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New York Creates Commission on Prosecutor Conduct

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New York recently became the first and, so far, only state in the country to create a commission to review claims of misconduct by prosecutors in the 62 district attorneys' offices throughout the state. Officially termed the Commission on Prosecutorial Conduct, it has been and continues to be controversial. Many have called for establishment of such a commission, as did the *New York Times* in an August 15, 2018, editorial titled "Prosecutors Need a Watchdog." But it is has drawn strong opposition from the District Attorneys Association of New York, which has filed a pending lawsuit challenging its constitutionality. In this column, we describe the Commission's composition, jurisdiction, and powers and provide an overview of the arguments surrounding it.

The Commission

Modeled on New York's Commission on Judicial Conduct, the Commission on Prosecutorial Conduct is composed of 11 members. Two are appointed by the governor, six by the legislature, and three by the judiciary. The members appointed by the governor and the legislature must be balanced with an equal number of prosecutors and defense counsel. Like federal appellate courts, the Commission is authorized to review individual complaints through three-member panels and also to appoint referees to investigate.

Investigation and review are triggered by the filing of a complaint. But the Commission is also authorized to initiate investigation and review without a complaint having been filed. Its mandate is to review prosecutorial compliance with statutes, case law, and New York's legal ethics rules. Examples include New York's criminal discovery rules, the constitutional requirement to disclose exculpatory evidence under *Brady v. Maryland* (373 U.S. 83 (1963)), and Rule 3.8 of New York's Rules of Professional Conduct.

The Commission has the power to conduct hearings, compel witnesses to testify, and subpoena records and other materials relevant to its inquiry. In terms of sanctions, the Commission can admonish or censure a prosecutor. It also can recommend to the governor that a prosecutor be removed from office or retired. The decision of whether a prosecutor is removed from office or retired lies exclusively with the governor. The prosecutor may request a review of the Commission's determination by the presiding justices of the appellate division in the department in which the alleged misconduct occurred, who may accept or reject the sanction, impose a different sanction including admonition or censure, recommend removal or retirement, or impose no sanction.

Disbarment and suspension are not listed as options. In New York such sanctions are the sole domain of the Appellate Divisions of the Supreme Court. The statute creating the Commission

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does not mention referral to ethics disciplinary authorities as an option. However, if the Commission were to find that a prosecutor committed a violation of the New York Rules of Professional Conduct that raises a substantial question of a prosecutor's "honesty, trustworthiness or fitness as a lawyer in other respects," there would a reporting obligation under Rule 8.3. Presumably, such a referral would go through the usual disciplinary process. Disciplinary authorities in New York also have the authority to initiate *sua sponte* investigations of lawyers.

Who Is For and Against the Commission?

The lineup of supporters and critics of the Commission in some ways is quite predictable. Defense lawyers as well as judges and academics critical of the criminal justice system and concerned about prosecutorial misconduct called for and have lauded creation of the Commission. Governor Cuomo supported it. It is opposed by district attorneys and their subordinates whose conduct is subject to scrutiny by the Commission. The party affiliations, though not the occupations, of those leading the two sides may surprise some. The Senate sponsor of the bill was John A. DeFrancisco, an upstate Republican and criminal defense lawyer. An outspoken critic of the Commission and the first-named plaintiff in the action challenging it is P. David Soares, a Democrat who is the District Attorney for Albany County.

Necessary?

Opponents argue that the Commission is unnecessary. The current ethics disciplinary system as well as remedies such as disqualification, exclusion of evidence, and reversal of a conviction for prosecutorial misconduct as well as internal monitoring by district attorney offices are already available to address and deter prosecutorial misconduct.

The primary response to this redundancy argument is practical and empirical. Although the mechanisms and measures mentioned above do indeed exist, they have, in fact, proven inadequate to deter and punish prosecutor misconduct. In recent decades, there have been a disturbing number of revelations of egregious prosecutor misconduct that has often had disastrous results for individual defendants, such as decades of wrongful imprisonment. The Innocence Project and the National Registry of Exonerations, for example, have found prosecutor misconduct to be a persistent cause of wrongful convictions.

