OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Ohio Constitutional Modernization Commission

Co-Chair
Sen. Charleta B. Tavares
Assistant Minority Leader

Co-Chair
Rep. Jonathan Dever
House District 28

Part I

April 13, 2017

Riffe Center for Government and the Arts
Room 1960

Ohio Constitutional Modernization Commission

Co-chair Sen. Charleta Tavares
Co-chair Rep. Jonathan Dever
Ms. Janet Abaray
Mr. Herb Asher
Mr. Roger Beckett
Ms. Karla Bell
Ms. Paula Brooks
Rep. Kathleen Clyde
Mr. Douglas Cole
Sen. Bill Coley
Rep. Hearcel Craig
Rep. Robert Cupp
Ms. Jo Ann Davidson
Justice Patrick Fischer
Mr. Edward Gilbert
Rep. Glenn Holmes
Mr. Jeff Jacobson
Sen. Kris Jordan
Mr. Charles Kurfess
Rep. Robert McColley
Mr. Fred Mills
Mr. Dennis Mulvihill
Sen. Bob Peterson
Mr. Richard Saphire
Sen. Michael Skindell
Sen. Vernon Sykes
Gov. Bob Taft
Ms. Petee Talley
Ms. Kathleen Trafford
Mr. Mark Wagoner

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

COMMISSION MEETING

THURSDAY, APRIL 13, 2017
1:30 P.M.
RIFFE CENTER FOR GOVERNMENT AND THE ARTS ROOM 1960

AGENDA

I. Call to Order

II. Roll Call

III. Approval of Minutes

- Meeting March 9, 2017

[Draft Minutes – attached]

IV. Standing Committee Reports

- Coordinating Committee (Trafford)

V. Subject Matter Committee Reports

- Constitutional Revision and Updating Committee (Mulvihill)
- Education, Public Institutions, and Local Government (Gilbert)
- Judicial Branch and Administration of Justice (Abaray)
- Finance, Taxation, and Economic Development (Cole)

VI. Reports and Recommendations

First Presentation

- Article I, Section 10 (The Grand Jury) (Abaray)
  - Review of Report and Recommendation
  - Public Comment
  - Discussion

  [Report and Recommendation – attached]

- Article I, Section 8 (Writ of Habeas Corpus) (Abaray)
  - Review of Report and Recommendation
  - Public Comment
  - Discussion
  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

Second Presentation

- Article II, Sections 3, 4, 5, and 11(Member Qualifications and Vacancies in the General Assembly) (Mills)

  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

- Article II, Sections 6, 7, 8, 9, 13, and 14 (Conducting Business of the General Assembly) (Mills)

  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

- Article II, Sections 10 and 12 (Rights and Privileges of Members of the General Assembly) (Mills)

  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

- Article V, Section 2a (Names on the Ballot) (Saphire/Jacobson)

  - **Possible Action Item: Consideration and Adoption**

  [Report and Recommendation – attached]

VII. Executive Director's Report

VIII. Old Business

IX. New Business

X. Public Comment

XI. Adjourn

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Co-Chair
Charleta B. Tavares
Assistant Minority Leader
15th Senate District

Co-Chair
Jonathan Dever
28th House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES
FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

DRAFT

Call to Order:

Co-chair Jonathan Dever called the meeting of the Ohio Constitutional Modernization Commission ("Commission") to order at 1:32 p.m.

Members Present:

A quorum was present with Commission Co-chairs Dever and Tavares, and Commission members Abaray, Asher, Beckett, Clyde, Cole, Coley, Davidson, Gilbert, Holmes, Jacobson, Jordan, Kurfess, McColley, Mulvihill, Peterson, Saphire, Skindell, Sykes, Taft, and Trafford in attendance.

Approval of Minutes:

The minutes of the December 15, 2016 and February 9, 2017 meetings were approved.

Standing Committee Reports:

Coordinating Committee

Kathleen Trafford, chair of the Coordinating Committee, reported that the committee voted to approve four reports and recommendations: three from the Legislative Branch and Executive Branch Committee, and one from the Bill of Rights and Voting Committee. She said the committee then took up the issue of gender neutrality in the constitution. She reported that the issue of assuring gender neutrality in future constitutional provisions has been assigned to the Constitutional Revision and Updating Committee. She said the remaining question, regarding gender-specific language in the current provisions, will be addressed by the Coordinating Committee, which will prepare a report and recommendation to be brought forward soon.

Subject Matter Committee Reports:

Constitutional Revision and Updating Committee

Dennis Mulvihill, chair of the Constitutional Revision and Updating Committee, said the committee is wrapping up its work on modernizing the constitutional and statutory initiative process. He said the committee's goal is to encourage people to take the statutory initiative route, rather than the constitutional initiative route, because there has been a trend in recent years for proponents to attempt to constitutionalize measures that are better suited for the Revised Code, and to create monopolies by constitutionalizing their business plans. He added that Ohio has seen a disproportionate use of the constitutional initiative method, with 80 percent of the initiatives being constitutional and only 20 percent being statutory.

Mr. Mulvihill continued that the committee has been rewriting the initiative and referendum sections because they are poorly written and difficult to follow. He said the committee's goal is to make the initiative process more user-friendly, and additionally allow the General Assembly to enact law to modernize the petition process. He said the recommendation will also require gender-neutral language where appropriate.

He said one change involves requiring the ballot board to write the ballot language up front, before requiring the proponents to gather signatures. He said the committee has heard testimony indicating that proponents have spent money and time getting signatures only to find that the ballot board has required ballot language they do not like. He said another change streamlines the process for filing an Ohio Supreme Court action if a decision by the attorney general, secretary of state, or other party has aggrieved them. He said the committee is making the timing prospective to clarify when key events need to occur. Another change Mr. Mulvihill noted is that proponents will be allowed to suggest the title, ballot language, and explanation, if they choose. He said the committee also plans to leave to the attorney general the analysis of whether the language is fair and truthful, and leave to the ballot board the role of writing the ballot language. He said the committee will also recommend removal of the supplemental petition requirement in the statutory initiative process, requiring a one-time signature requirement of five percent.

Finally, Mr. Mulvihill described that the committee will recommend requiring 55 percent approval at the polls rather than a simple majority, and allowing the issue to go on the ballot in even-year elections. He said the basis of that concept is data indicating that, in even-year elections, about 4.8 million people vote, while in odd-year elections only about 2.8 million people vote, which is a significant drop off. He said the collective wisdom of the committee is that it is preferable to have more, rather than fewer, people approving an amendment to the constitution. He said the new process will be easier for proponents, with the hope that the changes will take out any gamesmanship that may currently exist. Mr. Mulvihill said the committee expects to have a first presentation on a report and recommendation in April, and the proposal should be before the Commission in about three months.

