OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee

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

January 12, 2017

Ohio Statehouse
Room 018

OCMC Judicial Branch and Administration of Justice Committee

Chair	Ms. Janet Abaray
Vice-chair	Justice 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, JANUARY 12, 2017
12:30 P.M.
OHIO STATEHOUSE ROOM 017

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of November 10, 2016

  [Draft Minutes – attached]

IV. Reports and Recommendations

- None scheduled

V. Presentations

- "Article I, Section 8 – Writ of Habeas Corpus"

  Shari L. O'Neill
  Counsel to the Commission

  [Draft Report and Recommendation – attached]

- "Article I, Section 12 – Transportation for Crime, Corruption of Blood, and Forfeiture of Estate"

  Shari L. O'Neill
  Counsel to the Commission

  [Draft Report and Recommendation – attached]

- "Article I, Section 15 – No Imprisonment for Debt"

  Shari L. O'Neill
  Counsel to the Commission

  [Draft Report and Recommendation – attached]

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.

  [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]

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, NOVEMBER 10, 2016

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 10:36 a.m.

Members Present:

A quorum was present with Chair Abaray and committee members Jordan, Kurfess, McColley, Mulvihill, and Wagoner in attendance.

Approval of Minutes:

The minutes of the September 8, 2016 meeting of the committee were approved.

Discussion:

Article I, Section 10
Grand Jury Process

Chair Abaray recognized Morris Murray, Defiance County prosecutor, who was present on behalf of the Ohio Prosecuting Attorneys Association to provide additional perspective on the question of whether to change the grand jury process in Ohio as provided in Article I, Section 10.

Mr. Murray referenced his previous presentation to the committee in December 2015 relating to potential reform of the grand jury process. He expressed continued support for the concept that the grand jury process "is a time honored and important piece of the criminal justice system not only in Ohio, but throughout the country."

Mr. Murray continued that his experience with grand juries convinces him that grand juries take their oath seriously. Although the result of their deliberations is sometimes met with scorn and

skepticism, he said jurors are instructed that if the evidence does not meet the probable cause standard they should not return an indictment.

Mr. Murray explained that prosecutors receive investigatory files from law enforcement agencies and review those investigations to make a preliminary assessment of the legal sufficiency to proceed. He emphasized that the statutory, ethical, and professional obligation of a prosecuting attorney is not simply to seek a conviction, but to seek justice. He said prosecutors are sworn officers of the court expected to comply with the ethical considerations and disciplinary rules established to ensure that lawyers conduct themselves professionally.

Mr. Murray noted that Ohio prosecutors have "grave concerns" about some of the proposals under consideration. He said removing or diminishing the confidentiality of grand jury proceedings jeopardizes the purpose of the grand jury, and would remove an important protection for persons who are investigated but not ultimately indicted. He said confidentiality also protects witnesses from retribution or intimidation whether cases go forward or not.

Commenting on the possibility of using a grand jury legal advisor, Mr. Murray said the Ohio Prosecuting Attorneys Association is opposed to this concept because it adds a layer to the process. He said prosecutors, by nature of the process, are expected to provide instructions of law to the grand jury, providing evidence that provides proof of the essential elements of the criminal violations. He said prosecutors must understand the rules of evidence, and how information may be impacted by those rules. He said prosecutors have nothing to gain by submitting inadmissible evidence to a grand jury, or from withholding evidence that may prove or disprove allegations because all information is available during the trial. In addition, he said, grand juries are instructed that they have the option to obtain further instructions or legal advice from the court, if they require it. He said adding an advisor attorney makes no sense, adds expense and bureaucracy, and "honestly is a bit of an affront to prosecuting attorneys."

Mr. Murray said if the concern is that prosecutors will pursue cases and seek indictments where they should not, or fail to prosecute cases that should be prosecuted, the use of an advisor attorney will not address those concerns.

Mr. Murray having concluded his remarks, Chair Abaray invited the committee to ask questions.

Committee member Dennis Mulvihill, identifying himself as a civil attorney, said it is rare to go to trial in civil case where there is no opportunity to depose witnesses and have transcripts available. He asked what would be the problem with providing a defendant who is subsequently indicted and prosecuted a copy of the grand jury transcript.

Mr. Murray said, if a grand jury witness is intended to be called as a trial witness, no one can argue that the transcript should not be available. But, he said, the problem is that much of the testimony presented to grand jury may not lead to admissible evidence. He said there is value to the confidentiality of investigations, for example, there is a risk for destruction of evidence. He said an example might be that of a domestic violence investigation, in which there might be a teenage witness who has disclosed information confidentially. He said there might be some value in hearing what the witness has to say, but no intention to use that child as a witness at trial. He said the issue becomes whether that information might lead to something else. He

remarked that criminal investigation involves trying to develop leads, recognizing that not all information will be usable. He said his concern is that he wants to be able to put lay witnesses on so jurors can hear what they have to say.

