OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee

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

April 13, 2017

Riffe Center for Government and the Arts
Room 1960

OCMC Judicial Branch and Administration of Justice Committee

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

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

THURSDAY, APRIL 13, 2017
9:30 A.M.
RIFFE CENTER FOR GOVERNMENT AND THE ARTS ROOM 1960

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of March 9, 2017

  [Draft Minutes – attached]

IV. Reports and Recommendations

- Article I, Section 10 (The Grand Jury)

  - Review of Report and Recommendation
  - Public Comment
  - Discussion
  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

V. Committee Discussion

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

  The committee chair will lead a discussion of a proposal for changes to Article IV, Section 5(B) in order to gauge the committee's position.

[Letter from Michael L. Buenger, Administrative Director of the Supreme Court of Ohio, relating to proposed changes to Article IV, Section 5(B) - attached]

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

- "Civil Asset Forfeiture as a Possible Amendment to Article I, Section 12 (Transportation for Crime, Corruption of Blood, and Forfeiture of Estate)"

  The committee chair will lead a discussion of possible changes to Article I, Section 12, or a possible new constitutional section, that would address civil asset forfeiture.

  [Report and Recommendation – attached]

VI. 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]

VII. Old Business

VIII. New Business

IX. Public Comment

X. Adjourn

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 2:45 p.m.

Members Present:

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

Approval of Minutes:

The minutes of the January 12, 2017 meeting of the committee were approved.

Reports and Recommendations:

Article I, Section 8 (Writ of Habeas Corpus)

After describing a report and recommendation indicating the committee's view that Article I, Section 8, regarding the writ of habeas corpus, should be retained in its present form, Chair Abaray asked for a motion to issue the report. Senator Mike Skindell moved for the committee to issue the report, with committee member Jeff Jacobson seconding the motion. The committee voted unanimously to issue the report and recommendation.

Article I, Section 15 (No Imprisonment for Debt)

The committee also considered a report and recommendation relating to Article I, Section 15, prohibiting imprisonment for debt. Committee member Richard Saphire asked about the portion of the provision that allowed imprisonment for debt in cases of fraud. He said he was not aware the committee had discussed this aspect of the provision, indicating that he would like to have research that would help the committee understand how imprisonment for debt in the case of

fraud could be permitted. Chair Abaray agreed that information would be important for the committee's consideration of the issue, and said the committee would defer voting on the report and recommendation until more could be learned about that part of the section.

Article I, Section 10 (The Grand Jury)

Chair Abaray then turned the committee's attention to two versions of a report and recommendation relating to the grand jury process as contained in Article I, Section 10. One version recommends no change to the provision, while the other version indicates that the grand jury portion of Section 10 would be lifted out and placed in its own section, Section 10b. Additionally, the version prescribes an amendment that would create the position of "grand jury legal advisor" to be present to assist the grand jury with its questions, as well as providing a right of the accused to the record of grand jury testimony of any witness who is called to testify at trial.

Mr. Saphire moved for the committee to adopt the version advocating a change to the grand jury provision. Mr. Jacobson seconded the motion. Chair Abaray then opened the floor for discussion.

Representative Robert McColley said he agrees with the principle that the accused should have a right to a transcript of grand jury testimony, but is opposed to having it in the constitution. He said this could be done statutorily. He said a grand jury legal advisor sounds good on paper, but in practice would be difficult to implement, particularly in small counties.

Committee member Dennis Mulvihill said it is fundamentally unfair for witnesses to present evidence against someone who is not permitted access to that testimony. He said he supports a provision that makes it a fundamental right for the accused to have access to the grand jury witness transcripts, adding he has no problem enshrining that concept in the constitution. With regard to the grand jury legal advisor concept, Mr. Mulvihill said he does not know how that would work, and is unsure of putting it in the constitution.

Mr. Jacobson said he agrees with the grand jury witness transcript principle, indicating it is an important constitutional right to be able to confront one's accuser. He said it should be enshrined in the constitution and not left to the whims of the legislature. He said he does not doubt the legislature's commitment to doing the right thing, but he knows other considerations get in the way. He said he feels the same way about the grand jury legal advisor concept, saying the fact it would be difficult to implement should not affect whether to adopt the provision. He said there have been incidents involving a prosecutor with an agenda who abuses his power in order to get an indictment. He said abuse is more likely when the grand jury gets all of its information about the law from the prosecutor. He said he believes the difficulty of implementing this idea is more than justified by the protection that it would give to all Ohioans.

Chair Abaray said the topic came up because secrecy in the grand jury process, essential to the rights of the accused, causes distrust with the public. She said there is no accountability, so she was attracted to the legal advisor proposal because it gives the public and the accused the assurance there is an independent person overseeing the proceedings.

Mr. Saphire said he agrees with Mr. Mulvihill and Mr. Jacobson regarding access to grand jury witness transcripts. He said a grand jury legal advisor program would be difficult to implement, particularly in rural counties. However, he said, there are ways to accomplish something if it is important enough, and he believes this is important enough to put in the constitution.

Mr. Mulvihill asked whether a plan could be for the grand jury to have independent counsel available if they ask for it. Mr. Jacobson said that would not work because the grand jury would not know when they need assistance.

Senator Kris Jordan said he thinks the constitution should protect civil liberties and basic rights, agreeing that being able to confront one's accuser is a basic right. He said the grand jury witness transcript idea is clearly justified to be in the constitution. He asked whether there are other remedies for someone who is wrongfully indicted.