Bill of Rights and Voting Committee

Richard Saphire, chair of the Bill of Rights and Voting Committee, reported that the committee first considered a report and recommendation regarding Article V, Section 2, which states that all

elections shall be by ballot. He said the report and recommendation would have amended that section to include the word "secret," but, after a debate, the committee voted to reject the report and recommendation. However, he said the committee wished to consider at a future meeting whether to include language that would help secure the ballot from efforts to "hack" election results. He said the committee also considered Article V, Section 2a, which relates to names of candidates on the ballot, and unanimously voted to issue a report and recommendation for no change to that provision. He said the committee also considered Article V, Section 7, relating to the primary election process, identifying two issues for potential revision. First, the committee's consensus was to consider repealing as obsolete a phrase regarding the "preferential senatorial vote" as a result of the adoption of the Seventeenth Amendment to the United States Constitution. The committee also indicated it would like to consider the possibility of including federal offices as one of the listed offices for which the primary petition would provide a way to the ballot.

Legislative Branch and Executive Branch Committee

Reporting for the Legislative Branch and Executive Branch Committee, committee member Bob Taft said the committee voted to issue a report and recommendation for Article II, Sections 10 and 12, dealing with the rights and privileges of the General Assembly, specifically, the right to record a protest, and the privilege against arrest while going to and from legislative session, and also from having to answer elsewhere for speeches or debates made by members in the General Assembly. He said the committee also has issued two reports and recommendations for no change to multiple Article II sections: Article II, Sections 3, 4, 5, and 11 (Member Qualifications and Vacancies in the General Assembly); and Article II, Sections 6, 7, 8, 9, 13, and 14 (Conducting Business of the General Assembly). He said the committee hopes to have a first presentation of a report and recommendation for Article II, Sections 15, 16, 26, and 28 (Enacting Laws) at its next meeting, as well as to begin considering some sections of Article III, dealing with the Executive Branch.

Education, Public Institutions, and Local Government Committee

Education, Public Institutions, and Local Government Committee Vice-chair Edward Gilbert reported that the committee will meet later in the day to continue its review of Article VII, which deals with public institutions, including Sections 2 and 3 relating to the penitentiary. He said the committee is considering how to change Section 1 of Article VII, dealing with institutions for the "insane, blind, deaf and dumb."

Judicial Branch and Administration of Justice Committee

Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, said the committee will meet immediately after the full Commission meeting. She said the committee will hear from Robert Alt, from the Buckeye Institute, who will be addressing the topic of civil forfeiture in relation to the committee's review of Article I, Section 12 (Transportation for Crime, Corruption of Blood, and Forfeiture of Estate). She said the committee also will have a presentation on two other reports and recommendations, one for Article I, Section 8 (Writ of Habeas Corpus), and Article I, Section 15 (No Imprisonment for Debt). She said the committee will consider two versions of a report and recommendation regarding the grand jury process, looking at two possible changes: one involving the availability of transcripts and the other

involving a Hawaii model of having a grand jury legal advisor present to assist the grand jury. She said the committee has specific language related to those concepts that it can consider at its meeting. She said the committee had a presentation by Commission member Mark Wagoner regarding a proposal to amend the Modern Courts Amendment, and has received a letter from the Supreme Court in response to that proposal. She said the committee will discuss that issue at a future meeting.

Finance, Taxation, and Economic Development Committee

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported that, at its next meeting, the committee will address the role of the treasurer of state. He said, in light of the committee's recommendation, adopted by the Commission, that provisions related to the sinking fund be repealed, the committee will consider whether it would be prudent to include in the constitution a mandatory debt reporting function on the part of the treasurer. He said the committee will have a speaker from the Office of the Treasurer and a speaker from the Office of Budget and Management attend the meeting to provide their views on the topic.

Reports and Recommendations:

Article II, Sections 3, 4, 5, and 11
(Member Qualifications and Vacancies in the General Assembly)

Co-chair Dever recognized Shari L. O'Neill, interim executive director and counsel to the Commission, for the purpose of providing a first presentation of a report and recommendation for Article II, Sections 3, 4, 5, and 11. She said the report indicates the committee's recommendation that the sections be retained in their current form. She said the report further describes that these sections address the qualifications of members of the General Assembly, as well as providing for filling vacancies in legislative seats. Originally adopted as part of the 1851 constitution, she said the report states that the sections specifically describe residency requirements and restrictions on those who serve in the General Assembly, and the method for filling a vacancy in the General Assembly.

Ms. O'Neill continued that the report outlines the changes recommended by the Constitutional Revision Commission in the 1970s, as well as amendments to the sections. She said the report also describes related litigation, as well as documenting the committee's discussion and consideration of the sections. She said the report expresses the committee's conclusion that the sections continue to appropriately and effectively guide the legislature's organization and operation, and so should be retained in their current form.

Co-chair Dever thanked Ms. O'Neill for this first presentation of the report and recommendation for these sections. He asked whether there were any comments in relation to the report and recommendation.

Commission member Charles Kurfess asked whether there are any court decisions related to the requirement in Section 3 that legislators have resided in their respective districts for one year before their election. Ms. O'Neill noted a case cited in the report and recommendation, *State ex rel. Husted v. Brunner,* 123 Ohio St. 3d 288, 2009-Ohio-5327, 915 N.E.2d 1215, dealt with that issue.

With regard to Section 11, which prescribes the procedure for filling vacancies, Mr. Kurfess asked whether anyone has raised the issue of filling a vacancy if the individual member whose departure caused the vacancy was elected in some capacity other than as a member of the Republican or Democratic Party. He noted that the current trend is for more candidates to run as independents, but the current provision does not seem to be designed for that situation.

Senator Bill Coley said he is not aware of any member who did not caucus with someone, so that, even in the United States Congress, where members are elected as independents, they choose to caucus with one party caucus or the other. He said a situation in which someone was truly independent and did not caucus with anyone and then left, that would pose a quandary. But, he said, under the current rules, if an independent caucuses with a party, it would be up to that party to replace that person.

Commission member Jeff Jacobson disagreed, indicating that the replacement would depend on what the person was elected as. He noted an example in which a Democrat was elected but joined the Republican Party after being elected; indicating that if that person had left the Democratic Party would have chosen his replacement.

