURSDAY, JUNE 9, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:50 p.m.

Members Present:

A quorum was present with Chair Abaray, Vice-chair Fischer, and committee members Jacobson, Kurfess, Sapphire, Skindell, and Sykes in attendance.

Approval of Minutes:

The minutes of the February 11, 2016 meeting of the committee were approved.

Presentation:

*“Grand Jury Legal Advisor”
Professor Thaddeus Hoffmeister
University of Dayton, School of Law*

Chair Abaray announced the committee would be continuing to consider the right to a grand jury hearing as provided in Article I, Section 10. She introduced Professor Thaddeus Hoffmeister of the University of Dayton School of Law, who was present to describe the role of the grand jury legal advisor as used in Hawaii.

Prof. Hoffmeister testified that the grand jury legal advisor (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, 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 were actually 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. Prof. Hoffmeister said, in Ohio, the grand jury is instructed that one of the duties of the prosecutor is to address any questions of law. The grand jury is specifically instructed by the court to follow the advice of the prosecutor. He said, further, grand jurors are instructed that while they may call for additional instructions from the court, the information provided by the prosecutor “will probably be sufficient.” With the prosecutor taking the role of both presenter of evidence and advisor of law, Prof. Hoffmeister observed the balance of power is reconfigured to greatly favor the prosecutor. He emphasized, under this model, the grand jury no longer carries out its role as an independent body, promoting fairness and justice in the community, but is viewed as the arm of the prosecution.

Prof. Hoffmeister further explained that, historically, the grand jury facilitated community involvement in the criminal justice process, acting as the bulwark between the accused and the government. Deciding not only questions of probable cause, the grand jury also has the ability to decide the wisdom of criminal laws or their applicability to certain behaviors and situations, as traditionally, the grand jury has the power to fail to indict even on the finding of probable cause. While it is the petit jury that makes the final determination of guilt, it is the grand jury’s determination of probable cause that ultimately starts the criminal justice process. He said the evolution of the role of the prosecutor has caused the grand jury to lose its traditional independence.

Prof. 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 on to research and respond to questions posed by the grand jurors. However, he noted there is no duty for the GJLA to present exculpatory evidence or to advise witnesses. He said the proposed GJLA typically serves for one or two year terms and is present during all grand jury proceedings.

He also noted the GJLA can assist prosecutors because better informed grand jurors will be more likely to scrutinize the evidence and the law. He explained that informed grand jurors are better able to screen cases and alert prosecutors to situations that may result in a not guilty verdict at trial. Prof. Hoffmeister said the grand jury, with the aid of the GJLA, will assist the prosecutor in testing different legal theories, both correcting and improving the prosecutor’s case. In addition, the credibility of the indictment will be strengthened, improving the prosecutor’s hand in approaching plea deals that more accurately reflect pending charges. Finally, he said a more independent grand jury allows the prosecutor to avoid the appearance of impropriety which currently plagues the process.

Chair Abaray thanked Prof. Hoffmeister for his presentation, asking whether committee members had questions.

Committee member Jeff Jacobson asked how long the GJLA system has been used in Hawaii and in the military. Prof. Hoffmeister said Hawaii has used the system since the late 1970s, and the military, depending on which branch, has been using it since the mid-1960s.

Mr. Jacobson noted the recent controversy over a failure to indict police officers, noting that in the past the concern had been with over-indicting, rather than under-indicting. He wondered if the GJLA would make prosecutors more circumspect.

Prof. Hoffmeister said he has not seen a study that answers that question. He said he has not seen that military prosecutors have been limited in their ability to go forward. He observed the presence of a GJLA “works around the edges,” meaning that prosecutors do not ignore facts, or obfuscate things, but rather, the biggest benefit of having someone else in the room is that the prosecutor has to run a tighter ship and be more prepared. He said, because the grand jury process is the only one done in secret, having a neutral person in the room will require the government to bring stronger cases. He emphasized the importance of that fact because, he said, very few cases go to trial because the indictment usually produces a plea deal.

Mr. Jacobson noted the bigger problem is the over-indictment designed to produce plea bargains; calling that practice “a power grab by the prosecutor to ensure he does not have to go to trial.” Mr. Jacobson asked how the process works with a legal advisor in the room, wondering if the legal advisor can ask questions.

Prof. Hoffmeister said the GJLA can neither ask questions nor get jurors to ask questions. He said they take their role as a neutral party very seriously. He said they are simply there to observe and to answer questions. He said the GJLA is not with the jurors when they deliberate, and that, if the GJLA disagrees with the prosecutor regarding a legal interpretation, the common pleas judge has to decide the issue. However, he said, that is rare.

Prof. Hoffmeister continued, saying it is easy for the prosecutor to testify or comment on facts, but the GJLA only answers questions. He said the prosecutor is not allowed to testify and will not do that if the GJLA is in the room. He said the GJLA can answer legal questions, and would identify hearsay when he sees it, where the prosecutor might not.

Chair Abaray noted that, in his law review article, Prof. Hoffmeister said the federal court grand jury is the arm of the prosecution.¹ She wondered if that is also true in Ohio.

Prof. Hoffmeister said, similarly to the federal system, over time the Ohio grand jury became an adjunct or arm of the government. He said, because the grand jury does not have the resources or the knowledge to be independent, by nature the grand jury is more inclined to rely on the prosecutor.

Chair Abaray asked if there are other safeguards in Hawaii that Ohio does not have and what remedy there is if problems arise.

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

Prof. Hoffmeister said just the mere presence of the GJLA cleaned up a lot of problems. He said one GJLA was bothered by what the prosecutor was doing, told him and he stopped. He said in that instance, the prosecutor was taking an informal approach, being too familiar with the jurors, and the GJLA pointed out that conduct and changes were made. He said the GJLA can approach the prosecutor and if the problem is not solved, he can raise the issue with the judge.

Committee member Richard Saphire noted there are a variety of issues and problems relating to grand juries, and different proposals for reform. He said he finds this proposal interesting. He said the committee had presentations by two prosecutors and the Ohio public defender, none of whom advocated for legal advisor. He said because it is not that prevalent of a practice, there is not much data on what the GJLA ought to be. He wondered, if Ohio were to adopt this reform, whether it should be constitutionalized, and whether the specific responsibilities of the GJLA should be described in the constitution, in statute, or in a Supreme Court rule.

Prof. Hoffmeister said he has not thought about that. He said he would be hesitant to get into specifics in a constitution. He said he would be deferential to the Supreme Court to spell out the guidelines, but that he could see arguments for going another route.

Mr. Saphire asked, if Prof. Hoffmeister had the responsibility as a member of a Supreme Court task force, or as a judge supervising criminal process in the court, how he would define or describe the role of the GJLA.

Prof. Hoffmeister said a job description for a GJLA might say the person must have a criminal law background, would need to be able to attend grand jury hearings on a regular basis, would need to be on call for that purpose, and would serve a term of one or two years. He said whether the job is full time would depend on the jurisdiction, because he is not sure rural counties can keep a GJLA employed full time. He said, depending on the locale, a court may need several GJLAs. He said Hawaii does not require the GJLAs to be there all the time, instead using an on-call system. He said he advocates that person staying in the jury room the entire time, but would have to think about the role they would play. He said the GJLA might ride the circuit in some of the rural counties, but that, in any event, the GJLA could not be in this position and have another job in the government.

Judge Patrick Fischer asked which branch of government Prof. Hoffmeister believes the Ohio grand jury is part of.

Prof. Hoffmeister noted most authorities believe it belongs in the judicial branch. He said Justice Antonin Scalia once said it is the fourth branch of government. Prof. Hoffmeister said it is judiciary, but the prosecution has such sway that it is in theory only that the grand jury is part of the judiciary.

Judge Fischer asked whether the GJLA is permitted to discuss matters with the grand jurors while the prosecutor is in the room. Prof. Hoffmeister said that is how it works. Judge Fischer then asked whether there is an attorney-client relationship between the grand jury and the legal

advisor, to which Prof. Hoffmeister said the GJLA role is to advise the grand jury, but there is no attorney-client relationship.

Judge Fischer wondered if the position of legal advisor necessarily needs to be in the constitution. Prof. Hoffmeister said that question is beyond the scope of his expertise, but if the role is constitutionalized, it increases the likelihood that it cannot be removed by the next person who disagrees.

Judge Fischer wondered who would have standing to raise a claim if the GJLA is in the constitution but a county refused to allow a GJLA or pay for it.

Prof. Hoffmeister suggested the defendant would raise it as a claim, to which Judge Fischer replied that this suggests the attorney-client relationship is between the legal advisor and the defendant.

Prof. Hoffmeister continued that the defendant would argue to dismiss the indictment. Mr. Sapphire added the defendant could also state a due process claim.

Committee member Charles Kurfess said the role of the grand jury has been a concern to him ever since he was a common pleas judge. He said he used to give the grand jury copies of the statutes applicable to what they would hear until the prosecutor refused to let him know the details of the cases coming up, even though the prosecutor gave that information to the press. He said the grand jury needs counsel because it has a lot of options when a case is presented, and he is not confident that all of those options are made available to jurors. As an example, he said it may be a simple thing to bring a case of felonious assault, but then the issue might be whether the charge should be aggravated felonious assault. He said that information may not be given to the grand jury, but they ought to be able to ask about it. He said the grand jury needs counsel, and that could be a part-time attorney who is available every time they need it. He said the grand jury should be the judge's grand jury, rather than the prosecutor's. Mr. Kurfess said he objects to the grand jury meeting in the suite of prosecutor offices, a practice that sends the wrong message. He concluded, "if it takes a constitutional provision to give the grand jury counsel, then so be it."

Prof. Hoffmeister commented that it is difficult in the grand jury to get access to records, to raise concerns, and that some judges will hold off a decision on a problem at the grand jury stage until after determination of guilt or innocence. Prof. Hoffmeister said, because it is very difficult to fix problems with the grand jury process, it is good to address those problems on the front end, and the GJLA would go a long way toward that.