Chair Abaray noted that the prosecutor is immune for decisions made regarding whether to prosecute someone. Mr. Jacobson added there is no way to restore the accused's reputation once an improper indictment has been issued. Mr. Mulvihill noted there is a tort of malicious prosecution, but once the person is indicted that cause of action goes away unless the accused shows the process was manipulated, which he said is virtually impossible to show.

Mr. Saphire added the accused cannot bring an action under 42 U.S.C. Section 1983 because of prosecutorial immunity, and there would be no damages. Mr. Mulvihill wondered if there is an Ohio tort cause of action outside of the Section 1983 context. Chair Abaray noted there are cases in which prosecutors went far beyond what was legal, and there was no remedy.

Rep. McColley said he understands the point of having an independent counsel in the room, but does not think it is necessary because the grand jury proceeding is not adversarial.

Mr. Jacobson said the proposed amendment giving the accused the right to grand jury witness testimony does not create a right to the entire proceeding, so to the extent there is a false statement of the law or the prosecutor uses the grand jury process as a fishing expedition the accused will not be able to find out how the prosecutor got the information. He said the proposed provision is an attempt to retain secrecy where, for example, witnesses do not come forward at trial. He said the proposal attempts to provide some sort of protection without making it all public.

Committee member Charles Kurfess said he thinks grand juries need their own counsel, providing examples of situations in which the grand jury could use assistance in understanding the possible charges. He said the grand jury ought to know what the possible charges are, and that is why he thinks the independent counsel is important.

Chair Abaray asked if the committee was ready to vote on the report and recommendation, wondering if they should vote on the proposal as written.

Mr. Jacobson asked to divide the question, indicating that committee members could vote on whether to recommend a grand jury legal advisor, and whether to recommend a right to the grand jury witness testimony. He said if one or both are approved, then the committee would vote on

the entire report and recommendation, and if neither stay in, the motion to approve the report and recommendation could be withdrawn and the committee could vote on whether to approve the version of the report and recommendation that recommends no change.

Chair Abaray then called for a roll call vote on whether to recommend the creation of a role for a grand jury legal advisor, as indicated in the proposed amendment as follows:

> (B) Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons admitted to the practice of law in this State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.

The roll call vote was as follows:

> Abaray – yea
> Jacobson – yea
> Jordan – yea
> Kurfess – yea
> McColley – nay
> Mulvihill – yea
> Saphire – yea
> Skindell – yea

The motion passed, by a vote of seven in favor, one opposed, and two absent.

Chair Abaray then called for a roll call vote on whether to recommend that the accused have a right to the record of the grand jury testimony of any witness who is called to testify at trial, as indicated in the proposed amendment as follows:

> (C) A record of all grand jury proceedings shall be made, and the accused shall have a right to the record of the grand jury testimony of any witness who is called to testify at the trial of the accused; but provision may be made by law regulating the form of the record and the process of releasing any part of the record.

The roll call vote was as follows:

> Abaray – yea
> Jacobson – yea
> Jordan – yea
> Kurfess – yea
> McColley – nay
> Mulvihill – yea
> Saphire – yea
> Skindell – yea

The motion passed, by a vote of seven in favor, one opposed, and two absent.

Chair Abaray then called for a roll call vote on whether to recommend that the committee issue the full report and recommendation for change to the grand jury portion of Article I, Section 10.

The roll call vote was as follows:

Abaray – yea
Jacobson – yea
Jordan – yea
Kurfess – yea
McColley – nay
Mulvihill – yea
Saphire – yea
Skindell – yea

The motion passed, by a vote of seven in favor, one opposed, and two absent.

Chair Abaray announced that, because the report and recommendation was for a change, it would be subject to a second presentation and vote at the next meeting of the committee.

Presentations and Discussion:

"Civil Asset Forfeiture"
Robert Alt
The Buckeye Institute

Chair Abaray introduced Robert Alt, president and CEO of the Buckeye Institute, to present on the topic of civil forfeiture in connection with the committee's consideration of Article I, Section 12 (Transportation for Crime, Corruption of Blood, and Forfeiture of Estate).

Mr. Alt said the phrases "corruption of blood or forfeiture of estate" have their origin before the birth of the country, noting that in early England when a person was adjudged guilty he became a "taint," or dead in the eyes of the law. He said, as a result of being sentenced to death, all of the felon's property was forfeited to the government and additionally he suffered corruption of blood, meaning he could no longer inherit and no inheritance could pass through him.

Mr. Alt continued that Ohio and other states rejected the notion that the government could strip a person of all he owned for a crime that did not relate to his property, also rejecting the notion of corruption of blood. He said inherent in the prohibition against civil asset forfeiture is the concept of protection of rights of property. However, he said civil asset forfeiture allows law enforcement to take property without first obtaining a criminal conviction.

Mr. Alt said, ironically, what has grown to be a symbol of government abuse originated out of a deep respect for the law, noting the practice of civil forfeiture grew out of the exigencies of 18th century maritime law, which required asset forfeiture processes because the owners of

confiscated ships were unavailable, rather than because the government could not prove that a crime had been committed.