A second rejoinder to the opposition's redundancy claim points to the infrequency with which existing mechanisms and measures have been used to police prosecutors. Rarely have legal or ethical sanctions been imposed on prosecutors who engaged in the misconduct that has come to light in recent years across the country.

An opinion piece in the June 18, 2018, issue of the *New York Times* provided the details of a New York prosecutor's alteration and concealment of exculpatory evidence in multiple murder cases. One judge called the prosecutor's misconduct in one of these cases a "travesty." Another described his misconduct in another case as "absolutely stunning." Thankfully this man is no longer a prosecutor. Though the convictions were overturned, the prosecutor was never sanctioned either legally or ethically and continues to practice law. (Nina Morrison, *What Happens When Prosecutors Break the Law?*, N.Y. TIMES, June 18, 2018.) An article in the April 6, 2019, issue of the *New York Times* tells of several more instances of egregious but unsanctioned prosecutorial misconduct that resulted in years of wrongful imprisonment. (Jan Ransom & Ashley Southall, *If Prosecutors Go Bad, a New Commission Could Rein Them in*, N.Y. TIMES, Apr. 6, 2019.) Such vivid and egregious examples in New York and elsewhere have drawn considerable media attention and provided much of the political traction for creation of the Commission.

Academic studies such as those by Professor Richard Rosen and Professor Fred Zacharias confirm that failure to sanction prosecutors has long been a problem across the United States. (Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).) Examples of prosecutors who are repeat ethics offenders also highlight the fact that they typically have faced no sanctions within district attorneys' offices.

A "Few Bad Apples"

Commission opponents also argue that instances of prosecutorial misconduct, though they have occurred and received considerable publicity in recent years, are rare and not characteristic of the work of the vast majority of New York prosecutors. Drawing on a theme used in the context of police misconduct, one might simply argue that the prosecutorial misconduct that has been revealed is reflective only of "a few bad apples."

There are a number of responses to such "a few bad apples" argument. First, we simply do not know how widespread prosecutorial misconduct is. The very nature of disclosure violations, for example, makes it difficult, if not impossible, to determine how often the disclosure mandates of the *Brady* rule and Rule 3.8(b) are violated. The fact that most cases end in guilty pleas increases the chances that *Brady* and other disclosure violations never come to light. So, it is hard to determine whether such violations are uncharacteristic or, as some argue, consistent with the cultures of some prosecutor offices.

Second, even if prosecutorial misconduct is limited to a relatively small subset of prosecutors, which many are willing to concede, misconduct by that subset is a major concern because each of these "bad apple" prosecutors exercises enormous power and can have terrible negative consequences on the lives of individual defendants, such as a false conviction or the imposition of a grossly disproportionate sentence.

Third, even if the number of bad prosecutors is small, punishing these "few bad apples" is important. For one thing, such misconduct deserves to be punished. Second, failure to punish it encourages rather than discourages misconduct, undermining public confidence in prosecutors and supporting an office culture that condones misconduct. In short, sanctioning misconduct deters the wrongdoers and reinforces the many prosecutors who do not engage in misconduct.

In support of the Commission one can also point out structural problems that make it hard to reign in misconduct by prosecutors. One of these is the near impossibility of civilly suing a prosecutor for misconduct due to immunity. Another is a phenomenon that results from judges and ethics authorities both having jurisdiction over prosecutor misconduct. A judge might well not sanction a prosecutor because he or she views the misconduct as an ethical issue and thus defers to the ethics authorities and ultimately the state Supreme Court to handle it. Ethics authorities, in turn, may view the judge as the appropriate person to sanction the prosecutor because the misconduct took place in a case before the judge and the judge is likely to be more familiar with the context and nuances surrounding the alleged misconduct. When both a judge and ethics authorities defer to one another, neither may take action. The Commission remedies this problem.

Disruption

Commission opponents argue that its existence will create opportunities for those subject to criminal investigations and prosecutions to gain unfair strategic advantages by filing complaints in order to disrupt the investigation and prosecution of criminal cases.