Mr. Mulvihill said if the evidence is not admissible the judge will not let it in, so he is not sure that is an impediment to letting the defense have the transcript. Also, he said, he did not understand Mr. Murray's statement that providing transcript might lead to the destruction of evidence.

Regarding admissibility, Mr. Murray said a judge will not evaluate that until that point in the process, but if it is not ultimately a part of the state's case, there is some value to protecting the confidentiality of that information.

Mr. Mulvihill suggested the retribution issue is true of all witnesses. He said his concern is that the outcome of a criminal trial may be to incarcerate someone for many years, yet that person has no access to that information to prepare their defense. He said to insure a fair process if a person is indicted and tried, it is fair to let the defendant know what people have testified to under oath.

Mr. Murray disagreed, saying there is a great motivation to destroy evidence in criminal cases. He said it is also important to limit exposure to retribution against the grand jury witnesses, a concern similar to that which protects confidential informants.

Mr. Mulvihill asked whether a confidential informant typically testifies in front of a grand jury and remains confidential. Mr. Murray said an informant could testify and remain confidential at the same time.

Representative Robert McColley asked whether, if a witness makes statements to the grand jury that will be used later, Mr. Murray would agree to a change that would allow that witness's statements to be available for impeachment purposes. Rep. McColley also asked whether a constitutional amendment would be needed to effectuate that purpose or whether it could be done by statute.

Mr. Murray said if a grand jury witness will be called during the trial, it is reasonable to disclose that witness's statement. He said regarding other, collateral information, there is great concern about that during a grand jury investigation. He said such a change would be substantive, and, if desired, could be done statutorily.

Committee member Charles Kurfess asked what is the court's role regarding grand juries.

Mr. Murray said the court's role is as a "legal advisor," which implies that, ultimately, the judge gives legal advice and answers questions about the law. He said the court provides instructions to the grand jury indicating that ordinarily the prosecutor's advice is sufficient, and that if the grand jury needs more information the court will provide it.

Mr. Kurfess continued, asking how the grand jury is able to pose questions to the judge. Mr. Murray said normally there is a process where the prosecutor fields an informal request.

Mr. Kurfess commented that, when he was a judge, the prosecutor would ask the court to release the testimony of a grand jury witness for the purpose of giving that testimony to an investigative officer to assist him in his investigation. Mr. Murray said he cannot imagine that situation, but if a prosecutor wants a transcript that is the right way to do it. Mr. Kurfess said he felt that situation was "off the wall."

Mr. Kurfess asked when and to what extent the prosecutor should also present to the grand jury the possibility of lesser included offenses, and give the applicable statute. Mr. Murray said, historically, that is a legal and tactical decision of prosecutors, and if there is an obvious lesser included offense and the prosecutor wants the grand jury to make that analysis, the prosecutor provides the elements and asks the grand jury to consider that offense. He said sometimes that decision is made by a judge later on. Mr. Kurfess said to even open the door the lesser included offense has to be suggested to the grand jury. Mr. Murray said if the case goes to trial, the defense counsel does not want the lesser included offense in there.

There being no further questions from the committee, Chair Abaray summarized the current status of the committee's consideration of the issue. She said the issue was first presented as a concern about how the secrecy component of the grand jury process creates public concern. So, she said, one issue is how to address the public confidence issue. She said the second issue is whether there are ways to improve fairness, such as by allowing the defense to obtain transcripts or by having uniform instructions to the jurors. She said those types of requirements do not have to be in the constitution, but that the committee should ask whether there is anything that is so important that it should be included in the constitution.

Regarding the transparency issue, Chair Abaray said she shares the opinion of Ken Shimozono, the Hawaii grand jury legal advisor who provided information to the committee at a previous meeting, that having an independent attorney available to assist the grand jury would improve confidence in the system. She said she would like to recommend that the committee consider the Hawaii model.

Rep. McColley asked, as a practical matter, how an attorney legal advisor position might work, particularly in small rural counties.

Committee member Mark Wagoner said he agrees with Rep. McColley regarding the administrative concerns surrounding an attorney legal advisor. He added that, structurally, he views the grand jury as a protection for the individual against the power of the state. He said requiring an attorney legal advisor in the constitution would create a constitutional right and could create mischief. He said he does think there is a role for a legislative debate on the question, and it would occur in the context of budgetary issues. He said he is reluctant to see that requirement put into the constitution.

Mr. Mulvihill asked how many grand juries are convened in Mr. Murray's county at the same time. Mr. Murray said it varies by county, but in his county the grand jury sits for a part term of four months, and only convenes when needed, which is about every other week. In larger counties, he said, the grand jury sits about three days a week. John Murphy, executive director of the Ohio Prosecuting Attorneys Association, who was in the audience, added that Cuyahoga County runs two grand juries simultaneously.

