

2023

SB 92 - Establishing a Prosecuting Attorneys Qualifications Commission

Abigail C. Sisson

Georgia State University College of Law, achasteen2@student.gsu.edu

Erica L. Welsh

Georgia State University College of Law, ewelsh3@student.gsu.edu

Follow this and additional works at: <https://readingroom.law.gsu.edu/gsulr>



Part of the [Criminal Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Abigail C. Sisson & Erica L. Welsh, *SB 92 - Establishing a Prosecuting Attorneys Qualifications Commission*, 40 GA. ST. U. L. REV. 55 (2023).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol40/iss1/7>

This Peach Sheet is brought to you for free and open access by the Publications at Reading Room. It has been accepted for inclusion in Georgia State University Law Review by an authorized editor of Reading Room. For more information, please contact gfowke@gsu.edu.

COURTS

Prosecuting Attorneys: Amend Title 15 of the Official Code of Georgia Annotated, Relating to Prosecuting Attorneys, so as to Provide for Duties of District Attorneys; Create the Prosecuting Attorneys Qualifications Commission; Provide for Definitions; Provide for the Powers, Composition, Appointment, and Confirmation of such Commission; Provide for Commission Members' Terms, Vacancies, and Removals; Provide for Procedures and Confidentiality; Disqualify Certain Individuals for a Certain Amount of Time from Being Appointed or Elected to the Offices of District Attorney or Solicitor-General; Amend Chapter 4 of Title 21 of the Official Code of Georgia Annotated, Relating to Recall of Public Officers, so as to Revise Provisions Relating to Grounds for Recall of District Attorneys of Judicial Circuits and Solicitors-General of State Courts; Provide for Related Matters; Provide for an Effective Date; Repeal Conflicting Laws; and for Other Purposes

| | |
|----------------|---|
| CODE SECTIONS: | O.C.G.A. §§ 15-18-6 (amended); 15-18-32 (new); 15-18-66 (amended); 21-4-3 (amended) |
| BILL NUMBER: | SB 92 |
| ACT NUMBER: | 349 |
| GEORGIA LAWS: | 2023 Ga. Laws 718 |
| SUMMARY: | The Act establishes a Prosecuting Attorneys Qualifications Commission to discipline, remove, and cause involuntary retirement of appointed or elected district attorneys or |

solicitors-general. The Commission will have eight members divided among an investigative panel and a hearing panel, with the former consisting of five members and the latter consisting of three members. In addition, the Act amends the duties of district attorneys and solicitors-general to add individual case review where probable cause exists.

EFFECTIVE DATE: May 5, 2023

History

In the last few years, nationwide disputes over how certain criminal offenses should be charged led legislators to introduce bills that provide additional avenues for removing prosecutors.¹ In the 2022 election cycle, Republicans ran on anticrime platforms, “accusing Democrats of coddling criminals and acting improperly by refusing to prosecute whole categories of crimes including marijuana possession. All the efforts raise the question of prosecutorial discretion—a prosecutor’s decision of what cases to try or reject and what charges to bring.”² In Georgia, these bills come “amid complaints by Republicans that some Democratic prosecutors have publicly declared they would not prosecute Georgians arrested for violating the state’s six-week abortion ban.”³

1. Jeff Amy, *Georgia Bill Is Latest GOP Effort Targeting Prosecutors*, AP NEWS (Mar. 28, 2023, 7:43 AM), <https://apnews.com/article/georgia-prosecutor-district-attorney-remove-discipline-dd06c56d0d0672e38ef11f4c63dda468> [https://perma.cc/Z6QK-CWRS].

2. *Id.*

3. Dave Williams, *Georgia House Votes to Establish Board Overseeing Prosecutors*, AUGUSTA CHRON., <https://www.augustachronicle.com/story/news/state/2023/03/07/board-to-oversee-prosecutors-gets-ok-in-georgia-house/69981134007/> [https://perma.cc/MP4E-5UMQ] (Mar. 9, 2023, 3:24 PM).

In 2021, however, Democratic legislators were initially supportive of a prosecutor oversight commission.⁴ The killing of Ahmaud Arbery in 2020 “fueled calls for a state commission to investigate prosecutor misconduct.”⁵ A grand jury indicted former Brunswick Judicial Circuit District Attorney Jackie Johnson for “violation of oath of public officer” and “obstruction and hindering a law enforcement officer.”⁶ Although Democratic legislators initially supported the Commission, they “turned against [it] after liberal district attorneys sounded alarms about the potential for political meddling. They warned, for instance, that Republican leaders could use greater oversight powers to crack down on liberal prosecutors’ decisions not to target lower-level crimes such as marijuana possession.”⁷

During the 2021–2022 regular session, Republican legislators attempted to pass similar bills to create a Prosecuting Attorneys Oversight Commission.⁸ Representative Joseph Gullett (R-19th) sponsored House Bill (HB) 411, while Senator Larry Walker, III (R-20th) sponsored Senate Bill (SB) 218; however, both bills failed.⁹ The bills each failed in different procedural ways. The Senate never

4. Hannah Knowles & Mark Berman, *Ahmaud Arbery’s Killing in Georgia Puts an Unusually Bright Spotlight on Prosecutor Accountability*, WASH. POST (Oct. 27, 2021, 8:12 PM), <https://www.washingtonpost.com/nation/2021/10/27/ahmaud-arbery-prosecutors-georgia/> [<https://perma.cc/AED7-B3XZ>].

5. *Id.*

6. Alyssa Lukpat, *Former Prosecutor in Ahmaud Arbery’s Death Faces Criminal Charges*, N.Y. TIMES, <https://www.nytimes.com/2021/09/02/us/jackie-johnson-indicted-ahmaud-arbery.html> [<https://perma.cc/TJ7M-V98F>] (Nov. 24, 2021). Johnson is accused of “‘showing favor and affection’ to one of the men now charged with killing Ahmaud Arbery.” *Id.* Johnson has plead not guilty. Michael Hall, *Prosecution of Former District Attorney Delayed, but Not Going Away*, BRUNSWICK NEWS (Mar. 22, 2023), https://thebrunswicknews.com/news/local_news/prosecution-of-former-district-attorney-delayed-but-not-going-away/article_5152fed5-96a8-50c6-b006-495378355314.html [<https://perma.cc/2ETX-QTTF>]. The outcome of her case is still pending. *Id.* See also Jake Shore, *Three Years After Arbery’s Death, No Arraignment for Indicted DA. Here’s Where It Stands*, THE CURRENT, <https://thecurrentga.org/2023/02/22/three-years-after-arberys-death-no-arraignment-for-indicted-da-heres-where-it-stands/> [<https://perma.cc/N6J5-HS2P>] (Mar. 13, 2023).

7. Knowles & Berman, *supra* note 4.

8. Georgia General Assembly, HB 411, Bill Tracking [hereinafter HB 411, Bill Tracking], <https://www.legis.ga.gov/legislation/59573> [<https://perma.cc/MDU4-BLYN>]; Georgia General Assembly, SB 218, Bill Tracking [hereinafter SB 218, Bill Tracking], <https://www.legis.ga.gov/legislation/59915> [<https://perma.cc/2W3P-K25C>].

