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Halting Ga. Prosecutor Watchdog Gains Nationwide Support

By **Emily Johnson**

Law360 (September 6, 2023, 4:52 PM EDT) -- More than 80 current and former state and federal prosecutors and U.S. Department of Justice officials, along with a college-affiliated institute, have signaled their support for a request to halt the work of a new Georgia prosecutorial oversight commission that is being challenged by four Peach State district attorneys.

Two organizations — Fair and Just Prosecution, a national nonprofit that supports reform-minded prosecutors, and the Institute for Innovation in Prosecution at John Jay College — on Tuesday threw their support behind an injunction request filed nearly two weeks ago by Georgia district attorneys who are seeking to temporarily halt a new state law that created a state prosecutorial oversight commission.

In an amicus **brief** organized by Fair and Just Prosecution, a group of current and former elected prosecutors and attorneys general as well as former U.S. attorneys and DOJ officials said they are concerned that the new prosecutorial oversight board will cause "significant and wide-reaching disruptions in the fair administration of justice."

"Amici have a strong interest in this case because of the deeply troubling ways that SB 92 erodes the independence of duly elected prosecutors, constrains prosecutorial decision making and threatens to entangle those decisions in politics, and infringes on the inherent discretion prosecutors have had for decades, thereby trampling bedrock constitutional principles," they said in the brief.

The amicus briefs support the injunction request filed by District Attorneys Sherry Boston, Flynn Broady, Jared Williams and Jonathan Adams on Aug. 24 that seeks to curtail the powers of Georgia's new Prosecuting Attorneys Qualifications Commission, which could start accepting and investigating complaints against district attorneys and solicitors general as early as October.

In their amicus brief, the current and former criminal justice officials called recent statements troubling, such as a state senator's public statement about having the new commission investigate Fulton County District Attorney Fani T. Willis for her prosecution of former President Donald Trump for his attempts to overturn the results of the 2020 presidential election in Georgia.

"Whether the [new commission] will in fact find the complaint reasoned and decide to take action against DA Willis or not — the mere inquiry into DA Willis' work is itself profoundly troubling and disruptive, and undermines the autonomy of the duly elected prosecutor," the brief said.

Miriam Krinsky, executive director of Fair and Just Prosecution and a former federal prosecutor, told Law360 Pulse on Wednesday that leaders across the country have taken an interest in this suit because of the law's alleged infringement on prosecutors' discretion and separation of powers.

"What we hope is that the court will affirm those long-settled principles, and in doing so, will uphold democracy and stand behind the right of voters to select their elected prosecutors, and not strip voters, the way this recent legislation threatens to do, of their prerogative to put people in office, and to have those elected officials function in a way that's apolitical and transparent and abides by their jobs of minister of justice to make decisions with the community and public safety in mind," Krinsky said.

Krinsky said that it's crucial for prosecutors to be able to continue to move forward with prosecutorial discretion.

"There's a reason why prosecutors who are charged to act as ministers of justice need to function independently and be above political fray or partisan gamesmanship," Krinsky said. "Prosecutors have ... discretion and autonomy to make decisions about how to use inherently limited resources, and they

are charged with doing that and need to do so in a way that's transparent and allows the community to judge whether to keep them in office and whether their decisions align with the communities' priorities."

The group's brief argues that the new commission diminishes the well-settled discretion of prosecutors, which is normally held in check at the ballot box.

"This law invades elected prosecutors' discretionary authority at every step, tramples on separation of powers, thwarts the will of the electorate, disrupts purely prosecutorial functions, and interferes with prosecutors' management of their offices," the officials said. "The law does nothing to improve public safety; instead, by upending democratic and constitutional norms, it shatters public trust in the integrity of the legal system that serves as the predicate for keeping communities safe."

The brief is signed by Chatham County District Attorney Shalena Cook Jones, Western Judicial Circuit District Attorney Deborah Gonzalez, Douglas County District Attorney Dalia Racine and former DeKalb County District Attorney J. Tom Morgan. Delaware Attorney General Kathleen Jennings and District of Columbia Attorney General Brian Schwalb also signed on.

The district attorneys who **filed the suit** want the court to overturn as unconstitutional the law that created the Prosecuting Attorneys Qualifications Commission earlier this year.

The DAs are challenging SB 92, signed into law in May by Republican Gov. Brian Kemp, which created the commission with the ability to investigate, discipline, remove or cause involuntary retirement of appointed or elected district attorneys or solicitors general.

In its amicus **brief** also filed Tuesday, the Institute for Innovation in Prosecution at John Jay College argued that prosecutorial discretion is a cornerstone of the legal system.

The institute criticized the law's requirement that prosecutors review every case for which probable cause exists and decide whether or not to file charges based on facts and circumstances of the individual, saying that is "a requirement that deprives prosecutors of the ability to consider non-case specific factors when making charging decisions, such as the particular enforcement needs of their community, whether their offices' limited resources would be better deployed to investigating and prosecuting other types of crimes, or whether prosecution is even in the public interest at all."

The institute also argued that SB 92 is an "impermissible" action into "another branch's delegated powers," and attempts to circumvent the will of voters, which is a right in the state's constitution.

"Moreover, SB 92 intrudes on the power to enforce the laws that has been conferred on prosecutors, members of a separate and co-equal branch of Georgia's government, thereby violating the bedrock separation-of-powers doctrine, also enshrined in Georgia's constitution," the institute said.

The law will also make it harder for prosecutors to freely communicate their criminal enforcement priorities and strategies, the institute said.

The institute is a nonpartisan think tank that connects prosecutors, policy experts and communities to advocate for data-driven strategies, scholarship and innovative thinking in regards to prosecution and criminal justice matters, according to its brief.

Rachel Marshall, executive director of the institute, told Law360 Pulse on Wednesday in a statement that the organization "fears that, if allowed to stand, SB 92 will fundamentally alter prosecutors' role in our legal system and hamstringing their ability to respond to the needs of the community that elected them."

"Additionally, the failure to enjoin SB 92's implementation could incentivize other state legislatures to attempt to usurp local prosecutors' authority to prioritize limited community resources and decide if, when, and how to prosecute," Marshall added. "SB 92 thus presents a nationwide slippery slope of legislative overreach and disenfranchisement of voters."

Representatives for the parties in the suit did not immediately respond to requests for comment on Wednesday.

Fair and Just Prosecution is represented by K. David Cooke Jr. of Gautreaux Law LLC.

The Institute for Innovation in Prosecution is represented by Robert J. Cleary, Russell T. Gorkin, Andrew M. Sherwood, Brook G. Gottlieb and Christopher J. Spadaro of Proskauer Rose LLP and Peter C. Canfield of Canfield Law LLC.

The district attorneys are represented by David N. Dreyer and Quinton G. Washington of Washington Dreyer & Associates LLC, Joshua A. Rosenthal and Jonathan B. Miller of Public Rights Project and Bruce P. Brown of Bruce P. Brown Law LLC.

The commission members are represented by Christopher M. Carr and Logan B. Winkles of Georgia's Office of the Attorney General and Josh Belinfante, Chuck Boring, Carey Miller and Anna Edmondson of Robbins Alloy Belinfante Littlefield LLC.

The cases are Sherry Boston et al. v. Joseph Cowart et al., case number 2023CV383558, and Sherry Boston et al. v. State of Georgia, case number 2023CV383555, in the Superior Court of Fulton County, Georgia.

--Additional reporting by Rosie Manins. Editing by Dave Trumbore.

Update: This article has been updated with comments from the executive director of the Institute for Innovation in Prosecution at John Jay College.

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