Chair Abaray then formally moved for the committee to recommend adoption of the Hawaii model of having an attorney legal advisor available to the grand jury.

Mr. Kurfess said he is not sure having an attorney legal advisor is a constitutional issue. He wondered whether a court already has authority to appoint counsel for the grand jury.

Mr. Murray answered that a court does not currently have that ability to appoint an attorney for that purpose, but can appoint a special prosecutor.

Mr. Kurfess wondered if a court could appoint a special prosecutor to advise the grand jury, and Mr. Murray answered that that may be possible but it is not clear.

Mr. Kurfess said when he was a judge, after a grand jury served its term he would discuss their service with them. He said it is an eye opener for a citizen to sit on a grand jury. He said jurors would always say there were things they wish they had known. He said if counsel were present the jurors could raise those questions during the hearing.

Chair Abaray asked whether Mr. Kurfess wanted to second the motion.

Mr. Kurfess answered that there are ways of addressing this matter that the committee has not considered. He said the first question is whether the committee wants to address the issue, and then the committee should decide how. He said he would be interested in moving that direction further, but he is not sure it is the will of the committee.

Chair Abaray withdrew the motion until the next meeting, saying that committee members who were not present will want to weigh in on the question.

Presentation:

"Proposal to Amend Article IV, Section 5(B) of the Ohio Constitution"
Richard S. Walinski, Attorney at Law
Mark Wagoner, Commission Member

Chair Abaray recognized Richard Walinski, attorney and former Commission member, as well as committee member Mark Wagoner, to present their proposal to amend Article IV, Section 5(B), which provides:

> 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.

> Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the Supreme Court. The Supreme Court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

The proposed amendment would add the following sentence at the end of the subsection:

> 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.

Mr. Walinski began by commenting that a void has existed in the Ohio Constitution since the Modern Courts Amendment was adopted in 1968, specifically in Article IV, Section 5(B). He said the proposed amendment would fill the void by making permanent in the Ohio Constitution the current holdings by the Ohio Supreme Court that attempt to address the void.

Describing the section, Mr. Walinski said the constitution allows the Supreme Court to promulgate rules of practice and procedure. He said prior to adoption of the Modern Courts Amendment that authority resided with the General Assembly under Article II, Section 1.

Mr. Walinski continued that, in granting that rulemaking power to the Court, Section 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, while the restriction is that a court-promulgated rule may not "abridge, enlarge, or modify a substantive right." He said beyond that, Section 5(B) is silent about the allocation of rulemaking power as between the Court and the legislature.

Mr. Walinski said the most important matter about which the section is silent is whether the General Assembly may legislate on a matter of "practice and procedure" after a court-promulgated rule takes effect. He said, as a result of this silence, the Supreme Court has considered dozens of cases in which it attempted to divine an answer, and has answered the question in two contradictory ways.

Mr. Walinski said the Court's first answer was that the General Assembly is prevented from legislating on a matter of practice or procedure once the court has successfully promulgated a rule on the matter.[1] He noted that, more recently, the Court has held that the General Assembly may enact legislation on a matter of practice or procedure even if it conflicts with an existing court rule.[2] He noted that, in announcing the second interpretation, the Court did not overrule the first, and the first interpretation has not been overruled in any case applying the second interpretation.

[1] *Rockey v. 84 Lumber*, 66 Ohio St.3d 221, 611 N.E.2d 789 (1993).

[2] *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, 840 N.E.2d 1062.

Mr. Walinski observed that, although inconsistent interpretations do not usually require amending the constitution, this is an instance that does. The reason for this, according to Mr. Walinski, is that if the content of Section 5(B) were statutory law, the provision giving authority to the Supreme Court would easily be harmonized with the General Assembly's plenary legislative authority under Article II, Section 1. In that instance, he said, a reviewing court might reason that the statute authorizes legislative authority except to the extent that the amendment clearly places authority in the Court. He indicated that option for filing the void through a statute is not available when interpreting a constitution, at least not in a lasting form.

Mr. Walinski indicated that common law rules for interpretation and construction stand on a different footing when applied to interpretation of statutes than to the interpretation of constitutions. He said the rules work particularly well when applied to legislation and similar forms of positive law because the rules ultimately rest on the recognition that the originating legislative body is always free to adjust a statute to correct or to otherwise respond to judicial interpretation. He added that, 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.

Mr. Walinski stated that an attempt to fill the hole in Section 5(B) solely through the common law lasts only until the Court focuses on a different rule of interpretation that supports the opposite inference. He emphasized his view that the question of where Section 5(B) leaves legislative authority after the Court promulgates a rule of practice or procedure is currently unresolvable because there is not enough firm ground in the present language to support a definitive ruling.