Describing recently-enacted House Bill 347, Mr. Alt said the legislation was a great step forward toward restoring property rights, but more could be done. He said the law raised the standard from preponderance of the evidence to clear and convincing evidence, made civil asset forfeiture an *in personam* action, and limited civil asset forfeiture to criminal proceeds in amounts greater than $15,000. However, he said, civil proceedings do not afford the same constitutional protections as a criminal trial.

Mr. Alt noted a concurring opinion by Justice Clarence Thomas in the recent United States Supreme Court case of *Leonard v. Texas*, 580 U.S. ____ (2017), in which Justice Thomas expressed concerns about whether civil asset forfeiture violated the Due Process Clause of the Fourteenth Amendment. He said the U.S. Supreme Court has justified the constitutionality of civil asset forfeiture based on the historical use of it at the time of the founding. He indicated Justice Thomas, an originalist, dug deeper into the historical use, and found that the court's approval of civil asset forfeiture may be misguided for at least two reasons: first, that the historical uses of forfeiture laws were much narrower than they are now, and were limited to cases where the owner was unavailable. Second, he said, Justice Thomas opined that forfeiture may be procedurally civil but it is criminal in nature and does not afford the same constitutional protections a criminal trial would provide.

Mr. Alt said civil asset forfeiture is not justified even by resort to the harsh English practices of forfeiture of estate. He noted corruption of blood and forfeiture of estate were only permitted after sentencing, which was when a taint had attached, adding it cannot be justified where a person is available by resorting to practices historically used when a person was unavailable.

Mr. Alt concluded that, while Section 12 does not prohibit civil asset forfeiture, a decent respect for principles of due process and property rights should prohibit it.

Mr. Alt having concluded his remarks, Chair Abaray invited questions. She asked whether Mr. Alt was recommending that Article I, Section 12 be revised to strengthen the prohibition.

Mr. Alt said courts have interpreted Section 12 in such a way as to protect innocent owners. He said the provision would not apply to asset forfeiture related to criminal conviction where the property is an instrumentality of the crime. As a matter of policy, he said he would argue asset forfeiture should be limited to the context of a criminal conviction.

Rep. McColley said he agrees with Mr. Alt's assessment, asking that the committee discuss the issue because both the Ohio and United States Constitutions have provisions respecting private property rights, particularly when someone is accused of a crime. He said under the old law a prosecutor could accuse someone of committing a crime but not level criminal charges. The prosecutor could then file a civil suit and use that civil suit to take the person's property. He said the person would not have criminal protections in that setting because it is a civil case. He added it is worth noting that when the Ohio Judicial Conference was asked to opine on the original bill which abolished civil forfeiture completely, they unanimously voted to strip it for many of these reasons.

Chair Abaray asked Rep. McColley whether he thinks the new law covers the concern about civil forfeiture, or whether the constitution should be changed. Rep. McColley said the new law addresses what to do about the unavailable defendant or if the property is unclaimed. He said, in that instance, the law provides ways to take cash if it is unclaimed. He said an *in personam* action is allowed when the amount of proceeds, which is property or cash, obtained through the commission or alleged commission of a crime, is in excess of $15,000. He said civil forfeiture is now prohibited in any amount in a case in which a defendant is present and willing to defend himself in court. He said there are still some instances in which the civil forfeiture process could continue as it has in the past, but it would have to be an *in personam* action.

Mr. Alt emphasized that, in a case where an amount less than $15,000 is sought as a forfeited asset, the new law does not prohibit the state from seizing and getting title, but the state must first get a criminal conviction.

Rep. McColley indicated seizure and forfeiture are different. He said seizure is the initial taking of property by law enforcement based on a belief it was involved in the commission of a crime. He continued that forfeiture is the judicial proceeding that follows, in which the state is seeking to take permanent title to the assets that were seized. He said H.B. 347 is not aimed at law enforcement, so the standard for seizure is still probable cause because quick decisions sometimes need to be made. Instead, what the law changes is that, in the case where law enforcement has the assets, they are brought under the temporary title of the state, allowing the state to slow down and allow due process in the judicial proceeding.

Chair Abaray asked whether the idea of amending the constitution came up during the legislative hearing process. Rep. McColley said it came up a few times in committee. He noted a U.S. Supreme Court case in which civil forfeiture was challenged and the Court held it is the prerogative of the state to decide what the laws are. Noting the *Leonard* case, *supra*, Rep. McColley said, although the case is a denial of a writ of certiorari, it indicates Justice Thomas has doubts about the current breadth of civil asset forfeiture, suggesting that the decision invites a challenge to civil asset forfeiture in the U.S. Supreme Court.

Committee member Dennis Mulvihill asked whether the committee would entertain an effort to amend the constitution.

Rep. McColley said he would like to see language developed that would say an individual's assets could not be forfeit absent a criminal conviction unless that individual is unavailable or the property is unclaimed. He said he thinks that would be worth discussing. He said the more he delved into this topic, the more he realized that "this smells wrong." He said the Fifth Amendment and private property rights are put in conflict because someone would have to give up Fifth Amendment rights in order to protect property rights.

Mr. Saphire commented that the individual also would be put in a position where the money subject to forfeiture is money he or she might have used in his or her defense.

Rep. McColley noted that a colleague represented an indigent criminal defendant in a case where money was seized. He said the accused got an acquittal but Ohio law allowed for criminal and

civil cases to be filed simultaneously. He said the colleague wanted to help the client get back the money, but the client could not afford to pay attorney fees to do so.