Mr. Kurfess said the constitution is clear the grand jury is an established entity for the protection of the accused. He said he was not satisfied when he asked the prosecutors who appeared before the committee if they have looked at the constitution recently to see what the function is and they answered it is just due process. Mr. Kurfess said he disagrees with that view, rather, he believes the purpose of the grand jury in many cases has been usurped beyond its constitutional purpose.

Chair Abaray said she too was disturbed by the testimony of the two prosecutors. She said what struck her was the inconsistency, in that each prosecutor has the discretion to approach the grand

jury process according to his or her own preference. She asked if the grand jury advisor would have authority to report to the court if there were improprieties, or if their role is strictly to answer questions by grand jury members.

Prof. Hoffmeister answered that a good example of a question that the grand jury may ask is whether the defendant can testify and why he is not here to tell his side of the story. He said a GJLA can explain that to the jury.

Chair Abaray said that decision may be within the prosecutor's discretion, but nobody knows about it. She added, if there is not some ability to make some kind of findings, no one would find out.

Mr. Jacobson noted those are two different matters, but that the GJLA may have a duty as officer of court to report impropriety to the judge. Judge Fischer noted that is the reason he asked about the attorney-client relationship.

Mr. Jacobson said he is getting more persuaded about the value of the GJLA. He said it may not be needed all of the time, but possibly in capital cases or serious felonies, the GJLA could be of real value. He said having them present through every step of a capital case for every bit of testimony would make him feel better about the process by which an indictment was arrived at. He noted the grand jury would not know prosecutorial misconduct when they see it.

Chair Abaray noted there may be a difference between prosecutorial misconduct and prosecutorial discretion, but the grand jurors do not have enough knowledge to discern.

Mr. Saphire commented that one reason he was interested in the job description for the GJLA is that, under current practice, it is not clear whether the grand jury itself can go directly to the judge with a question or whether the question has to go through the prosecutor. He noted, if there is a dispute on a matter of law between the prosecutor and the grand jury advisor, there should be a way to resolve that dispute. He wondered if the GJLA has the legal standing to take that dispute to the judge.

Mr. Kurfess said when he was a judge, the first grand jury he ever had, and at the first meeting the grand jury had, the foreman came to him at lunch and said jurors heard this testimony and have not returned an indictment, but the prosecutor wants to bring more testimony. The foreman asked if the jury had to allow the prosecutor to do so. Mr. Kurfess told the foreman "you are running this jury, it is your decision." He said the jury did not take more testimony, but the prosecutor took it to another grand jury and got his indictment. He recalled another instance in which the prosecutor filed a motion asking to release testimony to the investigating officer to assist in the investigation. He said that practice ignored the secrecy obligation. He said the fact that type of request would come out of a prosecutor's office disturbed him greatly.

Chair Abaray asked whether there could be a procedure whereby the court appoints the GJLA and that person is a representative of the court, keeping it in the judiciary.

Mr. Kurfess observed that the court is the entity that has the responsibility to see that the constitutional protections with the grand jury are fulfilled in that judge's court. Judge Fischer commented that the common pleas judge theoretically controls the grand jury, wondering if a GJLA could effectively be a magistrate for the judge and sit in, and report to the judge.

Prof. Hoffmeister said the GJLA in Hawaii is independent, adding the challenge of the grand jury is to protect the citizens' rights but also to investigate people. He said the question becomes when to step in when the grand jury is performing its investigatory role. He said the GJLA is simply an advisor, rather than overseeing how the prosecutor does his or her job.

Chair Abaray asked whether the use of this process in Hawaii has created a better public perception of the grand jury process. Prof. Hoffmeister answered in the affirmative, saying it is surprising that more jurisdictions have not adopted the practice.

Senior Policy Advisor Steven H. Steinglass asked about the cost of the Hawaii system.

Prof. Hoffmeister said the real question is how the role is defined. He said the GJLA can be available on call or there for all times. He said if the GJLA is to attend every proceeding, costs will go up. He observed that when grand jurors have served for a while, they have enough experience to feel more comfortable in the process, to ask questions, and to not be as accepting of what the prosecutor tells them, meaning they may not need a GJLA as often. He said the cost would vary based on the situation.

Mr. Sapphire wondered, if the legal advisor is not in the room and a question arises, whether the prosecutor stops the proceedings and calls the judge. If that is the practice, it could create inefficiencies. He said having the GJLA in the room during the entire period is necessary because of that problem.

Prof. Hoffmeister said the grand jury process is more free-flowing than the trial process. He said if there is a GJLA on call or in the courthouse, questions can be answered fairly quickly.

Chair Abaray wondered if an approach could be to use a GJLA only in certain cases, such as capital cases, or to allow a GJLA at the discretion of the court.

Mr. Sapphire asked whether there is any reason why a common pleas judge could not do this now. Judge Fischer said he is not sure about that.

Mr. Kurfess said he thinks the judge has access to the grand jury proceedings if necessary. He said, if that is the case, it seems that individual counsel to the grand jury is almost the judge's representation. Judge Fischer commented that the argument is the GJLA should be independent.

Mr. Sapphire wondered what the committee's next step would be. He said the issue is worth serious consideration and wondered if staff could draft some proposals.

Chair Abaray commented that Executive Director Steven C. Hollon has a decision tree that provides different options for the committee's consideration. She said the committee could work

its way through the different options, determine what the consensus is, and formalize its questions.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:02 p.m.

Approval:

The minutes of the June 9, 2016 meeting of the Judicial Branch and the Administration of Justice Committee were approved at the July 14, 2016 meeting of the committee.

Janet Gilligan Abaray, Chair

Judge Patrick F. Fischer, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice-chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission

DATE: June 24, 2016

RE: The Committee's Consideration of Grand Jury Reform

To assist the Judicial Branch and Administration of Justice Committee in its review of the grand jury portion of Article I, Section 10, this memorandum is designed to describe the committee's review of the question of grand jury reform, to summarize grand jury reform legislation currently pending in the Ohio General Assembly, and to describe the work of the 1970s Ohio Constitutional Revision Commission relating to grand jury reform.

The Judicial Branch and Administration of Justice Committee's Work on Grand Juries

The committee began its consideration of the grand jury in July 2015, hearing from Senator Sandra Williams, a member of the Governor's Task Force on Community-Police Relations, on recommending changes to Ohio's grand jury process.

Senator Williams discussed the need for a preliminary hearing system in Ohio. She expressed concern over the lack of transparency in grand jury procedures and unchecked authority of the prosecutor. Sen. Williams noted that although indictment rates are high, there has been a refusal 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. Sen. Williams noted that it was unclear how much reform of the grand jury system in Ohio would be possible without violating the state constitution.

The committee also heard a presentation about grand juries by Professor Gregory M. Gilchrist of the University of Toledo College of Law. Prof. Gilchrist said in its current use the grand jury is not very effective as a shield for the individual citizen. He observed that historically it was,

noting that in colonial times it was a tool against royal prosecutors, and colonists refused to issue indictments. Today, he said, the procedure is largely in the control of the prosecution. Because grand juries serve for a period of months they 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.

In December 2015, the committee heard presentations by two county prosecutors, who provided 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.” 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.

The committee also heard from Morris Murray, prosecutor for Defiance County, who 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.

In February 2016, Senator Williams again presented to the committee, outlining legislation she has introduced related to the use of grand juries. Identifying recommendations she would like the committee to support, Sen. Williams 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.

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 advocated for the grand jury counsel having specific guidelines about interactions 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 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. 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 possibility would be to 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 recommended a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise, a useful procedure 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.

Also in February 2016, the committee heard from State Public Defender Tim Young, who 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:

- 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.

Most recently, 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 Hawaiian 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 were actually 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.

Committee members asked Prof. Hoffmeister how the use of such an advisor could improve the grand jury indictment procedure. Prof. Hoffmeister said having the advisor present “works around the edges” because it prevents prosecutors from ignoring facts, and requires them to run a tighter ship. He said the grand jury process is the only one done in secret, so by having a neutral person in the room the government is required to bring stronger cases. He emphasized the importance of that fact, because he said very few felony cases go to trial due to the indictment usually producing a plea deal.

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.

Pending Legislation Relating to Grand Juries

Four different pieces of legislation related to grand juries are now pending in the General Assembly.

- House Bill 380, sponsored by multiple representatives from both parties, would amend Revised Code Sections 2930.01, 03, 04, and 2901.45, to require law enforcement agencies to adopt written policies regarding the investigation of deaths directly resulting from the use of a firearm by a law enforcement officer, requiring a criminal investigation of such deaths, and requiring the formation of a pool of independent investigators who would prepare a report of their findings. The bill further requires the report to be released to the public if the prosecutor determines there is no basis for a prosecution or if a grand jury returns a “no bill.” The investigatory procedure required by the bill would be administered by the Attorney General’s office, specifically relying on the database of law enforcement investigators qualified to investigate officer-involved deaths as specified by the Ohio Peace Officer

Training Commission. HB 380 was introduced on October 22, 2015, and is pending before the House Judiciary Committee.

- Senate Bill 258, sponsored by Senator Sandra Williams and Senator Charleta Tavares, would enact Revised Code Section 109.021 to establish the duties and authority of the Attorney General to investigate and prosecute cases relating to the death of a person caused by a peace officer. The bill requires the Attorney General to investigate the death of an unarmed person caused by a peace officer engaged in the officer's duties, who may also investigate if there is a significant question whether the person is armed and dangerous. If the Attorney General's investigation results in a decision to proceed, the bill requires the evidence to be referred to a grand jury or a special grand jury, and allows the Attorney General and any assistant AG to act as prosecutor. If an indictment is returned, the AG is given sole responsibility to prosecute the case. The attorney general is also required to provide a report to the governor or the governor's designee if the AG declines to refer evidence to a grand jury subsequent to the investigation, or if the grand jury declines to return an indictment. Introduced on January 13, 2016, the bill has been referred to the Senate State and Local Government Committee.
- Senate Joint Resolution 4, also sponsored by Senators Williams and Tavares, proposes to amend Article I, Section 10 of the Ohio Constitution to eliminate the requirement that a felony only be prosecuted on the presentment or indictment by a grand jury. That resolution, if adopted, would remove the first sentence of Article I, Section 10. SJR 4 was offered on February 10, 2016, and is pending before the Senate Government Oversight and Reform Committee.
- Senate Joint Resolution 6, sponsored by Senator Williams, would amend Article I, Section 10 of the Ohio Constitution to allow the prosecutor in a felony case to elect to prosecute upon a finding of probable cause by a court following a hearing rather than solely upon an indictment by a grand jury. That resolution, if adopted, would add language to the first sentence of Article I, Section 10 in order to provide an option for the prosecutor to either use the grand jury indictment process or to ask a court to hold a hearing to determine whether there is probable cause to charge the individual with a crime. This resolution was offered on March 17, 2016 and is pending before the Senate Government Oversight and Reform Committee.