A criminal defense lawyer, a prosecutor, or a civil litigator may at times use any legitimate legal institution or rule improperly in an attempt to gain an unfair strategic advantage. Disqualification motions, liberal rules of discovery in civil litigation, and even ethics complaints are obvious examples. We seek to avoid such misuse, while recognizing that although some instances of it are inevitable, the benefits from these institutions and rules when used appropriately outweigh the costs of some misuse. We believe the same is true concerning the Commission. We also believe that the structure of the Commission is such that it should be able to act in a timely manner to weed out bogus complaints not supported by sufficient evidence.

The Constitutional Challenges

It is beyond the scope of this column to describe and evaluate each of the constitutional claims advanced to challenge the Commission. Two themes, though, seem to underlie the claims. One is the fear of prosecutors having too little power to operate effectively. The second is that it is constitutionally inappropriate for the judiciary or the legislature to exercise control over prosecutors.

Prosecutorial Power

In reality, the Commission will not alter or diminish much, if at all, the current power of prosecutors. It is aimed simply at enforcing current ethical, statutory, and constitutional standards, standards that many critics argue do too little to curtail the growth in prosecutorial power recent decades have witnessed. If anything, one can argue that the Commission will do too little to curtail prosecutorial power. The Commission, for example, does nothing to lessen the enormous powers prosecutors have in charging, negotiating guilty pleas, and determining punishment.

The argument that the Commission constitutes undue encroachment of prosecutorial power is out of touch with the reality that today prosecutors both in New York and across the country wield enormous power in the criminal justice system, power that has increased greatly in recent decades. Many argue that prosecutors currently exercise too much power. Increased use in recent decades of three-strikes laws and mandatory minimums along with a proliferation of offenses has given prosecutors much greater power than they had previously. They allow prosecutors to control sentencing outcomes through their charging decisions and give them great leverage in negotiating guilty pleas.

For these reasons, the current problem of imbalance of power between judges and prosecutors is that prosecutors now have too *much*, not too little, power. We thus should be concerned not with undue encroachment of prosecutorial power through commissions of the sort created in New York, but how to curtail that power.

The Role of the Legislature

The challengers to the Commission adopt the view that it is inappropriate for the legislature to wield power over prosecutors. This view strikes us as exactly wrong in terms of the role of the legislature in the criminal justice system.

It is now widely, if not uniformly, accepted in New York and throughout the United States that the legislature is supreme in the criminal sphere, bounded only by constitutional restraints such as due process and the bans on ex post facto laws and cruel and unusual punishment. Legislative supremacy in the criminal sphere is grounded in the idea that the harshest power of the state—imprisoning, executing, and stigmatizing citizens as criminals—should be wielded by the branch of government that is, and is widely viewed as, the most democratically representative and accountable. It was driven historically by negative experiences in the Colonial era with both executive and judicial officials appointed by and representing an English king. The U.S. Supreme Court in *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812), jettisoned common law crimes and found that any federal crime must be enacted by Congress through a statute. New York's highest court similarly concluded in 1911 that "[t]here is no longer any common law crime in this state." (People v. Knapp, 206 N.Y. 373, 380 (1911).) In New York and across the United States, legislatures clearly have the last word in creating and defining offenses.

The legislature in many states, often acting in conjunction with the state's judiciary, also creates statutory criminal procedure rules that control the behavior of prosecutors. The New York legislature, for example, has created and defined disclosure obligations for prosecutors through its enactment of Article 240 of New York's Criminal Procedure Law. Legislatures in some states have mandated generous, open file disclosure, while others have retained more traditional, narrow disclosure obligations. But the legislature's constitutional responsibility and authority to prescribe rules controlling prosecutors as well as defense lawyers and judges are beyond question.

Because the legislature has both the responsibility and authority to define prosecutorial obligations by enacting statutes and rules of criminal procedure, surely it must have, and does have, a legitimate interest in ensuring the enforcement of these statutes and rules. If creating these prosecutorial obligations is within the legislature's responsibility and authority, as no one questions, how can the enforcement of them not be within the responsibility and authority of the legislature?