9. HB 411, Bill Tracking, *supra* note 8; SB 218, Bill Tracking, *supra* note 8.

agreed to the House's changes to SB 218, and HB 411 failed on the Senate floor.¹⁰

During the 2022–2023 regular session, Representative Gullett introduced HB 231, which similarly created a prosecutor oversight panel.¹¹ HB 231 “would require the Georgia Supreme Court to appoint five-member investigation panels and three-member hearing panels that will determine disciplinary consequences for prosecutors who decline to prosecute low-level offenses.”¹² In contrast, SB 92, introduced by Senator Randy Robertson (R-29th), requires the individuals on the panels to be appointed by the Governor, Lieutenant Governor, Speaker of the House, and Senate Committee on Assignments.¹³ Ultimately, SB 92 moved forward.¹⁴

Senator Brian Strickland (R-17th) believes this Act will “provide oversight over elected prosecutors where currently none exist outside of the ability for citizens to elect individuals every four years.”¹⁵ James Beal, General Counsel for the Office of the Senate President Pro Tempore John F. Kennedy (R-18th), said that the goal of SB 92 is to establish a commission that would “enforce the statutory duties that district attorneys and solicitors-general must follow according to state law.”¹⁶

SB 92 is the product of discussions over the last few years about how to enforce prosecutors' duties.¹⁷ When asked about what led to the introduction of SB 92, Beal pointed to public concerns voiced

10. HB 411, Bill Tracking, *supra* note 8; SB 218, Bill Tracking, *supra* note 8.

11. See Stanley Dunlap, *GOP-Controlled Georgia House Pushes Through Bill to Create Oversight of County Prosecutors*, GA. RECORDER (Mar. 6, 2023, 10:10 PM), <https://georgiarecorder.com/brief/gop-controlled-georgia-house-pushes-through-bill-to-create-oversight-of-county-prosecutors/> [<https://perma.cc/ZC5E-QZZL>].

12. *Id.*

13. 2023 Ga. Laws 718, § 2, at 721–22.

14. Georgia General Assembly, SB 92, Bill Tracking [hereinafter SB 92, Bill Tracking], <https://www.legis.ga.gov/legislation/64008> [<https://perma.cc/6P7J-CVRQ>].

15. Electronic Mail Interview with Sen. Brian Strickland (R-17th) (June 13, 2023) [hereinafter Strickland Interview] (on file with the Georgia State University Law Review).

16. Telephone Interview with James Beal, General Counsel to Sen. John F. Kennedy, Office of the Senate President Pro Tempore (June 4, 2023) [hereinafter Beal Interview] (on file with the Georgia State University Law Review).

17. *Id.*

about local prosecutors during Georgia’s most recent campaign season.¹⁸ Beal explained that citizens felt limited in their options for district attorneys, and that district attorneys do not always follow the law or prosecute cases after they are elected.¹⁹ Instead, he stated that district attorneys come up with “blanket policies of nonprosecution.”²⁰

During the House Judiciary Non-Civil Subcommittee meeting on March 15, 2023, Representative Gullett, who sponsored SB 92 in the House, referred to the actions of individual district attorneys when discussing the factors that contributed to the introduction of the bill.²¹ One such example included the Athens-Clarke County District Attorney, Deborah Gonzalez.²² Gonzalez made headlines as the first Latina district attorney in Georgia, and ran on a “very progressive platform,” aiming to reduce incarceration and prosecutions for low-level drug offenses.²³ Supporters of the bill reference Gonzalez’s day-one memo, in which Gonzalez recommended not prosecuting certain minor drug offenses.²⁴ However, “Gonzalez’s attorney Derek Bauer argued in court that the memo was not a blanket policy, but a guideline for how Gonzalez wanted to proceed.”²⁵ During the House Judiciary Non-Civil Subcommittee meeting on March 15, 2023, Senator Robertson, SB 92’s lead sponsor, claimed that former Fulton County District Attorney Paul Howard was “prosecuting law

18. *Id.*

19. *Id.*

20. *Id.*

21. Video Recording of House Judiciary Non-Civil Hong Subcommittee at 1 hr., 33 min., 48 sec. (Mar. 15, 2023) [hereinafter House Subcommittee Video] (remarks by Rep. Joseph Gullett (R-19th)), https://www.youtube.com/watch?v=2dYF_H2Dktc [<https://perma.cc/P97F-MX58>].

22. *Id.*

23. Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, THE MARSHALL PROJECT (Feb. 3, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers> [<https://perma.cc/85AC-77GS>].

24. Stephen Fowler, *Lawsuit Alleges Athens DA ‘Unable and Unwilling’ to Do Her Job*, GA. PUB. BROAD., <https://www.gpb.org/news/2023/03/14/lawsuit-alleges-athens-da-unable-and-unwilling-do-her-job> [<https://perma.cc/5LFD-PXTD>] (Mar. 14, 2023, 7:05 PM).

25. Rebecca Lindstrom, *UPDATE: Athens DA’s Effort to Ask State Appeals Court to Stop a Lawsuit Against Her, Denied*, 11ALIVE, <https://www.11alive.com/article/news/investigations/athens-clarke-county-da-to-defend-her-office-policies-court/85-4832f0f0-91d4-43a4-b280-95680c2450fb> [<https://perma.cc/9J4M-5BXJ>] (May 12, 2023, 12:46 PM).

enforcement officers while neglecting his responsibilities to protect the citizens of Fulton County from rampant crime.”²⁶

Opponents to SB 92 asserted that the State Bar of Georgia Rules, the Georgia Constitution, and the Georgia Code already contain mechanisms for removing prosecutors from office. Opponents believe these mechanisms are sufficient.²⁷ First, the State Bar of Georgia maintains rules that govern attorneys and include the special duties of prosecutors.²⁸ Second, the legislature has the power to impeach prosecutors.²⁹ Third, voters have the power to remove elected district attorneys and solicitors-general from office through local elections.³⁰

Georgia’s SB 92 is similar to bills introduced in Florida, Missouri, Indiana, and Pennsylvania.³¹ In Florida, bills introduced in 2020, 2021, and 2022 sought to enact a similar committee to oversee prosecutorial action.³² Florida’s SB 1174, titled “Statewide Council on Prosecutorial Misconduct,” introduced in 2022, sought to create a statewide council within the Florida Department of Legal Affairs made up of “four state attorneys, four public defenders or their assistants, a district court of appeal judge, and two circuit or county court judges” that would review complaints and recommend findings of misconduct.³³ A bill

26. House Subcommittee Video, *supra* note 21, at 1 hr., 30 min., 40 sec. (remarks by Sen. Randy Robertson (R-29th)).

27. *Infra* notes 27-29 and accompanying text.

28. GA. RULES OF PRO. CONDUCT r. 3.8 (2023) (providing prosecutors with standards to maintain licensure in the State of Georgia); House Subcommittee Video, *supra* note 21, at 1 hr., 42 min., 45 sec. (remarks by Dalia Racine, Douglas County District Attorney) (“We are held to a higher standard. And that is encapsulated within our ethics rules, Rule 3.8, which places us at a much higher standard than anybody else within the criminal justice system . . .”).

29. GA. CONST. art. III, § 7, para. 1 & 2; Video Recording of Senate Judiciary Committee at 39 min., 44 sec. (Feb. 23, 2023) [hereinafter Senate Recording] (remarks by James Woodall, Public Policy Associate, Southern Center for Human Rights), <https://vimeo.com/showcase/8821960/video/801738918> [<https://perma.cc/E8PS-424X>] (“The Georgia General Assembly has the sole power to both vote and hear impeachment charges which to today I don’t believe has been done for over 50 years.”).