The Ohio Constitutional Revision Commission

The 1970s Commission created a special "Committee to Study the Grand Jury and Civil Trial Juries" for the purpose of looking at 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.¹

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

¹ A “presentment” is a charging document 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. An “information” is a charging document filed by the prosecutor and challenged by the accused at a preliminary hearing. If a judge determines at the preliminary hearing that there is not sufficient probable cause to bind the defendant over for trial, then the prosecution does not proceed. 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.

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.

Conclusion

In discussing possible reforms, committee members have expressed a variety of views, including that any changes should be statutory. Some members of the committee have expressed an interest in pursuing the Hawaii approach of having a neutral grand jury legal advisor present during the hearing. Other possibilities for reform being considered by the committee include requiring judicial oversight, requiring an independent prosecutor to handle cases involving investigations of law enforcement, and requiring a transcript of proceedings to be made available.

It is hoped that this review of the committee's work thus far, as well as information regarding current proposals for reform now pending in the General Assembly and reforms that were proposed in the 1970s, will assist the committee as it determines potential recommendations to the full Commission. Staff is prepared to offer additional research and assistance as needed.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice-chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice
Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission and
Bryan Becker, Student Intern

DATE: January 26, 2016

RE: Supplemental Memorandum Regarding the Use of
Grand Juries in the United States

At its July 2015 meeting, the Judicial Branch and Administration of Justice Committee discussed issues surrounding the use of the grand jury in criminal prosecutions across the United States. This memorandum is intended to provide supplemental research on that topic.

Preliminary Hearing

In 27 states, only an information filed by the prosecutor, with the opportunity for a preliminary hearing, is necessary to charge a person with a crime.¹ However, many of these states also allow a prosecutor to choose between presenting evidence to a grand jury and using an information with a preliminary hearing (though the information filing is far more common). In most of these states, a defendant can be denied a preliminary hearing if they have been indicted by a grand jury. *See, e.g., Martinez v. State*, 423 P.2d 700 (Alaska 1967). A grand jury may be preferred by a prosecutor for “saving time, limiting defense discovery, or reducing the number of times the victim must testify publicly.”² States with both an indictment and an information process may not systematically use one against certain classes of people. For instance, a prosecutor cannot choose an indictment over an information on the basis of a classification such as race, sex, or religion. *State v. Edmonson*, 113 Idaho 230, 743 P.2d 459 (1987).

¹ Sara S. Beale et al., *Grand Jury Law & Practice 2d*, 8.2.

² *Id.*

Constitutionally, the accused has a right to have either a grand jury or a judge establish probable cause before a case may go to trial. “[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.” *Hurtado v. California*, 110 U.S. 516, 538 (1884). The United States Supreme Court has ruled that a defendant has a constitutionally-protected right to have a preliminary hearing after the filing of an information. It also concluded that since the preliminary hearing only establishes probable cause, the accused is not entitled to the assistance of counsel. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

Grand Jury Legal Counsel

There has been a small but vocal call for the appointment of legal counsel to serve as an independent advisor to grand juries. “The most important reform would be to give the grand jury an independent legal adviser, selected from outside the prosecutor’s office.”³ Currently, Hawaii is the only state to provide independent legal counsel to the grand jury, requiring it through a constitutional provision that reads:

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 licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

Haw. Const. art. I, § 11.

University of Dayton Professor Thaddeus Hoffmeister notes that Hawaii’s grand jury legal advisors consider their role to be highly effective in ensuring grand juries can make independent decisions.⁴ Susan W. Brenner, also a University of Dayton law professor, suggests that “Hawaii’s unique system is a solid model for federal grand juries and states wishing to re-establish the legitimacy and independence of grand juries.”⁵ Another writer considers the short period for serving on the jury as ensuring the advisor does not become “an entrenched party in the system.”⁶ The provision does not require the independent counsel to be present throughout the entire proceeding. *State v. Kahlbaun*, 64 Haw. 197, 638 P.2d 309 (1981). The purpose of

³ Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 Am. Crim. L.Rev. 1, 65 (2004).

⁴ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury’s Shield*, 98 J. Crim. L. & Criminology 1171 (2008).

⁵ Susan W. Brenner, *Forum: Faults, Fallacies, and the Future of Our Criminal Justice System: The Voice of the Community: A Case for Grand Jury Independence*, 3 Va. J. Soc. Pol’y & L. 67, 95 (1995).

⁶ Note, *What Do You Do With a Runaway Grand Jury?: A Discussion of the Problems and Possibilities Opened Up by the Rocky Flats Grand Jury Investigation*, 71 S. Cal. L.Rev. 617, 637 (1998).



independent counsel is to provide a service for the grand jury, not the accused. *State v. Hehr*, 63 Haw. 640, 633 P.2d 545 (1981).

The only effort to provide counsel to a federal grand jury was made by then Senator Richard Nixon, who sought to give investigatory grand juries special counsel from outside the United States Attorney's Office.⁷ Nixon likely was thinking about the successful grand jury investigation into Alger Hiss, an investigation Nixon helped necessitate as a Congressman on the House Committee on Un-American Activities. The bill died in committee.⁸

Evidentiary Standards

There have been calls in the academic community for states to adopt tougher evidentiary standards than is required for federal grand juries. Professor John F. Decker argues for witnesses to have the right to counsel, the requirement of allowing exculpatory evidence, the exclusion of illegally or improperly obtained evidence, admonishments, the right for witnesses to appear, and the right to transcripts.⁹

Standards for protecting the accused that go beyond what is constitutionally required likely will be allowed by the courts. Ohio courts recognize the need for statutes that implement the constitutional guarantee of a speedy trial if they represent "a rational effort to enforce the constitutional guarantee * * *." *State v. Pachay*, 64 Ohio St.2d 218, 416 N.E.2d 589 (1980). Courts also recognize that statutes can offer stronger protections to defendants than what is constitutionally required. *See, e.g., State v. Jones*, 37 Ohio St.2d 21, 24, 306 N.E.2d 409, 411, fn. 1 (1974) (R.C. 2935.20 offers the accused a stronger right to counsel than what is guaranteed by the federal Constitution). Any statute that excludes illegally or improperly obtained evidence, allows exculpatory evidence, and allows witnesses to have the right to counsel are likely to be seen as constitutional. Some states already require some exculpatory evidence to be given to the jury. *See, e.g., State v. Hogan*, 144 N.J. 216, 676 A.2d 533 (New Jersey 1996).

New York Grand Jury Procedure

The New York grand jury system offers some of the strongest protections for persons subject to grand jury investigations and can serve as an example for Ohio. Moritz College of Law Professor Ric Simmons finds New York grand juries to be "active and engaged, and they critically evaluate the cases that come before them."¹⁰ Simmons calls for other states to follow the New York model by stopping prosecutors from re-presentation of the case if a grand jury investigation does not result in an indictment. He further advocates the New York practice of

⁷ Note, *Powers of Federal Grand Juries*, 4 Stan. L.Rev. 68, 75 (1951).

⁸ Note, *Reviving Federal Grand Jury Presentments*, 103 Yale L.J. 1333, 1345 n.60 (1999); Susan W. Brenner & Lori E. Shaw, *2 Fed. Grand Jury: A Guide to Law and Practice* (Supp. 2004), § 27:6.

⁹ John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L.Rev. 341 (2005).

¹⁰ Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L.Rev 1, 45 (2002).



banning hearsay testimony, allowing a suspect to testify in front of the grand jury, and providing judicial review of indictments, thus giving courts the power to reverse convictions if the indictment process was faulty. One commentator describes the New York process as relying on courts' willingness to be aggressive in protecting defendants' due process rights in the face of legislative silence on the matter.¹¹

Though these standards may appear tough, New York courts recognize that “[a] Grand Jury proceeding is not a ‘mini trial’ but a proceeding convened primarily to investigate crimes and determine whether sufficient evidence exists to accuse a citizen of a crime and subject him or her to a criminal prosecution.” *People v. Lancaster*, 69 N.Y.2d 20, 30, 503 N.E.2d 990 (1986) [internal citations and quotation marks removed]. Nevertheless, in the New York grand jury, as in other states, there is not the back and forth of a trial, nor a requirement to call every possible witness. See *People v. Thompson*, 22 N.Y.3d 687, 8 N.E.3d 803 (2014).

Police Action and the Grand Jury

California currently has pending a bill requiring the Attorney General to appoint a special prosecutor to investigate all use of deadly force by police officers, giving the sole discretion to the prosecutor to file charges.¹² The bill, AB-86 as introduced by Democrat Assemblymember Kevin McCarty, is currently held under submission in committee.

In Ohio, however, the accused has a constitutional right to a grand jury. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985). Unless the accused waives his right to a grand jury, he is entitled to have the charges be brought forth in front of one. *Ex parte Stephens*, 171 Ohio St. 323, 170 N.E.2d 735 (1960).

New York Judge Aaron Short offers a different solution. He suggests that a judge should oversee a grand jury that is hearing a case against police officers and have the transcripts of those hearings to be open to the public. However, this proposal has not been adopted by the legislature.¹³

¹¹ Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 Pace L.Rev. 41, 92 (1994).

¹² Melanie Mason, “Tired of prayer vigils’: California debates 20 bills aimed at police force,” *Los Angeles Times* (May 3, 2015), <http://www.latimes.com/local/politics/la-me-pol-police-force-legislature-20150504-story.html> (last visited Jan. 27, 2016). Text of bill available at: http://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB86 (last visited Jan. 27, 2016).