Mr. Kurfess said, as he reads it, what the member does after he gets to the legislature does not affect which party replaces the legislator if there is a vacancy.

Co-chair Dever suggested that question could be put to the Legislative Branch and Executive Branch Committee to determine how it might be addressed.

Article II, Sections 6, 7, 8, 9, 13, and 14 (Conducting Business of the General Assembly)

Co-chair Dever continued to recognize Ms. O'Neill for the purpose of providing a first presentation of a report and recommendation for Article II, Sections 6, 7, 8, 9, 13, and 14. Ms. O'Neill said the report describes that Section 6 outlines the powers of each house of the General Assembly, requiring each house to be the judge of the election, returns, and qualifications of its own members, setting the number of members for a quorum, allowing each house to prescribe punishment for disorderly conduct, and to obtain information necessary for legislative action, including the power to call witnesses and obtain the production of books and papers. She said the report describes that Section 7 provides for the organization of each house of the General Assembly, allowing the mode of organizing to be prescribed by law, and requiring each house to choose its own officers, with there being designated a president of the Senate and a Speaker of the House of Representatives. Ms. O'Neill indicated the report outlines that Section 8 governs the calendar of the General Assembly, and allows the governor, or the presiding officers of the general assembly chosen by the members thereof, acting jointly, to convene the general assembly in special session by a proclamation which may limit the purpose of the session.

She said the report states that Section 9 requires the two chambers to keep and publish a journal of proceedings, and to record the votes. The report also indicates that Section 13 relates to the public nature of the legislative process, requiring open proceedings except where, in the opinion of 2/3s of those present, secrecy is required. Finally, Ms. O'Neill stated, the report outlines that Section 14 controls the ability of either house to adjourn, providing that neither may adjourn for more than five days without the consent of the other. Ms. O'Neill indicated that the report and

recommendation describes the work of the 1970s Constitutional Revision Commission on these sections, indicating where amendments were recommended and adopted. She said the report also outlines litigation involving the provisions before describing the discussion and consideration by the committee. She said the report indicates the committee's conclusion that Article II, Sections 6, 7, 8, 9, 13, and 14 should be retained in their current form.

Co-chair Dever thanked Ms. O'Neill for this first presentation of the report and recommendation for Sections 6, 7, 8, 9, 13, and 14 of Article II. There were no comments or discussion offered in relation to these sections.

Article II, Sections 10 and 12 (Rights and Privileges of Members of the General Assembly)

Co-chair Dever continued to recognize Ms. O'Neill for the purpose of a first presentation of a report and recommendation for no change to Article II, Sections 10 and 12.

Ms. O'Neill said the report and recommendation describes that Section 10 provides a right of legislative members to protest, and to have their objections recorded in the journal. Discussing Section 12, she said the report and recommendation describes the historic basis for the idea that legislative representatives must be able to freely engage in debate, consult with staff and constituents, and travel to and from legislative session without hindrance. She said the report further describes the work of 1970s Commission, indicating that its Committee to Study the Legislature issued a report in which it concluded that because dissenting legislators now have the ability to publicize their views in the news media, the protest provision is "an anachronism and appropriate for removal." She said the report indicates that, despite this recommendation, the question was not taken up by the full 1970s Commission, and, so remains as it was adopted in 1851. The report indicates the 1970s Commission did not address Section 12, thus, it also remains in its 1851 form.

Ms. O'Neill continued that the report addresses litigation involving the provisions, as well as describing presentations related to the speech or debate clause in Section 12. She said the report and recommendation indicates the committee's discussion and consideration, documenting the committee's conclusion that, because the journal is the official record of the business of the General Assembly, and the member filing the protest can directly control the message being communicated, it is important to retain that right. She said the report also indicates the committee's conclusion that that Section 12 should be retained because legislative privilege helps to maintain the separation of powers, noting that many communications that occur in the executive and judicial branches of government are recognized as privileged. She said the report acknowledges the views of some of the committee that legislators are acting on behalf of citizens and should, as much as possible; maintain transparency as they conduct their duties. In addressing the confidentiality of communications between legislators and legislative staff, she said the report notes committee members' observation that the privilege allows legislators to effectively perform their role.

She said the report and recommendation indicates the Legislative Branch and Executive Branch Committee's conclusion that Article II, Sections 10 and 12 continue to serve the General Assembly and should be retained in their current form.

Co-chair Dever thanked Ms. O'Neill for this first presentation of the report and recommendation for Sections 10 and 12 of Article II. He invited any questions or comments and there were none.

Article V, Section 2a (Names on the Ballot)

Co-chair Dever recognized Christopher Gawronski, legal intern, for the purpose of providing a first presentation of a report and recommendation for no change to Article V, Section 2a, relating to the order of names of candidates on the ballot. Mr. Gawronski said the report describes the current provision, deriving from a 1949 constitutional initiative, was intended to bar straight-party voting, emphasizing the candidates for office rather than their political parties by using an office-bloc format. He said the report indicates the provision was subsequently amended twice to clarify how rotation of names on ballots is to occur. He said the report outlines the presentations offered on the issue, including testimony by Matthew Damschroder, assistant secretary of state, who described the current procedure for rotating names on Ohio ballots, as well as by Professor Erik Engstrom, of the University of California, Davis, who discussed the history of ballots in Ohio, and noted Ohio is the only state to prescribe name rotation on ballots by constitutional provision rather than statute. Mr. Gawronski said the report concludes with the committee's sense that the current wording provides the necessary flexibility to the General Assembly to provide for the specifics of name rotation based on the needs of new voting methods and technologies, so that no change is necessary.

Co-chair Dever thanked Mr. Gawronski for this first presentation of the report and recommendation for Section 2a of Article V. He invited any questions or comments.

Sen. Coley indicated the Senate is currently considering how to address an issue that has arisen in some counties where there may be 15 or 20 judicial races on the ballot, and all of the judicial races except for one are uncontested. He said if the one uncontested race is at the bottom of the ballot, it can result in voter drop off. So, he said, there has been discussion about the possibility of allowing the contested race to appear at the top. He offered that issue for the committee to consider.

Article VI, Section 5 (Loans for Higher Education)

Co-chair Dever recognized Ms. O'Neill for the purpose of providing a second presentation on a report and recommendation for no change to Article VI, Section 5, relating to loans for higher education. Ms. O'Neill indicated the report and recommendation by the Education, Public Institutions, and Local Government Committee expresses that the section articulates a policy encouraging financial support for state residents wishing to pursue higher education, declaring it to be in the public interest for the state to guarantee the repayment of student loans.