Mr. Saphire wondered if civil asset forfeiture could be used to coerce a plea. Rep. McColley said when civil and criminal actions are filed simultaneously the new law requires the civil case to be stayed pending the outcome of the criminal proceeding. He said, in one case the prosecutor filed criminal and civil charges, realized he did not have the facts necessary to pursue the criminal charges, and dropped them to proceed with the civil forfeiture.

Chair Abaray wondered whether a new section would be needed to deal with civil asset forfeiture, since Section 12 deals with forfeiture in relation to a criminal conviction.

Rep. McColley said his suggestion would be to make it an expansion of the existing provision. He said a revision would expressly state that the due process protections of criminal proceedings would take precedence. He said, under civil forfeiture, the state could only take proceeds, instrumentalities, and contraband, rather than the full estate.

Chair Abaray suggested that if there is particular language Rep. McColley would like to have the committee consider, he could present it at the next meeting.

Chair Abaray noted a request by Vice-chair Fischer that the discussion of a proposal to amend Article IV, Section 5(B) be postponed until the committee's next meeting. The committee agreed to wait to discuss that topic.

Adjournment:

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

Approval:

The minutes of the March 9, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the April 13, 2017 meeting of the committee.

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Janet Gilligan Abaray, Chair

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Justice 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 10

THE GRAND JURY

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

Recommendation

The committee recommends that Article I, Section 10 of the Ohio Constitution be amended to remove the reference to the grand jury, and that a new provision, Section 10b, be adopted as follows:

> *(A) Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.*
>
> *(B) Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons admitted to the practice of law in this State and shall not be a public employee. The term and compensation for independent counsel shall be as provided by law.*
>
> *(C) A record of all grand jury proceedings shall be made, and the accused shall have a right to the record of the grand jury testimony of any witness who is called*

> *to testify at the trial of the accused; but provision may be made by law regulating the form of the record and the process of releasing any part of the record.*

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.

On November 10, 2016, Mr. Murray again appeared before the committee, 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 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." He continued that grand juries take their oath seriously, and that 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.

He commented that 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.

Mr. Murray said the Ohio Prosecuting Attorneys Association is opposed to the concept of a grand jury legal advisor because that would add an unnecessary layer to the process. He said prosecutors are expected to provide instructions of law to the grand jury, providing evidence that proving the essential elements of the criminal violation. He said prosecutors must understand the rules of evidence, and how information may be impacted by those rules, and they have nothing to gain by submitting inadmissible evidence to a grand jury, or from withholding evidence that may prove or disprove allegations. 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 adds expense and bureaucracy.

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

On January 12, 2017, Mr. Murray was present in the audience to answer questions by committee members. Asked whether prosecutors should be required to provide transcripts of grand jury witness testimony, Mr. Murray indicated the state has adopted "open file discovery," in which prosecutors have to turn over everything they have, including statements outside the grand jury. He said his organization might be amenable to providing transcripts so long as the provision is drafted so as to protect witnesses who need protection.

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.

The committee also gave serious consideration to whether a constitutional provision is needed to grant the accused a right to a transcript of grand jury witness testimony. Some committee members expressed that denying the accused the opportunity to obtain the transcript of witness testimony might violate the right to confrontation, as well as due process rights. Believing the transcript issue touches on these fundamental rights, those committee members asserted constitutional language may be necessary to guarantee access to a transcript. While agreeing that access to a transcript is important, other committee members suggested the issue did not rise to the level of requiring a constitutional provision, instead asserting that the accused's interest in obtaining a transcript could be protected by statute.

Conclusion

Committee members expressed concern over the role of prosecutors in the grand jury process, recognizing that, under the current system, the prosecutor is the only attorney in the room, and has sole control over what the grand jury is told about the law. Some committee members were concerned that this arrangement creates the risk that grand jurors could be given inaccurate information, or that their questions will not be objectively answered. Based on these concerns, a majority of the committee favored the system used in Hawaii, by which a neutral grand jury legal

advisor is available to answer juror's questions. Thus, the committee recommends an amendment that would create the role of grand jury legal advisor. However, the committee would leave it to the legislature to address the details of appointment and funding of the legal advisor, as well as to specify issues such as the legal advisor's presence during the grand jury proceedings and immunity for official acts.

An additional concern of members was that, under current Criminal Rules 6 and 16, a criminal defendant does not have a right to a transcript of grand jury proceedings. In particular, members expressed support for the concept that criminal defendants should have access to transcripts of grand jury witness testimony in order to impeach witnesses in situations in which inconsistent testimony was provided during the grand jury proceedings. Although the committee felt that access to the grand jury record was an important principle to articulate, the committee felt that the details of how that access could be achieved was best addressed by statute or court rule, and so recommends that access would be afforded "as provided by law."

Date Issued

After formal consideration by the Judicial Branch and Administration of Justice Committee on March 9, 2017 and April 13, 2017, the committee voted to issue this report and recommendation on April 13, 2017.

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] As Bryan Garner has explained, the federal court system distinguishes between an indictment, an information, and a presentment:

> Any offense punishable by death, or for imprisonment for more than one year or by hard labor, must be prosecuted by indictment; any other offense may be prosecuted by either an indictment or an information. Fed. R. Crim. P. 7(a). An information may be filed without leave of court by a

> prosecutor, who need not obtain the approval of a grand jury. An indictment, by contrast, is issuable only by a grand jury.
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> Presentments are not used in American federal procedure; formerly, a presentment was 'the notice taken, or statement made, by a grand jury of any offense or unlawful state of affairs from their own knowledge or observation, without any bill of indictment laid before them." [citation omitted].

