OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Judicial Branch and Administration of Justice Committee

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

May 11, 2017

Ohio Statehouse
Room 018

OCMC Judicial Branch and Administration of Justice Committee

Chair	Ms. Janet Abaray
Vice-chair	Justice Patrick Fischer
	Rep. Glenn Holmes
	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, MAY 11, 2017
10:00 A.M.
OHIO STATEHOUSE ROOM 018

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting of April 13, 2017

  [Draft Minutes – attached]

IV. Reports and Recommendations

- Article I, Section 10 (The Grand Jury)
  - **Possible Action Item: Consideration and Adoption**

[Report and Recommendation – attached]

V. Committee Discussion

- Civil Asset Forfeiture

  The committee chair will lead a discussion of a possible new constitutional section that would address civil asset forfeiture.

VI. Next Steps

- Planning Worksheet

The committee chair will lead discussion regarding the committee's informal recommendations for the sections remaining for review.

[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, APRIL 13, 2017

Call to Order:

Chair Janet Abaray called the meeting of the Judicial Branch and Administration of Justice Committee to order at 9:44 a.m.

Members Present:

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

Approval of Minutes:

The minutes of the March 9, 2017 meeting of the committee were approved.

Reports and Recommendations:

Article I, Section 10 (The Grand Jury)

Chair Abaray provided a second presentation of a report and recommendation for change to the grand jury portion of Article I, Section 10.

She said the report describes the committee's recommendation 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. She said the report proposes new language that would require the presence of an independent legal counsel in the grand jury room who would be available to advise the members of the grand jury regarding matters brought before it. She said the report also sets out a proposed requirement that a record of all grand jury proceedings be made, and provides the criminally accused the right to a transcript of the grand jury testimony of any witness who is called to testify at the trial of the accused.

Chair Abaray continued that the report sets out the current provision, describes its history, discusses its review by the 1970s Ohio Constitutional Revision Commission, outlines relevant litigation, and lists the many presentations the committee received on the history, purpose, and operation of the grand jury system.

She said the report also encapsulates the committee's discussions about the grand jury process, and summarizes committee members' different views. She said the report proposes to lift the grand jury provision out of Section 10, and place it in its own section in order to improve clarity and make it easier in the future to amend either existing Section 10 or new Section 10b.

Chair Abaray described that, at the committee's March meeting, members of the committee had voted to proceed with the recommendation as set out in the report by a seven-to-one margin. She briefly described the history of the committee's review of the issue, noting a letter from Supreme Court of Ohio Chief Justice Maureen O'Connor recommending that the Commission take up the question, as well as correspondence and early testimony by Senator Sandra Williams, who, in 2015, participated in Governor John Kasich's Ohio Task Force on Community and Police Relations, a group that made recommendations for change to the grand jury process.

Chair Abaray also outlined the presentations the committee heard regarding the grand jury process, including from several county prosecutors, professors, and the public defender. She noted presentations by Professor Thaddeus Hoffmeister of the University of Dayton and Hawaii attorney Ken Shimozono who both spoke about the grand jury legal advisor system in Hawaii.

Chair Abaray having concluded the second presentation of the report and recommendation, she asked whether there was a motion to proceed separately on the two proposed changes to the grand jury procedure. Committee member Jeff Jacobson so moved, with committee member Richard Saphire seconding the motion.

Chair Abaray then recognized Franklin County Common Pleas Judge Stephen L. McIntosh, who was present to provide his perspective on the grand jury system and the proposed changes.

Judge McIntosh explained that he had led the Supreme Court of Ohio's Grand Jury Task Force, a body appointed by Chief Justice Maureen O'Connor in 2016 to examine the grand jury system and make recommendations with a goal of increasing public confidence in the grand jury process.

Judge McIntosh continued that some of the recommendations of the task force included instructing the public about what a grand jury does, as well as emphasizing the independence of the grand jury. He said the task force discussed making sure the judge, rather than the prosecutor, instructs the jury, and that the instructions be written. One recommended change already made is in the sample instructions, indicating that anytime grand jurors have questions they can ask the prosecutor and the court. He said the task force wanted grand jurors to feel comfortable asking questions to the court and the court would respond to those questions.