The Role of the Judiciary

Challengers also adopt the view that it is inappropriate for the judiciary to wield sanctioning power over prosecutors through the Commission. This view is at odds with (1) the role of the judiciary in defining and enforcing ethical obligations for all lawyers in the state, including prosecutors; (2) the supervisory power judges have over lawyers appearing before them, including prosecutors; and (3) the fact that under the American notion of judicial review, judges have the final word on the meaning and enforcement of constitutional protections, such as due process, that protect defendants and impose requirements, such as disclosure of exculpatory evidence, on prosecutors.

A state's highest court has the final say in creating and defining the ethical obligations for lawyers practicing within the state, including prosecutors. The state's highest court also has the final say on enforcement of those ethical rules because a state's ethics disciplinary process ends with that court. Prosecutors have argued in disciplinary contexts that having judges impose ethics sanctions on prosecutors violates the separation of powers. This constitutional argument has uniformly been rejected by state courts. (*See, e.g.*, Massemo v. Statewide Grievance Comm., 663 A.2d 317 (Conn. 1995); *In re* Discipline of Jeffries, 500 N.W.2d 220 (S.D. 1993); Commonwealth

ex rel. Pike Cty. Bar Ass'n v. Stump, 57 S.W.2d 524 (Ky. 1933); Ramsey v. Bd. of Prof'l Responsibility, 771 S.W.2d 116 (Tenn. 1989).)

How can judicial participation in a commission the function of which is to enforce the state's ethics rules against prosecutors, then, be viewed as outside the judiciary's proper sphere of authority and responsibility? It simply represents a new way of exercising authority and responsibility that have long been seen as belonging primarily, if not exclusively, to the judiciary.

Judges have also long been properly given the necessary power to supervise the conduct of lawyers appearing before them. This power can be exercised in a variety of ways, such as sanctions, contempt, disqualification, and exclusion of evidence.

Finally, under the American doctrine of judicial review, long accepted in both federal and state courts, judges have the final say in interpreting and applying both state and federal constitutional provisions that constrain prosecutors. Examples include the obligation to disclose exculpatory evidence and the obligation not to comment on a defendant's choice not to testify. Judicial participation in the Commission, one of the functions of which is to enforce constitutional obligations such as *Brady* disclosure, should not be viewed as outside the judiciary's proper sphere of authority and responsibility when such enforcement has long been entrusted to the judiciary.

Another potent response to the argument that the Commission gives the legislature and the judiciary powers beyond their proper constitutional sphere is that the Commission can only recommend to the governor that a prosecutor be removed from office or retired. Under the statute creating the Commission, the governor—obviously an executive branch official—has final say over these two most serious sanctions. The statute mandates that the governor independently determine whether a prosecutor should be removed or retired. This is consistent with the authority the governor has under the New York Constitution, which states that the governor "may remove any elective . . . district attorney . . . within the term for which he or she shall have been elected." (N.Y. CONST. art. XIII, § 13(a).)

Conclusion

Prosecutorial misconduct should be subject to sanction. Those in power who abuse their power are blameworthy. They deserve and are viewed by the public as deserving to be sanctioned. Therefore, it is critical for public confidence in the criminal justice system that those who run our system of justice not be seen as flouting the laws and rules that govern them. Such sanctioning also will deter and, in cases in which the prosecutor is removed from office, provide protection through incapacitation.

In our view, the arguments in favor of the New York Commission on Prosecutorial Conduct, as well as the creation of similar commissions in other states, are much more convincing than the arguments advanced by critics. Despite the existence of other potential policing mechanisms and measures, it is clear that these are not working. It is time to try something new to remedy this situation. We also see the view underlying the constitutional challenges to the Commission as out of touch with the current realities of our criminal justice system and inconsistent with the power and authority that both the legislature and the judiciary do and should exercise over the criminal justice system in general and prosecutors in particular.