Bryan Garner, *A Dictionary of Modern Legal Usage*, 438 (2d ed. 1995).

A "presentment" is an informal accusation 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. Ballentine's Law Dictionary (3rd ed. 1969), available at LexisNexis.com (last visited Feb. 28, 2017).

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.

[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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January 10, 2017

Ms. Janet Gilligan Abaray
Burg Simpson Eldredge Hersh & Jardine
312 Walnut Street, Suite 2090
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Dear Chairwoman Abaray:

I write to comment upon a proposal recently submitted to the Ohio Constitutional Modernization Commission ("Commission") by Attorneys Mark D. Wagoner, Jr. and Richard S. Walinski. Though framed as a moderate adjustment to the state constitution, in practice the proposal would significantly alter the current distribution of judicial rulemaking powers between the Supreme Court of Ohio and the Ohio General Assembly. Furthermore, the proposal could substantially erode the coherency of the rules of practice and procedure which, as will be explained, was one of the principal objectives of the Modern Courts Amendment of 1968.

The proposal before the Commission would add at the end of Article IV, Section 5(B) ¶ 1, the following new sentence:

> 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 it is enacted into law as provided in Article II, Section 16.

The proponents state that the purpose of this new language is to clarify the distinction between substantive right and procedure. However, when this language is read within the entirety of the Article IV, Section 5(B) ¶ 1, the proposal could effectively shift procedural rulemaking authority from the Supreme Court of Ohio to the Ohio General Assembly. While the proposal ostensibly leaves intact the Supreme Court's rulemaking power, the addition of the new sentence would ultimately render that power superficial at best. Using the moniker of

"substantive right," the General Assembly could effect considerable and largely unreviewable changes to rules of practice and procedure.[1]

As an initial matter, it is important to place the proponents' underlying concern and proposed solution in a proper historical and constitutional context. First, Ohio initially considered changing the allocation of rulemaking power between the courts and the legislature well before the enactment of the federal Rules Enabling Act in 1934, which the proponents argue is the basis of the Modern Courts Amendment. But in 1914, a commission studying the Ohio judicial system unanimously recommended that authority over rules of process, practice and procedure be vested in the Ohio Supreme Court.[2] This recommendation followed on the heels of President William Howard Taft's similar proposition to Congress in 1910 that "the best method of improving judicial procedure at law is to empower the [U.S.] Supreme Court to do it through the medium of the rules of Court as in Equity."[3] Ohio's Modern Courts Amendment, rather than representing a dramatic shift in power to the judiciary, is actually the culmination of many years of thought and experience in state and federal courts.

Second, the proponents state that they seek to end the "false dichotomy" between procedure and substantive right "as the standard for deciding which branch of Ohio government has constitutionally allocated authority to legislate." They appear to argue that Ohio should adopt an allocation of responsibilities similar to that followed in practice by Congress and the federal courts. It is important to note, however, that this allocation of responsibilities between the Congress and the federal judiciary is not grounded in constitutional design but is framed by the specific language of the Rules Enabling Act and more broadly by Congress's general authority under U.S. Constitution, Article III to superintend the federal courts. All federal courts, other than the U.S. Supreme Court, are creations of statute.[4] Even the administration of the federal courts is a power delegated by Congress under statutes creating the U.S. Judicial Conference and the U.S. Administrative Office of the Courts.[5] Therefore, the division of labor between the U.S. Supreme Court and Congress on procedural and structural matters is, as the proponents rightly note, attributable to the fact that much of the federal judiciary's operations is dependent upon and coextensive with Congress's legislative authority.

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[1] Article IV, § 5(B) ¶ 1 currently reads, in pertinent part, as follows:

> (B) The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

[2] 106 Journal of the House of Representatives (Ohio) 1388, 1389 (1915) (to reduce delay and expense in the administration of justice, Supreme Court should have plenary authority to proscribe rules of practice and procedure).

[3] *See* 46 Cong. Rec. 17, 26 (1910).

[4] *See*, Andrew St. Laurent, Reconstituting *United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBLS. 61, 86 (1997) ("[T]he the lower federal courts are a creation of a Congress which presumably may burden, limit, or disband them as it sees fit.").

[5] 28 U.S.C. § 331 (2016); 28 U.S.C. §§ 601-629 (2016).

While it has long been recognized that the federal courts retained *limited* inherent power to oversee litigation,[6] history tells us that generally speaking the power to regulate practice and procedure rests firmly in the hands of Congress.[7] In other words, through the Rules Enabling Act Congress transferred a part of *its* legislative authority to the U.S. Supreme Court,[8] always retaining plenary constitutional power to qualify, alter or even reclaim a power it has delegated. Therefore, when the U.S. Supreme Court promulgates rules of practice and procedure pursuant to the Rules Enabling Act it is actually exercising Congress's authority through delegation.[9] Perhaps the reason the U.S. Supreme Court has not attempted to definitively mark the line between substantive rights and procedure in the federal context, as the proponents contend, is because: (1) any rules created under the Rules Enabling Act presumptively express Congress's intent; but (2) as creations of delegated legislative power Congress can at any time use its authority to undo the Court's otherwise presumptively correct choices regarding practice and procedure. Stated differently, if Congress does not reject a proposed federal rule of practice the courts merely assume that Congress agrees that the rule is a proper exercise of Congress's authority to regulate practice and procedure even if the rule has ancillary impact on substantive rights.[10] The point is that because the U.S. Supreme Court is exercising rulemaking power through the delegation of Congress's authority, there is simply less need to wrestle with the question of substantive right versus procedure.