Mr. Walinski described that the proposed amendment permanently resolve the issue by inserting language that reflects the Court's second, currently controlling interpretation. He said the decision to follow that interpretation was not arbitrary, but, rather, was based on the view that the first interpretation turns on a blurred distinction between substance and procedure. He continued that the proposed amendment follows the historical basis of Modern Courts Amendment, which is modeled after the federal Rules Enabling Act of 1934.[3] Mr. Walinski noted that the 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. He concluded that the proposal is built simply on (1) the historical fact that the text of Section 5(B) is modeled after the Rules Enabling Act; and (2) the proposition that any positive law – whether a constitutional provision 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."

Mr. Walinski said Congress has several options when it disagrees with rules promulgated by the U.S. Supreme Court. He said the Ohio General Assembly's only option is to issue a concurrent resolution of disapproval, a remedy that was tested when the Court promulgated the Ohio Rules of Evidence. He said, in 1977, one person from the office of the attorney general said they were bad rules, arguing they were not within Supreme Court authority to promulgate. The General

[3] Ch. 651, Pub.L. 73–415, 48 Stat. 1064, enacted June 19, 1934, 28 U.S.C. § 2072.

Assembly unanimously concurred in a resolution of disapproval, and the dispute evolved into an "evidence war." He said the General Assembly considered a statute purporting to do what the federal government did with the Federal Rules of Evidence. He said Ohio ended up with the opposite result from what occurred with Congress.

Chair Abaray expressed that the Ohio Rules of Evidence are identical to the Federal Rules of Evidence.

Mr. Walinski and Mr. Wagoner disagreed, noting Rule 102 is different and has been given an expansive interpretation. They also noted that Rule 301 is different.

Chair Abaray expressed her view that Section 5(B) does not need to be fixed. She said the only problem she has encountered as a trial lawyer is that someone filing a complaint has to know to look at the statutory requirements as well as the rules. Mr. Wagoner said the point of the proposal is not to debate the rules of procedure but rather to discuss the structure of state government. Mr. Walinski said if there were no problem there would not have been more than 36 cases addressing conflicts between a statute and a rule.

Mr. Mulvihill asked whether there is any dispute in case law that practice and procedure are reserved to the Court and substance is reserved to the General Assembly. He said he understands there may be a dispute about what constitutes a rule of practice and procedure, but wonders if there is dispute that, whatever those words mean, the General Assembly cannot enact rules of practice and procedure.

Mr. Walinski said that since *Lovelady*, and in *Havel v. Villa St. Joseph*, the interpretation of the Modern Courts Amendment is that procedure is a subset of rights if the legislature chooses to make a procedure a matter of right for the parties.[4] He said the holding nevertheless is that a perfectly valid rule that is indisputably within the Court's authority can be altered by the General Assembly into a right of the litigating parties. He said prior to 2007, substance and procedure were allocated to separate branches of government.

Mr. Mulvihill asked whether, if the proposal were adopted, a rule enacted by the General Assembly would be subject to judicial review. Mr. Walinski answered if the statute is litigable the Court will hear it. He said the question is not whether it is substantive or procedural, but whether the General Assembly subjectively intended to make the possible procedural issue a right for one party or other. He added, if it is a right, it is within the General Assembly's authority.

Mr. Mulvihill followed up, asking whether the Court could review that initial decision. Mr. Walinski said that does not matter, because under the new doctrine a procedural matter is under the General Assembly's authority if it cloaks it in terms of a right.

Mr. Mulvihill asked whether the recommendation is to constitutionalize the *Havel* decision. Mr. Walinski said this is what is being recommended.

[4] *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

Mr. Mulvihill, going back to an earlier point, suggested the issue about substance versus procedure is raised in many constitutional provisions. Mr. Wagoner said the nuance is that the court is proposing the rule; in the end it becomes the court deciding that question that is the imbalance. He said that is what the proposal is trying to address.

Mr. Mulvihill suggested that constitutionalizing *Havel* could invite the General Assembly to meddle into court rules by stamping something as being substantive. Mr. Wagoner noted that, in the federal system, authority is delegated to the court and once the court decides something is procedural, the debate is over.

But, said Mr. Mulvihill, if the court determines a rule is procedural rather than substantive, the court could strike it down. Mr. Walinski replied that the current rule is that procedure becomes a legitimate subject of legislation if the General Assembly intends to vest someone with a right to a remedy in the courts regarding that procedural matter.

Mr. Mulvihill provided an example, saying that, in the rules of evidence, there is a requirement that before a doctor can provide expert testimony in a medical negligence case the doctor must spend a certain percentage of time in clinical practice. He said there is a different percentage of time required under a corresponding statute. He said courts have always interpreted the requirement as being procedural, and required litigants to follow the evidence rule. But, he said, if the General Assembly amended the current statute and inserted the word "substantive," and that were challenged, the proposed amendment would prevent the court from using the rule to determine if the physician is qualified to testify. Mr. Walinski said that question would no longer be material because of *Lovelady* and *Havel*. He said those two rules are incompatible.

