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The New York State Commission on Prosecutorial Conduct: What Comes Next?

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What is the New York State Commission on Prosecutorial Conduct?

On August 20th, 2018, Governor Cuomo signed into law a bill that created the nation's first state commission on prosecutorial conduct (the "Commission"). Since its inception, the law has elicited strong opposition from prosecutors and prosecutorial groups and equally fervent advocacy among members of the New York defense bar and other supporters. Supporters claim that the law is an invaluable tool in the fight against unethical prosecutorial conduct, while opponents such as the District Attorneys Association of the State of New York ("DAASNY") claim that the law violates both the New York State and U.S. Constitution. On October 17, 2018, DAASNY was joined by David Soares, president of DAASNY representing all district attorneys, and Robert J. Masters, an assistant district attorney in Queens County representing all assistant district attorneys in the state of New York, in filing a legal challenge to the law. The complaint, filed in the Albany County Supreme Court, seeks declaratory as well as injunctive relief.

The Current Law

The Commission, which will be formed on January 1, 2019, will be tasked with overseeing New York State's 62 district attorneys and their assistant district attorneys, investigating instances of prosecutorial misconduct, and more controversially, probing into a prosecutor's qualifications and fitness to perform his or her official duties.ⁱ Any member of the public, including a defendant, may submit a complaint alleging prosecutorial misconduct or challenging a prosecutor's fitness or qualification for officeⁱⁱ. The Commission may also initiate an investigation *sua sponte*.ⁱⁱⁱ The Commission has power to subpoena and cross examine witnesses, demand records or documents, compel the cooperation of any agency they deem necessary for their investigation^{iv} and demand the appearance of a prosecutor who is under investigation.^v If a prosecutor's office has a reasonable belief that the Commission's investigation "will substantially interfere with the [prosecuting] agency's own investigation," then the prosecuting agency may "[inform] the commission of its basis for that position, [and] the commission shall only exercise its powers in a way that will not interfere with an agency's active investigation or prosecution."^{vi} Upon completion of its investigation, the Commission may admonish or censure a prosecutor or may recommend to the governor that a prosecutor be removed from office.^{vii} Decisions by the Commission are appealable to the New York Court of Appeals ("Court of Appeals") and the Court of Appeals may accept or reject the determined sanctions, impose different sanctions on the prosecutor, recommend the removal or retirement of the prosecutor or impose no sanction.^{viii}

Under the current law, the Commission will consist of eleven members. Three members will be appointed by the chief judge of the New York Court of Appeals (the "Chief Judge"), two each by the governor (a prosecutor and a public defender), assembly speaker, temporary president of the senate, and one each by the senate and assembly minority leader.^{ix} The members appointed by state legislators must consist of an "equal number of prosecutors and attorneys providing defense services."^x The initial appointees will serve terms of between two and four years, and subsequent appointees will serve four year terms.

The Commission is permitted to delegate all of its investigative powers to panels of three of its members, with some notable exceptions.^{xi} If an investigation rises to the point where a hearing is necessary, the Commission is required to hold the hearing with a quorum of at least eight members. After a hearing before the entire Commission, the Commission may determine that a prosecutor be admonished, censured, or recommend to the governor that a prosecutor be removed. If the Commission decides to take any official action following a hearing, at least six members of the commission must sign on.^{xii}

The Proposed Amendment

On August 13, Leslie Dubeck, counsel to New York Attorney General Barbara Underwood, sent Governor Cuomo a memo that outlined several potential constitutional issues in the Commission bill that was then sitting before the governor.^{xiii} A majority of the constitutional issues that she outlined were later included in the lawsuit filed by DAASNY on October 17th. Despite the constitutional concerns raised by the Attorney General's Office, the governor signed the bill into law on August 20th, after reaching an agreement with the legislature to address some of the constitutional issues in the bill via a chapter amendment.^{xiv}

The proposed amendment would: i) vest appellate jurisdiction in the New York Appellate Division (“Appellate Division”) instead of the Court of Appeals, ii) require the Chief Judge to appoint retired, rather than active, judges to the Commission, iii) alter the appointee structure so that the governor appoints a majority of the Commission members and iv) include language, yet to be agreed upon, that would protect district attorneys from interference by the Commission in an active investigation or case.^{xv} The amendment is expected to be passed in January, when the state legislature reconvenes. However, the legislature is not obligated to pass the amendment, and with all members of the legislature up for re-election in November, there is the risk that the new legislature could choose to re-negotiate or refuse to pass the amendment.