On this point Ohio – as most other states[11] – differ remarkably from the federal model by constitutionally vesting rulemaking authority directly in the state judiciary. Again unlike the

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[6] *See* Bank of Nova Scotia v. United States, 487 U.S. 250, 254 (1988) (federal courts may not exercise inherent powers in a way that conflicts with constitutional or statutory provisions); Kovilic Const. Co., Inc. v. Missbrenner, 106 F.3d 768 (7th Cir. 1997) ("supersession" clause of the Rules Enabling Act suggests that exercises of inherent powers may not conflict with the national procedural rules).

[7] *Cf.*, Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987) ("Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in those courts.").

[8] *See* Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co. (2010) 559 U.S. 393, 422 (Congress decided to delegate the creation of rules to Court rather than to a political branch (Steven, J. concurring in part and concurring in judgment)).

[9] *See* Sibbach v. Wilson & Co., (1941) 312 U.S. 1 (Congress has power to regulate the practice and procedure of federal courts and may exercise that power by delegating to Supreme Court or other federal courts authority to make rules not inconsistent with statutes or Constitution).

[10] *See* Burlington Northern R. Co. v. Woods (1987) 480 U.S. 1, 5 ("The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. (Citations omitted)."

[11] *See e.g.*, Ala. Const. art. VI § 150; Alaska Const. art. IV, § 4.15; Ariz. Const. art VI, § 5.5; Ark. Const. amend. 80 § 3; Calif. Const. art. VI, § 5(d); Colo. Const, art. VI § 21; Del. Const. art. IV § 13; Fla. Const. art. V § 2; Ga. Const. art. VI § 9; Haw. Const. art. VI § 7; Ill. Const. art. VI; Ind. Const. art. VII §§ 4, 6; Ks. Const. art. III § 1; Ky. Const. § 116; La. Const. art. V § 5; Md. Const. art. IV, pt. 2 § 18; Mich. Const. art. VI § 5; Mo. Const. art. V § 5; Mt. Const. art. VII § 2(3); Neb. Const. art. V § 25; N.H. Const. pt. 1, art. 73-a; N.J Const. art. VI § II(3); N.C. Const. art. IV § 13(2); N.D. Const. art. VI § 3; Penn. Const. art. V § 10(c); S.C. Const. art. V § 4; S.D. Const. art. V § 12; Tex. Const. art. V § 31; Utah Const. art. VIII § 4; Vt. Const. ch. II § 37; Va. Const. art. V § 6; Wash. Const. art. IV §§ 24, 30; W.V. Const. art. VIII § 3. Even in the absence of an explicit constitutional grant of authority to promulgate rules of practice and procedure, some state supreme courts have relied on either inherent or explicit constitutional superintending authority to do so coincidental to their general supervisory power over inferior courts. *See e.g.*, Pankey v. City of Mobile (Ala. 1948) 35 So.2d 497; State v. Second Judicial Dist. Court ex rel. County of Washoe

federal judiciary, much of the structure, jurisdiction and authority of Ohio's courts is anchored firmly in the state constitution and is not dependent on the exercise of separate legislative authority. For example, the Ohio constitution requires a supreme court, courts of appeals, and courts of common pleas. And although the General Assembly has the power to establish other inferior courts, it cannot, as Congress might with respect to the lower federal courts, abolish the three constitutionally mandated court levels or alter jurisdiction that is firmly ensconced in the state constitution. The Ohio constitution also requires the actual placement of state courts. For example, a court of appeals must hold hearings in the counties that comprise the district[12]and a court of common pleas must exist in each county of the state.[13] The structure, jurisdiction and authority of state judiciaries is generally anchored in a state's constitution largely because state courts are our nation's general jurisdiction courts[14] (and not limited jurisdiction courts as are federal courts) charged with resolving all manner of dispute including most federal causes of action.[15] The general nature of state court jurisdiction is further evidenced by the fact that currently 37 state constitutions, including Ohio's, contain an "open court and right to redress" command, a command totally absent from the federal Constitution.

This constitutional grant of rulemaking power to state supreme courts should be understood in the general context of state constitutions, which are grounded in a different normative framework than is the federal constitution. States exercise the nation's general police powers,[16] which most state courts have held are plenary in nature and subject only to explicit constitutional limitation or direction.[17] No principle of enumeration frames and confines the exercise of state power as is the case with federal power. Absent a specific limitation in a state constitution or a federal constitutional limitation such as the guarantee of a republican form of government, states are relatively free to structure themselves and legislate as they need in order to promote public health, safety and welfare. This is precisely why most state constitutions are voluminous documents that outline in significant detail the distribution of state power across the three branches of government, the limitations on that power either through proscription or prescription, and the powers granted directly to the state courts.

