

Preserving Prosecutorial Discretion

2024 National Best Practices Prosecution Conference

Tuesday, October 8, 2024

8:30 a.m.





Sherry Boston

DeKalb County District Attorney

- Elected in 2016, took office in January 2017
- Previously served as DeKalb County Solicitor General
- Former defense attorney
- First woman appointed as a Municipal Court Judge for the City of Dunwoody
- Served as an Associate Magistrate Judge for DeKalb County



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- Lead plaintiff in *Boston v. Georgia*
- Filed lawsuit in August 2023 challenging the constitutionality of Senate Bill 92
- The law, passed by the Georgia General Assembly, created the Prosecuting Attorneys Qualifications Commission (PAQC), a politically-appointed body that has the power to accept complaints, investigate, and remove elected prosecutors from office.
- Anyone removed by the PAQC cannot serve again for 10 years.

What is prosecutorial discretion?

Prosecutorial discretion is the power to choose not only whether to pursue charges against someone, but also which charges. This discretion extends to the prosecutor's authority to negotiate plea deals, make sentencing recommendations, pursue alternative resolutions, and allocate resources to best protect the public.



Why is prosecutorial discretion important?

- Resources are limited. Not every case can or should go to trial.
- Prosecutorial discretion allows prosecutors to prioritize the most serious crimes impacting the community they serve.
- Discretion also gives prosecutors the power to refer defendants who qualify to pretrial diversion, mental health court, drug court, or veterans court.



Georgia's fight over prosecutorial discretion

The birth of the Prosecuting Attorneys Qualifications Commission



- State leaders began talking about establishing oversight of District Attorneys after the election of several new DAs across Georgia in 2020.
- Citing the need to rein in “rogue prosecutors,” the state legislature passed Senate Bill 92 in 2023.
- In May 2023, Governor Brian Kemp signed SB 92 into law.
- The law took effect July 1, 2023.

How the PAQC Stifles Free Speech

Under the new law, the PAQC is empowered to discipline prosecutors based on their stated philosophies and commitments. For instance, DAs could be subject to discipline or removal for committing not to prosecute adultery, which is a crime under state law.

That restricts the First Amendment rights of DAs and Solicitors General as candidates and officials by creating a chilling effect on their ability to openly communicate their prosecutorial priorities to the public for fear of a PAQC investigation based solely on philosophical differences.



Who is on the PAQC?

The PAQC is made up of eight members divided into two panels. The members of each panel are appointed by elected state leaders.

Investigative Panel

5 Members Appointed by:

Governor (1)

Lt. Governor (1)

Speaker of the House (2)

Senate Committee on Assignments (1)

Hearing Panel

3 Members Appointed by:

Governor (1)

Speaker of the House (1)

Senate Committee on Assignments (1)

SB 92 Legal Challenge

- Even before lawmakers passed SB 92, I started looking for allies to help fight what I believe is unconstitutional legislation.
- We partnered with **Public Rights Project**, a national nonprofit that works with local governments to protect civil rights, as well as local law firms **Washington, Dreyer, and Associates** and **Bruce P. Brown Law**.
- It was important we formed a **bipartisan** coalition of DAs to sign on as plaintiffs.

Plaintiffs:

- District Attorney Sherry Boston (D)
 - Stone Mountain Judicial Circuit
- District Attorney Jonathan Adams (R)
 - Towaliga Judicial Circuit
- District Attorney Jared Williams (D)
 - Augusta Judicial Circuit
- District Attorney Flynn Broady, Jr. (D)
 - Cobb Judicial Circuit

PAQC Timeline

- **May 5, 2023**—Gov. Brian Kemp signed Senate Bill 92 into law.
- **July 1, 2023**—SB 92 took effect.
- **August 2, 2023**—Working with Public Rights Project, District Attorneys Sherry Boston, Jonathan Adams, Jared Williams and Flynn Broady, Jr. filed a lawsuit against the State of Georgia challenging the constitutionality of SB 92. The suit was filed in Fulton County Superior Court.
- **July 1 – August 4, 2023**—State leaders appointed members of the Prosecuting Attorneys Qualifications Commission (PAQC).
- **August 24, 2023**—The plaintiffs filed a motion for a preliminary injunction to prevent the PAQC from investigating and removing/disciplining prosecutors.

PAQC Timeline

- **September 5, 2023**—The Institute for Innovation in Prosecution at John Jay College filed a brief in support of the lawsuit. In addition, a bipartisan group of 84 former and current elected prosecutors, attorneys general, former U.S. attorneys, and Department of Justice officials filed a brief in support of the motion for an injunction.
- **September 29, 2023**—Fulton County Superior Court Judge Paige Reese Whitaker issued an order denying the preliminary injunction.
- **September 29, 2023**—The PAQC submitted draft rules to the Georgia Supreme Court for approval.
- **October 1, 2023**—The PAQC began to accept complaints about DAs and Solicitors General.
- **November 3, 2023**—The Georgia Supreme Court issued an order questioning whether it has the constitutional authority to approve rules for the “state officers” of the PAQC.