Mr. Wagoner said the proposed amendment would put the determination in the constitution, as opposed to having the governmental branch that is directly involved make that decision.

Mr. Mulvihill asked, assuming the proposal were adopted, if the General Assembly changed the percentage requirement for an expert witness, it would remove the court's authority to decide whether that requirement is procedural or substantive. Mr. Walinski agreed, saying that is because it becomes immaterial. He continued, saying if the General Assembly satisfies the two steps first announced in *Lovelady* and *Havel* for how the General Assembly may permissibly make a procedure a right, it can change the procedural matter because they are making it a right.

Mr. Mulvihill said currently anything that comes out of the General Assembly is subject to judicial review, but that would change if the proposal is adopted. Mr. Walinski said that is true because the question would no longer be procedural.

Mr. Mulvihill expressed that the proposal would resolve which branch of government gets to make the decision as between procedural and substantive, saying the proposal would give that role to the General Assembly. Mr. Walinski agreed, but said the proposal tracks how the dispute would be resolved in the federal system.

Chair Abaray expressed a concern that the proposal looks like a power struggle between the Supreme Court and the legislature. Mr. Walinski said that power struggle has been going on

since *Rockey v. 84 Lumber*. He said the Court has thrown out statutory provisions that it perceives as violating the Modern Courts Amendment.

Chair Abaray asked whether Mr. Walinski and Mr. Wagoner have presented the proposal to the Supreme Court. Mr. Walinski said they have not discussed it with the Court. Mr. Wagoner said the conversation has been out there, which is why they brought the proposal to the Commission.

Mr. Mulvihill said he does not favor transferring the authority to the General Assembly.

Mr. Wagoner commented that the committee may be viewing the issue through the current political environment, which he said can change. He said he and Mr. Walinski are looking at it from a structural standpoint, and trying to protect the Supreme Court from getting too involved in policy.

Mr. Mulvihill said, in his view, this is constitutionalizing a current political problem, which is that the General Assembly is engaged in the mischief and the court is not checking that as it should.

Chair Abaray said she shares that concern, but is also concerned that if something is passed that is in conflict, that would prevent Supreme Court from resolving the conflict.

Mr. Kurfess commented that the proposal is what is actually currently available to the legislature by practice now. He said he concurs with the observation that the proposal shifts to the legislature what the Court can do. Mr. Kurfess added that there is a practical question of what would happen if the legislature puts this proposed constitutional amendment before the public.

There being no further questions, Chair Abaray thanked Mr. Walinski and Mr. Wagoner for their presentation.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:39 p.m.

Approval:

The minutes of the November 10, 2016 meeting of the Judicial Branch and Administration of Justice Committee were approved at the January 12, 2017 meeting of the committee.

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Janet Gilligan Abaray, Chair

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Judge Patrick F. Fischer, Vice-chair

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION ARTICLE I, SECTION 8

WRIT OF HABEAS CORPUS

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 8 of the Ohio Constitution concerning the writ of habeas corpus. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article I, Section 8 be retained in its present form.

Background

Article I, Section 8 reads as follows:

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

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

Habeas corpus, short for *habeas corpus ad subjiciendum*, is Latin for "that you may have the body."[1] Originating in early English common law, the concept that persons should not be imprisoned contrary to law was a key aspect of the Magna Carta.[2] Eventually, this principle was embodied in a provision for a formal writ, also called "The Great Writ," by which a person wrongfully imprisoned could petition the government for release.[3] As currently understood in American criminal law, the writ commands a person detaining someone to produce the prisoner or detainee.[4]

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

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

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

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

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

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

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

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

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

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

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

Amendments, Proposed Amendments, and Other Review

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

Litigation Involving the Provision

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

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

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

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

Presentations and Resources Considered

Discussion and Consideration

Conclusion

The Judicial Branch and Administration of Justice Committee finds that Article I, Section 8 _____. Therefore, the committee concludes that the provision should be retained in its present form.

Date Issued

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

Endnotes

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] *Id.*

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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 12

TRANSPORTATION FOR CRIME, CORRUPTION OF BLOOD, FORFEITURE OF ESTATE

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 12 of the Ohio Constitution concerning transportation for crime, and corruption of blood or forfeiture of estate for criminal conviction. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article I, Section 12 be retained in its present form.

Background

Article I, Section 12 reads as follows:

> No person shall be transported out of the state, for any offense committed within the same; and no conviction shall work corruption of blood, or forfeiture of estate.

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.

Article I, Section 12, unchanged since its adoption in 1851, derives from two separate sections of the 1802 constitution, which provided, at Article VIII, Section 16 that "No ex post facto law, nor any law impairing the validity of contracts, shall ever be made; and no conviction shall work corruption of blood nor forfeiture of estate," and, at Section 17, "That no person shall be liable to be transported out of this State for any offense committed within the State."[1]

Article I, Section 12 embodies three separate concepts: that criminal suspects not be transferred outside the state for crimes committed in Ohio, that criminal convictions not result in "corruption

of blood," and that criminal convictions not cause a forfeiture of estate. Each of these concepts arises from different historical underpinnings.