He said two areas the group focused on were grand jury secrecy, and who is responsible for prosecuting cases involving law enforcement use-of-force.

He said the task force discussed the independent counsel concept, but the discussions were different in that the focus was on giving the independent counsel more responsibility than the committee is proposing, with the result that a recommendation was not adopted. He said the task force also discussed allowing grand jurors to ask questions of witnesses with the prosecutor out of the room, but then had concerns that this might invite improper questions, such as the race of the defendant, the race of the victim, or the criminal record of the defendant. He said for that reason they ultimately decided not to make that recommendation.

As to grand jury secrecy, Judge McIntosh described the conclusion of the task force that, in certain situations, the transcript should be made available to the defendant. He said the group concluded that the grand jury transcript should be made available only in situations where there is already public knowledge of the incident, such as where there is a police-involved shooting, or a public official is being charged. He said the reason for that conclusion is that, in all police-involved shootings, the media reports the incident and the public already knows who the officers are. He added it is the same situation when public officials are investigated. He said those are the cases in which, when the grand jury comes back with a no-bill, the public wants to know the details. He said those are the two situations in which they thought the disclosure of the proceedings in the grand jury would be most appropriate.

Regarding who would be handling the prosecution of the case, he said the task force would give exclusive jurisdiction to the attorney general's office. He said the reason is that it would enhance public confidence in the grand jury process for those high profile cases. He said they discussed getting a prosecutor from a contiguous county, but then were concerned the public would see this as picking a friendly party. He said they also discussed having a pool of prosecutors, perhaps retired prosecutors, who could be tapped, but decided not to go in that direction because it could take weeks to select someone to conduct an investigation, so the task force ultimately decided that plan is not workable. He said they met with members of the attorney general's office to discuss these ideas, and their conclusions were the same as the task force's. He said the attorney general's office already is involved with a percentage of the police shooting cases, so the task force had confidence in the attorney general's ability to do so.

He said the task force thought in terms of public confidence, allowing the attorney general's office and the Bureau of Criminal Investigations to do the investigation. They thought that would be appropriate instead of having local law enforcement be involved in the investigative aspect in those special cases.

Committee member Dennis Mulvihill asked if Judge McIntosh has statistics regarding how many of the 35 law enforcement use-of-force fatality cases in 2015 were investigated by the attorney general's office as opposed to local prosecutors. Judge McIntosh said he is not sure, noting that, out of the 35, only five or six were an issue as it related to the officer's conduct. Mr. Mulvihill followed up, noting a conversation he had with the attorney general related to how often the attorney general's office has gotten an indictment when it is involved in these types of cases. Mr. Mulvihill said the attorney general's office was unable to answer his question, and wondered if Judge McIntosh was aware of any statistics regarding how often the attorney general obtains an indictment in such cases. He said he questions how independent the attorney general's investigation is if cases are sent to that office but no indictment is ever obtained, but he noted

that it is difficult to analyze that question because each case is different. Judge McIntosh said that information about the actual number of cases and the number of indictments did not come to the task force, but rather they simply considered the question of how to increase public confidence in the process, and whether there would be greater public confidence if a case were removed from the local prosecutor.

Mr. Mulvihill asked, in the task force proposal, whether attorney general investigations would be brought to a grand jury in the local county or in Columbus. Judge McIntosh said the grand jury would be local.

In relation to the concept of a grand jury legal advisor, Mr. Saphire asked what responsibilities the task force considered assigning to an independent counsel in the grand jury room. Judge McIntosh said the task force considered having that person be permitted to ask questions as well as answer them, but they never got to the point where they considered whether they would adopt the process if the person had less responsibility. He said the task force was concerned about whether that recommendation would result in the grand jury proceeding essentially being a mini-trial. He added that his own concern about the grand jury legal advisor is the financial aspect. He said, in Franklin County, there is a grand jury five days a week. He said he found the recommendation interesting, but noted that the independent counsel would have to be present all the time to allow the advisor to get the context of any questions that are asked.

Chair Abaray asked whether the task force recommended any changes to the Ohio Constitution. Judge McIntosh said the task force only looked at rule and statutory changes.

