



State of Connecticut
DIVISION OF CRIMINAL JUSTICE

TESTIMONY OF THE DIVISION OF CRIMINAL JUSTICE

REGARDING:

**S.B. No. 892 (RAISED) AN ACT CONCERNING THE CRIMINAL JUSTICE
COMMISSION, DIVISION OF CRIMINAL JUSTICE AND THE OFFICE OF THE
INSPECTOR GENERAL.**

JOINT COMMITTEE ON JUDICIARY
February 22, 2021

The Division of Criminal Justice (“Division”) continues to support the creation of the Office of the Inspector General. However, as the Division testified with regard to Public Act 20-1 (“Act”) in July 2020, the Office of the Inspector General must be created within the confines of our state constitution. The language contained within this bill does not cure the constitutional issues created within the Act. Specifically, the language in the bill continues to (1) usurp the state constitutional power to appoint prosecutorial officials that is granted exclusively to the Criminal Justice Commission (“Commission”), and (2) infringe upon the state constitutional power to prosecute that is granted exclusively to the Chief State’s Attorney and the state’s attorneys. These deficiencies will invite litigation challenging the constitutionality of the statutes, both as presently amended by the Act, and as potentially amended in the future in accordance with the bill. The remaining sections of the bill raise problematic constitutional and collective bargaining issues and present the possibility of significant conflicts of interest.

As such, the Division strongly urges the Committee to amend the bill to address the concerns expressed herein.

Usurpation of Criminal Justice Commission’s Power to Appoint

Both the Division and the Commission were established through the enactment of Amendment 23 of the state constitution, which was approved by a statewide vote and certified by the Secretary of the State on November 28, 1984. Amendment 23 states, in pertinent part:

There shall be a commission composed of the chief state’s attorney and six members appointed by the governor and confirmed by the general assembly, two of whom shall be judges of the superior court. *Said commission shall appoint a state’s attorney for each judicial district and such other attorneys as prescribed by law.*

(Emphasis added.) General Statutes § 51-278 (b)(1)(A) further states that the Commission is authorized to appoint all the assistant and deputy assistant state's attorneys that are necessary to assist the Chief State's Attorney and the state's attorneys in exercising their constitutional power of prosecution. The statute also provides that the commission "shall appoint ... one deputy chief state's attorney who shall be nominated by the commission to serve as Inspector General in accordance with section 33 of [the Act]." Like Section 33 of the Act, Section 6 of the bill bestows upon the General Assembly the authority to act upon this nomination and appoint the Inspector General.

Bestowing authority upon the General Assembly to appoint the Inspector General is constitutionally deficient because doing so effectively deprives the Commission of its self-executing authority to appoint a prosecutorial official, thereby rendering it nothing more than a nominating body, subject to ratification. Making the Inspector General ultimately subject to legislative appointment contravenes the intention underlying the constitutional amendment creating the Commission, which legislators plainly and repeatedly expressed as seeking to divorce the selection and appointment of prosecutorial officials from the political process.

For example, Representative Linda Emmons, of the 101st District, stated during the floor debate, "I do think that there is some amount of separation of powers that does need to occur to make sure that someone who is a prosecutor is less likely to be influenced by outside sources, viz a viz, reappointment." The legislative history also demonstrates that the legislature chose to establish the Division and the Commission through an amendment to the constitution, rather than statutorily, to remove "political or legislative involvement."

Authorizing the Commission to appoint a deputy chief state's attorney solely for the purpose of nominating that person to serve as Inspector General is further problematic, and costly, in the event that the General Assembly fails to ratify the nomination and make the appointment. Were this to occur, the position of Inspector General would remain vacant because the law contains no provision removing the failed nominee from his or her appointed position of deputy chief. Moreover, the statute limits to three the number of deputy chief state's attorneys who may be appointed by the Commission. The Division, therefore, would be left with an expensive and unnecessary deputy chief state's attorney, who has no defined role or responsibility, and the Commission would have no authority to appoint a fourth deputy chief state's attorney to nominate as Inspector General.

Infringement upon Constitutionally Exclusive Prosecutorial Power

Amendment 23 of the state constitution also expressly states: "The prosecutorial power of the state shall be vested in a chief state's attorney and the state's attorney for each judicial district."

General Statutes § 51-276 gives the Division "charge of the investigation and prosecution of all criminal matters in the Superior Court." It is within the executive department of state government "with all management rights except appointment of all state's attorneys." Pursuant to § 51-275, the Chief State's Attorney is "the chief of the Division of Criminal Justice," and § 51-278 (b)(1)(A) declares the state's attorney act in the judicial districts "as an attorney on behalf of the state."