Transportation for Crime

Transportation for crime, also known as "banishment," was an extreme form of punishment that, historically, could mean death because it separated the individual from the community that provided resources for survival.[2] The use of transportation as punishment rose dramatically in England in the 1700s, when it became preferable to transport unwanted citizens to British colonies rather than to bear the trouble and expense of housing them in prisons.[3] For some convicts, being transported to America provided a better life than prison would have afforded, but some commentators and courts have asserted the practice was a cruel and unusual form of punishment.[4]

Regardless, most courts have held transportation for crime to be illegal, and at least 15 state constitutions forbid banishing residents as punishment for crime.[5] As recognized by the Ohio Constitutional Revision Commission in the 1970s (1970s Commission), there is no federal counterpart to the prohibition against transportation as punishment for crime.[6]

Corruption of Blood

In English law, the idea arose that a criminal act brought about a metaphorical stain or "taint" on the blood of the offender, and justified stripping him of his life, property, or title. The practice known as "parliamentary attainder" worked a "corruption of blood" that prevented the "attainted" person both from inheriting property or title and from leaving an inheritance to his heirs.[7] The British monarchy frequently used acts of attainder to punish political foes, with Henry VIII famously using it to exact revenge on wives and noblemen alike.[8]

The practice was extremely popular in the American colonies, when revolutionaries used bills of attainder to target British loyalists.[9] In one example, Thomas Jefferson issued a bill of attainder against a Tory loyalist who allegedly was wreaking havoc across the Virginia countryside, declaring it to be "lawful for any person with or without orders, to pursue and slay" Josiah Philips and any "associates or confederates," on sight.[10] Despite the widespread use and acceptance of attainder as a way to prosecute and fund the Revolutionary War, some colonial leaders acknowledged concern about its use.[11] As Alexander Hamilton put it, the use of attainder creates an environment in which "no man can be safe, nor know when he may be the innocent victim of a prevailing faction."[12] Rejecting attainder in favor of procedures promoting judicial process, the founders outlawed attainder in the United States Constitution at Article I, Section 9, Clause 3, and outlawed corruption of blood as punishment for treason at Article III, Section 3, Clause 2.[13] In outlawing "corruption of blood" for criminal convicts, the Ohio Constitution forbids the enactment of laws that serve to extend the punishment of the offender to the beneficiaries of his or her estate.[14]

Forfeiture of Estate

Like corruption of blood, forfeiture of estate deprives the criminal actor of his property interest, specifically his present ownership rather than his expected inheritance or his anticipated ability to transfer ownership to his heirs. The constitutional provision's express purpose prevents convicts from having to forfeit their estate, and would seem to prohibit laws that permit government to seize property of offenders. Addressing the argument that Article I, Section 12 prohibits forfeiture of property on conviction for engaging in a pattern of corrupt activity as prohibited by state law pursuant to Ohio R.C. 2923.32, however, at least two state appellate courts have held a forfeiture under that law is of a limited nature, and does not constitute a forfeiture of an entire estate, but rather only of the property connected to the criminal enterprise. *See, e.g, State v. Thrower*, 62 Ohio App.3d 359, 575 N.E.2d 863 (1989); *State v. Lang*, Miami App. No. 92-CA-3, 1993 Ohio App. LEXIS 605.

Amendments, Proposed Amendments, and Other Review

The 1970s Commission, in reviewing Section 12, commented there is no Ohio case law on the transportation for crime portion of the provision because the General Assembly has never authorized imposition of banishment.[15] Discussing corruption of blood and forfeiture of estate, the 1970s Commission noted a Franklin County Probate Court decision holding that a statute prohibiting convicted murderers from inheriting from their victims does not violate Article I, Section 12 because the applicable statute does not divest an heir of property but rather merely prevents him inheriting it.[16] The 1970s Commission recommended no change to Article I, Section 12.

Litigation Involving the Provision

The Supreme Court of Ohio has interpreted Article I, Section 12 on only one occasion since the 1970s. In *State ex rel. Miller v. Anthony,* 72 Ohio St.3d 132, 1995-Ohio-39, 647 N.E.2d 1368, a nuisance abatement action involving a drug dealer, the trial court ordered the dealer's premises padlocked for one year. On appeal, the dealer argued, among other things, that Article I, Section 12 prevented the injunction, but the Supreme Court disagreed, stating "we decline to label the confiscation and sale of personal property under this statute a 'forfeiture.' It is instead a remedy designed to prevent the continuation of unlawful acts rather than a punishment for unlawful activity." *Id.,* 72 Ohio St.3d at 138, 647 N.E.2d 1372.