Ms. O'Neill continued that the report describes the history of the section, as well as indicating it has not been amended or reviewed since its adoption. She said the report indicates the section has not been subject to any Ohio Supreme Court decisions. Ms. O'Neill said the report describes that presentations by two former directors of the commissions that oversaw the state student loan program would support the conclusion that the constitutional section is currently nonfunctional, however, the committee recommends the section be retained because it could be necessary in the future to accommodate changes to the federal student loan program, or to support programs that forgive student loan debt in order to foster the provision of needed services in underserved areas

of the state. Thus, she said, the report documents the committee's recommendation to retain the section in its present form.

Co-chair thanked Ms. O'Neill for the presentation. He asked for any comment or discussion and there was none. He then asked for a motion to adopt the report and recommendation. Mr. Gilbert so moved, with Commission member Jo Ann Davidson seconding the motion.

Co-chair Dever asked for a roll call vote, which was as follows:

Co-chair Tavares – yea
Co-chair Dever – yea
Abaray – yea
Asher – yea
Beckett – yea
Clyde – yea
Cole – yea
Coley – yea
Davidson – yea
Gilbert – yea
Holmes – abstain
Jacobson – yea
Jordan – yea
Kurfess – yea
McColley – yea
Mulvihill – yea
Peterson – yea
Saphire – yea
Skindell – yea
Sykes – yea
Taft – yea
Trafford – yea

The motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

Article VI, Section 6 (Tuition Credits Program)

Co-chair Dever then recognized Ms. O'Neill to present a report and recommendation on Article VI, Section 6, relating to Ohio's tuition credits program. Stating the report by the Education, Public Institutions, and Local Government Committee concludes the section should be retained in its current form, Ms. O'Neill described that Section 6 is designed to promote the pursuit of higher education by establishing in the constitution a government-sponsored program to encourage saving for post-secondary education. Ms. O'Neill said the report summarizes the history of the section, indicating it was adopted in order to address concerns about the tax exempt status of college savings plans. Ms. O'Neill said the report indicates these concerns were resolved by changes in the federal tax code that confirmed the exempt status of these "529 plans," so named for the Internal Revenue Code section that describes them. She said the report outlines a presentation to the committee by the director of the agency that oversees the program,

as well as documenting the committee's sense that, although the need for the provision was resolved by the tax code change, the section should be retained because one purpose of the provision is to establish the full faith and credit backing of the state for one of the savings plans offered by the program. She said the report indicates the committee's conclusion that the fact that some accounts are still active may require the constitutional provision to be retained in its current form. Thus, she said, the report concludes Article VI, Section 6 should be retained.

Co-chair Dever thanked Ms. O'Neill for her presentation, and asked if there were questions or comments from the audience or the Commission. There being none, he called for a motion to adopt the report and recommendation. Mr. Saphire so moved, with Mr. Gilbert seconding the motion.

Co-chair Dever asked for a roll call vote, which was as follows:

Co-chair Tavares – yea
Co-chair Dever – yea
Abaray – yea
Asher – yea
Beckett – yea
Clyde – yea
Cole – yea
Coley – yea
Davidson – yea
Gilbert – yea
Holmes – abstain
Jacobson – yea
Jordan – yea
Kurfess – yea
McColley – yea
Mulvihill – yea
Peterson – yea
Saphire – yea
Skindell – yea
Sykes – yea
Taft – yea
Trafford – yea

The motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, 2s (Additional Authorization of Debt Obligations)

Co-chair Dever recognized Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, for the purpose of providing a first presentation of the committee's report and recommendation on Article VIII, Sections 2l through 2s, relating to the authorization of debt obligations.

Mr. Cole indicated the sections covered by the report and recommendation contrast with other debt authorization sections in Article VIII in that they still have outstanding bonding amounts and are still in use, therefore the report recommends retaining Sections 2l through 2s.

Mr. Cole indicated the report and recommendation outlines that the sections authorize debt to fund projects relating to state infrastructure, and that the sections are relatively recent and, for the most part, have not been amended. He said the report indicates there has been no litigation relating to the sections and concludes that because the bonds are still outstanding, the committee did not recommend change.

Co-chair Dever thanked Mr. Cole and asked if there were questions or comments regarding the report and recommendation. There being none, he called for a motion to adopt the report and recommendation. Mr. Gilbert so moved, with Sen. Coley seconding the motion.

Co-chair Dever asked for a roll call vote, which was as follows:

Co-chair Tavares – yea
Co-chair Dever – yea
Abaray – yea
Asher – yea
Beckett – yea
Clyde – yea
Cole – yea
Coley – yea
Davidson – yea
Gilbert – yea
Holmes – abstain
Jacobson – yea
Jordan – yea
Kurfess – yea
McColley – yea
Mulvihill – yea
Peterson – yea
Saphire – yea
Skindell – yea
Sykes – yea
Taft – yea
Trafford – yea

The motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

Executive Director Report

Co-chair Dever recognized Ms. O'Neill for the purpose of providing an executive director's report. Ms. O'Neill indicated that Commission members have been provided a copy of a new edition of the Rules of Procedure and Conduct. She said the edition incorporates changes that were adopted by the Commission in the fall of 2016, indicating that the changes include a

revision to Rule 3.9, providing that a quorum for the purposes of conducting business is 17, rather than 21 members; and a change to Rules 5.4 and 5.5, effectively combining the Public Education and Information Committee with the Liaisons with Public Offices Committee, to form the Public Information and Liaisons with Public Offices Committee.

Ms. O'Neill indicated that, under Rule 3.9, the Commission requires a quorum of 17 members in order to do business such as approving minutes and voting to adopt a report and recommendation for no change. She continued that a quorum for purposes of adopting a report and recommendation for a new constitutional provision, or for a change in an existing constitutional provision remains at 22 members.

Old Business:

Co-chair Dever recognized Mr. Saphire, who asked whether Commission members would be receiving an account of the progress of recommendations that have been forwarded by the Commission to the General Assembly. Co-chair Dever said that the information would be provided and circulated to the Commission when the time is right.

Senator Vernon Sykes asked if new Commission members have been assigned to specific committees. Co-chair Tavares said the new members who are filling legislative member vacancies will be taking the position of the member they are replacing until there is a full complement of commissioners, and then once those appointments are made the decision about committees would be made so that assignments would not have to be done twice.

