OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee

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

November 10, 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, NOVEMBER 10, 2016
10:30 A.M.
OHIO STATEHOUSE ROOM 018

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of September 8, 2016

  [Draft Minutes – attached]

IV. Reports and Recommendations

- None scheduled

V. 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.

  [Draft Report and Recommendation – attached]

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

VI. Presentations

- "Proposal to Amend Article IV, § 5(B) of the Ohio Constitution – Modern Courts Amendment"

  Richard S. Walinski
  Attorney at Law
  Toledo, Ohio

  Mark Wagoner
  Commission Member
  Ohio Constitutional Modernization Commission

  [Proposal to Amend Article IV, Section 5(B) – Modern Courts Amendment by Mark D. Wagoner and Richard S. Walinski]

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, SEPTEMBER 8, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:36 p.m.

Members Present:

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

Approval of Minutes:

The minutes of the July 14, 2016 meeting of the committee were approved.

Discussion:

Article I, Section 10
Grand Jury Process

Chair Abaray began the meeting by noting that Nancy Brown, director and advocacy committee chair for the Ohio League of Women Voters, who had attended many of the committee's meetings, has moved out of state. Chair Abaray acknowledged the service of Ms. Brown, saying she would be missed.

Chair Abaray announced that the committee would be continuing its discussion of the grand jury process, specifically, whether to recommend any changes to Article I, Section 10.

Committee member Richard Saphire asked whether Professor Thaddeus Hoffmeister of the University of Dayton College of Law, who was present to assist the committee, could clarify some aspects of the grand jury procedure.

Professor Hoffmeister said the right to a grand jury hearing in the United States Constitution is one of the few rights that have not been incorporated in the states, noting a majority of states do not have a grand jury, with some states allowing the prosecutor to file an information. Professor Hoffmeister said an information is the equivalent of a criminal complaint. He said, in Ohio, the citizen has right to a grand jury hearing unless he has already been indicted.

Describing the preliminary hearing process, Professor Hoffmeister said in that setting the accused is entitled to have counsel present and has an opportunity to cross-examine prosecution witnesses and put on witnesses in his own defense. Professor Hoffmeister said the grand jury was conceived as a way to buffer the citizen from the government and to have community conscience in the criminal justice process. He said the issue is important today because so often criminal cases do not go to trial. He said using a grand jury is one of the few examples of how the community can be involved in the process. He said a big difference between a grand jury hearing and a preliminary hearing is that the preliminary hearing is presided over by a judge, and is open to the public and is adversarial, while the grand jury process involves the community and is closed.

Mr. Saphire asked whether an individual who is arrested and charged has a right to proceed by preliminary hearing and waive the grand jury. Professor Hoffmeister said a person who is already indicted has lost the right to a preliminary hearing.

Mr. Saphire asked whether someone who has not been charged but has been notified they are under investigation can insist that there be a grand jury in order to proceed. Professor Hoffmeister answered that the government is always going to have to get an indictment absent a waiver by the defendant of the grand jury. He added that, if the prosecution does not indict within ten days of charging there has to be a grand jury unless it is waived. He said a preliminary hearing is very rapid fire, adding there is benefit to the defense and the prosecution to have the preliminary hearing, especially if it is a sensitive case, because it lets people see the evidence. He said a preliminary hearing can facilitate a plea bargain.

Committee member Charles Kurfess asked what the issue is before the court at the preliminary hearing. Professor Hoffmeister said the question is whether there is probable cause for the charge to go forward.

Mr. Kurfess asked if the court makes a ruling, and what alternatives are available to the court at the preliminary hearing. Professor Hoffmeister said the court does make a ruling, and there are a number of alternatives available, including finding probable cause and, if the hearing is in municipal court, binding the person over for trial in common pleas court.

Professor Hoffmeister continued that most states use preliminary hearings, some use the grand jury, and some allow the filing of an information, but even there a judge is required to agree there is probable cause. He commented that "by waiving a grand jury you are agreeing there is a true bill."

Mr. Saphire wondered whether an accused who waives the grand jury submits to indictment. Professor Hoffmeister said the accused who waives under the federal system improves his

position for sentencing. He said the more an accused can show he cooperated, the better his sentencing is likely to go.

Mr. Saphire asked whether, by waiving his right to grand jury, the defendant is incriminating himself. Professor Hoffmeister said he would not go that far, saying the defendant is strategically deciding what rights he will exercise that are going to benefit him at the end of the day. He added, "If you go to trial they will impose a 'trial tax'."

Mr. Saphire said he is less inclined to believe the grand jury has any value to a defendant. Professor Hoffmeister commented that it does have value if the grand jury truly operates as it has historically, but if a defense attorney advises the client he is likely to be indicted, the defendant is likely to waive. He said that is the scenario if there is only one attorney in the room, because the prosecutor is the only person in the room and there is less pressure to present a compelling case.

Committee member Dennis Mulvihill asked how often the prosecutor recommends a particular indictment rather than leaving the question open-ended. Professor Hoffmeister answered that one of the challenges is a lack of data on that question. He said, outside Hawaii, he does not know how many jurisdictions allow another attorney to be present. He said it may depend on the prosecutor and how strictly the prosecutor follows the rules. He added the prosecutors are much more hands-on than just allowing the grand jury to consider the question alone. He said the prosecutor gives direction, guiding the jurors because there is no one else they can turn to.

Chair Abaray then recognized Attorney Kenneth J. Shimozono, a grand jury legal advisor in Hawaii, who was available via telephonic conference call to answer the committee's questions on the grand jury process in his state.