The Lawsuit

On October 17th, DAASNY, joined by David Soares, representing all district attorneys, and Robert J. Masters, representing all assistant district attorneys, filed a challenge to the law forming the Commission, alleging that the law is unconstitutional on seven different grounds, seeking to enjoin the formation and operation of the Commission and seeking to have the law and the Commission declared unconstitutional under the New York and U.S. Constitution.^{xvi}

Interference with the independence and core functions of the District Attorney’s office.

The complaint claims that the law forming the Commission violates the New York Constitution (“NY Constitution”) by interfering with the independence and core functions of the District Attorney’s office. The plaintiffs argue that well established New York case law forbids the legislature from substantially impairing the powers and duties of an office created by the NY Constitution.^{xvii} Since the office of the district attorney is created by the NY Constitution, the legislature is forbidden from substantially impairing the powers and duties of a district attorney.^{xviii} By giving the Commission the power to take or threaten to take disciplinary action against any prosecutor for any decision, the statute impermissibly grants the Commission the power to interfere with prosecutorial decision making and operation of the office of the district attorney.^{xix} More specifically, the plaintiffs argue that the law violates the independence of the district attorney’s office by granting the Commission the power to: i) grant immunity to any witness it chooses, ii) hold hearings and compel the appearance of any witness and any prosecutor, iii) investigate and discipline a prosecutor, *sua sponte*, for reasons such as the prosecutor’s fitness for office and his qualifications for office, iv) publicly disclose any evidence that it may deem relevant or material to any investigation, even if such disclosure interferes with an ongoing law enforcement investigation. ^{xx}

Additionally, the plaintiffs argue that the law interferes with the independence and core functions of the District Attorney by granting the Court of Appeals the power to suspend prosecutors while an investigation is ongoing.^{xxi} The proposed amendment will vest review authority in the Appellate Division instead, so presumably it will also vest the power to suspend prosecutors in the Appellate Division. However, it is unclear if this change of appellate review will actually cure the defect that the plaintiffs are alleging because the law still ultimately grants New York courts the power to suspend employees and elected officials of the executive branch.

Violation of the Separation of Powers doctrine

Second, the plaintiffs argue that the law violates separation of powers principles by allowing the legislative and judicial branch to encroach on the executive branch’s prerogative to ensure that the laws of the state are faithfully executed.^{xxii} The plaintiffs first argue that the law vests executive oversight authority over executive branch employees within a hybrid body, the Commission, composed of a majority of appointees appointed by the legislative branch.^{xxiii} The plaintiffs also argue that the law allows the judicial branch to encroach on executive branch authority by allowing the Court of Appeals to remove prosecutors.^{xxiv}

Unlawful expansion of the jurisdiction of the Court of Appeals

The plaintiffs argue that the statute also violates the NY Constitution by expanding the powers and jurisdiction of the Court of Appeals and of the Chief Judge of the Court of Appeals.^{xxv} As set forth in the NY Constitution, the Court of Appeals is a court of limited jurisdiction and the legislature may not expand its jurisdiction by legislative fiat.^{xxvi} Plaintiffs argue that the law expands the jurisdiction of the Court of Appeals and thus violates the Constitution by giving it the power to review determinations made by the Commission, suspend prosecutors and issue recommendations to the governor regarding removal of prosecutors. In addition, the plaintiffs argue that the law unconstitutionally expands the power of the Chief Judge by allowing him or her to appoint individuals to a non-judicial commission.