Chair Abaray also asked whether there is a current requirement that a grand jury witness transcript be made. Judge McIntosh said that is not currently a requirement. He said there is a requirement that a record be kept, and the proceedings are recorded but not transcribed unless there is a particularized need. Chair Abaray asked whether that practice is different in each county. Judge McIntosh said some counties may still have stenography, but in his court they record.

Chair Abaray noted that currently there is no constitutional right for the accused to get a transcript of the grand jury witness testimony. She asked whether that transcript even necessarily exists if the prosecutor has not requested it. Judge McIntosh said there is a record but not a transcript. He said, in looking at the committee's recommendation regarding the transcript, it is his understanding that if a witness is called at trial, then a transcript must be made available for the defense to use. He said, if that is what the recommendation means, then prior to trial the prosecution must allow the defense to have the transcript of the grand jury testimony of all witnesses the prosecution anticipates will testify at trial.

Clarifying, Chair Abaray asked whether, currently, if the testimony is not transcribed it does not get turned over in discovery. Judge McIntosh said that is correct.

Representative Glenn Holmes asked whether the task force did not move forward with the grand jury legal advisor idea because the role as they perceived it was too extensive. Judge McIntosh said the discussion was about having another person in the room other than the prosecutor. He

said that person's responsibility would be to answer questions as well as to ask questions, so the task force was concerned about the process turning into a mini-trial.

Committee member Charles Kurfess asked about whether a prosecutor also should be required to advise the grand jury other offenses that might be related to the factual pattern. Judge McIntosh said currently grand jurors should be presented with all potential charges that could be filed. He said that is supposed to be done as part of the instructions and it is his understanding that that type of instruction is given in Franklin County.

There being no further questions for Judge McIntosh, Chair Abaray thanked him for his testimony.

Chair Abaray then recognized Paul Dobson, Wood County prosecutor and president of the Ohio Prosecuting Attorneys Association.

Responding to Mr. Kurfess's previous question, Mr. Dobson said it is important for prosecutors to be cautious in suggesting potential charges because they could be accused of overcharging. He said potential charges should be those that prosecutors reasonably believe are appropriate.

Regarding the constitutional changes proposed in the report and recommendation, Mr. Dobson said, in addition to the prosecutors, members of the law enforcement community also are concerned about the proposed changes. He said the worry is that police officers as witnesses are affected by this recommendation.

Mr. Dobson continued that Hawaii is the only state to have a grand jury legal advisor role, and has had it since 1974. He said in 43 years no other state has adopted this practice. He said states have a variety of ways to commence a case. He said in Hawaii a prosecutor can proceed by presentment to grand jury or by preliminary hearing to a judge.

He added that, in Hawaii, there is no political process for the election of judges, rather they are appointed. He added that the population of Hawaii is little bigger than the population of Cincinnati. He said the chief of the Hawaii Supreme Court is the administrative judge for all judges down the line. He noted other differences, including that Hawaii has a longer period of time in which to bring a case to trial. He said this impacts the grand jury legal advisor concept because in Wood County and smaller counties there is only a grand jury twice a month.

He said while there is obvious concern about the power of government, a process that has been tested in only one state where the system is different than Ohio is not something that should be placed in the constitution.

He said his organization also opposes the proposal because the grand jury legal advisor would have to be a full-time person, but that person would have to be a government employee. Mr. Dobson said the proposal transforms the grand jury from its real job into a mini-trial.

Chair Abaray commented regarding Mr. Dobson's point about judges being appointed in Hawaii. She said the committee has looked at how judges are selected in Ohio, but did not reach a consensus on a new proposal. However, she said the committee's consensus is that the judiciary

is independent; and that, in Ohio, judges are not tainted by politics regardless of the fact they are elected. Mr. Jacobson added that judges are not free from politics merely because they may be appointed.

Representative Robert McColley said he agrees with Mr. Dobson's points, expressing that the grand jury legal advisor concept would be unworkable in Ohio. He said in some counties there are not enough attorneys to tap for the role. Rep. McColley asked whether Mr. Dobson would oppose a statutory change that would simply say the grand jury witness transcripts can be made available only for impeachment purposes.