¹³ Aaron Short, “NY chief judge proposes sweeping grand jury reforms.” *New York Post*, (Feb. 17, 2015), available at <http://nypost.com/2015/02/17/ny-chief-judge-proposes-sweeping-grand-jury-reforms/> (last visited Jan. 27, 2016).





OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

TO: Chair Janet Abaray, Vice Chair Patrick Fischer, and
Members of the Judicial Branch and Administration of Justice Committee

CC: Steven C. Hollon, Executive Director

FROM: Shari L. O'Neill, Counsel to the Commission and
Bryan B. Becker, Student Intern

DATE: July 2, 2015

RE: History and Use of Grand Juries

This memorandum is being provided to the Judicial Branch and Administration of Justice Committee as an aid to its review of Article I, Section 10, specifically, the use of the grand jury in criminal prosecutions.

The Grand Jury in Ohio

The Ohio Constitution provides for the use of the grand jury in Article I, Section 10, which states, in part:

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.

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 Article I, Section 10 is original to the 1851 constitution, but was amended in 1912.

The grand jury process in Ohio is further controlled by Revised Code Chapter 2939. That chapter governs the size and selection of the grand jury; the use of additional or alternate jurors; specific terms of juror service, including compensation, the juror's oath, and the need to maintain secrecy; organizational matters such as the jury's use of a foreman and a clerk; procedural matters such as the jury's deliberations and the reporting of conclusions; and evidentiary matters, such as the procurement of witness attendance and testimony. Revised Code Chapter 2939 is provided as Attachment A to this memorandum.

The Use of the Grand Jury in the United States

In the United States, grand juries are used as a method for indicting persons accused of crimes. A prosecutor presents evidence and witnesses to a grand jury, which then votes if the evidence is enough to establish probable cause. The procedure is intended to protect the accused from frivolous criminal charges by ensuring that lay citizens decide if the prosecutor has made a correct decision. A grand jury is chosen by random selection from the district's voter rolls. It sits for a period of time – in the federal system for 18 months – hearing all the different charges brought by the prosecutor during that period. In the federal system, the jury is made up of between 16 and 23 members, with the need of 12 jurors to concur to indict the accused.² The process is kept in strict confidence, with the record of proceedings rarely being reviewed by anyone besides the prosecutor as a way of protecting the integrity of the grand jury process.

History

The grand jury system originated in 12th Century England, under the reign of King Henry II. At the time, Great Britain lacked a sophisticated policing mechanism. 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. This 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 began to be 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 a person. This turn from the jury being a "tool of the crown" to "defender of individual rights" came after two refusals by a London grand jury to indict the Earl of Shaftesbury on a dubious treason charge in 1667, leaving the lasting effect of freemen being entitled to the right to have their neighbors review the charges against them before the government could indict them. American colonists followed this tradition, using the process to nullify despised English laws, as grand juries refused to indict those who took stances against the royalist government. 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 U.S. 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 * * *." Many states followed suit, protecting grand juries in their own constitutions. Ohio's version uses almost identical language: "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."⁴ Three other states, Alaska, Maine, and New York, also used the Fifth Amendment as their indictment clause model. The Ohio Supreme Court, following the language of the clause, has ruled the grand jury to be a required entitlement of the accused. *State v. Sellards*, 17 Ohio St.3d 169, 169, 478 N.E.2d 781 (1985).

From these two traditions flow the basic duties of grand jury today, often described as "the sword and the shield." First, the jury has a screening function, whereby the grand jury reviews evidence presented to them by a prosecutor to decide if there is probable cause for an indictment, thus "shielding" the accused from false charges. The grand jury also has an investigative function, in which it gathers evidence and issues subpoenas, using the "sword" to discover criminal conduct. While the latter has been used for sensational effect in political corruption cases, and in other cases lacking identifiable victims who would otherwise help investigators, it is the former most people think of when discussing grand juries, and it is the most common form.⁵

Criticism and Support

Grand juries have come under criticism since at least the 19th Century. At that time, the new Western states did not include grand juries in their constitutions, although this is likely because populations of those states were so dispersed that requiring citizens travel to a central location to form a grand jury would have been too onerous. Also at that time, many states removed the requirement from their constitutions, with one Michigan legislator declaring grand juries to be "akin to the star chamber."⁶

Both recently and historically, the use of the grand jury has been criticized as merely a reflection of the prosecutor's interest in securing or, in some instances, avoiding an indictment.⁷ While currently the focus of public attention, these concerns are not new. In 1973, U.S. Supreme Court Justice William Douglas noted that it was "common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting). Concerns remain that grand juries merely rubberstamp the decisions of prosecutors, leading to the famous quote by the New York state judge Sol Wachtler that a district attorney "could get a grand jury to indict a ham

sandwich.”⁸ There is near-unanimous scholarly agreement that the grand jury system is in need of reform or fundamentally broken.⁹ It is notable that the United Kingdom abandoned the system in the 1930s, and grand juries no longer are used by any common law country besides the United States.

Nevertheless, many argue that the grand jury process is important for reaching justice. Justice Learned Hand described grand juries as being the “voice of the community.” *In re Kittle*, 180 F. 946 (S.D.N.Y. 1910). Supporting community involvement in local criminal proceedings, Professor Ric Simmons of the Ohio State University Moritz College of Law has argued that, while federal grand juries might turn into rubber stamps, state grand juries using the correct processes could ensure the protection of defendants’ rights. According to Simmons, grand juries can provide the only lay perspective in a system where jury trials are becoming scarce.¹⁰ Simmons does suggest reform for the grand jury system where the prosecutor would only have one chance for an indictment and the process would have a higher evidentiary standard.

Legal Issues

There is no U.S. constitutional requirement that states have grand jury indictments for any crime. The Fifth Amendment’s guarantee of a grand jury has not been extended to the states through the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516 (1884). There have been no challenges to overturn *Hurtado*. Even during the Warren era, when the Supreme Court applied Fourteenth Amendment principles to much of the Bill of Rights, grand juries remain a requirement only in the federal criminal justice system. *Beck v. Washington*, 369 U.S. 541, 545 (1962). “Ever since *Hurtado v. California*, 100 U.S. 516 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions.” In *Alexander v. Louisiana*, 405 U.S., 625, 633 (1971), the Court stated it “has never held that federal concepts of a ‘grand jury,’ binding on the federal courts under the Fifth Amendment, are obligatory for the States.” The grand jury requirement, along with the Seventh Amendment, remain the last elements of the Bill of Rights that have not been incorporated by the Court to be applied to state government. As such, state grand jury procedure can be remarkably different from that of a federal grand jury, and is even completely abolished in some states.

While United States Supreme Court precedent has not required states to use grand juries, the court has strongly supported the federal grand jury system mentioned in the Fifth Amendment. The court has issued decisions protecting the grand jury’s ability to hear hearsay evidence (*Costello v. United States* 350 U.S. 359 (1956)), to hear evidence that otherwise would be excluded (*United States v. Calandra* 414 U.S. 338, (1974)), and allowing prosecutors not to present exculpatory evidence (*United States v. Williams*, 504 U.S. 36 (1992)). Ohio decisions have reflected the Supreme Court’s rulings in federal criminal cases. An Ohio appellate court simply quoted *United States v. Calandra* in deciding against a defendant. *State v. Muenick*, 26 Ohio App.3d 3, 498 N.E.2d 171 (1985). The Ohio Rules of Evidence explicitly do not apply to grand juries. Evid.R. 101(C)(2).

Moreover, the defendant is not allowed access to the records of the grand jury's proceedings. Ohio Crim.R. 16(J)(2) explicitly states that transcripts of grand jury testimony are not subject to disclosure but are governed by Crim.R. 6. Specifically, Crim.R. 6(E) states the deliberations and vote of the grand jury shall not be disclosed. *See also* R.C. 2939.11. In addition to these rules, the Ohio Supreme Court held in *State v. Patterson*, 28 Ohio St.2d 181, 185, 277 N.E.2d 201 (1971), that grand jury minutes are not released before or during trial unless "the ends of justice require[] it, such as when the defense shows that a particularized need exists * * * " (quoting *State v. Laskey*, 21 Ohio St.2d 187, 257 N.E.2d 54 (1970)). The balancing test is repeated in *In re Petition for Disclosure of Evidence Presented to Franklin County Grand Juries in 1970*, 63 Ohio St.2d 212, 407 N.E.2d 513 (1980). *See also Wiggins v. Kumpf*, 2d Dist. No. 26263, 2015-Ohio-201, 2015 Ohio App. LEXIS 174, 2015 WL 302839 (Montgomery Cty., Jan. 23, 2015).

While Ohio courts consistently follow jurisprudence relating to the federal system, this trend is not universal, as one-fifth of states with grand juries allow judicial review of grand jury conclusions. The most significant evidence of this trend is the system adopted in New York.¹¹

State Comparisons

States' use of the grand jury process falls into several categories. Some, like Ohio, require a grand jury for a variety of different crimes, while others require a grand jury only for capital crimes. Some states allow the legislature the option to abolish the grand jury system, some allow the legislature to choose between grand juries or the use of an information system, and some are completely silent on the issue. A complete list of state constitutional provisions relating to grand juries is provided as Attachment B.