30. *See* House Subcommittee Video, *supra* note 21, at 1 hr., 5 min., 5 sec. (remarks by Rep. Tanya Miller (D-62nd)).

31. Amy, *supra* note 1.

32. *See generally* S.B. 1174, 2022 Leg., Reg. Sess. (Fla. 2022); S.B. 434, 2021 Leg., Reg. Sess. (Fla. 2021); S.B. 262, 2020 Leg., Reg. Sess. (Fla. 2020).

33. Jim Ash, *Measure Would Create a Statewide Council on Prosecutorial Misconduct*, FLA. BAR NEWS (Dec. 30, 2021), <https://www.floridabar.org/the-florida-bar-news/measure-would-create-a-statewide-council-on-prosecutorial-misconduct/> [<https://perma.cc/GY2D-K6HU>].

introduced in Missouri would give the Governor the power to appoint a special prosecutor for specific offenses, specifically for cases in any jurisdiction where the Governor finds there is a threat to public health and safety.³⁴ Ultimately, Georgia’s bill resembles a national trend that seeks to regulate prosecutors.³⁵

Bill Tracking of SB 92

Consideration and Passage by the Senate

Senator Randy Robertson (R-29th) sponsored the bill in the Senate with cosponsors Senator John F. Kennedy (R-18th), Senator Larry Walker, III (R-20th), Senator Bill Cowsert (R-46th), Senator Matt Brass (R-28th), and Senator Jason Anavitarte (R-31st).³⁶ On February 2, 2023, the initial bill was placed in the Senate hopper.³⁷ The Senate read the bill on February 6, 2023, and referred the bill to the Senate Judiciary Committee.³⁸ On February 27, 2023, the Committee favorably reported the bill by substitute.³⁹

The Committee made substantial changes to the bill. First, the Committee’s substitute changed the language from “Oversight Commission” to “Qualifications Commission.”⁴⁰ Language was added to clarify that the Prosecuting Attorneys’ Council of Georgia specifically could recommend Commission members.⁴¹ Additionally, the substitute expanded the requirements to qualify for the

34. Rebecca Rivas, *House Passes Bill to Allow for State Takeover of Missouri Prosecutor Offices*, MISSOURI INDEPENDENT (Feb. 9, 2023, 11:14 AM), <https://missouriindependent.com/2023/02/09/house-passes-bill-to-allow-for-state-takeover-of-missouri-prosecutor-offices/> [https://perma.cc/5EGV-2SRP].

35. Amy, *supra* note 1.

36. SB 92, Bill Tracking, *supra* note 14.

37. *Id.*

38. State of Georgia Final Composite Status Sheet, SB 92, May 9, 2023.

39. *Id.*

40. Compare SB 92, as introduced, § 1, p. 1, ll. 16–17, 2023 Ga. Gen. Assemb., with SB 92 (SCS), § 1, p. 2, ll. 16–17, 2023 Ga. Gen. Assemb.

41. Compare SB 92, as introduced, § 1, p. 3, ll. 49–51, 2023 Ga. Gen. Assemb., with SB 92 (SCS), § 1, p. 3, ll. 47–49, 2023 Ga. Gen. Assemb.

Commission's investigative panel.⁴² The Committee also altered the qualifications for the Commission's hearing panel.⁴³ Regarding disciplinary action under the Qualifications Commission, the Committee's substitute altered the "willful and persistent failure to perform his or her duties" to be specific to district attorneys and solicitors-general according to their respective Code sections.⁴⁴

The Committee's substitute removed the discipline for a "[v]iolation of the Georgia Rules of Professional Conduct of the State Bar of Georgia" and removed the portion of the bill stating that the Commission may not knowingly authorize a decision based on a lack of probable cause.⁴⁵ The Committee also added the provision that "[u]pon indictment of a district attorney or solicitor-general of a matter before either panel, the [C]ommission shall suspend its investigation or hearing pending the outcome of the procedure."⁴⁶ Lastly, under the substitute, the Commission cannot receive complaints about misconduct that took place before July 1, 2025, unless the conduct is a pattern that continues past that date.⁴⁷

Additionally, the Senate made two floor amendments to the Committee substitute which were subsequently adopted.⁴⁸ Senator Robertson, Senator John Albers (R-56th), and Senator Chuck

42. O.C.G.A. § 15-18-32(d)(3)(A)(i) (2023). The first attorney appointed by the Governor must have "prosecutorial experience as an elected district attorney or elected solicitor-general." *Id.* The attorney appointed by the Lieutenant Governor and the attorney appointed by the Senate Committee on Assignments must have at least five years of service as an assistant district attorney or as an assistant solicitor-general. *Id.* § 15-18-32(d)(3)(A)(ii), (iv).

43. SB 92 (SCS), § 1, p. 4, ll. 75–77, 2023 Ga. Gen. Assemb. Instead of a citizen member on the panel, the substitute requires the Governor to appoint an elected district attorney or elected solicitor-general. *Id.* The Senate must vote on one elected district attorney or elected solicitor-general. *Id.* § 1, p. 4, ll. 78–81. The judge appointed for the panel must also be a former district attorney or solicitor-general. *Id.* § 1, p. 4, ll. 82–87.

44. Compare SB 92, as introduced, § 1, p. 6, l. 147, 2023 Ga. Gen. Assemb., with SB 92 (SCS), § 1, pp. 6–7, ll. 148–51, 2023 Ga. Gen. Assemb. (indicating that Code section 15-18-6 relates to district attorneys, and Code section 15-18-66 relates to solicitors-general).

45. Compare SB 92, as introduced, § 1, p. 7, ll. 154–56, 172, 2023 Ga. Gen. Assemb., with SB 92 (SCS), § 1, p. 7, ll. 155–57, 171–73, 2023 Ga. Gen. Assemb.

46. SB 92 (SCS), § 1, p. 8, ll. 179–81, 2023 Ga. Gen. Assemb.

47. *Id.* § 1, p. 10, ll. 233–35, 2023 Ga. Gen. Assemb. See also SB 92, as passed Senate, § 1, p. 10, ll. 231–32, 2023 Ga. Gen. Assemb. (amending the date from July 1, 2025, to July 1, 2023).

48. See SB 92 (SFA 1), 2023 Ga. Gen. Assemb.; SB 92 (SFA 2), 2023 Ga. Gen. Assemb.

Hufstetler (R-52nd) offered the first adopted amendment.⁴⁹ The first amendment deleted the word “citizen,” ensuring that only attorneys or district attorneys are eligible for a seat on the Commission.⁵⁰ Previously, the Committee substitute also removed the definition of “citizen.”⁵¹ Additionally, the first amendment deleted the requirement of review and adoption by the Supreme Court of Georgia of certain rules and standards.⁵² Such rules regarded different parts of the Commission, including the Commission’s governance and the hearing panel’s orders in certain matters.⁵³ The second adopted amendment to the Committee substitute changed select dates to be approximately six months to one year prior to the original listed date.⁵⁴

On February 28, 2023, the Senate read the bill for the second time, and on March 2, 2023, the Senate read the bill for the third time.⁵⁵ The Senate adopted the Judiciary Committee substitute on March 2, 2023, by a party-line vote of 32 to 24.⁵⁶

Consideration and Passage by the House of Representatives

Representative Joseph Gullett (R-19th) sponsored the bill in the House of Representatives.⁵⁷ The House read the bill for the first time on March 6, 2023, and for the second time on March 7, 2023.⁵⁸ The

49. See SB 92 (SFA 1), 2023 Ga. Gen. Assemb.

50. *Id.*

51. Compare SB 92, as introduced, § 1, p. 3, ll. 45–46, 2023 Ga. Gen. Assemb., with SB 92 (SCS), § 1, p. 3, ll. 43–46, 2023 Ga. Gen. Assemb.