Public Comment:

Co-chair Dever recognized Don H. Thompson, a member of the public who appeared to speak with the Commission.

Addressing the issue of Congressional redistricting, Mr. Thompson said, in 2015, Ohio took a giant step forward in adopting a better method for shaping voting districts for the state legislature. But, he said, the General Assembly did not take the opportunity to include Congressional redistricting reform. He noted expectations that the overwhelming passage of the 2015 initiative would spur action to end gerrymandered Congressional districts, but, he said, 2016 came and went without progress on that issue. He urged action on the question because, as he noted, "gerrymandered districts have become a major contributor to unproductive political polarization that is definitely on the rise throughout our state and throughout our nation."

Mr. Thompson continued that various citizens' groups have formed a coalition to advocate for fair and competitive voting districts, noting that more than a dozen newspaper editorials also have advocated for change. Mr. Thompson said it is disappointing to see the slow pace of progress by the Commission on this topic. He said he recently wrote to the House Speaker and the Senate President to request a clarification on their position. He said he received a reply from the speaker that indicated he would keep Mr. Thompson's views in mind as he continues to discuss the topic with others. Mr. Thompson indicated his concern that the speaker may not wish to fix the problem prior to the next map re-drawing cycle. He said he has not yet received a response from the Senate President. Mr. Thompson expressed that "more time and money will get spent on this topic because some politicians desire to preserve an unfair hold on political

power." Mr. Thompson said "the General Assembly is missing an opportunity to demonstrate solid support for fairness principles and make Ohio a model for the rest of the nation." Mr. Thompson stated that "voters should have a fair opportunity to select their representatives without the back-room political operatives, contracted map-makers, and expensive court-room challenges."

Mr. Thompson said he would like to see the Commission stop the inertia on the topic, set a brisk pace to propose reform, establish a committed timeline in 2017 for reform, demonstrate that the General Assembly is capable of putting the best interests of constituents first, and persuade leadership that a fair process is needed for the 2021 redistricting cycle.

Mr. Thompson having concluded his remarks, Co-chair Dever thanked him for his presentation. Co-chair Dever then recognized Mr. Jacobson for comment.

Mr. Jacobson indicated that he and Sen. Sykes, who was seated next to him, negotiated the legislative redistricting reform measure. He said he shares Mr. Thompson's frustration about redistricting reform for the Congressional districts. He said he would point out that if members of the General Assembly wanted to preserve their own easy districts they would not have passed the joint resolution for legislative redistricting reform. So, he said, he thinks "we can be both frustrated with the slow pace on Congressional without it meaning that people were looking out to preserve what matters to them." He said a big part of last year was spent trying to negotiate and that they thought they had reached a good conclusion in November only to have it undone. He said the one thing that should not be done is to set up a new system of gerrymandering to replace the old one, which is his fear about ballot initiatives, in that the proponents are not neutral. He said it is better if it is done the way Issue 1 was done on the November 2015 ballot, where both sides worked it out together.

Adjournment:

There being no further business to come before the Commission, the meeting adjourned at 2:40 p.m.

Approval:

The minutes of the March 9, 2017 meeting of the Ohio Constitutional Modernization Commission were approved at the April 13, 2017 meeting of the Commission.

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Co-chair Senator Charleta B. Tavares Assistant Minority Leader	Co-chair Representative Jonathan Dever

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE
JUDICIAL BRANCH AND ADMINISTRATION OF JUSTICE COMMITTEE

OHIO CONSTITUTION
ARTICLE I, SECTION 10

THE GRAND JURY

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

Recommendation

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

> *(A) Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law.*
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> *(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.*
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> *(C) A record of all grand jury proceedings shall be made, and the accused shall have a right to the record of the grand jury testimony of any witness who is called*

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

Background

Article I, Section 10 reads as follows:

> Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Many of the concepts memorialized in Section 10, including the requirement of a grand jury indictment for felony crime, date from the 1802 constitution. In the 1802 constitution, Section 10 was part of the Bill of Rights that was contained in Article VIII. Section 10 read:

> That no person arrested or confined in jail shall be treated with unnecessary rigor or be put to answer any criminal charge but by presentment, indictment, or impeachment.

Section 11 of the 1802 constitution provided additional rights of the accused, stating:

That in all criminal prosecutions, the accused hath a right to be heard by himself and counsel; to demand the nature and cause of the accusations against him and to have a copy thereof; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favor; and in prosecutions by indictment or presentment a speedy public trial by an impartial jury of the

County or District in which the offense shall have been committed; and shall not be compelled to give evidence against himself, nor shall he be twice put in jeopardy for the same offense.

The 1851 Constitution moved the Bill of Rights to Article I, and combined aspects of prior Sections 10 and 11 into one Section 10, which read:

> Except in cases of impeachment, and cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, in cases of petit larceny and other inferior offenses, no person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; be the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense.

The 1912 Constitutional Convention resulted in several changes to the grand jury portion of the 1851 provision. First, the categorical reference to “cases of petit larceny and other inferior offenses,” was clarified to mean “cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary.” The 1912 convention also added a reference to the ability of the General Assembly to enact laws related to the total number of grand jurors, and the number of grand jurors needed to issue an indictment.

Other parts of Section 10 were changed in 1912, including allowing the General Assembly to enact laws related to taking and using witness depositions, and adding that the failure of the accused to testify at trial may be the subject of comment by counsel. Section 10 also requires that the accused be allowed to appear and defend in person, and sets out the right to counsel, the right to demand details about the accusation, to have a copy of the charges, to face witnesses, to have defense witnesses compelled to attend, to have a speedy trial by an impartial jury, the right against self-incrimination (nevertheless allowing comment regarding the accused’s failure to testify), and the protection against double jeopardy. The section further specifies provision may be made by law for deposing witnesses. In short, the lengthy section encompasses many of the procedural safeguards enumerated in the United States Constitution, specifically in the Fifth and Sixth Amendments.[1]

Originating in 12th century England, under the reign of King Henry II, grand juries were a way for citizens to note suspicious behavior and then, as jurors, report on suspected crime to the rest of the jury.[2] This system helped centralize policing power with the king, power that otherwise would have been held by the church or barons. By the 17th century, grand juries were viewed as a way of shielding the innocent against criminal charges.[3] Resembling the system used today, the government was required to get an indictment from a grand jury before prosecuting. Thus, the grand jury evolved from being a “tool of the crown” to “defender of individual rights,” a transformation helped by two famous refusals of a London grand jury to indict the Earl of

Shaftesbury on a dubious treason charge in 1667. The resulting rule of law, that freemen are entitled to have their neighbors review the charges against them before the government can indict, was brought to the colonies with British citizens who, when their relationship with England soured, used the process to nullify despised English laws and deny indictment to dissenters. The most famous example of this was newspaper editor John Peter Zenger, who was arrested for libel in 1743 based on his criticisms of the New York royal governor. Three grand juries refused to indict him, and, although royal forces would still put him on trial after an information proceeding, a trial jury acquitted him.