Mr. Dobson said that specific issue has not been addressed by his association, but as a county prosecutor he does not see a problem with it. He said former Crim.R. 16(B)(1)(g) required that, if the witness testified at trial, the court would order an in camera inspection of that person's grand jury testimony to see if it was substantially different. If it was, the court would allow the defense attorney to cross examine the witness regarding the inconsistency. He said the current standard is an almost unworkable standard for a defense attorney to meet because the defense attorney has to show a particularized need for the testimony.

Mr. Mulvihill said, as a civil attorney, it is inconceivable to him that the prior testimony is not available to the defense attorney for impeachment purposes when in a criminal setting the defendant is at risk of losing life or liberty. He said if the grand jury witness testimony is completely consistent with the witness's trial testimony, the secrecy component is lost because the witness has already revealed everything. He added, if there is no more secrecy interest because the witness is testifying to the same issues at trial, it suggests the transcripts ought to be given to the defense.

Mr. Dobson answered one reason behind the secrecy is the person who testifies in trial will not necessarily have testified as to all the facts comprising their testimony in front of the grand jury, because the grand jury is a separate investigative body. The grand jurors' questions may subsequently be determined to have resulted in answers that are not admissible at trial.

Mr. Mulvihill noted that the judge could deal with that issue at trial, and that, in the civil context, there are questions that are asked in depositions that result in evidence that cannot be admitted at trial and the judge addresses that. Mr. Dobson continued that is why a rule similar to Crim.R. 16(B)(1)(g) is a better option as opposed to simply handing all the transcripts to the defense. Mr. Dobson said if witnesses know all of their statements will be handed over to the defense it would have a chilling effect on their testimony.

Mr. Mulvihill followed up, asking what rule Mr. Dobson would suggest. Mr. Dobson said that, similarly to Crim.R. 16(B)(1)(g), the court would analyze the witness's statement and would determine whether there was an inconsistent statement. Mr. Mulvihill wondered if that would occur in camera with the lawyers present. He said he worries about the workability of that method, and whether the judge would have to take a break after each witness to review what that witness had said during the grand jury proceeding.

Chair Abaray said another problem is that both defense counsel and the judge may be unaware that a statement is inconsistent because only the prosecutor knows all of the evidence that was

presented to the grand jury. She said that is why it is vital to allow defense counsel to see what the actual testimony was because the judge will not know all the facts of the case. Mr. Dobson disagreed, saying the judge will know. Chair Abaray said the judge will not get to see all the testimony.

Mr. Jacobson commented that he was not aware that Hawaii had two procedures to obtain a charge, but he thinks that fact actually supports the point of having an independent legal advisor. He said the preliminary hearing process in Hawaii involves a judge. He said the point of having an independent advisor is much the same thing in that it provides an alternative to taking the prosecutor's word for what the law is. In addition, he said, states are laboratories of democracy and often do independent things without any other experience, but the fact one state has done this for 43 years is important when the committee has not heard the practice is not working in Hawaii. He said no major problem has been found through any of the committee's research. He said, from that perspective he draws a different conclusion than Mr. Dobson.

Rep. Holmes commented that he was a grand jury foreman for a while, and thought he had a good relationship with everyone involved in the process. He wondered if Mr. Dobson feels that he shares a good relationship with the grand jury. Mr. Dobson answered affirmatively, saying he and his staff share an excellent relationship with the grand jury.

Chair Abaray noted there is no reason to assume the grand jury legal advisor would have to be from the same county. She said details of their compensation and other practical considerations could be addressed by the General Assembly.

Mr. Mulvihill asked Mr. Dobson whether he recommends a specific charge to the grand jury. Mr. Dobson said the prosecutor has to identify potential charges to the jurors, and he recommends what the indictment should be.

Mr. Kurfess asked whether there is any reason a preliminary hearing could not provide Ohio's system of justice with everything a grand jury does. Mr. Dobson said a preliminary hearing would not provide the same thing. He said a preliminary hearing reduces the number of indictments because victims and other witnesses will not testify in an open proceeding. He said he does not know what the preliminary hearing system in Hawaii looks like, but that, in Ohio, secrecy and citizen input in the grand jury are important to the process.