52. SB 92 (SFA 1), 2023 Ga. Gen. Assemb.; SB 92, as introduced, § 1, pp. 6, 9, ll. 137–38, 225–27, 2023 Ga. Gen. Assemb.

53. See SB 92, as introduced, § 1, pp. 6, 9, ll. 137–38, 225–27, 2023 Ga. Gen. Assemb.

54. SB 92 (SFA 2), 2023 Ga. Gen. Assemb.; see SB 92 (SCS), § 1, p. 10, ll. 231–34, 2023 Ga. Gen. Assemb. These time changes include a new start date for the Commission; the Commission now commences no later than October 1, 2023, not April 1, 2024. SB 92 (SFA 2), 2023 Ga. Gen. Assemb. Additionally, the rules of the Commission must be established by April 1, 2024, not April 1, 2025. *Id.*; SB 92 (SCS), § 1, p. 10, ll. 231–34, 2023 Ga. Gen. Assemb.

55. SB 92, Bill Tracking, *supra* note 14; State of Georgia Final Composite Status Sheet, SB 92, May 9, 2023.

56. Georgia Senate Voting Record, SB 92, #117 (Mar. 2, 2023).

57. SB 92, Bill Tracking, *supra* note 14.

58. *Id.*; State of Georgia Final Composite Status Sheet, SB 92, May 9, 2023.

House Committee on Judiciary Non-Civil offered a substitute to SB 92.⁵⁹ That substitute was later withdrawn and recommitted to the House Rules Committee, which offered its own substitute that was favorably reported on March 23, 2023.⁶⁰ The substitute passed after its third reading on March 27, 2023, by a vote of 97 to 77, and a subsequent motion to reconsider the passage failed by a vote of 73 to 98.⁶¹

One of the noticeable changes from the bill as passed the Senate to the House Judiciary Non-Civil substitute is the re-addition of the word “citizen” into Section 1 in regard to a Commission member’s eligibility.⁶² With the addition of the word, a Commission member remains eligible to serve as long as they maintain their “status as an attorney, citizen, or district attorney.”⁶³ Additionally, the substitute revived the provision stating that the Supreme Court must review the rules and standards of the Commission’s governance for such rules and standards to be effective.⁶⁴ Lastly, the House Judiciary Non-Civil Committee added to the procedure for appeal.⁶⁵ Originally, in the bill as passed the Senate, a respondent could receive a copy of the proposed record from the Supreme Court and have the record settled by the presiding officer of the hearing panel if the respondent had objections to it.⁶⁶ Under the House Judiciary Non-Civil Committee’s version, the respondent could appeal the hearing panel’s decision “by submitting a petition to the superior court of the county where such respondent served as a district attorney or solicitor-general,” and the hearing

59. SB 92, Bill Tracking, *supra* note 14.

60. State of Georgia Final Composite Status Sheet, SB 92, May 9, 2023. *See generally* SB 92 (HCS), 2023 Ga. Gen. Assemb.

61. SB 92, Bill Tracking, *supra* note 14; Georgia House Voting Record, SB 92, #308 (March 27, 2023); Georgia House Voting Record, SB 92, #309 (March 27, 2023).

62. SB 92 (HCS), § 1, p. 4, ll. 92–93, 2023 Ga. Gen. Assemb.

63. *Id.*

64. *Id.* § 1, p. 6, ll. 137–38.

65. *Compare* SB 92, as passed Senate, § 1, p. 9, ll. 224–27, 2023 Ga. Gen. Assemb., *with* SB 92 (HCS), § 1, pp. 9–10, ll. 225–32, 2023 Ga. Gen. Assemb.

66. SB 92, as passed Senate, § 1, p. 9, ll. 224–27, 2023 Ga. Gen. Assemb.

panel's order could be reviewed by the Supreme Court according to the Commission's rules.⁶⁷

The substitute by the House Rules Committee substantively altered the previous substitutes in numerous ways. First, the Rules Committee added two separate statements to the preamble of the bill: (1) "to disqualify certain individuals for a certain amount of time from being appointed or elected to the offices of district attorney or solicitor-general" and (2) "to amend Chapter 4 of Title 21 of the Official Code of Georgia Annotated, relating to recall of public officers, so as to revise provisions relating to grounds for recall of district attorneys . . . and solicitors-general."⁶⁸

Second, and more importantly, the Rules Committee added an amendment to Code section 15-18-6 that requires the district attorney to review every individual case in which probable cause for prosecution exists and to make a decision based on the facts and circumstances of each individual case.⁶⁹ Additionally, the provisions of the hearing panel were altered to include the terms of the initial appointment and who has the appointment power.⁷⁰ All members of the Commission will start their terms on July 1, 2023, not April 1, 2024.⁷¹ The Rules Committee further altered the procedure for appeal by changing the review of the hearing panel's order from the Supreme Court to the Superior Court of Fulton County in accordance with Chapter 3 of Title 5.⁷² The Commission will commence by July 1,

67. SB 92 (HCS), § 1, pp. 9–10, ll. 225–32, 2023 Ga. Gen. Assemb.

68. Compare SB 92 (HCS), p. 1, ll. 1–7, 2023 Ga. Gen. Assemb., with SB 92 (HRCS), p. 1, ll. 1–11, 2023 Ga. Gen. Assemb.

69. SB 92 (HRCS), § 1, pp. 1–2, ll. 14–29, 2023 Ga. Gen. Assemb.

70. Compare SB 92 (HCS), § 1, p. 4, ll. 74–87, 2023 Ga. Gen. Assemb., with SB 92 (HRCS), § 2, p. 6, ll. 126–41, 2023 Ga. Gen. Assemb. The Governor's initial appointment of the one elected district attorney or solicitor-general is for a three-year term, and successors serve for four-year terms. SB 92 (HRCS), § 2, p. 6, ll. 129–30, 2023 Ga. Gen. Assemb. Instead of the Senate electing one member, the Senate Committee on Assignments is now responsible for the appointment. *Id.* § 2, p. 6, ll. 131–32. The House of Representatives no longer elects a member, but the Speaker of the House of Representatives appoints such member. *Id.* § 2, p. 6, ll. 136–41.

71. Compare SB 92 (HCS), § 1, p. 10, ll. 233–37, 2023 Ga. Gen. Assemb., with SB 92 (HRCS), § 2, p. 12, ll. 287–92, 2023 Ga. Gen. Assemb.

72. Compare SB 92 (HCS), § 1, p. 10, ll. 231–32, 2023 Ga. Gen. Assemb., with SB 92 (HRCS), § 2, p. 12, ll. 285–86, 2023 Ga. Gen. Assemb.