Mr. Saphire asked Mr. Shimozono how he would characterize the relationship between the prosecutor and the grand jury legal advisor, wondering whether, if jurors pose a question to the prosecutor and are not satisfied with the answer, they can pose the same question to the advisor.

Mr. Shimozono said the relationship is generally professional and cordial. As a legal advisor to the grand jury, he said he recognizes that he has to wear a different hat than he does when he is defending. He said most grand jury counsel are former prosecutors who are now defense attorneys, or they are defense attorneys. He said, in his experience, the relationship has never been antagonistic, and that prosecutors recognize he is not there to influence the jury's decision.

Mr. Saphire asked how the grand jury advisor would handle a question that already had been asked of the prosecutor. Mr. Shimozono said he has not been in that situation, and that, for the most part, the jury does not really question the prosecutor but rather questions the witnesses. He said it is the prosecutor's decision to present evidence as he sees fit, and the jury's questions are directed to the witnesses. He said he has had jurors say afterward they wish the prosecutor had done a better job but they are not telling the prosecutor that.

Judge Patrick Fischer asked if there an attorney-client relationship between the legal advisor and the grand jury. Mr. Shimozono said he would not disclose the jury's questions to the prosecutor so he would believe they have an attorney-client relationship. He said his understanding is that the advisor is there to advise the grand jury, but the grand jury is not the client in the traditional

sense. He noted an attorney-client relationship encompasses a broad range of considerations; for instance, there can be a conflict of interest if the grand jury legal advisor is later asked to represent one of the jurors in a legal proceeding.

Judge Fischer followed up, asking whether the legal advisor owes a duty to the grand jury or to the target of the investigation. Mr. Shimozono said the duty is owed to the jurors and not to the defendant. Judge Fischer wondered who has standing to object if the prosecutor interferes with the legal advisor's access to the grand jury. Mr. Shimozono said he would expect the jurors would notify the legal advisor that they wanted to ask a question but were not allowed. He said, in that instance, everyone goes in front of the administrative judge and puts it on the record in a hearing. But, he said, to his knowledge that has never happened. Judge Fischer asked to whom the legal advisor owes a constitutional duty, to which Mr. Shimozono replied it is not specifically to the defendant but rather to the grand jury.

Committee member Mark Wagoner asked what would happen if the legal advisor provided a wrong answer, left out an element of the offense, or misinterpreted the law, resulting in the grand jury moving forward with an indictment. Mr. Shimozono said the remedy would be for the defense counsel to look at the transcript to see if there were improprieties, and, if so, the defense could file a motion to dismiss the indictment. But, he said, the error has to be material and, if the defendant were found guilty, the issue would be preserved for appeal.

Mr. Mulvihill asked if it is automatic for the defendant to get access to a transcript of the grand jury hearing. Mr. Shimozono said the defendant has to request the transcript, but no one challenges the request. He said supplying the transcript is "more of a given," so that the defendant requests the transcript from the court reporters' office and they pull the video and make a transcript. Or, he said, the defense can watch the video and see if there is an issue, and then ask for the hearing to be transcribed so it can be submitted to the court.

Mr. Mulvihill noted that, in Ohio, the defendant is not entitled to grand jury testimony unless he can show grounds exist for dismissal of the indictment, a rule that seems impossible because it requires the defendant to show something happened when, without access to a transcript, it is impossible to know what happened. Mr. Shimozono remarked that he saw that Ohio rule and was surprised by it.

Mr. Mulvihill asked how frequently Mr. Shimozono uses the grand jury transcript to impeach a prosecution witness who may have changed his story. Mr. Shimozono said the transcript is a tremendous asset to the defense because any time a person gives a version of the facts he will not give the exact same version each time. So, he continued, that is a useful tool for the defense. He said "Not only are we looking to see if there is anything wrong with what was presented, but just knowing what was presented is a tremendous benefit to the defense." He added, if the prosecutor has the benefit of knowing what was presented to the grand jury, the defense also should know.

Mr. Mulvihill asked whether the legal advisor gets a transcript of the grand jury's deliberation. Mr. Shimozono said the legal advisor is only allowed to see the presentation of witnesses and questions by the grand jury to the witnesses and to grand jury counsel. He said the deliberations are not recorded.

Chair Abaray asked if the transcript is free. Mr. Shimozono said there is a charge but it the defendant is indigent, the public defender's office will pay for the transcript. He said the reason there is a cost is that the court reporter must be paid. He said this can be costly, so what defense counsel often does is get a copy of the recording of the hearing and then only request the key parts.

Chair Abaray asked whether the legal advisor is immune for actions taken during grand jury proceedings. Mr. Shimozono said he would believe so, but has not been told that specifically. He said legal advisors are paid by the state, but are independent contractors, so he is not sure if they have complete immunity. He said he is not aware that the issue has been raised. He said even if the legal advisor is not immune, the state attorney general would step in to defend in that situation, similar to what occurs in relation to the public defender.

Mr. Saphire asked whether the duties and responsibilities of the legal advisor are set out in statutes or court rule. Mr. Shimozono said they are set out in statute, and also court rule. He said grand jury legal advisors receive a binder with information about the process, setting forth the powers of the grand jury, Hawaii rules of penal procedure, the duties of the legal advisor, related case law, and procedural rules, as well as a copy of the constitutional provision and statutory references to the grand jury legal advisor.

Mr. Saphire asked how many separate criminal jurisdictions exist in Hawaii, noting that Ohio has 88 counties, each with a separate common pleas court. Mr. Saphire wondered how Mr. Shimozono might structure a grand jury legal advisor system in a state with that many jurisdictions. Mr. Shimozono said Hawaii has five circuits, each with its own criminal administrative judge, and that judge selects the counsel. He said he would assume if there are 88 districts and all are separate, then each would have its own judge and each would have its own legal advisor. He said the chief justice of the Hawaii Supreme Court relies on the recommendation of the the criminal administrative judge when he appoints.