There being no further questions, Chair Abaray suggested the committee proceed with the vote.

Senator Mike Skindell suggested the proposed new language exclude the requirement that the grand jury legal advisor not be a public employee, as well as remove the statement that the term and compensation of the grand jury legal advisor be provided by law. He explained that it is inherent that the legislature will spell out the terms and compensation of the grand jury advisor so that does not need to be stated. He said the goal is to keep the constitution simple and leave out unnecessary wording. He added he thinks it should be left to the legislature to determine whether the advisor is to be a public employee. He said the legislature may allow in some instances for multiple counties to go together and have a contracted person but in a larger county may want to have someone who is a public employee.

Mr. Jacobson moved to amend by striking everything in paragraph (B) after the word "state." Sen. Skindell seconded the motion.

Mr. Saphire said he had practical concerns regarding small counties, but said that the change suggested by Sen. Skindell regarding allowing the legislature to determine whether the advisor would be a public employee resolved that issue. However, he said he would like to retain the proposal directing that the legislature address terms and compensation. Mr. Jacobson disagreed, saying in other contexts the legislature has the inherent authority to address terms and compensation for other offices and positions throughout the state.

Chair Abaray then called for a vote on the pending motion, which was to edit the proposed amendment to remove the requirements that the grand jury legal advisor not be a public employee and the direction that the General Assembly set the terms and compensation for the advisor. The motion passed by voice vote.

Mr. Jacobson noted that the committee's recommendation would be both with regard to existing Section 10, in that it would lift out the grand jury portions of that section; and with regard to creating a new section, Section 10b, that would incorporate the grand jury portions of Section 10 and add the two new recommendations regarding the grand jury legal advisor and the requirement of a transcript.

Chair Abaray called for a vote. Mr. Jacobson moved to approve the adoption of the proposal for Sections 10 and 10b. Mr. Mulvihill asked whether the proposal was for a single vote or for two separate votes. Mr. Jacobson said if someone wants to vote separately on the sections they can ask for a division of the vote. Mr. Mulvihill said because that was how it was voted on last time, he would like to request consistency in the division. Mr. Mulvihill then seconded the motion. Chair Abaray then asked for discussion.

Justice Fischer said he objects to the two proposed changes to the constitution because they would fundamentally change the Ohio criminal legal system. He said some changes recommended in the Supreme Court's Grand Jury Task Force Report would make similar improvements, but because they would not be constitutionalized they could be easily changed. He said the changes in the committee's report and recommendation turn a nonadversarial process into an adversarial process, which would not be good for many reasons, especially for the grand jurors who will wonder who to look to for advice – the judge instructing them, the prosecutor meeting with them, or the independent legal advisor. He said all of the questions or concerns can be taken care of by the judge, who is independent from the prosecutor.

Justice Fischer continued that he believes the recommendations would undermine and significantly change the reason to have grand juries, which is for investigative purposes, and especially for secrecy. He said the transcript requirement would negatively impact testimony in child, rape, and sexual assault cases, as well as public corruption cases. He said there would be less cooperation from independent witnesses because their testimony is more easily publicized. He added if the recommended changes are made by statute and rule, they can be altered, but if they are in the constitution it will be hard to get them out. He said he will vote against the report and recommendation, not just because of day-to-day implementation problems but because there are bigger issues involved.

Mr. Saphire said if he were persuaded that the addition of grand jury legal advisor would fundamentally transform the nature of the grand jury process to make it an adversarial one he would vote against it, but he does not think it has happened that way in Hawaii. He said the advisor is there to answer questions, and he does not see how that makes it more adversarial than it otherwise would be. He added, with respect to the transcript proposal, there is a need to balance the chilling effect that provision would have on testimony with the right of the defendant who is facing the full weight of the state's authority and needs to have due process of law.

Mr. Kurfess suggested that the committee hear from judges on the matter. He said the committee should hear from a representative of the Ohio Judicial Conference before making a decision. He said, to the extent there are problems with the grand jury, it is because judges have paid little or no attention to the function of the grand jury.