2023, not April 1, 2024, and no complaint may be filed before October 1, 2023, not July 1, 2025.⁷³ Additionally, the rules and regulations for the Commission must be established no later than the October 1, 2023 deadline.⁷⁴ One of the key provisions added to the Rules Committee substitute is the addition of the disqualification of removed attorneys. If a district attorney or solicitor-general is removed or retired by the Commission, then the individual is disqualified from being a district attorney in any judicial circuit or a solicitor-general in any county of the state for ten years from the date of the removal.⁷⁵

In regard to solicitors-general's duties and authority, the Rules Committee added amendments to Code section 15-18-66 to mirror the duty added for district attorneys.⁷⁶ Solicitors-general must review every individual case in which probable cause for prosecution exists and make a decision based on the circumstances and the facts of each individual case.⁷⁷ Further, the Rules Committee amended the definition of "grounds for recall" in Code section 21-4-3 to include the recall of a district attorney or solicitor-general for their failure to perform duties enumerated in the respective Code sections.⁷⁸

The Senate agreed to the House substitute on March 27, 2023, by a vote of 32 to 24.⁷⁹ On April 5, 2023, the Senate sent the bill to Governor Brian Kemp (R), and on May 5, 2023, the Governor signed the bill into law as Act 349.⁸⁰ The Act's effective date is May 5, 2023.⁸¹

73. Compare SB 92 (HCS), § 1, p. 10, ll. 233–37, 2023 Ga. Gen. Assemb., with SB 92 (HRCS), § 2, p. 12, ll. 287–92, 2023 Ga. Gen. Assemb.

74. Compare SB 92 (HCS), § 1, p. 10, ll. 233–34, 2023 Ga. Gen. Assemb., with SB 92 (HRCS), § 2, p. 12, ll. 287–88, 2023 Ga. Gen. Assemb.

75. SB 92 (HRCS), § 2, p. 12, ll. 297–301, 2023 Ga. Gen. Assemb.

76. *Id.* § 3, p. 12, ll. 303–09.

77. *Id.*

78. *Id.* § 4, p. 13, ll. 326–30.

79. SB 92, Bill Tracking, *supra* note 14; Georgia Senate Voting Record, SB 92, #336 (Mar. 27, 2023).

80. SB 92, Bill Tracking, *supra* note 14.

81. *Id.*

The Act

The Act amends the following portions of the Official Code of Georgia Annotated: Chapter 18 of Title 15 “relating to duties of district attorney[s]”; Chapter 18 of Title 15 “relating to duties and authority regarding solicitors-general”; and Chapter 4 of Title 21 “relating to recall of public officers.”⁸² The Act adds to Article 1, Chapter 18 of Title 15 “relating to general provisions relative to prosecuting attorneys.”⁸³ The Act’s overall purpose is to amend the duties of district attorneys and solicitors-general, and to create a Prosecuting Attorneys Qualifications Commission to discipline, remove, and cause involuntary retirement of appointed or elected district attorneys and solicitors-general.⁸⁴

Section 1

Section 1 of the Act amends Code section 15-18-6 by adding subsection (4) to require district attorneys “[t]o review every individual case for which probable cause for prosecution exists, and make a prosecutorial decision available under the law based on the facts and circumstances of each individual case.”⁸⁵

Section 2

Section 2 of the Act creates Code section 15-18-32, which establishes the Prosecuting Attorneys Qualifications Commission and describes the Commission’s powers, composition, responsibilities, rules, process, compensation, and other requirements.⁸⁶

82. 2023 Ga. Laws 718, § 1, at 719; 2023 Ga. Laws 718, §§ 3–4, at 726.

83. 2023 Ga. Laws 718, § 2, at 720.

84. 2023 Ga. Laws 718, § 1, at 719; 2023 Ga. Laws 718, § 2, at 720; 2023 Ga. Laws 718, §§ 3–4, at 726.

85. 2023 Ga. Laws 718, § 1, at 719 (codified at O.C.G.A. § 15-18-6(4) (2023)).

86. 2023 Ga. Laws 718, § 2, at 720–26 (codified at O.C.G.A. § 15-18-32 (2023)).

Subsection (a) of the new Code section creates the “Commission, which shall have the power to discipline, remove, and cause involuntary retirement of appointed or elected district attorneys or solicitors-general.”⁸⁷

Subsections (b) and (c) describe the Commission’s composition and responsibilities.⁸⁸ The eight-member Commission will consist of a five-member investigative panel and a three-member hearing panel.⁸⁹ The investigative panel will be responsible for “[t]he investigative, prosecutorial, and administrative functions of the [C]ommission,” including investigating “alleged conduct constituting grounds for discipline.”⁹⁰ Additionally, the investigative panel shall select the director of the Commission and authorize the employment of additional staff as needed.⁹¹ The hearing panel is responsible for “[a]djudicating formal charges filed by the investigative panel.”⁹² Also, the hearing panel shall issue disciplinary and incapacity orders, formal advisory opinions, and standards.⁹³ Any standards issued “shall elaborate, define, or provide context for the grounds for discipline.”⁹⁴

Subsection (d) defines “attorney” and “judge” and describes the Commission’s appointments.⁹⁵ This subsection provides, in part, that “[t]he Prosecuting Attorney’s Council of the State of Georgia may recommend . . . individuals for consideration to serve as attorney commission members.”⁹⁶ The five-member investigative panel shall be comprised of the following: (1) an “attorney with prosecutorial experience as an elected district attorney or elected solicitor-general . . . appointed by the Governor”; (2) an “attorney with at least five years of service as an assistant district attorney or an

87. § 15-18-32(a).

88. *Id.* § 15-18-32(b)-(c).

89. *Id.* § 15-18-32(b)-(c)(1).

90. *Id.* § 15-18-32(c)(2)(A)-(B).

91. *Id.* § 15-18-32(c)(2)(C)-(D).

92. *Id.* § 15-18-32(c)(3)(A).

93. O.C.G.A. § 15-18-32(c)(3)(B)-(D) (2023).

94. *Id.* § 15-18-32(c)(3)(D).

95. *Id.* § 15-18-32(d).

96. *Id.* § 15-18-32(d)(2).

assistant solicitor-general . . . appointed by the Lieutenant Governor”; (3) “[t]wo practicing attorneys . . . appointed by the Speaker of the House of Representatives”; and (4) “[o]ne attorney with at least five years of service as an assistant district attorney or an assistant solicitor-general . . . appointed by the Senate Committee on Assignments.”⁹⁷ All investigative panel members shall serve a four-year term.⁹⁸ The initial terms of these appointments vary.⁹⁹ The investigative panel “shall annually elect a chairperson and vice chairperson.”¹⁰⁰

The hearing panel shall consist of three members.¹⁰¹ The Governor shall appoint one elected district attorney or elected solicitor-general.¹⁰² The Senate Committee on Assignments shall appoint one elected district attorney or elected solicitor-general.¹⁰³ The Speaker of the House shall appoint one former judge of the superior court, Court of Appeals, or former Justice.¹⁰⁴ The former judge or Justice must have at least ten years of service as a former judge or Justice and must be a former district attorney or solicitor-general.¹⁰⁵ All hearing panel members shall serve a four-year term.¹⁰⁶ Initial terms begin on July 1, 2023.¹⁰⁷ Each member can serve only two full terms, but the initial term does not count toward the limit.¹⁰⁸ Commission members must maintain their status as an attorney, citizen, or district attorney.¹⁰⁹ A vacancy is created if they lose the status or designation under which they were appointed.¹¹⁰ The appointing authority chooses someone to fill the vacancy for the remainder of the term; however,

97. *Id.* § 15-18-32(d)(3)(A).