Under a preliminary hearing system, the prosecutor files a document referred to as an "information." The defendant may then challenge the information in front of a judge. If the prosecutor can satisfy the judge that there is probable cause in the case, the defendant is held over to trial. Twenty-seven states allow any prosecution to be initiated by information.¹²

Colorado, Connecticut, Illinois, Indiana, Iowa, Nebraska, North Dakota, South Dakota, Utah, and Wyoming explicitly empower the legislature to abolish or modify the grand jury system. Though only Connecticut has used this power, all of these states have the option of changing to an information system at their choosing. Connecticut abolished their grand jury system and replaced it with an "adversarial probable cause hearing" by a constitutional referendum.¹³

Today, only 18 states require a grand jury indictment to initiate all serious criminal charges: Alabama, Alaska, Delaware, Georgia, Kentucky, Maine Massachusetts, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, South Carolina, Tennessee, Virginia, and West Virginia. Four states require grand jury indictments for crimes carrying a capital sentence or life imprisonment: Florida, Louisiana, Minnesota, and Rhode Island.¹⁴

Note that not all grand juries are required by state constitutional amendments. Eight states: Georgia, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, Tennessee, and

Virginia, require grand juries by statute, with their constitution either being silent, or allowing either indictment or information as chosen by the legislature.¹⁵

Grand Jury Discussion in the Ohio Constitutional Revision Commission

The Constitutional Revision Commission in the 1970s (“1970s Commission”) formed a special sub-committee of the Bill of Rights Committee to study both the grand jury and civil petit jury systems in Ohio.¹⁶

The Grand Jury and Civil Trial Jury Committee of the 1970s Commission discussed four questions relating to possible changes to the operation of grand juries in the Ohio constitution: 1) whether indictment by grand jury should only be mandatory in cases of impeachment, cases arising in the armed forces of the United States, or in the militia when in actual service during time of public danger, and capital offenses; 2) whether indictment by grand jury should be confined only to capital and a limited number of other offenses; 3) whether all grand jury witnesses should have the right to the assistance of counsel; and 4) whether the prosecuting attorney should be compelled to present evidence that tends to exculpate the defendant at grand jury proceedings. The committee heard from several witnesses on the topic.

One witness, an administrative judge with the Franklin County Court of Common Pleas, expressed his view that the grand jury is a “functioning and viable body,” and shared a letter he had received from a grand jury foreman who had found the experience to be very positive in helping his understanding of the criminal justice system. Another witness, who was executive director of the American Bar Foundation, presented a report listing arguments for and against grand juries. On the side opposing grand juries, he recognized that juries can serve as tools of the prosecutor, that there may not be enough constitutional safeguards when grand juries serve their investigatory function, and that they can be inefficient when combined with other screening processes like preliminary hearings. On the side supporting grand juries, he noted that they promote citizen participation and fulfill a need for prosecutors to have someone else make the charging decision. His conclusion was that grand juries should not be used for the vast majority of cases, and are best used when the prosecutor has a difficult choice on whether to prosecute.

The committee of the 1970s Commission also heard from a representative of the Coalition to End Grand Jury Abuse, who emphasized her organization’s position that grand juries lack independence. She recommended that all witnesses should have counsel available, all those subpoenaed should know ahead of time what they have been accused of, and grand juries should not collect facts. She added that transcripts of the hearing should be given to the defendant, and there should be limits on grand jury’s power to issue subpoenas. Speaking in support of grand juries, a county prosecutor also appeared before the committee, and described the typical grand jury experience in his county. He further described a unique case in which a white police chief shot an unarmed Africa-American suspect. He said there were calls for a murder prosecution but the prosecutor thought it was important that a grand jury made up of members of the community be allowed to make the final judgment about whether to indict. He said grand juries are particularly important in homicide cases. Considering possible reforms, the prosecutor said grand juries should not be required for some lesser offenses. He discredited a criticism that

prosecutors could use evidence in grand jury hearings that would not be admissible in court, as he said it would be pointless to go to trial with evidence that could not be used. Finally, he noted it can be important for grand juries to hear evidence that is helpful to the defendant.

Other witnesses expressed that having both a preliminary hearing procedure and a grand jury procedure is unnecessary, that exculpatory evidence as well as incriminating evidence should be presented to jurors, and that the General Assembly should be given the power to abolish the grand jury. Witnesses further opined that grand juries should be saved for only the most serious charges, such as capital murder or rape, and that defense attorneys should be given a copy of the grand jury proceedings, so as to ensure witnesses are giving the same story both then and at trial. One witness, a law professor, expressed that the best use of grand juries is in murder cases, cases with political ramifications, and sexual crimes, and that they are also useful for investigating political corruption and inspecting the conditions of jails and other public institutions.

The committee also heard from a representative of the Ohio Prosecuting Attorneys Association who said that, historically, the grand jury was a constitutional right of the defendant, and that removing the grand jury in order to streamline the criminal prosecution process would impinge that constitutional right. He said, as a practical matter, having the prosecutor present evidence that might exculpate the accused would put the burden on prosecutors to anticipate what evidence would be favorable to a defendant, which involved making subjective conclusions on matters of evidence in a hearing that is supposed to be investigatory, not adversarial, and would result in prosecutors going beyond their authority and doing the work of the defense. He also was critical of the suggestion that advisory counsel be afforded grand jury witnesses, an unnecessary provision because under current practice witnesses were not precluded from leaving the room and consulting with counsel. He said allowing advisory counsel to be present for the proceedings would only defeat one of the chief advantages of a grand jury proceeding: secrecy. Asked whether he thought prosecutors could be as diligent in suggesting the innocence of the accused as they are in attempting to establish guilt, the witness answered that the role of the prosecutor is not as a juror, but to take all the evidence available to the grand jury and let that body decide. He emphasized it is not the function of the prosecutor to determine probable cause, but to present what he or she feels may be a legitimate claim to the grand jury.

In his written remarks, the witness supported allowing grand jury proceedings for felonies other than capital offenses, such as those that may involve extreme deprivation of freedom, liberty, and property. He also advocated continuing to prohibit advisory counsel's presence in grand jury proceedings in order to preserve secrecy and the investigatory nature of the proceeding, as well as avoiding a requirement that prosecutors offer exculpatory evidence because it would burden the grand jury process with dilatory evidentiary appeals.

The committee of the 1970s Commission debated the merits of several of the proposed modifications. No members expressed any problem with requiring a grand jury indictment as the exclusive means of initiating the prosecution of a capital offense. Further, the committee agreed that the prosecutor should always have the option of taking a case to the grand jury instead of utilizing the information or a preliminary hearing. The committee wrestled with how to explicitly favor the use of the information, basically a preliminary hearing in which an individual

is actually accused, as the primary means of prosecuting non-capital crimes. The committee could not come to a consensus on how to make the information secret in the same way as is a grand jury proceeding. The committee ultimately chose to agree on the purpose of the provision and table discussion of procedure.

As for a provision requiring prosecutors to present exculpatory evidence on behalf of the accused, the committee agreed that there is a tendency for prosecutors to favor their own case rather than that of the accused. No agreement was reached as to specific language, although several alternatives were discussed.

Regarding a possible provision that would allow witnesses to have counsel present during grand jury proceedings, the committee agreed that there was currently no real right to counsel because it was ultimately up to the witness to make a decision as to when to seek the advice of counsel. Further, the committee proposed language instructing appropriate counsel to advise the client on “matters of self-incrimination,” and that every witness, not just the witness who was also the accused, should enjoy such a right. (There are cases in which it is unknown whether an individual is just a witness or if they are going to end up being the accused, so affording only the accused the right to have counsel present defeats the idea of secrecy in the grand jury proceeding.)

The committee of the 1970s Commission finally recommended that the information should be the primary method of initiating a criminal charge, unless the defendant asks for a grand jury. The committee also supported adoption of a provision that would allow for either a preliminary hearing or grand jury to establish probable cause; require the prosecutor to provide exculpatory evidence to a grand jury; and allow witnesses in front of the grand jury to have counsel with them.

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 Fed. R. of Crim. P. 6.

³ Beale, Sarah, et al., Grand Jury Law & Practice 1.2.

⁴ Ohio Const., Art. I, Sec. 10.

⁵ Beale, *supra*, 1.7.

⁶ Report of the Judiciary Committee of the House of Representatives on recommending the passage of the bill to provide for the trial of offenses upon information, Michigan House Document No. 4 (1859); Michigan House Journal (1859), 237; Michigan Senate Journal (1859), 567; Laws of Michigan (1859), No. 138, sec. 1, 7, as described in:

Younger, Richard D., *The Grand Jury Under Attack, Part I*, 46 J. Crim. L. Criminology & Police Sci. 26 (1955-56), pp. 35-36, available at:

<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=4344&context=jclc>, accessed July 1, 2015.

⁷ Recently, after the failure of grand juries to indict for the deaths of Eric Gardner and Michael Brown, there was public outcry that grand juries were archaic and serve no practical purpose. *See, e.g.*, Hazzard Corbell, LaDoris, “Grand Juries Should Be Abolished,” *Slate*, Dec. 9, 2014. Web. Available at:

http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/abolish_grand_juries_justice_for_eric_gardner_and_michael_brown.html, accessed July 1, 2015.

⁸ Kramer, Marcia and Frank Lombardi, “New top state judge: Abolish grand juries & let us decide,” *New York Daily News*, Jan. 31, 1985, p. 3. Available at: <http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208>, accessed June 30, 2015.

⁹ *See* Decker, John F., *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 Okla. L.Rev. 341 (2005), available at: <http://adams.law.ou.edu/olr/articles/vol58/decker583.pdf>, accessed July 1, 2015;

Washburn, Kevin K., *Restoring the Grand Jury*, 76 Fordham L.Rev. 2333 (2008), available at: <http://www.law.virginia.edu/pdf/workshops/0708/washburn.pdf>, accessed July 1, 2015; Leipold, Andrew D., *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 Cornell L.Rev. 260 (1995), available at:

<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2544&context=clr>, accessed July 1, 2015.

¹⁰ Simmons, Ric, *Re-Examining the Grand Jury: Is there Room for Democracy in the Criminal System?* 82 B.U. L.Rev. 1 (2002).

¹¹ *Id.*, at 27.

¹² *See* Beale, *supra*, at 8.2 (Pennsylvania has a unique system of allowing common pleas courts to replace the grand jury with prosecution by information at the permission of the state’s supreme court, with currently all lower courts choosing the information system.) Available at: <http://www.courts.phila.gov/pdf/report/ri/Grand-Jury-Subcommittee-Report.pdf>, accessed July 1, 2015.

¹³ Matthews, Jason K., *The Evolution of Connecticut’s Grand Jury System*, OLR Research Report, 2002-R-0088, Jan. 18, 2002. Available at: <http://www.cga.ct.gov/2002/olrdata/jud/rpt/2002-R-0088.htm>, accessed July 1, 2015.

¹⁴ Professor James R. Acker argues that grand juries should be required for all possible death sentence cases to lower the chances of arbitrary uses of the punishment. *See* Acker, James R., *The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution Under the Modern Jurisprudence of Death*, 21 Pac. L.J. 31 (1989).