Assignment of non-judicial functions to New York judges

Fourth, plaintiffs argue that the law violates the Constitution by assigning non-judicial functions to judges appointed to the Commission, the judges on the Court of Appeals, and the Chief Judge. According to the NY Constitution, New York judges may not “hold any other public office or trust except an office in relation to the administration of the courts, member of a constitutional convention or member of the armed forces of the United States or of the State of New York.”^{xxxvii} Plaintiffs argue that the purpose of this constitutional provision is to ensure that a judge’s time is dedicated to their judicial duties and to avoid the impression of political partisanship among the judiciary.^{xxxviii} Under the current law, the judges appointed to the Commission would engage, like the rest of the Commission members, in non-judicial functions including conducting investigations, conferring immunity upon witnesses involved in the Commission’s investigation, and recommending the removal of prosecutors.^{xxxix} Plaintiffs argue that the non-judicial functions assigned by the new law to the Court of Appeals are: “1) overseeing prosecutors’ qualifications and performance of their executive duties, 2) removing prosecutors on an interim basis, and 3) issuing recommendations regarding the permanent removal of prosecutors.”^{xxx} Finally, the plaintiffs argue that the law is unconstitutional as it grants the Chief Judge the power to appoint individuals to the Commission. ^{xxxi}

Intrusion on the exclusive jurisdiction of the Appellate Division

The plaintiffs’ fifth constitutional argument revolves around the law’s intrusion on the exclusive jurisdiction of the Appellate Division over matters of attorney discipline. The plaintiffs argue that since Article VI, Section 4(k) of the NY Constitution states that the “appellate divisions of the supreme court shall have all the jurisdiction possessed by them on the effective date of this article and such additional jurisdiction as may be prescribed by law,”^{xxxii} then the appellate divisions have exclusive jurisdiction over matters of attorney discipline given that they had such exclusive jurisdiction when the aforementioned constitutional amendment was passed. By granting the Commission concurrent authority to supervise prosecutors, the plaintiffs reason, the law violates the Constitution.^{xxxiii}

Due Process and Equal Protection violations

The plaintiffs allege that the current law violates the prosecutors’ due process and equal protection guarantees under the New York and U.S. Constitutions. The prosecutors’ due process rights are violated, they argue, because the current law fails to “identify any standards by which the [Commission] is to decide whether to initiate an investigation, find that a complaint has been sustained, or determine whether or how to impose disciplinary sanctions against a prosecutor.”^{xxxiv} The prosecutors’ equal protection guarantees are also violated because, unlike the current law at issue, the Uniform Rules of Attorney Discipline adopted by the Appellate Division of the Supreme Court (the “Uniform Rules”) require that probable cause exist before formal disciplinary proceedings are initiated against attorneys in New York^{xxxv} and “formal disciplinary charges may only be sustained after ‘a fair preponderance of the evidence’ is found to support each essential element of the charges.”^{xxxvi} The divergence in standards between the Commission and the Uniform Rules, plaintiffs argue, violates the equal protection rights of prosecutors under the New York and U.S. Constitutions.

The Commission is not part of the civil department structure of the NY Constitution

Under the NY Constitution, New York State’s executive and administrative functions must be organized under no more than twenty civil departments.^{xxxvii} The Commission is not part of an existing civil department, is not a “temporary commission for special purpose” and it cannot be considered a new civil department, plaintiffs contend, because it is not headed by an individual appointed by the governor.^{xxxviii} Plaintiffs argue that the Commission is “imbued with executive and administrative powers” and in order to pass constitutional muster, it must either be a temporary commission or part of an existing or new civil department.^{xxxix} Since it fails on all three fronts, the Commission violates the NY Constitution by being outside its mandated governmental organizational structure.

What Comes Next?