98. *Id.*

99. *See* O.C.G.A. § 15-18-32(d)(3)(A) (2023).

100. *Id.* § 15-18-32(d)(3)(B).

101. *Id.* § 15-18-32(d)(4).

102. *Id.* § 15-18-32(d)(4)(A).

103. *Id.* § 15-18-32(d)(4)(B).

104. *Id.* § 15-18-32(d)(4)(C).

105. O.C.G.A. § 15-18-32(d)(4)(C) (2023).

106. *Id.* § 15-18-32(d)(4)(A)-(C).

107. *Id.* § 15-18-32(d)(5).

108. *Id.*

109. *Id.* § 15-18-32(d)(6).

110. *Id.*

the Governor appoints the replacement member if the vacancy is not filled within sixty days.¹¹¹

Subsection (e) bars the hearing panel from having “ex parte communications regarding a disciplinary or incapacity matter . . . including with members and staff of the investigative panel.”¹¹²

Subsection (f) describes the voting rules, process, and compensation for the Commission’s panels.¹¹³ Each member is entitled to vote on any matter before their panel and must vote unless recused.¹¹⁴ “[F]or cause” removal from the Commission includes “indictment for or conviction of a felony or any offense involving moral turpitude; misconduct, malpractice, malfeasance, misfeasance, nonfeasance, or incapacity; failure to attend three or more panel meetings or hearings in a one-year period without good and sufficient reason; or abstaining from voting, unless recused.”¹¹⁵ Removing a panel member for cause requires a unanimous vote of all Commission members.¹¹⁶ A quorum of the investigative panel requires three members.¹¹⁷ Commission members serve without compensation but receive the same daily expense allowance and transportation reimbursement as General Assembly members.¹¹⁸ The expense allowance and reimbursement do not apply if a Commission member is already entitled to such as a state employee.¹¹⁹ Expenses and reimbursements are paid from moneys appropriated to the Commission.¹²⁰

Subsection (g) describes the Commission’s duty to establish rules and standards of conduct for the Commission’s governance; however, the Supreme Court must review and adopt such standards and rules.¹²¹

111. O.C.G.A. § 15-18-32(d)(6) (2023).

112. *Id.* § 15-18-32(e).

113. *Id.* § 15-18-32(f).

114. *Id.* § 15-18-32(f)(1).

115. *Id.* § 15-18-32(f)(2)(A).

116. *Id.* § 15-18-32(f)(2)(B).

117. O.C.G.A. § 15-18-32(f)(3) (2023).

118. *Id.* § 15-18-32(f)(4)(A).

119. *Id.* § 15-18-32(f)(4)(B).

120. *Id.* § 15-18-32(f)(4)(C).

121. *Id.* § 15-18-32(g).

The investigative panel requires a majority vote to allow for a full investigation.¹²² Commission members must provide the Commission's director with information received "relating to the conduct of a district attorney or solicitor-general."¹²³

Subsection (h) describes the "grounds for discipline of a district attorney or solicitor-general."¹²⁴ The grounds for discipline include the following:

- (1) Mental or physical incapacity interfering with the performance of his or her duties which is, or is likely to become, permanent;
- (2) Willful misconduct in office;
- (3) With respect to district attorneys, willful and persistent failure to carry out duties pursuant to Code Section 15-18-6;
- (4) With respect to solicitors-general, willful and persistent failure to carry out duties pursuant to Code Section 15-18-66;
- (5) Conviction of a crime involving moral turpitude;
- (6) Conduct prejudicial to the administration of justice which brings the office into disrepute; or
- (7) Knowingly authorizing or permitting an assistant district attorney or assistant solicitor-general to commit any act constituting grounds for removal under paragraphs (1) through (6) of this subsection.¹²⁵

Subsection (i) describes the parameters and limits for complaints filed with the Commission.¹²⁶ Complainants must file "with the commission a sworn affidavit detailing the personal knowledge of the facts supporting the complaint, including any interest the complainant may have in the outcome."¹²⁷ The Commission can also bring a complaint on its own motion.¹²⁸ Complaints based on "a charging

122. *Id.*

123. O.C.G.A. § 15-18-32(g) (2023).

124. *Id.* § 15-18-32(h).

125. *Id.*

126. *Id.* § 15-18-32(i).

127. *Id.* § 15-18-32(i)(1).

128. *Id.*

decision, plea offer, opposition to or grant of a continuance, placement of a case on a trial calendar, or recommendation regarding bond” cannot be entertained unless supported by documents showing plausibility that the district attorney or solicitor-general’s decision was based on bias, prejudice, an undisclosed conflict of interest or financial interest, factors unrelated to prosecution duties, or a stated policy to “categorically refuse[] to prosecute any offense or offenses of which he or she is required by law to prosecute.”¹²⁹ If the district attorney or solicitor-general is indicted before either panel, the Commission shall “suspend its investigation or hearing pending the outcome.”¹³⁰

Subsection (j) describes the confidentiality of the Commission.¹³¹ All information regarding disciplinary or incapacity matters must be kept confidential before formal charges are filed.¹³² If there is “a satisfactory disposition of a disciplinary matter other than by a private admonition or deferred discipline agreement, a report of such disposition shall be publicly filed in the Supreme Court.”¹³³ After formal charges are filed and served, incapacity matters shall remain confidential, and disciplinary matters shall be subject to public disclosure unless they “could be properly sealed or closed under Chapter 14 or Article 4 of Chapter 18 of Title 40 or by a court as provided by law.”¹³⁴ Administrative records and information shall be subject to public disclosure unless those records would disclose protected disciplinary or incapacity information, would be considered a matter subject to executive session, or are otherwise not required to be publicly disclosed by law.¹³⁵ The Commission’s work product shall remain confidential.¹³⁶

129. O.C.G.A. § 15-18-32(i)(2) (2023).

130. *Id.* § 15-18-32(i)(3).

131. *Id.* § 15-18-32(j).

132. *Id.* § 15-18-32(j)(1).

133. *Id.*

134. *Id.* § 15-18-32(j)(2).

135. O.C.G.A. § 15-18-32(j)(3) (2023).

136. *Id.* § 15-18-32(j)(4).

Subsection (k) explains when information may be disclosed.¹³⁷ Information regarding a disciplinary or incapacity matter may be disclosed or confidentiality may be removed when the privilege is waived or when the Commission's rules otherwise allow for disclosure.¹³⁸ Disclosure may occur if it is for the protection of the public and in the interest of justice, an emergency, or if the district attorney or solicitor-general is being considered for another government position, either state or federal.¹³⁹

Subsection (l) states that information and testimony shall be "absolutely privileged" and "no civil action predicated upon such information or testimony shall be instituted against any complainant, witness, or his or her counsel."¹⁴⁰

Subsection (m) describes the appeals process.¹⁴¹ Respondents may appeal to the county superior court where that respondent served as a district attorney or solicitor-general.¹⁴² The respondent is entitled to a copy of the proposed record and shall have the hearing panel's presiding officer settle any of the respondent's objections to the record.¹⁴³ In a disciplinary or incapacity matter, the Superior Court of Fulton County will hear appeals from the hearing panel's order.¹⁴⁴

Subsection (n) provides July 1, 2023, as the Commission's commencement date.¹⁴⁵ The Commission's rules and regulations must be established by October 1, 2023.¹⁴⁶ The subsection further provides that "[n]o complaints shall be filed before October 1, 2023," and that complaints must not be "regarding misconduct in office that occurred prior to May 5, 2023, unless such alleged misconduct is related to a continuous pattern of conduct that continues beyond that date."¹⁴⁷

137. *Id.* § 15-18-32(k).