PAQC Timeline

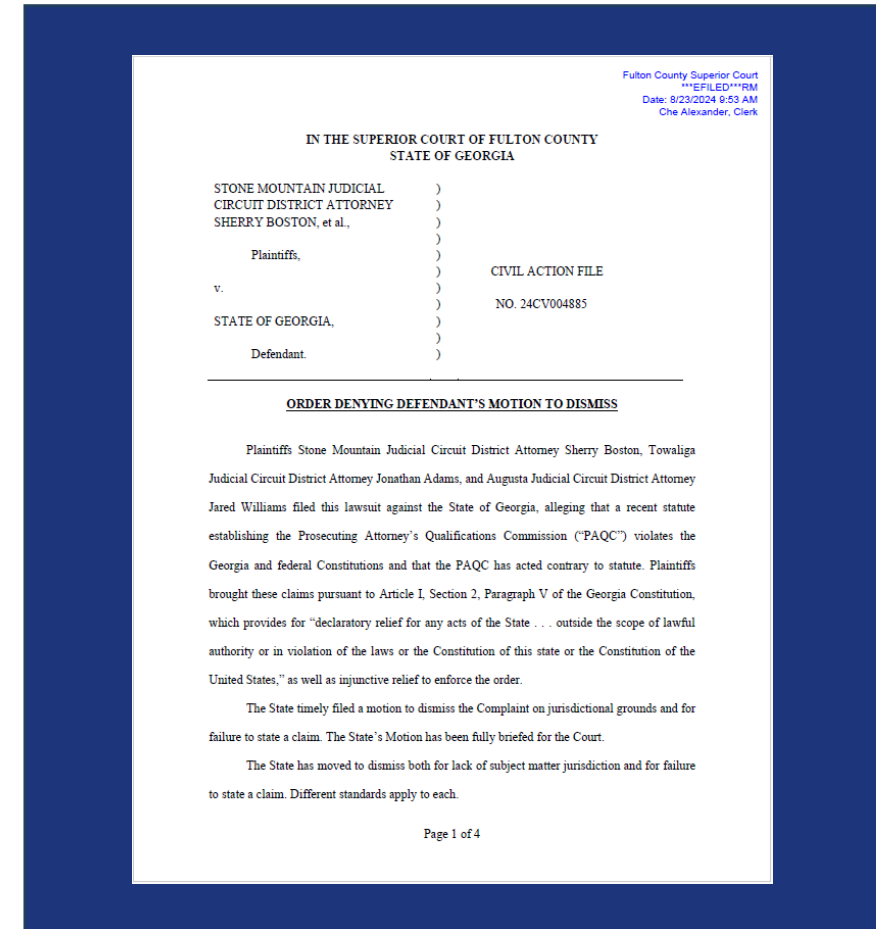
- **November 17, 2023**—The PAQC responded to the Supreme Court’s concerns in a letter saying they “defer[red] to the Court’s findings of the Court’s own power and authority.”
- **November 22, 2023**—The Georgia Supreme Court issued a six-page order stating that it would not review the proposed rules of the PAQC. Under SB 92, the PAQC could not begin its work until the Supreme Court approves its rules, therefore the commission was unable to act on any submitted complaints.
- **December 11, 2023**—The plaintiffs officially dismissed the lawsuit following the decision by the Georgia Supreme Court that effectively paused the PAQC.
- **March 13, 2024**—Gov. Brian Kemp signed a new bill (SB 332) into law removing the Supreme Court’s oversight of the PAQC and reactivating the commission.

PAQC Timeline

- **April 16, 2024**—DAs filed a new lawsuit challenging the constitutionality of the PAQC.
- **April 30, 2024**—The Institute for Innovation in Prosecution at John Jay College filed an amicus brief in support of the legal challenge to SB 332.
- **May 28, 2024**—Attorneys for the State of Georgia filed motions to dismiss the lawsuit against the state and the companion lawsuit that named the individual members of the PAQC.
- **July 23, 2024**—Fulton County Superior Court Judge Paige Reese Whitaker denied the plaintiffs' request for an interlocutory injunction, which would have prevented the PAQC from operating until the legal challenge was settled in the courts.
- **August 14, 2024**—Judge Whitaker dismissed the companion lawsuit naming the individual members of the PAQC.

PAQC Timeline


- **August 23, 2024**—Judge Whitaker denied the State’s request to dismiss *Boston v. Georgia*.
- **NEXT:** We are negotiating a discovery schedule in anticipation of trial.



Looking Back and Looking Ahead

- What worked well?
- What would we have done differently?
- What can a prosecution office do now to set itself up for success if it faces a similar attack on prosecutorial discretion?
- How are we navigating sharing our policy stances after the creation of the PAQC? Are we less vocal? More vocal?

DeKalb district attorney among four prosecutors challenging oversight commission

 Zoe Seiler • Aug 2, 2023



DeKalb County District Attorney Sherry Boston (left), alongside Towaliga District Attorney Jonathan Adams (center) and Cobb County District Attorney Flynn Broady, announced a lawsuit challenging the new prosecuting attorneys qualification commission on Wednesday, Aug. 2, 2023, at the DeKalb County Courthouse. Photo by Zoe Seiler.

Questions?