Chair Abaray asked whether Mr. Shimozono has information on what prompted Hawaii to put this in the constitution, and whether the system is viewed as being effective. Mr. Shimozono said he does not know about the history of the provision, although he speculated that it is because Hawaii has a very strong interest in privacy and due process, and so has a more liberal constitution. He said the state expands privacy rights where the federal law is the floor.

As far as the effectiveness of the system, Mr. Shimozono said having the grand jury legal advisor is helpful because it improves the process to have someone there who is more neutral. He said it also may help the grand jurors feel more comfortable that they are getting an unbiased view, so that they have more confidence in the process. He said they have found grand jurors take their duties seriously and they get better at performing their role as the year progresses. He said once the jury catches on to how things work they have fewer questions.

Chair Abaray noted an issue in Ohio concerns the secrecy of the process, with some distrusting the grand jury because they believe the prosecutor is steering the results. She asked whether having the grand jury legal advisor in Hawaii has helped create more confidence. Mr. Shimozono said he thinks it helps but he is not sure because they have not done it any other way. He said he

is not sure the general public in Hawaii even knows there is a grand jury legal advisor present, and that they have not had a lot of high profile cases.

Professor Hoffmeister asked Mr. Shimozono whether, if Mr. Shimozono were advising a jurisdiction about adopting the system, whether he would recommend they do it exactly like Hawaii or whether he would recommend some changes. Mr. Shimozono said he would recommend not adopting the system in its entirety. He said one thing that would make a difference is to require the grand jury counsel to sit through the entire proceedings to get a better grasp of what is going on. He said, under Hawaii's current system, in which the legal advisor is not always in the room, the jury may not realize something is improper and so would not bring it to the legal advisor's attention. He said, as a defense attorney, he would prefer that cases be brought through a preliminary hearing process. He said he has not seen abuse with the grand jury process, but, generally speaking, there was not a huge problem when he was a public defender, although sometimes there was a little more hearsay evidence than he thought was appropriate.

John Murphy, executive director of the Ohio Prosecuting Attorneys Association, who was in the audience, asked Mr. Shimozono whether jurors ask questions of the witnesses. Mr. Shimozono said jurors will do this, although the practice is not extensive.

Mr. Murphy said the prosecutor is in the room and does a basic examination of witnesses, suggesting that, in Ohio, it is the prosecutor's function to explain the law. Mr. Shimozono explained that, in Hawaii, the prosecutor gives jurors a sheet of paper that has the charge on it, without much detail. Then, he said, the prosecutor puts on evidence. But, he added, the prosecutor does not explain the law. He said, in some cases, the law is straightforward so there is not much to explain. Usually, the role of the legal advisor is to explain a legal phrase that the jury does not understand. He said many times, if not most times, the legal advisor does not get asked any questions. He said, in four out of five sessions he may not get a single question.

There being no further questions for Mr. Shimozono, Chair Abaray thanked him for his time.

Chair Abaray then requested staff to provide the committee with the Hawaii constitutional provision regarding the grand jury legal advisor so that the committee might consider it. Mr. Saphire added the committee would benefit from taking a close look at the current content of Article I, Section 10.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 4:00 p.m.

Approval:

The minutes of the September 8, 2016 meeting of the Judicial Branch and Administration of Justice Committee were approved at the November 10, 2016 meeting of the committee.

_____
Janet Gilligan Abaray, Chair

_____
Judge Patrick F. Fischer, Vice-chair

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION
ARTICLE I, SECTION 10

THE GRAND JURY

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 10 of the Ohio Constitution concerning the requirement of a grand jury indictment for felony crimes. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article I, Section 10 of the Ohio Constitution be _____.

Background

Article I, Section 10 reads as follows:

> Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the

> accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Many of the concepts memorialized in Section 10, including the requirement of a grand jury indictment for felony crime, date from the 1802 constitution. In the 1802 constitution, Section 10 was part of the Bill of Rights that was contained in Article VIII. Section 10 read:

> That no person arrested or confined in jail shall be treated with unnecessary rigor or be put to answer any criminal charge but by presentment, indictment, or impeachment.

Section 11 of the 1802 constitution provided additional rights of the accused, stating:

That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusations against him and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment a speedy public trial by an impartial jury of the County or District in which the offense shall have been committed; and shall not be compelled to give evidence against himself, nor shall he be twice put in jeopardy for the same offense.

The 1851 Constitution moved the Bill of Rights to Article I, and combined aspects of prior Sections 10 and 11 into one Section 10, which read:

> Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; be the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense.

The 1912 Constitutional Convention resulted in several changes to the grand jury portion of the 1851 provision. First, the categorical reference to "cases of petit larceny and other inferior

offenses," was clarified to mean "cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary." The 1912 convention also added a reference to the ability of the General Assembly to enact laws related to the total number of grand jurors, and the number of grand jurors needed to issue an indictment.