138. *Id.*

139. *Id.* § 15-18-32(k)(2).

140. *Id.* § 15-18-32(l).

141. O.C.G.A. § 15-18-32(m) (2023).

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* § 15-18-32(n).

146. *Id.*

147. O.C.G.A. § 15-18-32(n) (2023).

Subsection (o) limits the Commission’s authority to “incapacity or discipline regarding the conduct of a district attorney or solicitor-general as a holder of such office.”¹⁴⁸ The Supreme Court and the State Bar of Georgia’s authority “to regulate the practice of law in this state” shall not be construed as diminished by this Code section.¹⁴⁹

Subsection (p) explains that a district attorney or solicitor-general who is either removed or involuntarily retired under the Code section cannot be appointed or elected as a district attorney or solicitor-general of this state for ten years following removal or involuntary retirement.¹⁵⁰

Section 3

Section 3 of the Act amends Code section 15-18-66, specifically paragraph (1) of subsection (b) of this Code section, by requiring solicitors-general “[t]o review every individual case for which probable cause for prosecution exists, and make a prosecutorial decision available under the law based on the facts and circumstances of each individual case.”¹⁵¹

Section 4

Section 4 of the Act amends Code section 21-4-3 by revising paragraph (7) to add that a district attorney or solicitor-general’s failure to perform duties provided in Code sections 15-18-5 or 15-18-66, respectively, “shall constitute grounds for a recall of such elected official.”¹⁵²

148. *Id.* § 15-18-32(o).

149. *Id.*

150. *Id.* § 15-18-32(p).

151. 2023 Ga. Laws 718, § 3, at 726 (codified at O.C.G.A. § 15-18-66(b)(1) (2023)).

152. 2023 Ga. Laws 718, § 4, at 726 (codified at O.C.G.A. § 21-4-3(7) (2023)).

*Analysis**

Republican senators have expressed a variety of reasons as to why this law is necessary. Senator Randy Robertson (R-29th), the Act's sponsor, explained that the Act essentially extends oversight to prosecutors that already apply to law enforcement officials.¹⁵³ Senator Robertson sees the Act as “key for criminal justice system oversight.”¹⁵⁴ Additionally, Senator Brian Strickland (R-17th) stated that only “[t]ime will tell if [the Act] was necessary,” but that elected prosecutors in the state have used their power “to push political agendas,” and these individuals’ actions ultimately “caused the momentum for this legislation.”¹⁵⁵ He stated that the Act probably would have failed “without these actions and individuals doubling down on these actions.”¹⁵⁶ Lieutenant Governor Burt Jones (R) expressed a similar sentiment, stating that some district attorneys in the state have not fulfilled their duties as elected officials, and the Commission would act as a way to hold elected officials accountable.¹⁵⁷

* *Editor's Note:* On November 22, 2023, the Supreme Court of Georgia declined to adopt the Prosecuting Attorneys Qualifications Commission's draft standards of conduct and rules for its governance. *In re Prosecuting Att'ys Comm'n & Code of Conduct*, Matter No. S24U0190, at 1–2 (Ga. 2023). Code section 15-18-32(g) provides that “such standards and rules shall be effective only upon review and adoption by the Supreme Court.” *Id.* at 1. The court is not required to adopt the rules, and the court has exercised its discretion to decline to do so at the time of this publication. *Id.* The court explained that although it has an inherent power to regulate the Judicial Branch, it is not clear whether that authority extends to the regulation of district attorneys. *Id.* at 3. Practically, this order stops the Act from taking effect beyond its alteration of the Code.

153. Sarah Kallis, *Lawmakers: Georgia Senate Passes Divisive District Attorney Oversight Bill on Day 27*, GA. PUB. BROAD., <https://www.gpb.org/news/2023/03/02/lawmakers-georgia-senate-passes-divisive-district-attorney-oversight-bill-on-day-27> [<https://perma.cc/MMR9-ZKL6>] (July 25, 2023, 4:05 PM).

154. *Id.*

155. Strickland Interview, *supra* note 15.

156. *Id.*

157. *Lawmakers Day 28, 2023*, at 31 min., 17 sec. (GPTV broadcast, Mar. 6, 2023) (remarks by LG Burt Jones (R)), <https://video.gpb.org/video/lawmakers-day-28-030623-9rglxn/> [<https://perma.cc/357U-5859J>].

Opposition to Senate Bill 92

Many Democratic legislators and prosecutors have expressed concerns about the enactment of a commission for prosecutorial oversight. Senator Harold Jones, II (D-22nd) explained that the Act is unnecessary, primarily because “everything that [the legislators] put in this bill is current law.”¹⁵⁸ Opponents have voiced additional concerns, expressing that the Act will essentially control and punish prosecutors who Republicans disagree with.¹⁵⁹ Senator Jones also explained that the Act’s language on its face could remove district attorneys with mental or physical incapacities.¹⁶⁰ For example, if the language in the Act is taken literally, a prosecutor who has an accident and is physically incapacitated but still able to do his or her job with Americans with Disabilities Act compliance could still face removal.¹⁶¹

One of the most outspoken prosecutors to oppose the Act is Fulton County District Attorney Fani Willis.¹⁶² In the Senate Judiciary Committee meeting on February 23, 2023, Willis expressed that “we should not have a committee,” and “only the voters” are responsible for electing people into office.¹⁶³ Further, Willis described the Act as “dangerous” because the political parties in charge change, and “it is dangerous to undo the voters because you don’t like someone, and you don’t like their policies.”¹⁶⁴ If the political party in charge changes,

158. Telephone Interview with Sen. Harold Jones II (D-22nd) (May 20, 2023) [hereinafter Jones Interview] (on file with the Georgia State University Law Review).

159. *Lawmakers Day 27, 2023*, at 7 min., 33 sec. (GPTV broadcast, Mar. 2, 2021) <https://video.gpb.org/video/lawmakers-day-27-030223-nhalbf/> [<https://perma.cc/3AE2-N73U>].

160. Jones Interview, *supra* note 158; see Kallis, *supra* note 153; O.C.G.A. § 15-18-32(h)(1) (2023) (“Mental or physical incapacity interfering with the performance of his or her duties which is, or is likely to become, permanent; . . .”).

161. Jones Interview, *supra* note 158.

162. See Jason Morris & Sydney Kashiwagi, *Georgia’s GOP Governor Signs Bill That Could Remove Local Prosecutors and DAs from Their Jobs*, CNN POLITICS, <https://www.cnn.com/2023/05/05/politics/georgia-elections-oversight-commission-kemp-willis/index.html> [<https://perma.cc/4F8F-BP67>] (May 5, 2023, 6:50 PM).