Defendants are expected to answer the complaint in mid-November and an initial trial conference before Judge Weinstein of the Albany County Supreme Court is set for November 16. No matter the outcome of this trial, it is expected that Judge Weinstein’s decision will be appealed and the Court of Appeals will eventually be asked to weigh in. Under the current law, the Commission is expected to begin its operations on January 1, 2019, so Judge Weinstein’s determination on the preliminary injunction will be significant. In addition, the New York legislature is expected to amend the current law, as per the agreement with Governor Cuomo, when it reconvenes in January. Since the amendment is supposed to address some of the constitutional infirmities raised by the plaintiffs, it will also be important to watch what strategies the parties to the lawsuit will adopt to address the amended law, if and when it is amended.

ⁱ N.Y. Judiciary Law § 499-f (Mckinney)

ⁱⁱ Id.

ⁱⁱⁱ Id.

^{iv} Id. § 499-d(1)

^v Id. § 499-f(3)

^{vi} Id. § 499-d(1)

^{vii} Id. § 499-f(7)

^{viii} Id.

^{ix} Id. § 499-c(1)

^x Id.

^{xi} Id. § 499-e(1)

^{xii} Id. § 499-c(6)

^{xiii} Dan M. Clark, *Prosecutorial Misconduct Commission Might Not Survive Judicial Review, AG's Counsel Writes*, New York Law Journal, (Aug. 13, 2018, 3:08 PM), <https://www.law.com/newyorklawjournal/2018/08/13/prosecutorial-misconduct-commission-might-not-survive-judicial-review-ags-counsel-writes/>

^{xiv} Dan M. Clark, *Cuomo, Lawmakers Agree on Changes to Prosecutorial Misconduct Commission Bill*, New York Law Journal, (Aug. 13, 2018, 3:08 PM), <https://www.law.com/newyorklawjournal/2018/08/20/cuomo-lawmakers-agree-on-changes-to-prosecutorial-misconduct-commission-bill/>

^{xv} Id.

^{xvi} Complaint, Soares v. The State of New York (Sup. Ct, Albany County 2018) (No. 906409-18, entry no. 2)

^{xvii} Id. at 8-9

^{xviii} Id. at 8-9

^{xix} Id. at 9-10

^{xx} The proposed amendment is supposed to address this last point, but as mentioned above, it is unclear what language will be added to the amendment to address the issue.

^{xxi} Complaint at 11, Soares v. The State of New York (Sup. Ct, Albany County 2018) (No. 906409-18, entry no. 2)

^{xxii} Id. at 13

^{xxiii} Id. at 14. The proposed amendment re-shuffles the appointee balance so that the executive branch appoints a majority of the Commission members. However, the Commission will still contain members appointed by the legislature and the Chief of the Court of Appeals.

^{xxiv} Id. As noted, the proposed amendment will vest appellate review authority in the Appellate Division rather than the Court of Appeals. Given that the Appellate Division already has authority to discipline lawyers operating under its jurisdiction, proponents of the commission may have a strong argument that the amendment will cure this particular alleged defect in the existing law.

^{xxv} Id. at 15

^{xxvi} Id.

^{xxvii} N.Y. Const. art. VI, § 20(b)(1)

^{xxviii} Complaint at 15-16, Soares v. The State of New York (Sup. Ct, Albany County 2018) (No. 906409-18, entry no. 2)

^{xxix} The proposed amendment should cure this defect, as the Chief Judge will be required to appoint retired judges to the Commission.

^{xxx} Complaint at 16, Soares v. The State of New York (Sup. Ct, Albany County 2018) (No. 906409-18, entry no. 2)

^{xxxi} Id. at 17

^{xxxii} N.Y. Const. art. VI, § 4(k)

^{xxxiii} Complaint at 17-18, Soares v. The State of New York (Sup. Ct, Albany County 2018) (No. 906409-18, entry no. 2)

^{xxxiv} Id. at 18

^{xxxv} Id. at 19 (referencing 22 NYCRR 1240.7(d)(2)(vi))

^{xxxvi} Id. at 19 (quoting 22 NYCRR 1240.8(b)(1))

^{xxxvii} N.Y. Const. art. V, § 2

^{xxxviii} Complaint at 20, Soares v. The State of New York (Sup. Ct, Albany County 2018) (No. 906409-18)

^{xxxix} Id.