After independence, the United States Constitution's framers considered grand juries to be so vital to due process that the institution was enshrined in the Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger * * *." As described by the United States Supreme Court in *U.S. v. Calandra,* 414 U.S. 338, 342-343 (1974):

> The institution of the grand jury is deeply rooted in Anglo-American history. [Footnote omitted.] In England, the grand jury served for centuries both as a body of accusers sworn to discover and present for trial persons suspected of criminal wrongdoing and as a protector of citizens against arbitrary and oppressive governmental action. In this country the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury." Cf. *Costello v. United States*, 350 U.S. 359, 361-362 (1956). The grand jury's historic functions survive to this day. Its responsibilities continue to include both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions. *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972).

Many states, including New York, Ohio, Maine, and Alaska, institutionalized grand juries in their own constitutions, using language almost identical to the Fifth Amendment.

Amendments, Proposed Amendments, and Other Review

The Ohio Constitutional Revision Commission (1970s Commission) created a special "Committee to Study the Grand Jury and Civil Trial Juries" to consider the purpose and function of grand juries. As described in the 1970s Commission report, that committee determined "there are some classes of cases in which the grand jury could serve a useful purpose," including "cases that have complex fact patterns or a large number of potential defendants, such as conspiracies or instances of governmental corruption; cases which involve use of force by police or other cases which tend to arouse community sentiment; and sex offenses and other types of cases in which either the identity of the complaining witness or the identity of the person being investigated should be kept secret in the interest of justice unless the facts reveal that prosecution is warranted."

The 1970s Commission recommended that the reference to the grand jury in Article I, Section 10 be moved to a new Section 10A, which would read:

> Section 10a. Except in cases arising in the armed forces of the United States, or in the militia when in actual service in time of war or public danger, felony prosecutions shall be initiated only by information, unless the accused or the state demands a grand jury hearing. A person accused of a felony has a right to a hearing to determine probable cause. The General Assembly shall provide by law the time and procedure for making a demand for a grand jury hearing. In the absence of such demand, the hearing to determine probable cause shall be by a court of record. At either such hearing before a court or at a grand jury hearing, the state shall inform the court or the jury, as the case may be, of evidence of which it is aware that reasonably tends to negate the guilt of an accused or of a person under investigation. The inadvertent omission by the state to inform the court or the jury of evidence which reasonably tends to negate guilt, in accordance with the requirements of this section, does not impair the validity of the criminal process or give rise to liability.
>
> A person has the right to the presence and advice of counsel while testifying at a grand jury hearing. The advice of counsel is limited to matters affecting the right of a person not to be a witness against himself and the right of a person not to testify in such respects as the General Assembly may provide by law.

In contrast to existing Section 10, which prevented a felony prosecution "unless on presentment or indictment of a grand jury," the recommended change required all felony prosecutions to proceed by information unless either the accused or the state demanded a grand jury hearing.[4]

The recommendation thus rendered the information or complaint the primary method of initiating felony prosecutions, allowed those accused of a felony the right to a probable cause hearing, required the prosecutor to reveal to either the court or the grand jury any exculpatory evidence, and permitted grand jury witnesses to have counsel present to advise on matters of privilege.

The 1970s Commission described the rationale behind the recommended change as being to simplify the process, since the existing practice allowed both a preliminary hearing in the municipal or county court to determine probable cause, and a grand jury hearing if the person is bound over to the common pleas court – where again probable cause is determined. Thus, the goal of the suggested change was to provide either for a preliminary hearing or a grand jury hearing, but not both. The 1970s Commission also explained that the purpose of recommending the provision of a right to counsel to grand jury witnesses was to recognize the need to safeguard the rights of a witness who also may be the target of the criminal investigation. However, the recommended right only extended to allowing counsel in the grand jury room during the witness's testimony and only for the purpose of advising on the witness's privilege against self-incrimination.

The 1970s Commission's recommendation for grand jury reform failed to result in a joint recommendation by the General Assembly and was not presented to voters.

Litigation Involving the Provision

The Ohio Supreme Court, following the language of the indictment clause, has ruled the grand jury to be a required entitlement of a person accused of a felony. *State v. Sellards*, 17 Ohio St.3d 169, 478 N.E.2d 781 (1985).

Presentations and Resources Considered

Williams Presentations

Senator Sandra Williams first appeared before the committee on July 9, 2015 to discuss her view that the grand jury should be replaced by a preliminary hearing system. She expressed concern over the lack of transparency in grand jury procedures and the perception that the authority of the prosecutor is unchecked. Sen. Williams noted that, despite generally high indictment rates, grand juries frequently fail to indict police officers, indicating the discretion given to the prosecutor allows for favoritism toward law enforcement. She said if Ohio does not want to eliminate grand juries, the state may consider having a special prosecutor who would handle cases involving the police.

On February 11, 2016, Sen. Williams again presented to the committee, outlining legislation she introduced related to the use of grand juries. Identifying recommendations she would like the committee to support, Sen. Williams advocated requiring the attorney general to appoint a special prosecutor to investigate and, where necessary, charge a suspect in cases involving a law enforcement officer's use of lethal force against an unarmed suspect.

Sen. Williams also advocated the court appointment of an independent grand jury counsel to advise the grand jury on procedures and legal standards. Sen. Williams said an independent counsel would have specific guidelines for interacting with jurors, asserting that the prosecutor should not be the jury's only source of legal guidance. She said this would be another way to provide transparency, removing as it does the current ambiguity caused by allowing the prosecutor to be both active participant and referee.

Describing how this system would work in the grand jury room, Sen. Williams said the prosecutor would be able to present the case and offer his opinion on possible charges that apply, as determined by the evidence presented, but jurors' questions would be answered by the independent counsel, who could explain the proceedings based on law. Sen. Williams added that the independent counsel would be selected by the presiding judge of the local common pleas court, and the length of service of the counsel would be determined by law.