Prior to the enactment of P.A. 20-1, and the creation of the Inspector General, all prosecutorial officials have been subordinate to the Chief State's Attorney or a state's attorney, and none have possessed independent prosecutorial power. Thus, pursuant to § 51-278 (b)(1)(A), the deputy chief state's attorneys for operations and for administration, and all assistant state's attorneys and deputy assistant state's attorneys, "shall assist" either the Chief State's Attorney or the state's attorneys in the exercise of his or her duties relating to criminal matters.

It is constitutionally *imperative*, and not a matter of legislative choice, that all prosecutorial officials be subordinate to the Chief State's Attorney and the state's attorneys, lacking any independent prosecutorial power, because only by possessing and exercising managerial and operational control over subordinate prosecutorial officials may the Chief State's Attorney and the state's attorneys retain and exercise their exclusive, constitutionally granted, prosecutorial power.

S.B. 892 fails to correct the constitutional deficiencies that plague P.A. 20-1 because it continues to bestow prosecutorial power on the Inspector General that is independent of, and not subordinate to, the prosecutorial power that Amendment 23 vests exclusively in the Chief State's Attorney and the state's attorneys, thereby depriving these constitutional officers of their managerial and operational control over the exercise of such power.

This is expressed in three specific sections:

- Pursuant to Section 1 of the bill, only the deputy chief state's attorneys for operations and administration, but *not* the deputy chief state's attorney to serve as the Inspector General, "shall assist" the Chief State's Attorney;
- Pursuant to Section 6 of the bill, the office of the Inspector General "shall be an *independent* office within the Division of Criminal Justice[,]" and the Inspector General "*shall ... prosecute*" criminal cases against certain law enforcement and correctional officials (emphasis added); and
- Section 6 of the bill continues to provide transitional accommodations for the Inspector General and staffers "who w[ere] previously employed within the Division of Criminal Justice" to "be transferred back" to the Division, further demonstrating that the Inspector General is neither employed by the Division nor subject to the managerial and operational control of the Chief State's Attorney or a state's attorney.

Section 7 of the bill provides that the Division "shall cause an investigation to be made and the Inspector General shall have the responsibility of determining whether the use of physical force by the peace officer was justifiable under section 53a-22." It further provides that, upon the conclusion of his or her investigation, the Inspector General shall file a report with the Chief State's Attorney containing the circumstances of the incident, a determination regarding the justifiability of the police use of force, and "any recommended future action to be taken by the Office of the Inspector General as a result of the incident."

As written, these provisions alone are inadequate to correct the aforementioned infringements upon the prosecutorial power that is vested exclusively in the Chief State's Attorney and the state's attorneys, because they do not clearly delineate that the Inspector General does not possess prosecutorial authority that is independent of, and not subordinate to, the Chief State's Attorney, or a state's attorney.

An example of such clarity may be found in the further provision of Section 7 whereby, if the Inspector General determines that the deceased person "may have died as a result of criminal action not involving the use of force by a peace officer, the Inspector General *shall refer* such case to the Chief State's Attorney or state's attorney for potential prosecution." (Emphasis added.)

The Division understands and appreciates the concept of an independent Inspector General, and it finds no constitutional fault with legislation which bestows upon the Inspector General the authority to investigate the use of force by law enforcement officials, and to recommend prosecution in appropriate cases. The state constitution demands, however, that the authority to make the decision to prosecute rest exclusively with the Chief State's Attorney or a state's attorney.

Such a requirement will not undermine or impugn the independence of Inspector General because neither the Chief State's Attorney, nor a state's attorney, can credibly refuse to ratify a well-founded recommendation by the Inspector General to prosecute a particular case. Transparency and accountability are ensured by the existing requirements that interim and final reports be prepared, submitted, and made publicly available, and by any other public disclosures that the Inspector General chooses to make.

Concerns Unrelated to Inspector General

Inconsistencies Regarding the Candidates

Section 1 of the bill appears to be internally inconsistent. In lines 25-27, the bill provides that, in hiring assistant and deputy assistant state's attorneys, the Commission must consider "at least five candidates for a single open position, or at least eight candidates for two or more open positions" Lines 92-94, on the other hand, provide that "[t]he commission shall determine how many recommendations they shall receive for each appointment." To eliminate the inconsistency, the Division suggests that the proposed changes on lines 25-27 be removed from the bill. Eliminating those lines would also prevent a potential problem if fewer than five people applied for a single position or fewer than eight applied for more than one position in a jurisdiction. In any event, the Division suggests that these provisions are not necessary as it has always worked with the Commission to ensure that a sufficient number of qualified candidates are submitted for the Commission's review.