Presentations and Resources Considered

Discussion and Consideration

Conclusion

The Judicial Branch and Administration of Justice Committee finds that Article I, Section 12 _____. Therefore, the committee concludes that the provision should be retained in its present form.

Date Issued

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

Endnotes

[1] Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments.* (Cleveland: Arthur H. Clark Co., 1912), 93.

[2] William Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 New. Eng. J. on Crim. & Civ. Confinement 455, 460 (1998).

[3] *Id.* at 461.

[4] *Id.* at 462, citing A. Roger Ekirch, *Bound for America: The Transportation of British Convicts to the Colonies 1718-1775*, 2-3 (1987). For a discussion of banishment as potentially violating the Eighth Amendment to the U.S. Constitution, *see* Snider, *supra*, n. 82 at 467; Andrew D. Leipold, *Targeted Loitering Laws*, 3 U. Pa. J. Const. L. 474, 492 (2001).

[5] Snider, *supra*, at 465-66.

[6] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, 35 (Apr. 15, 1976), available at: http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf, (last visited Dec. 28, 2016).

[7] Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 Cornell L.Rev. 355, 356-57 (1978).

[8] Matthew Steilen, *Bills of Attainder*, 53 Hous. L.Rev. 767, 775, 796-804 (2016); *see also* Berger, *supra.*

[9] *Id.* at 826-831.

[10] Matthew Steilen, *The Josiah Philips Attainder and the Institutional Structure of the American Revolution*, 3 Critical Studies of Law (2015). Available at: SUNY Buffalo Legal Studies Research Paper No. 2016-017. Available at SSRN:https://ssrn.com/abstract=2730084; http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/Law-humanities-jr/steilen_matthew.pdf (last visited Dec. 28, 2016).

Ultimately, Philips was arrested, tried, and executed for robbery without resorting to use of the bill, but the issuance of the bill was viewed unfavorably by many, including the prosecutor of Philips' robbery case, Edmund Randolph, who, while a delegate to the Virginia ratifying convention for the U.S. Constitution, commented "if I conceived my country would passively permit a repetition of [the Philips attainder], dear as it is to me, I would seek means of expatriating myself from it." *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787,* (Jonathan Elliot, ed. 1888), as provided in *The Founders' Constitution,* vol. 3, 396 (Philip B. Kurland & Ralph Lerner, eds. 1987). Available at: http://press-pubs.uchicago.edu/founders/print_documents/a1_10_1s7.html (last visited Dec. 28, 2016).

[11] Duane L. Ostler, *The Forgotten Constitutional Spotlight: How Viewing the Ban on Bills of Attainder as a Takings Protection Clarifies Constitutional Principles*, 42 U. Tol. L.Rev. 395, 396-97 (2011).

[12] Alexander Hamilton, *Letter from Phocion,* as reprinted in *The Papers of Alexander Hamilton,* Vol. 3, 485-86 (Harold C. Syrett et al., 3ds. 1961-79), also available at: http://press-pubs.uchicago.edu/founders/print_documents/a1_9_3s5.html (last visited Dec. 28, 2016).

[13] Article I, Section 9, Clause 3 reads: "No Bill of Attainder or ex post facto Law shall be passed. Article III, Section 3, Clause 2 reads: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

[14] Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution*, 111-12 (2nd prtg. 2011), citing *Lessee of McMillan v. Robbins*, 5 Ohio 28, 34 (1831).

[15] Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, *supra*, at 36.

[16] *Id.*, citing *Egelhoff v. Presler*, 1945 Ohio Misc. LEXIS 194, 32 Ohio Op. 252, 44 Ohio L. Abs. 376 (1945).

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

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

OHIO CONSTITUTION ARTICLE I, SECTION 15

NO IMPRISONMENT FOR DEBT

The Judicial Branch and Administration of Justice Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 15 of the Ohio Constitution prohibiting imprisonment for debt. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article I, Section 15 be retained in its present form.

Background

Article I, Section 15 reads as follows:

> No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

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.

The institution known as "debtors' prison" can be traced to early Roman Law, when debtors who could not pay were subjected to death, enslavement, imprisonment, or exile.[1] Although imprisonment sometimes resulted in repayment by the debtor or his relatives, more often it left the creditor without recourse, since an imprisoned debtor is separated from the source of income that could satisfy the debt. While more harsh punishments, such as death by dissection, or holding the corpse of the debtor for ransom, were practiced on the continent, they were not permitted by English law.[2] Nevertheless, debtors' prisons were a well-established British institution by the 17th century, and, like other British traditions, became a common American

practice.[3] Debtors in the New World could also be subject to "debt slavery," a practice in which immigrants were subjected to indentured servitude for a term of years in exchange for debt forgiveness.[4]