Other parts of Section 10 were changed in 1912, including allowing the General Assembly to enact laws related to taking and using witness depositions, and adding that the failure of the accused to testify at trial may be the subject of comment by counsel. Section 10 also requires that the accused be allowed to appear and defend in person, and sets out the right to counsel, the right to demand details about the accusation, to have a copy of the charges, to face witnesses, to have defense witnesses compelled to attend, to have a speedy trial by an impartial jury, the right against self-incrimination (nevertheless allowing comment regarding the accused's failure to testify), and the protection against double jeopardy. The section further specifies provision may be made by law for deposing witnesses. In short, the lengthy section encompasses many of the procedural safeguards enumerated in the United States Constitution, specifically in the Fifth and Sixth Amendments.[1]

Originating in 12th century England, under the reign of King Henry II, grand juries were a way for citizens to note suspicious behavior and then, as jurors, report on suspected crime to the rest of the jury.[2] This system helped centralize policing power with the king, power that otherwise would have been held by the church or barons. By the 17th century, grand juries were viewed as a way of shielding the innocent against criminal charges.[3] Resembling the system used today, the government was required to get an indictment from a grand jury before prosecuting. Thus, the grand jury evolved from being a "tool of the crown" to "defender of individual rights," a transformation helped by two famous refusals of a London grand jury to indict the Earl of Shaftesbury on a dubious treason charge in 1667. The resulting rule of law, that freemen are entitled to have their neighbors review the charges against them before the government can indict, was brought to the colonies with British citizens who, when their relationship with England soured, used the process to nullify despised English laws and deny indictment to dissenters. The most famous example of this was newspaper editor John Peter Zenger, who was arrested for libel in 1743 based on his criticisms of the New York royal governor. Three grand juries refused to indict him, and, although royal forces would still put him on trial after an information proceeding, a trial jury acquitted him.

After independence, the United States Constitution's framers considered grand juries to be so vital to due process that the institution was enshrined in the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *." As described by the United States Supreme Court in *U.S. v. Calandra*, 414 U.S. 338, 342-343 (1974):

> The institution of the grand jury is deeply rooted in Anglo-American history. [Footnote omitted.] In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand

> jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

Many states, including New York, Ohio, Maine, and Alaska, institutionalized grand juries in their own constitutions, using language almost identical to the Fifth Amendment.

Amendments, Proposed Amendments, and Other Review

The Ohio Constitutional Revision Commission (1970s Commission) created a special "Committee to Study the Grand Jury and Civil Trial Juries" to consider the purpose and function of grand juries. As described in the 1970s Commission report, that committee determined "there are some classes of cases in which the grand jury could serve a useful purpose," including "cases that have complex fact patterns or a large number of potential defendants, such as conspiracies or instances of governmental corruption; cases which involve use of force by police or other cases which tend to arouse community sentiment; and sex offenses and other types of cases in which either the identity of the complaining witness or the identity of the person being investigated should be kept secret in the interest of justice unless the facts reveal that prosecution is warranted."

The 1970s Commission recommended that the reference to the grand jury in Article I, Section 10 be moved to a new Section 10A, which would read:

> Section 10a. Except in cases arising in the armed forces of the United States, or in the militia when in actual service in time of war or public danger, felony prosecutions shall be initiated only by information, unless the accused or the state demands a grand jury hearing. A person accused of a felony has a right to a hearing to determine probable cause. The General Assembly shall provide by law the time and procedure for making a demand for a grand jury hearing. In the absence of such demand, the hearing to determine probable cause shall be by a court of record. At either such hearing before a court or at a grand jury hearing, the state shall inform the court or the jury, as the case may be, of evidence of which it is aware that reasonably tends to negate the guilt of an accused or of a person under investigation. The inadvertent omission by the state to inform the court or the jury of evidence which reasonably tends to negate guilt, in accordance with the requirements of this section, does not impair the validity of the criminal process or give rise to liability.
>
> A person has the right to the presence and advice of counsel while testifying at a grand jury hearing. The advice of counsel is limited to matters affecting the right

> of a person not to be a witness against himself and the right of a person not to testify in such respects as the General Assembly may provide by law.

In contrast to existing Section 10, which prevented a felony prosecution "unless on presentment or indictment of a grand jury," the recommended change required all felony prosecutions to proceed by information unless either the accused or the state demanded a grand jury hearing.[4]

The recommendation thus rendered the information or complaint the primary method of initiating felony prosecutions, allowed those accused of a felony the right to a probable cause hearing, required the prosecutor to reveal to either the court or the grand jury any exculpatory evidence, and permitted grand jury witnesses to have counsel present to advise on matters of privilege.

The 1970s Commission described the rationale behind the recommended change as being to simplify the process, since the existing practice allowed both a preliminary hearing in the municipal or county court to determine probable cause, and a grand jury hearing if the person is bound over to the common pleas court – where again probable cause is determined. Thus, the goal of the suggested change was to provide either for a preliminary hearing or a grand jury hearing, but not both. The 1970s Commission also explained that the purpose of recommending the provision of a right to counsel to grand jury witnesses was to recognize the need to safeguard the rights of a witness who also may be the target of the criminal investigation. However, the recommended right only extended to allowing counsel in the grand jury room during the witness's testimony and only for the purpose of advising on the witness's privilege against self-incrimination.

The 1970s Commission's recommendation for grand jury reform failed to result in a joint recommendation by the General Assembly and was not presented to voters.

Litigation Involving the Provision

The Ohio Supreme Court, following the language of the indictment clause, has ruled the grand jury to be a required entitlement of a person accused of a felony. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985).

Presentations and Resources Considered

Williams Presentations

Senator Sandra Williams first appeared before the committee on July 9, 2015 to discuss her view that the grand jury should be replaced by a preliminary hearing system. She expressed concern over the lack of transparency in grand jury procedures and the perception that the authority of the prosecutor is unchecked. Sen. Williams noted that, despite generally high indictment rates, grand juries frequently fail to indict police officers, indicating the discretion given to the prosecutor allows for favoritism toward law enforcement. She said if Ohio does not want to eliminate grand juries, the state may consider having a special prosecutor who would handle cases involving the police.