Conflicts with Collective Bargaining Agreement

Section 2 of the bill is problematic because it runs afoul of the collective bargaining agreement between the Division and its prosecutors. This section would amend General Statutes §51-278b(b) to allow any member of the Commission to initiate removal proceedings against any deputy chief state's attorney, state's attorney, assistant state's attorney or deputy assistant state's attorney.

Currently, a recommendation for removal of office may be initiated by the Chief State's Attorney or the appropriate state's attorney. Section 2 appears to similarly extend to any member of the Commission the power to initiate disciplinary proceedings. The current collective bargaining agreement would not allow for the Commission to do so, and, moreover, includes a specific clause that supersedes this particular statute.

In addition, Section 4 of the bill suffers from similar problems. First, it appears to employ a misunderstanding that assistant state's attorneys and deputy assistant state's attorneys are subject to reappointment. To the contrary, once appointed by the Commission, they are permanent employees. Beyond that, however, amending § 51-280 to require each assistant state's attorneys' and deputy assistant state's attorneys' performance evaluations to the Commission also is in contravention to the provisions of the collective bargaining agreement.

Innate Conflicts with Expanding the Role of the Commission as Drafted

Beyond the conflicts with the collective bargaining agreement, granting any member of the Commission, individually, with the power to initiate removal or disciplinary actions creates conflicts of interest concerns. To understand the conflict inherent in the bill, one need only look at the current makeup of the Commission, which includes two attorneys who practice in the area of criminal defense. A criminal defense attorney who has the power to initiate removal or disciplinary proceedings against a prosecutor can wield undue influence in a case, especially when there are no restrictions on why discipline can be sought and may be simply because the defense attorney did not agree with a prosecutor's position. Even if proven unfounded, the mere initiation of an investigation holds immense impact on a prosecutor.

As it currently stands, any member of the public, including those on the Commission, may lodge a complaint with the Chief State's Attorney to investigate a prosecutor. In addition to internal discipline that can be handed down by the Division, prosecutors, like all lawyers, are subject to discipline by the court and the Statewide Grievance Committee. As such, any individual with a complaint against a prosecutor has a number of avenues to seek recourse, none of which are mutually exclusive.

Section 3 of this bill seeks to expand the power of the Commission by giving it a role in the operations of the Division. Specifically, it would allow the Commission to participate in developing policy for the Division by designating a person to sit on the Division of Criminal Justice Advisory Board which is responsible for advising "on statewide prosecutorial standards and guidelines and other policy matters, including peer review and resolution of conflicts."

Amendment 23 established the Division within the Executive branch of the state government. In addition, a review of the debates at the time of the passage of Amendment 23 confirms that the role of the Commission was intended to be limited to the appointment of prosecutors. There was no discussion of, and the text of the approved amendment contained no provision for, the Commission to exercise any role in the *operations* of the Division.

This proposal is particularly problematic because the Commission consists of two judges, who should have no role in the operations of a division within the Executive branch as a separation of

powers concern. Additionally, as noted above, the Commission includes two criminal defense attorneys, whose interests might be in direct conflict with those of the Division.

Feasibility

Section 4 would require that the Chief State's Attorney conduct a formal review of all thirteen state's attorneys every year, and for each state's attorney to formally review all of their assistant state's attorney and deputy assistant state's attorneys every year.

With respect to state's attorneys, the Division has recently adopted an evaluation and peer review process for each state's attorney that will be conducted every two years. The process is extremely extensive and time consuming and cannot reasonably be conducted annually. Those evaluations will be provided to the Commission in accord with General Statutes § 51-280 as it currently reads, and the Commission has the ability to question the state's attorney about any of the information contained within the evaluations at the time of his or her reappointment. As such, no change would be necessary to the current statute.

Furthermore, there are currently 24 deputy assistant state's attorneys and 45 assistant state's attorneys. In addition, there are 106 senior assistant state's attorneys and 38 supervisor assistant state's attorneys. Requiring the state's attorney, who carries his or her own heavy caseload, to conduct extensive, formal evaluations every year would be overly burdensome. It is important to note, however, that every employee within the Division is evaluated annually by their direct supervisor.

Finally, subsection (j) of Section 6 regarding the staffing of the Inspector General's office, is concerning as drafted. This subsection removes the proviso that prosecutors within the office come from within the Division. As such, it suggests that the Inspector General would have full, unabashed, hiring authority, without any limitations of the Division, the Division's budget, or the vetting and appointment of the Commission.

In conclusion, while the Division of Criminal Justice continues to support the creation of the Office of Inspector General, it respectfully recommends the Committee amend S.B. 892 to cure the problematic and unconstitutional portions. We thank the Committee for affording this opportunity to provide input on this matter and would be happy to provide any additional information the Committee might require or to answer any questions that you might have.