Sen. Williams also recommended that the General Assembly or Supreme Court expand the rules and set standards allowing access to grand jury transcripts. She said an additional reform would allow those directly impacted by a grand jury outcome to request the transcript. If there are concerns about witness privacy, Sen. Williams said sensitive information could be redacted.

Sen. Williams additionally advocated a provision allowing the creation of an independent panel or official for the purpose of reviewing grand jury proceedings when questions arise, a practice she said is useful in cases in which there is a significant question whether the prosecutor is overcharging or undercharging. She said this recommendation would retain the need for secrecy while allowing review if there is a question whether the prosecutor is conducting the investigation in good faith.

Sen. Williams acknowledged the secrecy component has been an integral part of the grand jury process, but said modern realities demand that there be some way to review the proceedings in cases in which there is significant public interest, where the public may feel justice is being circumvented, or where motives are viewed as politically expedient. She said when it comes to high profile cases, the secrecy of the process and, in many cases, the evidence presented, no longer retains the need to be secret. She said the current grand jury system in Ohio operates without any mechanism to review the process.

Gilchrist Presentation

Also on July 9, 2015, Professor Gregory M. Gilchrist of the University of Toledo College of Law addressed the committee on the history of the grand jury. Prof. Gilchrist described that historically the grand jury served as a shield to protect the individual citizen, noting that in colonial times the grand jury thwarted royal prosecutors from bringing charges perceived as unjust. Today, he said, the procedure is largely in the control of the prosecution. He observed that, because grand juries serve for a period of months, jurors get to know the prosecutor on a day-to-day basis, and the prosecutor can serve as their only source for legal knowledge and information about the criminal justice system.

Gmoser and Murray Presentations

On December 10, 2015, two county prosecutors offered their perspectives on the use of the grand jury. Both prosecutors advocated for retaining the grand jury system in its current form. Michael Gmoser, Butler County Prosecutor, said 98 percent of felony prosecutions in the criminal division of his office begin with a grand jury indictment, as opposed to a bill of information. He said, unlike the popular saying, there is nothing to be gained by "indicting a ham sandwich," adding that might be true as an exception to the rule, "but we should not change the whole system because of it."[5] He said secrecy prevents the innocent person from being maligned and abused based on improper charges. He said prosecutors use the grand jury for investigatory purposes, so that, if the process becomes transparent, it will prevent opportunities for disclosure of crime.

Morris Murray, prosecutor for Defiance County, emphasized the grand jury process is "absolutely critical" to the fair and efficient administration of justice. Reading from the jury instructions that are provided to grand jurors at the time they are sworn by the judge, Mr. Murray described the grand jury as an "ancient and honored institution," indicating that jurors take an oath in which they promise to keep secret everything that occurs in the grand jury room, both during their service and afterward.

On November 10, 2016, Mr. Murray again appeared before the committee, on behalf of the Ohio Prosecuting Attorneys Association, to provide additional perspective on the question of whether to change the grand jury process in Ohio as provided in Article I, Section 10.

Mr. Murray expressed continued support for the concept that the grand jury process "is a time honored and important piece of the criminal justice system not only in Ohio, but throughout the country." He continued that grand juries take their oath seriously, and that jurors are instructed that if the evidence does not meet the probable cause standard they should not return an indictment.

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

He commented that removing or diminishing the confidentiality of grand jury proceedings jeopardizes the purpose of the grand jury, and would remove an important protection for persons who are investigated but not ultimately indicted. He said confidentiality also protects witnesses from retribution or intimidation whether cases go forward or not.

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

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

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

Young Presentation

On February 11, 2016, State Public Defender Tim Young presented to the committee. Mr. Young said grand juries are "a vital and important step in the criminal justice process." However, he said, the unfettered, unchecked secrecy in the process sets it apart from the rest of the justice system and society's basic ideals relating to government. Mr. Young proposed several reforms to the committee for improving the grand jury process, including that, after indictment, the testimony of trial witnesses should be made available to the court and counsel; that the secrecy requirement be eliminated in cases involving the conduct of a public official in the performance of official duties; and that, in the case of a police shooting, a separate independent authority be responsible for investigating and presenting the matter to the grand jury.

Hoffmeister Presentation

On June 9, 2016, the committee heard a presentation by University of Dayton law professor Thaddeus Hoffmeister, who has written extensively about the grand jury system and particularly studied the Hawaii model of having a Grand Jury Legal Advisor (GJLA).

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

He noted that historically the grand jury was an independent body, and the prosecutor had a limited role in the process. He said when communities were small and crimes were simple, the grand jurors actually were more knowledgeable than the prosecutor regarding both the law and the controversies giving rise to the investigations. Later, when the population grew and prosecutors became more specialized, the courts allowed the prosecutor to play a larger role in educating the grand jury.

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

Prof. Hoffmeister said the legal advisor is not permitted to ask questions, and is not with the jurors when they deliberate. When the advisor disagrees with the prosecutor regarding a legal interpretation, the dispute is presented to the common pleas judge who resolves the conflict, but that, in practice this is rare because the prosecutor and the GJLA usually work it out on their own.

Shimozono Presentation

In September 2016, Attorney Kenneth J. Shimozono, a grand jury legal advisor in Hawaii, was available via telephonic conference call to answer the committee's questions on the grand jury process in his state. Mr. Shimozono described the relationship between prosecutors and grand jury legal advisors as generally professional and cordial. He said most grand jury counsel are former prosecutors who are now defense attorneys, or they are defense attorneys. Mr. Shimozono said it is the prosecutor's decision to present evidence as he sees fit, and the jury's questions are directed to the witnesses. Asked whether there is an attorney-client relationship between the legal advisor and the grand jury, Mr. Shimozono said he would not disclose the jury's questions to the prosecutor so he would believe they have an attorney-client relationship. He said his understanding is that the advisor is there to advise the grand jury, but the grand jury is not the client in the traditional sense. Mr. Shimozono said the duty is owed to the jurors and not to the defendant. He said the jurors would notify the legal advisor if they wanted to ask a question but were not allowed, adding that, in that instance, everyone goes in front of the administrative judge and puts it on the record in a hearing. But, he said, to his knowledge that has never happened.

Asked what would happen if the legal advisor provided a wrong answer, left out an element of the offense, or misinterpreted the law, resulting in the grand jury moving forward with an indictment, Mr. Shimozono said the remedy would be for the defense counsel to look at the transcript to see if there were improprieties, and, if so, file a motion to dismiss the indictment. But, he said, the error has to be material and, if the defendant were found guilty, the issue would be preserved for appeal.