On February 11, 2016, Sen. Williams again presented to the committee, outlining legislation she introduced related to the use of grand juries. Identifying recommendations she would like the committee to support, Sen. Williams advocated requiring the attorney general to appoint a special prosecutor to investigate and, where necessary, charge a suspect in cases involving a law enforcement officer's use of lethal force against an unarmed suspect.

Sen. Williams also advocated the court appointment of an independent grand jury counsel to advise the grand jury on procedures and legal standards. Sen. Williams said an independent counsel would have specific guidelines for interacting with jurors, asserting that the prosecutor should not be the jury's only source of legal guidance. She said this would be another way to provide transparency, removing as it does the current ambiguity caused by allowing the prosecutor to be both active participant and referee.

Describing how this system would work in the grand jury room, Sen. Williams said the prosecutor would be able to present the case and offer his opinion on possible charges that apply, as determined by the evidence presented, but jurors' questions would be answered by the independent counsel, who could explain the proceedings based on law. Sen. Williams added that the independent counsel would be selected by the presiding judge of the local common pleas court, and the length of service of the counsel would be determined by law.

Sen. Williams also recommended that the General Assembly or Supreme Court expand the rules and set standards allowing access to grand jury transcripts. She said an additional reform would allow those directly impacted by a grand jury outcome to request the transcript. If there are concerns about witness privacy, Sen. Williams said sensitive information could be redacted.

Sen. Williams additionally advocated a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise, a practice she said is useful in cases in which there is a significant question whether the prosecutor is overcharging or undercharging. She said this recommendation would retain the need for secrecy while allowing review if there is a question whether the prosecutor is conducting the investigation in good faith.

Sen. Williams acknowledged the secrecy component has been an integral part of the grand jury process, but said modern realities demand that there be some way to review the proceedings in cases in which there is significant public interest, where the public may feel justice is being circumvented, or where motives are viewed as politically expedient. She said when it comes to high profile cases, the secrecy of the process and, in many cases, the evidence presented, no longer retains the need to be secret. She said the current grand jury system in Ohio operates without any mechanism to review the process.

Gilchrist Presentation

Also on July 9, 2015, Professor Gregory M. Gilchrist of the University of Toledo College of Law addressed the committee on the history of the grand jury. Prof. Gilchrist described that historically the grand jury served as a shield to protect the individual citizen, noting that in

colonial times the grand jury thwarted royal prosecutors from bringing charges perceived as unjust. Today, he said, the procedure is largely in the control of the prosecution. He observed that, because grand juries serve for a period of months, jurors get to know the prosecutor on a day-to-day basis, and the prosecutor can serve as their only source for legal knowledge and information about the criminal justice system.

Gmoser and Murray Presentations

On December 10, 2015, two county prosecutors offered their perspectives on the use of the grand jury. Both prosecutors advocated for retaining the grand jury system in its current form. Michael Gmoser, Butler County Prosecutor, said 98 percent of felony prosecutions in the criminal division of his office begin with a grand jury indictment, as opposed to a bill of information. He said, unlike the popular saying, there is nothing to be gained by "indicting a ham sandwich," adding that might be true as an exception to the rule, "but we should not change the whole system because of it."[5] He said secrecy prevents the innocent person from being maligned and abused based on improper charges. He said prosecutors use the grand jury for investigatory purposes, so that, if the process becomes transparent, it will prevent opportunities for disclosure of crime.

Morris Murray, prosecutor for Defiance County, emphasized the grand jury process is "absolutely critical" to the fair and efficient administration of justice. Reading from the jury instructions that are provided to grand jurors at the time they are sworn by the judge, Mr. Murray described the grand jury as an "ancient and honored institution," indicating that jurors take an oath in which they promise to keep secret everything that occurs in the grand jury room, both during their service and afterward.

Young Presentation

On February 11, 2016, State Public Defender Tim Young presented to the committee. Mr. Young said grand juries are "a vital and important step in the criminal justice process." However, he said, the unfettered, unchecked secrecy in the process sets it apart from the rest of the justice system and society's basic ideals relating to government. Mr. Young proposed several reforms to the committee for improving the grand jury process, including that, after indictment, the testimony of trial witnesses should be made available to the court and counsel; that the secrecy requirement be eliminated in cases involving the conduct of a public official in the performance of official duties; and that, in the case of a police shooting, a separate independent authority be responsible for investigating and presenting the matter to the grand jury.

Hoffmeister Presentation

On June 9, 2016, the committee heard a presentation by University of Dayton law professor Thaddeus Hoffmeister, who has written extensively about the grand jury system and particularly studied the Hawaii model of having a Grand Jury Legal Advisor (GJLA).

Professor Hoffmeister testified that the GJLA is a licensed attorney who neither advocates on behalf of nor represents anyone appearing before the grand jury, but serves as counsel to the grand jurors. The role of the GJLA is to provide grand jurors with unbiased answers to their questions, legal or otherwise.

He noted that historically the grand jury was an independent body, and the prosecutor had a limited role in the process. He said when communities were small and crimes were simple, the grand jurors actually were more knowledgeable than the prosecutor regarding both the law and the controversies giving rise to the investigations. Later, when the population grew and prosecutors became more specialized, the courts allowed the prosecutor to play a larger role in educating the grand jury.

Professor Hoffmeister advocated that introducing a GJLA to the process is one possible solution to restoring grand jury independence. He said the GJLA could be appointed by a common pleas judge who would also be responsible for settling any disputes between the GJLA and the prosecutor, which rarely arise. The GJLA's main job would be to support grand jurors in their determination of whether to issue an indictment. The GJLA would also be called upon to research and respond to questions posed by the grand jurors. However, there is no duty for the GJLA to present exculpatory evidence or to advise witnesses, which dramatically alters the traditional functions of the grand jury. Finally, the proposed GJLA typically serves for one or two year terms and is present during all grand jury proceedings.