Justice Fischer asked why the common pleas judge could not answer the questions from the jury, instead of having a grand jury legal advisor. Mr. Saphire wondered if questions are frequent whether that would be disruptive of the process. Mr. Jacobson added that the judge does not sit in the room; it is what happens when the judge is not in the room that may trigger the need for someone to be present. He said a prosecutor is less likely to come in and say more than they should if there is someone else there with a law degree whose job it is to at least advise.

Mr. Mulvihill said the discussion informs him the committee is not ready to vote. Chair Abaray and Mr. Jacobson disagreed, saying they are ready to vote.

Rep. McColley moved to table, and Justice Fischer seconded the motion. Rep. McColley said there is no discussion on a motion to table.

Mr. Saphire said one reason to table is so he can have in front of him the proposal they are voting on.

Mr. Mulvihill asked what the motion to table means, wondering if it means the committee will talk about the issue at the next meeting. Mr. Jacobson said there are two different things – taking it off the table in the General Assembly means a motion to postpone indefinitely. He said it is different than saying a motion to postpone until a time certain, such as next meeting.

Rep. McColley clarified that his motion is to table the discussion until the next meeting. Mr. Jacobson said that is a debatable motion. He said he does not think the committee will get enough additional information to be valuable and urged the committee to vote no on the motion to postpone.

Sen. Skindell asked regarding how to start the process of getting a judicial conference review. Justice Fischer said there are various committees in the conference and this issue would go to a particular committee, probably the committee dealing with criminal procedure. He suggested providing the proposed language to the conference.

Chair Abaray said the committee was asked to look at this issue by Chief Justice O'Connor and has had public discussions of the topic for two years. She said the Supreme Court has been well

aware of the debate. She then called the question as to whether to postpone. The motion passed by voice vote with three opposed.

Discussion:

Chair Abaray then drew the committee's attention to a proposal by Attorney Richard Walinski and committee member Mark Wagoner to amend Article IV, Section 5(B), which was brought to the committee in November 2016. She said the proposal was to change the rulemaking authority of the Supreme Court. She said the Court has provided a letter opposing the proposal, which has been distributed to the committee. She noted that Justice Fischer has expressed opposition to the proposal. She said that Mr. Wagoner indicated to her that he and Mr. Walinski would like to withdraw the proposal. She said unless someone on the committee wants to advocate for that proposal, she would like to suggest the committee vote to close that issue. Mr. Mulvihill moved to close the issue, with Justice Fischer seconding the motion. By voice vote, the committee unanimously voted to close the issue.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:18 a.m.

Approval:

The minutes of the April 13, 2017 meeting of the Judicial Branch and Administration of Justice Committee were approved at the May 11, 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.

The committee further recommends that the reference to the grand jury in Section 10 be placed in a new provision, Section 10b.

Finally, the committee recommends that the new Section 10b include provision for a grand jury legal advisor and the creation of a right of the accused to a transcript of grand jury witness testimony under certain circumstances.

The new Section 10b would be divided into three separate parts that would consist of subdivision (A) expressing the original language regarding the grand jury from Section 10, subdivision (B)creating and describing the role of the grand jury legal advisor, and subdivision (C) relating to the requirement of a transcript.

The committee proposes that the new Section 10b would state 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.

(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, April 13, 2017, and May 11, 2017, the committee voted to issue this report and recommendation on May 11, 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.
>
> ***
>
> 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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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MEMORANDUM

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

FROM: Shari O'Neill, Interim Executive Director and Counsel

DATE: April 13, 2017

RE: Civil Asset Forfeiture

Representative McColley has suggested the following in relation to the topic of civil asset forfeiture:

Article 1 Section 12 would be maintained as is.

Add another section to Article I that would state:

> *No person shall have their property forfeited to the state on the basis or allegation of a crime without a criminal conviction, unless a conviction against the person is unattainable by reason of death or inability to bring the person within jurisdiction of the court.*

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Judicial Branch and Administration of Justice Committee

Planning Worksheet
(Through April 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**	**4.13.17**	**4.13.17**	**N/A**	**4.13.17**

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**	**4.13.17**					

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
Completed							

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
Completed	**3.9.17**						

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

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

Article IV - Judicial

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

June 8

July 13

August 10

September 14

October 12

November 9

December 14