OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

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

Members Present:

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

Approval of Minutes:

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

Reports and Recommendations:

Article I, Section 8 (Writ of Habeas Corpus)

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

Article I, Section 15 (No Imprisonment for Debt)

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

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

Article I, Section 10 (The Grand Jury)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The roll call vote was as follows:

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

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

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

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

The roll call vote was as follows:

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

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

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

The roll call vote was as follows:

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

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

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

Presentations and Discussion:

"Civil Asset Forfeiture"
Robert Alt
The Buckeye Institute

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adjournment:

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

Approval:

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

/s/ Janet Gilligan Abaray
Janet Gilligan Abaray, Chair

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