¹⁵ Brenner, Susan & Lori Shaw, “Federal Grand Jury,” Web. Last modified Nov. 17, 2006.

<http://campus.udayton.edu/~grandjur/stategj/abolish.htm>, accessed July 1, 2015.

¹⁶ Ohio Constitutional Revision Commission, Proceedings of the Grand Jury and Civil Trial Jury Committee, Volume 10, January 23, 1976, pp. 5245 et seq.

ATTACHMENT A**Ohio Revised Code Chapter 2939: GRAND JURIES****2939.01 Grand jury definitions.**

The definition of "magistrate" set forth in section 2931.01 of the Revised Code applies to Chapter 2939. of the Revised Code.

Effective Date: 10-01-1953

2939.02 Grand jury selection and composition.

Grand juries shall consist of fifteen persons who satisfy the qualifications of a juror specified in section 2313.17 of the Revised Code. Persons to serve as grand jurors in the court of common pleas of each county shall be selected from the persons whose names are contained in the annual jury list.

At the time of the selection of the persons who are to constitute the grand jury, the commissioners of jurors shall randomly draw from the annual jury list the names of not fewer than twenty-five persons. The first fifteen persons whose names are drawn shall constitute the grand jury, if they can be located and served by the sheriff, and if they are not excused by the court or a judge of the court. If any of the first fifteen persons whose names are so drawn are not located or are unable to serve and are for that reason excused by the court or by a judge of the court, whose duty it is to supervise the impaneling of the grand jury, the judge shall then designate the person whose name next appears on the list of persons drawn, to serve in the place of the person not found or excused and shall so continue to substitute the names of the persons drawn in the order in which they were drawn, to fill all vacancies resulting from persons not being found or having been excused by the court or the judge of the court, until the necessary fifteen persons are selected to make up the grand jury. If all of the names appearing on the list of persons drawn are exhausted before the grand jury is complete, the judge shall order the commissioners of jurors to draw such additional names as the judge determines, and shall proceed to fill the vacancies from those names in the order in which they are drawn.

The judge of the court of common pleas may select any person who satisfies the qualifications of a juror and whose name is not included in the annual jury list to preside as foreperson of the grand jury, in which event the grand jury shall consist of the foreperson so selected and fourteen additional grand jurors selected from the annual jury list.

Amended by 129th General Assembly File No.81, HB 268, §1, eff. 5/22/2012.

Effective Date: 10-01-1984

2939.03 Grand juror drawing, notification, exemptions.

Except for a foreperson selected by the judge of the court of common pleas under section 2939.02 of the Revised Code, a grand jury is drawn and notified in the same manner as other jurors are drawn and notified under Chapter 2313. of the Revised Code. Grand jurors so drawn and notified are not entitled to an exemption for any reason but may be excused from service or have their service postponed for the same reasons and in the same manner as other jurors under that chapter and not otherwise. Grand jurors are subject to the same fines and penalties for nonattendance and otherwise as are other jurors under that chapter. The duties and the powers of courts of common pleas, clerks of courts of common pleas, and commissioners of jurors in regard to grand jurors in all respects are the same as in regard to other jurors.

*Amended by 129th General Assembly File No.81, HB 268, §1, eff. 5/22/2012.
Effective Date: 04-16-1998*

2939.031 Additional or alternate jurors.

When it appears to the judge impaneling a grand jury that the inquiry is likely to be protracted, or upon direction of the judge, an additional or alternate juror shall be selected in the same manner as the regular jurors in the inquiry are selected. The additional or alternate juror shall be sworn and seated near the jury, with equal opportunity for seeing and hearing the proceedings, shall attend the inquiry at all times and shall obey all orders and admonitions of the court or foreman. When the jurors are ordered kept together, the alternate juror shall be kept with them. The additional or alternate juror shall be liable as a regular juror for failure to attend the inquiry or to obey any order or admonition of the court or foreman. He shall receive the same compensation as other jurors, and except as provided in this section shall be discharged upon the final submission of the bill to the foreman.

If before the final submission of the bill to the jury, a juror dies or is discharged by the judge or foreman due to incapacity, absence, or disqualification of such juror, the additional or alternate juror, upon order of the judge or foreman, shall become one of the jury and serve in all respects as though selected as an original juror during the absence or incapacity of an original juror.

Effective Date: 10-14-1953

2939.04 Compensation - prohibition of repeated service in same term.

The compensation of grand jurors shall be fixed by resolution of the board of county commissioners, not to exceed forty dollars for each day's attendance, payable out of the county treasury. Except in counties of less than one hundred thousand population according to the last federal census, in which counties the judge of the court of common pleas shall make rules in the judge's own county applicable to subsequent grand juror and petit juror service, a person who has served as a grand juror at a term of court is prohibited from serving again, either as a grand juror or petit juror, in that jury year in which the service is rendered or in the next jury year. The person is entitled to a certificate of excuse or postponement in the same manner as a petit juror.

The court of common pleas may order the drawing of a special jury to sit at any time public business requires it.

Effective Date: 04-16-1998

2939.05 [Repealed].

Effective Date: 09-11-1961

2939.06 Oath or affirmation of grand jurors.

(A) When a grand jury is impaneled, the court of common pleas shall appoint one of the members of the grand jury as foreperson, and shall administer, or cause to be administered, to the jurors an oath in the following words to which the jurors shall respond "I do solemnly swear" or "I do solemnly affirm" :

"Do you solemnly swear or affirm that you will diligently inquire into and carefully deliberate all matters that shall come to your attention concerning this service; and do you solemnly swear or affirm that you will keep secret all proceedings of the grand jury unless you are required in a court of justice to make disclosure; and do you solemnly swear or affirm that you will indict no person through malice, hatred, or ill will; and do you solemnly swear or affirm that you will not leave unindicted any person through fear, favor, or affection, or for any reward or hope thereof; and do you solemnly swear or affirm that in all your deliberations you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding, as you shall answer unto God or under the penalties of perjury?"

(B) If, on or after the effective date of this amendment, a court impaneling a grand jury uses the grand juror's oath that was in effect prior to the effective date of this amendment instead of the oath set forth in division (A) of this section, the court's use of the former oath does not invalidate or affect the validity of the impanelment of the grand jury, any proceeding, inquiry, or presentation of the grand jury, any indictment or other document found, returned, or issued by the grand jury, or any other action taken by the grand jury.

Effective Date: 03-24-2003

2939.07 Charge of jurors by judge.

The grand jurors, after being sworn, shall be charged as to their duty by the judge of the court of common pleas, who shall call their attention particularly to the obligation of secrecy which their oaths impose, and explain to them the law applicable to such matters as may be brought before them.

Effective Date: 10-01-1953

2939.08 Grand jury duty after charge.

After the charge of the court of common pleas, the grand jury shall retire with the officer appointed to attend it, and proceed to inquire of and present all offenses committed within the county.

Effective Date: 10-01-1953

2939.09 Clerk - minutes.

The grand jury may appoint one of its members to be its clerk to preserve the minutes of its proceedings and actions in all cases pending before it. Such minutes shall be delivered to the prosecuting attorney before the jury is discharged.

Effective Date: 10-01-1953

2939.10 Prosecuting attorney to have access to grand jury.

The prosecuting attorney or assistant prosecuting attorney may at all times appear before the grand jury to give information relative to a matter cognizable by it, or advice upon a legal matter when required. The prosecuting attorney may interrogate witnesses before the grand jury when the grand jury or the prosecuting attorney finds it necessary, but no person other than the grand jurors shall be permitted to remain in the room with the jurors while the jurors are expressing their views or giving their votes on a matter before them. In all matters or cases which the attorney general is required to investigate or prosecute by the governor or general assembly, or which a special prosecutor is required by section 177.03 of the Revised Code to investigate and prosecute, the attorney general or the special prosecutor, respectively, shall have and exercise any or all rights, privileges, and powers of prosecuting attorneys, and any assistant or special counsel designated by the attorney general or special prosecutor for that purpose, has the same authority. Proceedings in relation to such matters or cases are under the exclusive supervision and control of the attorney general or the special prosecutor.

Effective Date: 09-03-1986

2939.11 Official reporter.

The official reporter of the county, or any reporter designated by the court of common pleas, at the request of the prosecuting attorney, or any such reporter designated by the attorney general in investigations conducted by the attorney general, may take notes of or electronically record testimony before the grand jury, and furnish a transcript to the prosecuting attorney or the attorney general, and to no other person. The reporter shall withdraw from the jury room before the jurors begin to express their views or take their vote on the matter before them. Such reporter shall take an oath to be administered by the judge after the grand jury is sworn, imposing an obligation of secrecy to not disclose any testimony taken or heard except to the grand jury, prosecuting attorney, or attorney general, unless called upon in court to make disclosures.

*Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 9/10/2012.
Effective Date: 10-01-1953*

2939.12 Clerk of court to issue subpoenas for witnesses.

When required by the grand jury, prosecuting attorney, or judge of the court of common pleas, the clerk of the court of common pleas shall issue subpoenas and other process to any county to bring witnesses to testify before such jury.

Effective Date: 10-01-1953

2939.121 Employer may not penalize employee for being subpoenaed before grand jury.

No employer shall discharge or terminate from employment, threaten to discharge or terminate from employment, or otherwise punish or penalize any employee because of time lost from regular employment as a result of the employee's attendance at any proceeding before a grand jury pursuant to a subpoena. This section generally does not require and shall not be construed to require an employer to pay an employee for time lost resulting from attendance at any grand jury proceeding. However, if an employee is subpoenaed to appear at a grand jury proceeding and the proceeding pertains to an offense against the employer or an offense involving the employee during the course of his employment, the employer shall not decrease or withhold the employee's pay for any time lost as a result of compliance with the subpoena. Any employer who knowingly violates this section is in contempt of court.

Effective Date: 09-26-1984

2939.13 Oath of witnesses.

Before a witness is examined by the grand jury, an oath shall be administered to him by the foreman of the grand jury or by the judge of the court of common pleas or the clerk of the court of common pleas, truly to testify of such matters and things as may lawfully be inquired of before such jury. A certificate that the oath has been administered shall be indorsed on the subpoena of the witness or otherwise made by the foreman of the grand jury, judge, or clerk certifying the attendance of said witness to the clerk of the court.