Prof. Hoffmeister said the legal advisor is not permitted to ask questions, and is not with the jurors when they deliberate. When the advisor disagrees with the prosecutor regarding a legal interpretation, the dispute is presented to the common pleas judge who resolves the conflict, but that, in practice this is rare because the prosecutor and the GJLA usually work it out on their own.

Shimozono Presentation

In September 2016, Attorney Kenneth J. Shimozono, a grand jury legal advisor in Hawaii, was available via telephonic conference call to answer the committee's questions on the grand jury process in his state. Mr. Shimozono described the relationship between prosecutors and grand jury legal advisors as generally professional and cordial. He said most grand jury counsel are former prosecutors who are now defense attorneys, or they are defense attorneys. Mr. Shimozono said it is the prosecutor's decision to present evidence as he sees fit, and the jury's questions are directed to the witnesses. Asked whether there is an attorney-client relationship between the legal advisor and the grand jury, Mr. Shimozono said he would not disclose the jury's questions to the prosecutor so he would believe they have an attorney-client relationship. He said his understanding is that the advisor is there to advise the grand jury, but the grand jury is not the client in the traditional sense. Mr. Shimozono said the duty is owed to the jurors and not to the defendant. He said the jurors would notify the legal advisor if they wanted to ask a question but were not allowed, adding that, in that instance, everyone goes in front of the administrative judge and puts it on the record in a hearing. But, he said, to his knowledge that has never happened.

Asked what would happen if the legal advisor provided a wrong answer, left out an element of the offense, or misinterpreted the law, resulting in the grand jury moving forward with an indictment, Mr. Shimozono said the remedy would be for the defense counsel to look at the transcript to see if there were improprieties, and, if so, file a motion to dismiss the indictment. But, he said, the error has to be material and, if the defendant were found guilty, the issue would be preserved for appeal.

Asked about the procedure for a defendant to get access to a transcript of the grand jury hearing, Mr. Shimozono said the defendant has to request the transcript, but no one challenges the request. He said supplying the transcript is "more of a given," so that the defendant requests the transcript from the court reporters' office and they pull the video and make a transcript. Or, he said, the defense can watch the video and see if there is an issue, and then ask for the hearing to be transcribed so it can be submitted to the court.

Asked whether the legal advisor is immune for actions taken during grand jury proceedings, Mr. Shimozono said he would believe so, but has not been told that specifically. He said legal advisors are paid by the state, but are independent contractors, so he is not sure if they have complete immunity. He said even if the legal advisor is not immune, the state attorney general would step in to defend in that situation, similar to what occurs in relation to the public defender.

Summarizing the effectiveness of the system, Mr. Shimozono said having the grand jury legal advisor is helpful because it improves the process to have someone there who is more neutral. He said it also may help the grand jurors feel more comfortable that they are getting an unbiased view, so that they have more confidence in the process. He said they have found grand jurors take their duties seriously and they get better at performing their role as the year progresses. He said once the jury catches on to how things work they have fewer questions.

Asked whether he would advise another state to adopt a procedure like Hawaii's, Mr. Shimozono said he would recommend not adopting the system in its entirety. He said one thing that would make a difference is to require the grand jury counsel to sit through the entire proceedings to get a better grasp of what is going on. He said, under Hawaii's current system, in which the legal advisor is not always in the room, the jury may not realize something is improper and so would not bring it to the legal advisor's attention. He said, as a defense attorney, he would prefer that cases be brought through a preliminary hearing process. He said he has not seen abuse with the grand jury process, but, generally speaking, there was not a huge problem when he was a public defender, although sometimes there was a little more hearsay evidence than he thought was appropriate.

Discussion and Consideration

Committee members expressed a variety of views on whether and how to reform the grand jury process. While committee members generally agreed that the grand jury process could allow prosecutors to exert undue influence on the grand jury's deliberations, and that the absence of transparency contributes to public concern over the grand jury's operation, some members were reluctant to conclude that reform was necessary or that constitutional change is necessary for reform.

Some committee members focused on the possibility of creating a separate procedure for cases involving police use-of-force. Such a procedure would allow or require appointment of a special prosecutor as a way of addressing concerns arising out of the perception that the working relationship between prosecutors and local police creates a conflict of interest. Some committee members expressed concern that creating a special procedure for such cases could have unintended consequences, and so were not in favor of treating police use-of-force cases differently.

Committee members generally agreed that, although there are problems in the grand jury system, they were not in favor of eliminating the constitutional requirement of a grand jury indictment for felony prosecutions.

The committee considered the concept of a grand jury legal advisor, with some members seeing a benefit in the appointment of an independent attorney to assist the grand jury. Although committee members found the idea to be interesting, they expressed concerns about how such a system would work as a practical matter, particularly in smaller counties. Committee members also expressed that, although Hawaii provides for a grand jury legal advisor in its constitution, it may not be necessary for Ohio to create a constitutional provision allowing for a grand jury legal advisor; rather, such a system could be created by statute or court rule.

Conclusion

Date Issued

After formal consideration by the Judicial Branch and Administration of Justice Committee on November 10, 2016, the committee voted to issue this report and recommendation on _____.