Given the subtle but important differences regarding the role of federal and state courts, there is a high need to preserve state judicial authority over a wider range of issues affecting the

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(Nev. 2000) 311 P.3d 1209; Ammerman v. Hubbard Broadcasting, Inc. (N.M. 1976) 551 P.2d 1354; Squillace v. Kelley (Wyo. 1999), 990 P.2d 497.

[12] Art, IV, § 3(A).

[13] Art. IV, § 4(A).

[14] Plaquemines Tropical Fruit Co. v. Henderson (1898) 170 U.S. 511, 517 (noting that in defining and regulating jurisdiction of federal courts, Congress has taken care not to exclude the jurisdiction of the state courts from every case to which the judicial power of the United States extends).

[15] *See* Claflin v. Houseman (1876), 92 U.S.C. 130, 136 (there is a strong presumption that state courts share concurrent jurisdiction over federal matters with the federal courts).

[16] *See* U.S. v. Morrison, 529 U.S. 598, 618 (2000) (Founders denied national government of generalized police powers leaving such general powers in the states). *See also,* U.S. v. Lopez, 514 U.S. 549, 584, 585 (Thomas, J., concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power[.]").

[17] *See* Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce (2010), 127 Ohio St.3d 511 (General Assembly has plenary authority to enact legislation limited only by the state and federal constitutions).

judicial branch[18] if only to ensure access to a judicial forum for the peaceful resolution of virtually any dispute. To understand state court rulemaking through the prism of federal court rulemaking is to improperly conflate America's dual constitutional system (and by extension its dual court system) into a single system of understandings. State courts are not mirror images of federal courts[19] for they can have vastly different and more expansive responsibilities. Ohio need not follow federal court practices simply because some may think those practices are simpler, less burdensome, or represent a better division of labor between the branches of government. That the people of Ohio have decided on a different distribution of governing power does not make that distribution improper or invalid. Indeed, as noted, the vast majority of states concur in Ohio's constitutional model by vesting their state supreme courts with limited legislative powers in reference to the promulgation of rules of practice and procedure.[20] It is the odd state that does not. The practices of the federal government in this regard need not be the only model for the distribution of governing power given the vastly different functions of state constitutions and state courts.

At a more practical level it is important to note that the rules of practice and procedure are a finely tuned system designed to govern practices in all courts in Ohio. Whether we examine the Rule of Civil Procedure, the Rules of Criminal Procedure, the Rules of Appellate Procedure, the Rules of Evidence or the Rules of Juvenile Procedure, the rules governing each area balance multiple considerations and subjects, the utmost of which is the need for efficient and effective judicial processes that safeguard the rights of all citizens. For example, the rules are designed to prevent parties from engaging in piecemeal litigation absent compelling circumstances. Thus, under the Rules of Civil Procedure an order granting summary judgment on one issue in a case is not subject to piecemeal review by an appellate court unless the trial court has expressly determined that "there is no just reason for delay." *See*, R. Civ. Proc. 54(B). An entire body of case law has built over the years to guide both trial and appellate judges as well as litigants regarding the circumstances under which such determination should be made and the consequences of that determination. These cases often inform the Rules of Appellate Procedure. Receipt of the power suggested by the proponents would allow the General Assembly to pick and choose which causes of action would be subject to immediate appeal and which would not. Coherency across the rules would be lost.

Accordingly, the rules of practice and procedure do not represent standalone systems of procedure but rather overlapping systems of procedure designed to ensure orderly litigation across the state. This is precisely the objective of Article IV, Section 5(B) as currently constructed. Prior to the adoption of the Modern Courts Amendment, practice and procedure in Ohio's courts was governed by the Ohio Practice Code, a compilation of statutory enactments.[21] But as noted at the time the Modern Courts Amendment was proposed, "While the Ohio Practice

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[18] Parenthetically, even the U.S. Constitution recognizes the role of state courts in resolving a wide range of issues and being a forum for resolving federal questions. *See* ASARCO Inc. v. Kadish (1989), 490 U.S. 605, 617 (Constitution does not required Congress to create inferior federal courts; Supremacy Clause requires state judges to be bound by federal law when applicable).

[19] *Cf.*, Eugene Kontorovich, *Three International Courts and their Constitutional Problems*, 99 CORNELL L. REV. 1353, 1376 (2014) (state court jurisdiction was preserved by the U.S. Constitution, it was not granted by it).

[20] *See* note 10.

[21] William W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 Ohio St. L.J. 811 (1968).

Code has served the state long and well, it has become overly complicated and disorganized."[22] Through multiple standalone legislative enactments, the General Assembly constructed a practice code that over time became less coherent, integrated, and organized. Altering a particular practice one year without regard to the long-term impact on other areas of the code eventually produced a code that was more attentive to special considerations than general coherency. This is evidenced by staff notes published during consideration of the Modern Courts Amendment. Those notes reveal concern with the legislative approach to constructing rules of practice and procedure. The staff notes included a list of "pros" and "cons" with vesting rulemaking power in the Supreme Court. The "pros" associated with the Modern Courts Amendment included:

- "The method makes use of expert knowledge, results in interpretation of rules by those who make them, provides a more flexible procedure because of the speed of amendment, insures a continuing effective procedure, and emphasizes the subsidiary nature of procedure to substantive law.
- The legislature is subject to the influence of pressures other than those who seek the efficient administration of justice and who are not responsible for judicial efficiency in the public eye."[23]

As is apparent from the staff notes, a major objective to the Modern Courts Amendment was to reduce the impact of special influences on practice and procedure thereby establishing a more predictable and coherent system of rules designed to promote general judicial effectiveness and efficiency.