Effective Date: 10-01-1953

2939.14 Witness refusing to testify.

If a witness before a grand jury refuses to answer an interrogatory, the court of common pleas shall be informed in writing, in which such interrogatory shall be stated, with the excuse for the refusal given by the witness. The court shall determine whether the witness is required to answer, and the grand jury shall be forthwith informed of such decision.

Effective Date: 10-01-1953

2939.15 Contempt proceedings against witness refusing to testify.

If the court of common pleas determines that a witness before a grand jury is required to answer an interrogatory and such witness persists in his refusal, he shall be brought before the court, which shall proceed in a like manner as if such witness had been interrogated and refused to answer in open court.

Effective Date: 10-01-1953

2939.16 Sickness, death, discharge, or nonattendance of a grand juror.

In case of sickness, death, discharge, or nonattendance of a grand juror after the grand jury is sworn, the court may cause another to be sworn in his stead. The court shall charge such juror as required by section 2939.07 of the Revised Code.

Effective Date: 10-01-1953

2939.17 Summoning new grand jury - immunity of witnesses.

After the grand jury is discharged, the court of common pleas, when necessary, may order the drawing and impaneling of a new grand jury, which shall be summoned and returned as provided by section 2939.03 of the Revised Code and shall be sworn and proceed in the manner provided by sections 2939.06 to 2939.24, inclusive, of the Revised Code. Whenever the governor or general assembly directs the attorney general to conduct any investigation or prosecution, the court of common pleas or any judge thereof, on written request of the attorney general, shall order a special grand jury to be summoned, and such special grand jury may be called and discharge its duties either before, during, or after any session of the regular grand jury, and its proceedings shall be independent of the proceedings of the regular grand jury but of the same force and effect.

Whenever a witness is necessary to a full investigation by the attorney general under this section, or to secure or successfully maintain and conclude a prosecution arising out of any such investigation, the judge of the court of common pleas may grant to such witness immunity from any prosecution based on the testimony or other evidence given by the witness in the course of the investigation or prosecution other than a prosecution for perjury in giving such testimony or evidence.

Effective Date: 09-16-1970

2939.18 Secrecy of indictment.

No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person not in custody or under bail, before such indictment is filed and the case docketed, except by the issue of process.

Effective Date: 10-01-1953

2939.19 Testimony of grand juror.

No grand juror may state or testify in court in what manner any member of the grand jury voted or what opinion was expressed by any juror on any question before the grand jury.

Effective Date: 10-01-1953

2939.20 Concurrence by twelve grand jurors for indictment.

At least twelve of the grand jurors must concur in the finding of an indictment. When so found, the foreman shall indorse on such indictment the words "A true bill" and subscribe his name as foreman.

Effective Date: 10-01-1953

2939.21 Quarterly visits to county jail.

Once every three months, the grand jurors shall visit the county jail, examine its condition, and inquire into the discipline and treatment of the prisoners, their habits, diet, and accommodations. They shall report on these matters to the court of common pleas in writing. The clerk of the court of common pleas shall forward a copy of the report to the department of rehabilitation and correction.

Effective Date: 07-06-1982

2939.22 Filing indictments with clerk of court of common pleas.

Indictments found by a grand jury shall be presented by the foreman to the court of common pleas, and filed with the clerk of the court of common pleas, who shall indorse thereon the date of such filing and enter each case upon the appearance docket and the trial docket of the term when the persons indicted have been arrested. The court shall assign such indictments for trial under section 2945.02 of the Revised Code, and recognizances of defendants and witnesses shall be taken for their appearance in court. When a case is continued to the next term of court, such recognizance shall require the appearance of the defendants and witnesses at a time designated by the court. Secret indictments shall not be docketed by name until after the apprehension of the accused.

Effective Date: 10-01-1953

2939.23 No indictment to be reported.

If an indictment is not found by the grand jury, against an accused who has been held to answer, such fact shall be reported by the foreman to the court of common pleas.

Effective Date: 10-01-1953

2939.24 Discharge of indicted person when no indictment returned.

If a person held in jail charged with an indictable offense is not indicted at the term of court at which he is held to answer, he shall be discharged unless:

- (A) He was committed on such charge after the discharge of the grand jury.
- (B) The transcript has not been filed.
- (C) There is not sufficient time at such term of court to investigate said cause.
- (D) The grand jury, for good cause, continues the hearing of said charge until the next term of court.
- (E) It appears to the court of common pleas that a witness for the state has been enticed or kept away, detained, or prevented from attending court by sickness or unavoidable accident.

Effective Date: 10-01-1953

2939.25 Attendance of witnesses at foreign grand jury proceedings definitions.

As used in sections 2939.25 to 2939.29, inclusive, of the Revised Code:

- (A) "Witness" includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding.
- (B) "State" includes any territory of the United States and District of Columbia.
- (C) "Summons" includes a subpoena, order, or other notice requiring the appearance of a witness.

Effective Date: 10-01-1953

2939.26 Compelling witnesses to attend by foreign courts.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution or grand jury investigation, and that his presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in this state in which such person is, such judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

If at a hearing such judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, and of any other state through which the witness may be required to pass by ordinary course of travel, will

give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence, at a time and place specified in the summons. In any such hearing the certificate is prima-facie evidence of all the facts stated therein.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before him for said hearing. If the judge at the hearing is satisfied of the desirability of such custody and delivery, for which determination the certificate is prima-facie proof of such desirability, he may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state.

If the witness, who is summoned as provided in this section, after being paid or tendered by some properly authorized person the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day, that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Effective Date: 10-01-1953

2939.27 Certificate specifying number of days witness will be required.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and five dollars for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

Effective Date: 10-01-1953

2939.28 Witness not subject to arrest or the service of process.

If a person comes into this state in obedience to a summons directing him to attend and testify in this state, while in this state pursuant to such summons he is not subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, while so passing through this state he is not subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this state under the summons.

Effective Date: 10-01-1953

2939.29 Construction and interpretation.

Sections 2939.25 to 2939.28, inclusive, of the Revised Code shall be so interpreted and construed as to effectuate their general purpose, to make the law of this state uniform with the law of other states which enact similar uniform legislation.

Effective Date: 10-01-1953

ATTACHMENT B**50 State Survey of the Use of Grand Juries****ALABAMA**

Article I, Section 8

That no person shall, for any indictable offense, be proceeded against criminally, by information, except in cases arising in the militia and volunteer forces when in actual service, or when assembled under arms as a military organization, or, by leave of the court, for misfeasance, misdemeanor, extortion, and oppression in office, otherwise than is provided in the Constitution; provided, that in cases of misdemeanor, the legislature may by law dispense with a grand jury and authorize such prosecutions and proceedings before justices of the peace or such other inferior courts as may be by law established.

ALASKA

Article I, Section 8

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 armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

ARKANSAS

Article 2, Section 8

No person shall be held to answer a criminal charge unless on the presentment or indictment of a grand jury, except in cases of impeachment or cases such as the General Assembly shall make cognizable by justices of the peace, and courts of similar jurisdiction; or cases arising in the army and navy of the United States; or in the militia, when in actual service in time of war or public danger * * *.

ARIZONA

Article 6, Section 17

The superior court shall be open at all times, except on nonjudicial days, for the determination of non-jury civil cases and the transaction of business. For the determination of civil causes and matters in which a jury demand has been entered, and for the trial of criminal causes, a trial jury shall be drawn and summoned from the body of the county, as provided by law. The right of jury

trial as provided by this constitution shall remain inviolate, but trial by jury may be waived by the parties in any civil cause or by the parties with the consent of the court in any criminal cause. Grand juries shall be drawn and summoned only by order of the superior court.

CALIFORNIA

Article I, Section 14

Felonies shall be prosecuted as provided by law, either by indictment or, after examination and commitment by a magistrate, by information.

Section 23

One or more grand juries shall be drawn and summoned at least once a year in each county.

CONNECTICUT

Article I, Section 8

No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on a presentment or an indictment of a grand jury, except in the armed forces, or in the militia when in actual service in time of war or public danger.

COLORADO

Article I, Section 8

Until otherwise provided by law, no person shall, for a felony, be proceeded against criminally otherwise than by indictment, 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. In all other cases, offenses shall be prosecuted criminally by indictment or information.

Section 23

The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law. Hereafter a grand jury shall consist of twelve persons, any nine of whom concurring may find an indictment; provided, the general assembly may change, regulate or abolish the grand jury system; and provided, further, the right of any person to serve on any jury shall not be denied or abridged on account of sex, and the general assembly may provide by law for the exemption from jury service of persons or classes of persons.

DELAWARE

Article I, Section 8

No person shall for any indictable offense be proceeded against criminally by information, 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 * * *.

FLORIDA

Article I, Section 15

No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

GEORGIA

Article I, Section 1, Paragraph (c)

The General Assembly shall provide by law for the selection and compensation of persons to serve as grand jurors and trial jurors

HAWAII

Article I, Section 11

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 licensed to practice law by the supreme court of the State and shall not be a public employee.

IDAHO

Article I, Section 8

No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, in cases cognizable by probate courts or by justices of the peace, and in cases arising in the militia when in actual service in time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of public prosecutor.

ILLINOIS

Article I, Section 7

No person shall be held to answer for a criminal offense unless on indictment of a grand jury, except in cases in which the punishment is by fine or by imprisonment other than in the penitentiary, in cases of impeachment, and in cases arising in the militia when in actual service in time of war or public danger. The General Assembly by law may abolish the grand jury or further limit its use. No person shall be held to answer for a crime punishable by death or by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or the person has been given a prompt preliminary hearing to establish probable cause.

INDIANA

Article 7, Section 17

The General Assembly may modify, or abolish, the grand jury system.

IOWA

Article I, Section 11

All offences less than felony and in which the punishment does not exceed a fine of One hundred dollars, or imprisonment for thirty days, shall be tried summarily before a Justice of the Peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offence, unless on presentment or indictment by a grand jury, except in cases arising in the army, or navy, or in the militia, when in actual service, in time of war or public danger. The grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly may by law provide, or the general assembly may provide for holding persons to answer for any criminal offense without the intervention of a grand jury.