Endnotes

[1] The Fifth Amendment to the U.S. Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[2] For more on the history of grand juries, see, e.g., Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?* 82 B.U.L. Rev. 1 (2002); Thaddeus Hoffmeister, *The Grand Jury Legal*

Advisor: Resurrecting the Grand Jury's Shield, 98 J. Crim. L. & Criminology 1171 (2007-2008); Richard H. Helmholz, *The Early History of the Grand Jury and the Canon Law,* 50 U. Chicago L.Rev. 613 (1983).

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

[4] 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. CITE

[5] Mr. Gmoser's "ham sandwich" remark is a reference to the famous comment by New York Chief Judge Sol Wachtler that New York district attorneys have so much influence on grand juries that they could get jurors to indict "a ham sandwich." Marcia Kramer & Frank Lombardi, "New top state judge: Abolish grand juries & let us decide," New York *Daily News,* Jan. 31, 1985. Available at: http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208 (last visited June 28, 2016).

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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**

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.

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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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PROPOSAL TO OHIO CONSTITUTION MODERNIZATION COMMISSION:

TO AMEND ARTICLE IV, § 5(B) OF THE OHIO CONSTITUTION

(MODERN COURTS AMENDMENT)

Submitted by:
MARK D. WAGONER, JR., TOLEDO
RICHARD S. WALINSKI, TOLEDO

The proposal is to amend Art. IV, § 5(B) as follows:

> (B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. **The general assembly may change rules promulgated hereunder by introducing a bill (1) that states in its preamble specifically that it is the legislature's purpose to create a substantive right and (2) that is enacted into law as provided in Article II, Section 16.**

Summary of a Current Problem and the Reasons for the Proposal

A void has existed in the Ohio Constitution since the Modern Courts Amendment was adopted in 1968, specifically in Art. IV, § 5(B). This is a proposal to fill it. It would do so simply by making permanent in the Ohio Constitution the current holdings by the Ohio Supreme Court that attempt to address the void.

Art. IV, § 5(B) gives the Ohio Supreme Court the power to promulgate "rules of practice and procedure." Before adoption of the Modern Courts Amendment,[1] the au-

[1] *See* Josiah H. Blackmore, *Civil Procedure in Ohio*, in 1 HISTORY OF OHIO LAW 441-57 (Michael Les Benedict and John F. Winkler, eds. (2004) ("In 1850 Ohioans . . . made the legislature responsible for reforming judicial procedure. The Modern Courts Amendment transferred that authority to the supreme court, leaving the legislature only the minimal authority to disapprove the court's propositions . . . .").

thority to legislate rules of practice and procedure in the courts of Ohio resided in General Assembly under authority of Art. II, § 1 since at least adoption of the 1851 Constitution.[2]

In granting that rulemaking power to the supreme court, Art. IV, § 5(B) adds one attribute to the power and one limitation. The attribute is that a court-promulgated rule supersedes all laws then in effect that conflict with the court-promulgated rule: "All laws in conflict . . . shall be of no further force or effect after such rules have taken effect." The restriction is that a court-promulgated rule may not "abridge, enlarge, or modify a substantive right."

Beyond that, Art. IV, § 5(B) is silent about the allocation of rulemaking power between the court and the legislature.

Certainly the most important matter about which it is silent is whether the General Assembly may legislate on a matter of "practice and procedure" after a court-promulgated rule takes effect. We know that question is important because, as a direct result of Art. IV, § 5(B)'s silence, the Ohio Supreme Court has considered dozens of cases in which it attempted to divine an answer. Divining it has been difficult.

The court has answered the question in two ways that are directly contradictory. The court's first answer was that the General Assembly is disenfranchised from legislating on a matter of practice or procedure once the court has successfully promulgated a rule on the matter.[3] More recently, the court has held that the General Assembly

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[2] Art. II, § 1 states in pertinent part:

> The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. . . .

[3] *See Rockey v. 84 Lumber* (1993), 66 Ohio St. 3d 221; 611 N.E.2d 789; 1993 Ohio LEXIS 727 (F. E. Sweeney, Sr., J.) (Moyer, C.J., A.W. Sweeney, Douglas, Wright, Resnick, and Pfeifer, JJ., concurring), *aff'd in State ex rel. Ohio Acad. of Trial Lawyers v. Sheward (*1999), 86 Ohio St. 3d 451, 1999-Ohio-123 (Resnick, J.)(Douglas, F.E. Sweeney and Pfeifer, JJ., concurring. Moyer, C.J., Cook and Lundberg Stratton, JJ., dissenting).

may enact legislation on a matter of practice or procedure even if it conflicts with an existing, duly promulgated court rule.[4] In announcing the second interpretation, the court did not overrule the first. Nor has the first been overruled in any of the cases in which the court has applied its second interpretation.

The fact that inconsistent interpretations exist regarding a provision of the constitution does not, of course, itself justify amending the constitution. This, however, is the rare instance in which it does.

If the provisions of Art. IV, § 5(B) were in a statute, not in the constitution, the provision giving authority to the supreme court would easily be harmonized with the General Assembly's plenary legislative authority under Art. II, §1. A court, applying common-law rules of statutory interpretation, court might reason that the statute left legislative authority in the General Assembly except to the extent that the Amendment clearly places authority in the court. That option for filing the void in a statute isn't available, however, when interpreting a constitution — at least not lastingly. First, common-law rules for interpretation and construction stand on a different footing when applied to interpretation of statutes than to the interpretation of constitutions. The rules work particularly well when applied to legislation and similar forms of positive law because the rules ultimately rest on the recognition that originating legislative body is always free to adjust a statute to correct or to otherwise respond to judicial interpretation. Because that ease of correcting the source-document does not exist regarding judicial interpretation of a constitution, rules of interpretation that are based on the existence of that ease have little meaning to the interpretation of constitutional texts.

