



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, JUNE 9, 2016

Call to Order:

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

Members Present:

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

Approval of Minutes:

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

Presentation:

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

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

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

He noted, historically, the grand jury was an independent body, and the prosecutor had a limited role in the process. He said when communities were small and crimes were simple, the grand jurors were actually more knowledgeable than the prosecutor regarding both the law and the controversies giving rise to the investigations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adjournment:

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

Approval:

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

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

/s/ Patrick F. Fischer
Judge Patrick F. Fischer, Vice-chair