KANSAS

[No constitutional requirement. Grand juries permitted by statute.]

KENTUCKY

Section 12

No person, for an indictable offense, shall be proceeded against criminally by information, 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, or by leave of court for oppression or misdemeanor in office.

LOUISIANA

Article V, Section 34(A)

There shall be a grand jury or grand juries in each parish, whose qualifications, duties, and responsibilities shall be provided by law. The secrecy of the proceedings, including the identity of witnesses, shall be provided by law. (B) Right to Counsel. The legislature may establish by law terms and conditions under which a witness may have the right to the advice of counsel while testifying before the grand jury.

MAINE

Article I, Section 7

No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offenses, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger.

MARYLAND

[No requirement in constitution. Requirement found in statute.]

MASSACHUSETTS

[No requirement in constitution. Requirement found in statute.]

MISSOURI

Article I, Section 16

That a grand jury shall consist of twelve citizens, any nine of whom concurring may find an indictment or a true bill: Provided, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime; and that the power of grand juries to inquire into the willful misconduct in office of public officers, and to find indictments in connection therewith, shall never be suspended.

MICHIGAN

[Abolished the constitutional requirement for a grand jury in 1859. Grand jury permitted by statute.]

MINNESOTA

[Abolished the constitutional requirement of a grand jury in 1904. Grand jury permitted by statute.]

MISSISSIPPI

Article 3, Section 26

Notwithstanding any other provisions of this Constitution, the Legislature may enact laws establishing a state grand jury with the authority to return indictments regardless of the county where the crime was committed. The subject matter jurisdiction of a state grand jury is limited to criminal violations of the Mississippi Uniform Controlled Substances Law or any other crime involving narcotics, dangerous drugs or controlled substances, or any crime arising out of or in connection with a violation of the Mississippi Uniform Controlled Substances Law or a crime involving narcotics, dangerous drugs or controlled substances if the crime occurs within more than one (1) circuit court district of the state or transpires or has significance in more than one (1) circuit court district of the state. The venue for the trial of indictments returned by a state grand jury shall be as prescribed by general law.

Section 27

No person shall, for any indictable offense, be proceeded against criminally by information, except in cases arising in the land or naval forces, or the military when in actual service, or by leave of the court for misdemeanor in office or where a defendant represented by counsel by sworn statement waives indictment; but the legislature, in cases not punishable by death or by imprisonment in the penitentiary, may dispense with the inquest of the grand jury, and may authorize prosecutions before justice court judges, or such other inferior court or courts as may be established, and the proceedings in such cases shall be regulated by law.

MONTANA

Article II, Section 20

(1) Criminal offenses within the jurisdiction of any court inferior to the district court shall be prosecuted by complaint. All criminal actions in district court, except those on appeal, shall be prosecuted either by information, after examination and commitment by a magistrate or after leave granted by the court, or by indictment without such examination, commitment or leave. (2)

A grand jury shall consist of eleven persons, of whom eight must concur to find an indictment. A grand jury shall be drawn and summoned only at the discretion and order of the district judge.

NEBRASKA

Article I, Section 10

No person shall be held to answer for a criminal offense, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in case of impeachment, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, unless on a presentment or indictment of a grand jury; Provided, That the Legislature may by law provide for holding persons to answer for criminal offenses on information of a public prosecutor; and may by law, abolish, limit, change, amend, or otherwise regulate the grand jury system.

NEVADA

Article 1, Section 8(1)

No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of petit larceny, under the regulation of the Legislature) except on presentment or indictment of the grand jury classic language.

NEW HAMPSHIRE

[No constitutional requirement. Grand jury permitted by statute.]

NEW JERSEY

Article I, Section 8

No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time of war or public danger.

NEW MEXICO

Article II, Section 14

No person shall be held to answer for a capital, felonious or infamous crime unless on a presentment or indictment of a grand jury or information filed by a district attorney or attorney general or their deputies, except in cases arising in the militia when in actual service in time of

war or public danger. No person shall be so held on information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination.

A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. Citizens only, residing in the county for which a grand jury may be convened and qualified as prescribed by law, may serve on a grand jury. Concurrence necessary for the finding of an indictment by a grand jury shall be prescribed by law; provided, such concurrence shall never be by less than a majority of those who compose a grand jury, and, provided, at least eight must concur in finding an indictment when a grand jury is composed of twelve in number. Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. A grand jury shall be convened upon order of a judge of a court empowered to try and determine cases of capital, felonious or infamous crimes at such times as to him shall be deemed necessary, or a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county, or a grand jury may be convened in any additional manner as may be prescribed by law.

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary 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.

NEW YORK

Article I, Section 6

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his or her counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he or she be compelled in any criminal case to be a witness against himself or herself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his or her present office or of any public office held by him or her within five years prior to such grand jury call to testify, or the performance of his or her

official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his or her present office by the appropriate authority or shall forfeit his or her present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law. No person shall be deprived of life, liberty or property without due process of law.

NORTH CAROLINA

Article I, Section 22

Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

NORTH DAKOTA

Article I, Section 10

Until otherwise provided by law, no person, shall, for a felony be proceeded against criminally, otherwise than by indictment, 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. In all other cases offenses shall be prosecuted criminally by indictment or information. The legislature may change, regulate, or abolish the grand jury system.

OHIO

Article I, Section 10

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.

OKLAHOMA

Section II-17

No person shall be prosecuted criminally in courts of record for felony or misdemeanor otherwise than by presentment or indictment or by information. No person shall be prosecuted for a felony by information without having had a preliminary examination before an examining magistrate, or having waived such preliminary examination. Prosecutions may be instituted in courts not of record upon a duly verified complaint

Section II-18

A grand jury shall be composed of twelve (12) persons, any nine (9) of whom concurring may find an indictment or true bill. A grand jury shall be convened upon the order of a district judge upon his own motion; or such grand jury shall be ordered by a district judge upon the filing of a petition therefor signed by qualified electors of the county equal to the number of signatures required to propose legislation by a county by initiative petition as provided in Section 5 of Article V of the Oklahoma Constitution, with the minimum number of required signatures being five hundred (500) and the maximum being five thousand (5,000); and further providing that in any calendar year in which a grand jury has been convened pursuant to a petition therefor, then any subsequent petition filed during the same calendar year shall require double the minimum number of signatures as were required hereunder for the first petition; or such grand jury shall be ordered convened upon the filing of a verified application by the Attorney General of the State of Oklahoma who shall have authority to conduct the grand jury in investigating crimes which are alleged to have been committed in said county or involving multicounty criminal activities; when so assembled such grand jury shall have power to inquire into and return indictments for all character and grades of crime. All other provisions of the Constitution or the laws of this state in conflict with the provisions of this constitutional amendment are hereby expressly repealed.

The Legislature shall enact laws to prevent corruption in making, filing, circulating and submitting petitions calling for convening a grand jury.

OREGON

Article VII, Section 5d (3)

Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

PENNSYLVANIA

Article I, Section 10

Except as hereinafter provided no person shall, for any indictable offense, be proceeded against criminally by information, 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, or by leave of the court for oppression or misdemeanor in office. Each of the several courts of common pleas may, with the approval of the Supreme Court, provide for the initiation of criminal proceedings therein by information filed in the manner provided by law.

RHODE ISLAND

Article I, Section 7

Except in cases of impeachment, or in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, no person shall be held to answer for any offense which is punishable by death or by imprisonment for life unless on presentment or indictment by a grand jury, and no person shall be held to answer for any other felony unless on presentment or indictment by a grand jury or on information in writing signed by the attorney-general or one of the attorney-general's designated assistants, as the general assembly may provide and in accordance with procedures enacted by the general assembly. The general assembly may authorize the impaneling of grand juries with authority to indict for offenses committed any place within the state and it may provide that more than one grand jury may sit simultaneously within a county. No person shall be subject for the same offense to be twice put in jeopardy. Nothing contained in this article shall be construed as in any wise impairing the inherent common law powers of the grand jury.

SOUTH CAROLINA

Article I, Section 11

No person may be held to answer for any crime the jurisdiction over which is not within the magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed, 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. The General Assembly may provide for the waiver of an indictment by the accused. Nothing contained in this Constitution is deemed to limit or prohibit the establishment by the General Assembly of a state grand jury with the authority to return indictments irrespective of the county where the crime has been committed and that other authority, including procedure, as the General Assembly may provide.

SOUTH DAKOTA

Article 6, Section 10

No person shall be held for a criminal offense unless on the presentment or indictment of a grand jury, or information of the public prosecutor, except in cases of impeachment, in cases cognizable by county courts, by justices of the peace, and in cases arising in the army and navy, or in the militia when in actual service in time of war or public danger: provided, that the grand jury may be modified or abolished by law.

TENNESSEE

Article I, Section 14

That no person shall be put to answer any criminal charge but by presentment, indictment or impeachment.

TEXAS

Article I, Section 10

* * * [N]o person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

UTAH

Article I, Section 13

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

VERMONT

Chapter II, Section 39

All prosecutions shall commence, By the authority of the State of Vermont . All Indictments shall conclude with these words, against the peace and dignity of the State . And all fines shall be proportioned to the offences.

VIRGINIA

[No requirement in constitution. Requirement found in statute.]

WASHINGTON

Article I, Section 25

Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law.

Section 26

No grand jury shall be drawn or summoned in any county, except the superior judge thereof shall so order.

WEST VIRGINIA

Article III, Section 3-4

No person shall be held to answer for treason, felony or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury.

WISCONSIN

Article I, Section 7

In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

WYOMING

Article I, Section 9

The right of trial by jury shall remain inviolate in criminal cases. A jury in civil cases and in criminal cases where the charge is a misdemeanor may consist of less than twelve (12) persons but not less than six (6), as may be prescribed by law. A grand jury may consist of twelve (12) persons, any nine (9) of whom concurring may find an indictment. The legislature may change, regulate or abolish the grand jury system.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

September 8

October 13

November 10

December 8