But the staff notes also listed as "cons" the courts' inability to respond readily to the public's point of view, the courts' reluctance to exercise powers expressly granted, and the courts' inability to use fact-finding techniques, such as public hearings.[24] To address these concerns, the Supreme Court adopted and utilizes today an open process that engages in extensive deliberation. The Ohio Supreme Court's Commission on the Rules of Practice and Procedure, the body responsible for proposing changes to the rules, is comprised of eminent judges, magistrates, attorneys, scholars and other experts including those who regularly use or administer the courts. For example, the Superintendent of the Ohio Highway Patrol as well as a representative from the Department of Public Safety serve as *ex officio* members.

Proposed amendments to the Rules of Practice and Procedure once approved by the Court are filed annually with the General Assembly on or before January 15th. Further opportunities then follow for additional public comment and amendments to the proposed rule may be made up until May 1st in light of additional comments. The General Assembly retains the ability to reject the proposed changes by filing a concurrent resolution of disapproval. If no such concurrent resolution is filed or a filed resolution does not receive the threshold number of votes in each chamber, the changes to rules of practice and procedure become effective July 1st of that year.

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[22] *Id.* at 829.
[23] Staff Research Report No. 75, Problems of Judicial Administration 57, Ohio Legislative Ser. Comm'n (Feb. 1965)
[24] *Id.*

The proposal before the Commission would transfer the bulk of procedural rulemaking authority away from the Supreme Court and to the General Assembly and could undermine the primary objective of the Modern Courts Amendment: to establish a predictable and coherent system of rules. Article IV, Section 5(B) retention of the Supreme Court's rulemaking power does not alter the practical effect of the proposal. While the proposed amendment is framed as merely installing the Supreme Court's legal precedent, the proposed language could actually remove the Supreme Court's judgment from rulemaking altogether. As observed, the simple moniker of "substantive right" on a legislative act effectively forecloses any judicial review. While parsing the difference between "substantive" and "procedural" can prove difficult, the courts are regularly tasked with interpreting statutory language and have dealt with this particular issue since the Modern Courts Amendment was adopted in 1968.[25]

Finally, it is not entirely clear what problem this proposal is attempting to solve. The proponents note in their memorandum in support that the Supreme Court has on no less than 37 occasions sought to bring clarity to the distinction between substantive right and procedure. Even conceding this point, that means the Supreme Court has addressed this issue 37 times in 48 years. (To put this in context, the Ohio judiciary, on average, handles approximately 3.3 million cases per year.) In other words, while the distinction has been a matter that occasionally needs clarification, any confusion over the distinction has not been so great as to cause a collapse in general understand of the rules of practice and procedure nor a source of heighten and continuing conflict between the two branches of government. The very function of the judiciary is to interpret the law in light of the facts and circumstance presented in a case. This can at times produce divergent views on a matter given the facts under review. But interpreting and applying the law is also a daily activity for judges throughout Ohio in large cases as well as small cases. To propose that the current constitutional system be overturned because 37 times in the last 48 years the Supreme Court has been required to clarify the difference between substantive right and procedure seems unnecessary.

Rather than clarifying the allocation of responsibilities, the proposal, in effect, fuses the concepts of "substantive right" and "procedure" into a single concept. There is effectively no distinction between the two if by simply declaring the existence of a substantive right the General Assembly can rewrite rules of practice and procedure even as to matters that are unequivocally procedural in nature. Practice in Ohio's courts will not be governed by a deliberative process resulting in a coherent set of rules but rather, over time, by the "influence of pressures other than those which seek the efficient administration of justice[.]" The proposal before the Commission would return Ohio to the pre-1968 era where by a simple declaration and without any benefit of a check, the General Assembly could rewrite rules of practice and procedure at its discretion. This is not a step forward but rather a step back to a time when rules governing the processes of courts became "overly complicated and disorganized." The proposal represents a significant erosion in the ability of the Supreme Court to address multiple

[25] Those proposing this amendment contend that *Lovejoy* represented a decisive change in the law, creating an era where the legislature can freely legislate procedure. But the Supreme Court had previously ruled that the General Assembly may create a substantive right through a statute that appears procedural in nature. *See City of Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 150, 459 N.E.2d 532 (1984). The key question before the Court has never been *when* the statute was passed, but rather *what* the statute says.

overlapping considerations in practice and procedure in order to ensure that orderly, coherent and fair procedures are followed in all courts of Ohio.

The General Assembly is certainly the proper entity to address substantive rights within the bounds of our state and federal constitutions. However, the task of establishing practice is, as it was when the Modern Court's Amendment was adopted, best left to the courts if the goal is to maintain a cohesive, reasonable and generally applicable system of rules. For that reason, I would urge that this committee approach with great caution the proposed amendment to Article IV, Section 5(B) of the Ohio Constitution.

Respectfully,

Michael L. Buenger
Administrative Director

cc: Richard Walinski, Esq.
Mark Wagoner, Esq.
Steven Hollon, Esq.

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).

Judicial Branch and Administration of Justice Committee

Planning Worksheet
(Through March 2017 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
Completed	**3.9.17**	**N/A**	**3.9.17**				

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
Completed	**3.9.17**						

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

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14