OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 10, 2016

Call to Order:

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

Members Present:

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

Approval of Minutes:

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

Discussion:

Article I, Section 10
Grand Jury Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Presentation:

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

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

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

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

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

> The General Assembly may change rules promulgated hereunder by introducing a bill (1) that states in its preamble specifically that it is the legislature's purpose to create a substantive right and (2) that is enacted into law as provided in Article II, Section 16.

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

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

Mr. Walinski continued that, in granting that rulemaking power to the Court, Section 5(B) adds one attribute to the power, and one limitation. The attribute is that a court-promulgated rule supersedes all laws then in effect that conflict with the court-promulgated rule, while the restriction is that a court-promulgated rule may not "abridge, enlarge, or modify a substantive right." He said beyond that, Section 5(B) is silent about the allocation of rulemaking power as between the Court and the legislature.

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

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

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

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

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

Mr. Walinski indicated that common law rules for interpretation and construction stand on a different footing when applied to interpretation of statutes than to the interpretation of constitutions. He said the rules work particularly well when applied to legislation and similar forms of positive law because the rules ultimately rest on the recognition that the originating legislative body is always free to adjust a statute to correct or to otherwise respond to judicial interpretation. He added that, because that ease of correcting the source document does not exist regarding judicial interpretation of a constitution, rules of interpretation that are based on the existence of that ease have little meaning to the interpretation of constitutional texts.

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

Mr. Walinski described that the proposed amendment permanently resolve the issue by inserting language that reflects the Court's second, currently controlling interpretation. He said the decision to follow that interpretation was not arbitrary, but, rather, was based on the view that the first interpretation turns on a blurred distinction between substance and procedure. He continued that the proposed amendment follows the historical basis of Modern Courts Amendment, which is modeled after the federal Rules Enabling Act of 1934.[3] Mr. Walinski noted that the Court's second interpretation establishes a relationship between the General Assembly and the Court's rulemaking authority that fairly parallels the relationship that the Rules Enabling Act created between Congress and the Supreme Court of the United States. He concluded that the proposal is built simply on (1) the historical fact that the text of Section 5(B) is modeled after the Rules Enabling Act; and (2) the proposition that any positive law – whether a constitutional provision or a statute – that purports to transfer rulemaking power out of the legislature and to a court cannot intelligibly separate those powers based on the false dichotomy between "substance" and "procedure."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adjournment:

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

Approval:

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

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

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