163. Senate Recording, *supra* note 29, at 1 hr., 23 min., 35 sec. (remarks by Fani Willis, Fulton County District Attorney).

164. *Id.*

questions arise as to how the Commission will respond and how this will impact the profession. James Beal, General Counsel for the Office of the Senate President Pro Tempore John F. Kennedy (R-18th), however, emphasized that the Commission is not nearly as political as impeachment.¹⁶⁵ Impeachment is one of the main tools already in place for prosecutorial oversight that Democratic prosecutors and senators have emphasized.¹⁶⁶

Additionally, individuals have expressed concern over the \$1.4 million cost of establishing the Commission.¹⁶⁷ Republican senators have responded by pointing to the great responsibility that prosecutors hold and the worthwhile investment of ensuring leaders in these positions use their power appropriately.¹⁶⁸ Willis, in the Senate Judiciary Committee meeting, expressed that the money could be better spent elsewhere, such as for drug testing.¹⁶⁹

Unintended Consequences and Long-Term Impact

Senator Jones expressed his belief that an Act of this nature is another step towards the state micromanaging local communities.¹⁷⁰ Senator Jones conveyed concern that public defender's offices, or even judgeships, could be next, stating that "[w]e're heading down this road that we really shouldn't be going into."¹⁷¹ Republican senators have also expressed some thought over potential unintended consequences. Senator Strickland expressed the idea that "the Commission could be

165. Beal Interview, *supra* note 16.

166. See Senate Recording, *supra* note 29, at 1 hr., 44 min., 1 sec. (remarks by Fani Willis, Fulton County District Attorney).

167. House Subcommittee Video, *supra* note 21, at 1 hr., 43 min., 58 sec. (remarks by Dalia Racine, Douglas County District Attorney).

168. Strickland Interview, *supra* note 15. ("[I]t is worth the investment to make sure [prosecutors] have the resources needed and that those few that may want to improperly use their title to push an agenda focus instead on doing the job they were elected to do.").

169. Senate Recording, *supra* note 29, at 1 hr., 24 min., 52 sec. (remarks by Fani Willis, Fulton County District Attorney) ("If you all have extra money, can you please give it to the Georgia Bureau of Investigations so they can test my Ballistics evidence they don't have enough money to test . . . so they can test the drugs they don't have enough money to test?").

170. Jones Interview, *supra* note 158.

171. *Id.*

used for political purposes as well to improperly target prosecutors that may make individuals angry when they exercise sound and legitimate discretion concerning whether or not to prosecute any individual.”¹⁷²

Beal, when asked about unintended consequences, emphasized that changes were made to the bill during the legislative process to address such concerns.¹⁷³ These changes included the name of the Commission, as well as the suspension of Commission action against a prosecutor who is facing criminal charges.¹⁷⁴

Impact of Prosecutorial Oversight in Other States

Georgia is not the only state seeking to address prosecutorial discretion.¹⁷⁵ Not every state, however, has focused on addressing these concerns in the same manner.¹⁷⁶ For example, in Pennsylvania, a bill enacted in 2019 limited prosecutorial power by creating concurrent jurisdiction for the Attorney General with prosecutors in relation to specific firearm offenses.¹⁷⁷ However, later Pennsylvania bills seeking to limit prosecutorial power failed. This includes a 2022 Pennsylvania bill targeted at a specific prosecutor.¹⁷⁸ Bills like those enacted in Pennsylvania, do not create a commission to broadly oversee prosecutorial efforts, like the Georgia Act does, but instead more narrowly target certain offenses that prosecutors typically have more discretion over. Many states have taken similar approaches to Pennsylvania, focusing specifically on altering prosecutorial

172. Strickland Interview, *supra* note 15.

173. Beal Interview, *supra* note 16.

174. *Id.*; see O.C.G.A. § 15-18-32(a) (2023). The name of the committee is the “Prosecuting Attorneys Qualifications Commission.” *Id.* See also *id.* § 15-18-32(i)(3) (“Upon indictment of a district attorney or solicitor-general of a matter before either panel, the commission shall suspend its investigation or hearing pending the outcome of the procedure . . .”).

175. Amy, *supra* note 1.

176. See generally Jorge Camacho, Nicholas Goldrosen, Rick Su & Marissa Roy, *Preempting Progress: States Take Aim at Local Prosecutors*, LOC. SOLS. SUPPORT CTR. (Jan. 17, 2023), <https://static1.squarespace.com/static/592c8640c534a5adf895986b/t/63dad362de56d35595d2271d/1675285357150/ProsecutorialDiscretion2023.pdf> [<https://perma.cc/N6JD-8VGC>].

177. *Id.* at A4 (discussing H.B. 1614, introduced in Pennsylvania in 2019).

178. *Id.* (discussing H.B. 2238, introduced in Pennsylvania in 2022).

discretion over specific laws, although these efforts have largely failed.¹⁷⁹

States like Tennessee have relied on the power of the state supreme court. In 2021, Tennessee's HB 9071 granted the Attorney General the power "to petition the state supreme court for the appointment of a district attorney general pro tem if a district attorney general categorically refuses to prosecute a criminal offense."¹⁸⁰ The law requires the court to appoint such a figure if it is found that the prosecutor chose not to prosecute the law.¹⁸¹ On the other hand, some states have attempted to create private rights of actions against prosecutors who fail to enforce the law or who do not properly exercise discretion over individual cases.¹⁸² Indiana has tried twice, and failed, to pass a bill granting the Attorney General the power to appoint a special prosecutor focused on prosecuting specific crimes if the prosecutors in the state "categorically" refuse to charge the crimes.¹⁸³ States like New York have also sought to influence prosecutorial discretion through the introduction of SB 9484 in 2022, which would have started a recall process for district attorneys if twenty percent of voters who voted in the past election provided their signature.¹⁸⁴ This recall process could be performed for any reason.¹⁸⁵

Given the lack of other bodies similar to the Prosecuting Attorneys Qualifications Commission established by Georgia's Act, it is hard to project how the Commission will perform. Beal emphasized that the Commission is modeled largely after the state's Judicial Qualifications Commission (JQC), a body that performs oversight for judges.¹⁸⁶ The JQC, created in 1972 by Constitutional Amendment and reconstituted in 2016, primarily considers ethical misconduct complaints about

179. *Id.* at A1–A5.

180. *Id.* at A4 (discussing H.B. 9071, introduced in Tennessee in 2021).

181. *Id.*

182. *See* Camacho et al., *supra* note 176, at A2 (discussing H.B. 1914, introduced in Illinois in 2021).

183. *Id.*

184. *Id.* at A3 (discussing S.B. 9484, introduced in New York in 2022).

185. *Id.*

186. Beal Interview, *supra* note 16.

Georgia judges and conducts investigations and hearings accordingly.¹⁸⁷

Conclusion

SB 92's support and opposition remained split along party lines as the bill went through the Georgia General Assembly. The Act's supporters insist that the Commission is necessary to hold prosecutors responsible for refusing to perform their duties. The Act's opponents, however, believe there are existing mechanisms in place for discipline and removal and fear the possible abuse of the Commission for political purposes. Only time will tell if SB 92 is effective and necessary.

Abigail C. Sisson & Erica L. Welsh

187. THE JUD. QUALIFICATIONS COMM'N OF GA., <https://gajqc.gov/> [<https://perma.cc/J6B4-QFJY>].