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[4] *See* S*tate ex rel. Lloyd v. Lovelady* (2006), 108 Ohio St. 3d 86; 2006-Ohio-161; 840 N.E.2d 1062; 2006 Ohio LEXIS 218 (Pfeifer, J.) (Moyer, C.J., Resnick, Lundberg Stratton, O'Connor, O'Donnell and Lanzinger, JJ., concurring); *Havel v. Villa St. Joseph* (2012), 131 Ohio St. 3d 235; 2012-Ohio-552; 963 N.E.2d 1270; 2012 Ohio LEXIS 390 (per O'Donnell, J.) (Lundberg Stratton, Lanzinger, and Cupp, JJ., concurring. O'Connor, C.J., concurring in judgment only. Pfeifer and McGee Brown, JJ., dissenting).

Besides, even if rules for construing constitutions were applied the same as are rules of statutory construction, these common-law rules are numerous and, often, point toward contradictory interpretations. Any attempt to fill the hole in Art. IV, § 5(B) solely through judicial application of a common-law rule of interpretation and construction would last only until the court — perhaps when differently composed — focuses on a different rule of interpretation that supports the opposite inference.

Most importantly, the question of where Art. IV, § 5(B) leaves legislative authority after the court promulgates a rule of practice or procedure is currently unresolvable because there is simply not enough firm ground in the present language of the Modern Courts Amendment to support a definitive ruling — either way.

The proposed amendment would patch the hole permanently. It would do so by inserting language that reflects the court's second, currently controlling interpretation. Selecting that interpretation rather than the first was not arbitrary. The proposal rejects the court's first allocation of authority primarily because it suffers from a fundamental, structural flaw. Its allocation of mutually exclusive spheres of legislative authority between the court and General Assembly turns on an indistinct and irredeemably blurred distinction between substance and procedure.

Instead, we propose a path that follows the Modern Courts Amendment's ancestry. The Modern Courts Amendment was modeled after the federal Rules Enabling Act of 1934, The Ohio Supreme Court's second interpretation establishes a relationship between the General Assembly and the court's rulemaking authority that fairly parallels the relationship that the Rules Enabling Act created between Congress and the Supreme Court of the United States.[5]

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[5] Judge Jeffrey S. Sutton of the United States Court of Appeals for the Sixth Circuit has long urged state courts to recognize that their state constitutions need not be interpreted in the same way that federal courts interpret the U.S. Constitution, even when provisions of the federal constitutions are worded similarly. *See, e.g.*, Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. , 687, 710 (2011) ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the

In other words, the proposal is built simply on (1) the historical fact that the text of Art. IV, § 5(B) is modeled after the federal Rules Enabling Act and (2) the proposition that any positive law — whether a constitution or a statute — that purports to transfer rulemaking power out of the legislature and to a court cannot intelligibly separate those powers based on the false dichotomy between "substance" and "procedure."

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same. Still less is there reason to think that a highly generalized guarantee, such as a prohibition on 'unreasonable' searches, would have just one meaning for a range of differently situated sovereigns.") *See generally*, William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

By proposing to amend Art. IV, § 5(B) in a manner that would parallel the federal Rules Enabling Act, this proposed amendment does not violate Judge Sutton's view of states' autonomy. This proposal is driven, not by any reflexive deference to the federal approach to rulemaking, but rather by the fact that the federal approach is the only workable way to approach any allocation of rulemaking that separates the authority based on the substance/procedure dichotomy.

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Judicial Branch and Administration of Justice Committee

Planning Worksheet
(Through October 2016 Meetings)

Article I – Bill of Rights (Select Provisions)

Sec. 5 – Trial by jury (1851, am. 1912)

Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 8 – Writ of habeas corpus (1851)

Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 9 – Bail (1851, am. 1997)

Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec.10 – Trial for crimes; witness (1851; am. 1912)

Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 10a – Rights of victims of crime (1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 12 – Transportation, etc. for crime (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 14 – Search warrants and general warrants (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 15 – No imprisonment for debt (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 16 – Redress for injury; due process (1851; am. 1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 19a – Damages for wrongful death (1912)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Article IV - Judicial

Sec. 1 – Judicial power vested in court (1851, am. 1883, 1912, 1968, 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 2 – Organization and jurisdiction of Supreme Court (1851, am. 1883, 1912, 1944, 1968, 1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 3 – Organization and jurisdiction of court of appeals (1968, am. 1994)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 4 – Organization and jurisdiction of common pleas court (1968, am. 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 5 – Powers and duties of Supreme Court; rules (1968, am. 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 6 – Election of judges; compensation (1968, am. 1973)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 13 – Vacancy in office of judge, how filled (1851, am. 1942)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 15 – Changing number of judges; establishing other courts (1851, am. 1912))							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

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Sec. 17 – Judges removable (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 18 – Powers and jurisdiction of judges (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. 19 – Courts of conciliation (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**11.13.14**	**1.15.15**	**1.15.15**	**2.12.15**	**2.12.15**	**4.9.15**	**4.9.15**

Sec. 20 – Style of process, prosecution, and indictment (1851)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

Sec. [21] 22 – Supreme Court commission (1875)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved
Completed	**11.13.14**	**1.15.15**	**1.15.15**	**2.12.15**	**2.12.15**	**4.9.15**	**4.9.15**

Sec. 23 – Judges in less populous counties; service on more than one court 1965)							
Draft Status	Committee 1st Pres.	Committee 2nd Pres.	Committee Approval	CC Approval	OCMC 1st Pres.	OCMC 2nd Pres.	OCMC Approved

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

December 8

2017 Meeting Dates

January 12

February 9

March 9

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14