Asked about the procedure for a defendant to get access to a transcript of the grand jury hearing, Mr. Shimozono said the defendant has to request the transcript, but no one challenges the request. He said supplying the transcript is "more of a given," so that the defendant requests the transcript from the court reporters' office and they pull the video and make a transcript. Or, he said, the defense can watch the video and see if there is an issue, and then ask for the hearing to be transcribed so it can be submitted to the court.

Asked whether the legal advisor is immune for actions taken during grand jury proceedings, Mr. Shimozono said he would believe so, but has not been told that specifically. He said legal advisors are paid by the state, but are independent contractors, so he is not sure if they have complete immunity. He said even if the legal advisor is not immune, the state attorney general would step in to defend in that situation, similar to what occurs in relation to the public defender.

Summarizing the effectiveness of the system, Mr. Shimozono said having the grand jury legal advisor is helpful because it improves the process to have someone there who is more neutral. He said it also may help the grand jurors feel more comfortable that they are getting an unbiased view, so that they have more confidence in the process. He said they have found grand jurors take their duties seriously and they get better at performing their role as the year progresses. He said once the jury catches on to how things work they have fewer questions.

Asked whether he would advise another state to adopt a procedure like Hawaii's, Mr. Shimozono said he would recommend not adopting the system in its entirety. He said one thing that would make a difference is to require the grand jury counsel to sit through the entire proceedings to get a better grasp of what is going on. He said, under Hawaii's current system, in which the legal advisor is not always in the room, the jury may not realize something is improper and so would not bring it to the legal advisor's attention. He said, as a defense attorney, he would prefer that cases be brought through a preliminary hearing process. He said he has not seen abuse with the grand jury process, but, generally speaking, there was not a huge problem when he was a public defender, although sometimes there was a little more hearsay evidence than he thought was appropriate.

Discussion and Consideration

Committee members expressed a variety of views on whether and how to reform the grand jury process. While committee members generally agreed that the grand jury process could allow prosecutors to exert undue influence on the grand jury's deliberations, and that the absence of transparency contributes to public concern over the grand jury's operation, some members were reluctant to conclude that reform was necessary or that constitutional change is necessary for reform.

Some committee members focused on the possibility of creating a separate procedure for cases involving police use-of-force. Such a procedure would allow or require appointment of a special prosecutor as a way of addressing concerns arising out of the perception that the working relationship between prosecutors and local police creates a conflict of interest. Some committee members expressed concern that creating a special procedure for such cases could have unintended consequences, and so were not in favor of treating police use-of-force cases differently.

Committee members generally agreed that, although there are problems in the grand jury system, they were not in favor of eliminating the constitutional requirement of a grand jury indictment for felony prosecutions.

The committee considered the concept of a grand jury legal advisor, with some members seeing a benefit in the appointment of an independent attorney to assist the grand jury. Although committee members found the idea to be interesting, they expressed concerns about how such a system would work as a practical matter, particularly in smaller counties. Committee members also expressed that, although Hawaii provides for a grand jury legal advisor in its constitution, it may not be necessary for Ohio to create a constitutional provision allowing for a grand jury legal advisor; rather, such a system could be created by statute or court rule.

The committee also gave serious consideration to whether a constitutional provision is needed to grant the accused a right to a transcript of grand jury witness testimony. Some committee members expressed that denying the accused the opportunity to obtain the transcript of witness testimony might violate the right to confrontation, as well as due process rights. Believing the transcript issue touches on these fundamental rights, those committee members asserted constitutional language may be necessary to guarantee access to a transcript. While agreeing that

access to a transcript is important, other committee members suggested the issue did not rise to the level of requiring a constitutional provision, instead asserting that the accused's interest in obtaining a transcript could be protected by statute.

Conclusion

Committee members expressed concern over the role of prosecutors in the grand jury process, recognizing that, under the current system, the prosecutor is the only attorney in the room, and has sole control over what the grand jury is told about the law. Some committee members were concerned that this arrangement creates the risk that grand jurors could be given inaccurate information, or that their questions will not be objectively answered. Based on these concerns, a majority of the committee favored the system used in Hawaii, by which a neutral grand jury legal advisor is available to answer juror's questions. Thus, the committee recommends an amendment that would create the role of grand jury legal advisor. However, the committee would leave it to the legislature to address the details of appointment and funding of the legal advisor, as well as to specify issues such as the legal advisor's presence during the grand jury proceedings and immunity for official acts.

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

Date Issued

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

Endnotes

[1] The Fifth Amendment to the U.S. Constitution provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the U.S. Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[2] For more on the history of grand juries, see, e.g., Ric Simmons, *Re-examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?* 82 B.U.L. Rev. 1 (2002); Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield,* 98 J. Crim. L. & Criminology 1171 (2007-2008); Richard H. Helmholz, *The Early History of the Grand Jury and the Canon Law,* 50 U. Chicago L.Rev. 613 (1983).

[3] Beale, Sarah, et al., Grand Jury Law & Practice 1.2.

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

> Any offense punishable by death, or for imprisonment for more than one year or by hard labor, must be prosecuted by indictment; any other offense may be prosecuted by either an indictment or an information. Fed. R. Crim. P. 7(a). An information may be filed without leave of court by a prosecutor, who need not obtain the approval of a grand jury. An indictment, by contrast, is issuable only by a grand jury.
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> Presentments are not used in American federal procedure; formerly, a presentment was 'the notice taken, or statement made, by a grand jury of any offense or unlawful state of affairs from their own knowledge or observation, without any bill of indictment laid before them." [citation omitted].

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

A "presentment" is an informal accusation returned by a grand jury on its own initiative, as opposed to an indictment, which results from a prosecutor's presentation of charges to the grand jury. Both a presentment and an indictment result from actions by a grand jury. Ballentine's Law Dictionary (3rd ed. 1969), available at LexisNexis.com (last visited Feb. 28, 2017).

Some states allow both a grand jury hearing and a preliminary hearing, but restrict the grand jury process to certain types of crimes or investigations.

[5] Mr. Gmoser's "ham sandwich" remark is a reference to the famous comment by New York Chief Judge Sol Wachtler that New York district attorneys have so much influence on grand juries that they could get jurors to indict "a ham sandwich." Marcia Kramer & Frank Lombardi, "New top state judge: Abolish grand juries & let us decide," New York *Daily News,* Jan. 31, 1985. Available at: http://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208 (last visited June 28, 2016).

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2017 Meeting Dates

May 11

June 8

July 13

August 10

September 14

October 12

November 9

December 14