By the time of the U.S. Constitution, a need was recognized for some form of bankruptcy law, and the framers drafted a provision to enable Congress to address the problem of debtors who could not meet their obligations.[5] Thus, Congress was given the power to "establish * * * uniform Laws on the subject of Bankruptcies throughout the United States."[6] Subsequent Bankruptcy Acts focused more on merchant debtors than individual debtors, and did nothing to eliminate the practice of imprisoning debtors, which persisted until states began to prohibit debtors' prisons in their constitutions in the 1820s, and federal law addressed the problem in the 1830s.[7] By the 1870s, all states had abolished the practice, both in their constitutions and in enabling law.[8]

The 1802 Ohio Constitution prohibited debtors' prisons, indicating at Article VIII, Section 15 that "The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditor or creditors, in such manner as shall be prescribed by law."[9] The 1851 Constitutional Convention resulted in the section being moved to Article I, and revised to prohibit the "mesne process," whereby the debtor could be imprisoned solely on the basis of a creditor's sworn statement that the debt was unpaid, the debtor had engaged in fraudulent concealment of property, or that the debtor was about to abscond.[10]

Amendments, Proposed Amendments, and Other Review

The Constitutional Revision Commission in the 1970s (1970s Commission) recommended no change to the section. In reviewing Section 15, the 1970s Commission noted case law that distinguished between imprisonment for debt and imprisonment for failure to pay alimony or child support, or for the willful failure to pay a tax obligation. Noting United States Supreme Court precedent holding that imprisonment for failure to pay a criminal fine and court costs violates the Fourteenth Amendment to the U.S. Constitution, the 1970s Commission acknowledged that Ohio has outlawed imprisonment for failure to pay a fine where the failure was based on indigency. *See In re Jackson,* 26 Ohio St.2d 51, 268 N.E.2d 812 (1971) (so long as a criminal defendant had the means to pay a fine but refused, imprisonment was justified).

Litigation Involving the Provision

Although multiple Ohio appellate courts have had occasion to interpret Article I, Section 15 since the 1970s, the Supreme Court of Ohio rarely has addressed the section. In *Cramer v. Petrie,* 70 Ohio St.3d 131, 1994-Ohio-404, 637 N.E.2d 882, a defendant/father failed to pay court-ordered child support and was found in contempt. The trial court sentenced him to 60 days imprisonment, with 50 days suspended. On appeal, defendant argued his prison sentence violated Section 15's prohibition against imprisonment for debt. Concluding the child support arrearage did not constitute "debt" as that term was used in Section 15, and that its decision conflicted with those of other appellate districts, the Hancock County Court of Appeals certified the case to the Supreme Court of Ohio, which, on review, agreed the sentence was not

"imprisonment for debt." As the Court explained, child support orders compared to alimony obligations and property division orders, which prior cases had firmly established were not "debts" within the purview of Section 15. *Id.*, *citing State ex rel. Cook v. Cook*, 66 Ohio St. 566, 572, 64 N.E. 567, 568 (1902) (alimony); *Belding v. State ex rel. Heifner*, 121 Ohio St. 393, 169 N.E. 301 (1929) (expenses related to pregnancy and childbirth); and *Harris v. Harris*, 58 Ohio St.2d 303, 390 N.E.2d 789 (1979) (provisions in a separation agreement relating to the division of property).

Presentations and Resources Considered

Discussion and Consideration

Conclusion

The Judicial Branch and Administration of Justice Committee finds that Article I, Section 15

Therefore, the committee concludes that the provision should be retained in its present form.

Date Issued

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

Endnotes

[1] Vern Countryman, *Bankruptcy and the Individual Debtor – And a Modest Proposal to Return to the Seventeenth Century*, 32 Cath. U. L.Rev. 809, 809-810 (1983).

[2] *Id.* at 810-11.

[3] Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons,* 75 Md. L.Rev. 486, 495-96 (2016). *See also*, Jason J. Kilborn, *Mercy, Rehabiitation, and Quid Pro Quo: A Radical Reassessment of Individual Bankruptcy*, 64 Ohio St. L.J. 855, 872 (2003), citing J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900*, at 249 (1974).

[4] V. Countryman, *supra*, note 1 at 812-13.

[5] *Id.* at 813.

[6] U.S. Const., art. I, §8, cl. 4 (1787).

[7] Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L.Rev. 1595, 1628-29 (2015).

[8] N. Sobol, *supra*, note 3 at 498; J. Kilborn, *supra*, note 3 at 875.

[9] Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments.* (Cleveland: Arthur H. Clark Co., 1912), 93.

[10] Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution*, 115 (2nd prtg. 2011), citing Andrew J. Duncan, *From Dismemberment to Discharge: The Origins of Modern American Bankruptcy Law*, Commercial L.J. 191 (Summer, 1995): 212-13.

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.

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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Judicial Branch and Administration of Justice Committee

Planning Worksheet
(Through December 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

2017 Meeting Dates

February 9

March 9

April 13

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14