An iterative theory of the legislative process: a case study of the New York State Commission on Prosecutorial Conduct

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An Iterative Theory of the Legislative Process:

A Case Study of the New York State Commission on Prosecutorial Conduct

by

Kimberly M. Bernstein

A Dissertation

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ABSTRACT

Prosecutors wield the power of the criminal justice system (Medwed, 2014) and the ability to deprive a person of their constitutional rights (Imbler v. Pachtman, 1976). With such power, it is unsurprising that a leading cause of miscarriages of justice is prosecutorial misconduct (e.g., Joy, 2006; Ridolfi & Possley, 2010). New York State became the first state in the country to respond to this issue with a specialized Commission on Prosecutorial Conduct (CPC). The goal of the CPC is to serve as an official mechanism for holding District Attorneys and Assistant District Attorneys accountable by challenging convictions and handing down penalties (State Commission on Prosecutorial Conduct, N.Y. JUD Art. 15-A § 499-a, 2019). The bill creating the CPC was signed into law in 2019, but the idea for such a commission was first introduced in the legislature six years prior in 2013. What factors influenced the failure and success of this bill during these six years? How did these factors change over time through the legislative process and from its inception to its eventual passage? These are questions that have not yet been empirically studied. Nor is there currently an adequate theory on the legislative process with which to answer them. As such, the current work builds a more complete theory of the legislative process—specifically as related to criminal justice issues—and tests it with a longitudinal, qualitative case study of the Commission on Prosecutorial Conduct. The results have implications for not only this Commission and New York State, but for the rest of the country as it looks toward New York as a pioneer of criminal justice reform.
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Flame.
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CHAPTER 1:
INTRODUCTION

In March 2019, then-New York State Governor Andrew M. Cuomo signed into law Article 15-A of the Judiciary Law, creating the State Commission on Prosecutorial Conduct (State Commission on Prosecutorial Conduct, N.Y. JUD Art. 15-A, 2019). Although it was challenged in the courts before it could be implemented, subsequent drafts were able to remedy the constitutional concerns and a final version of the bill was passed into law in 2021. The initial law responded to calls for either revisions to existing procedures or the creation of new organizations dedicated to disciplining prosecutors for misconduct (e.g., Davis, 2007; Sullivan & Possley, 2015), as the existing disciplinary processes were often underutilized or ineffective (e.g., Brink, 2009; Ridolfi & Possley, 2010; Sarma, 2017). The new Commission has the power to review complaints of potential misconduct allegedly committed by District Attorneys (DAs) and Assistant District Attorneys (ADAs), thereby specifically addressing the well-documented role of prosecutorial misconduct in miscarriages of justice (Armstrong & Possley, 1999; Joy, 2006; Ridolfi & Possley, 2010).

The Commission on Prosecutorial Conduct (CPC) is designed to be an independent entity composed of active or former judges, defense attorneys, and prosecutors that has the authority to “review and investigate the conduct of prosecutors” to examine whether they have “committed conduct in the course of his or her official duties…potentially violative of statutes…[or] the rights of private persons” (State Commission on Prosecutorial Conduct, NY JUD Art. 15-A § 499-a, 2021). The CPC will provide an official mechanism for holding DAs and ADAs accountable by conducting hearings and investigations, and, when appropriate, recommending
penalties and punishments, such as reprimands, fines, suspensions, and dismissals (State
Commission on Prosecutorial Conduct, N.Y. JUD Art. 15-A § 499-a, 2021). The goal is for New
York State to enjoy an organization effective in its prescribed role in holding prosecutors who
engage in misconduct accountable for their actions.

Throughout the process to create the Commission, many voiced their support while
others voiced concerns. Supporters—including organizations for defense attorneys, social justice
advocates, and religious groups—believed that the Commission would provide much-needed
oversight to the heretofore practically unchecked powers of prosecutors (Innocence Project,
2018). In contrast, others, such as the District Attorney’s Association of the State of New York
(DAASNY), argued that the CPC would negatively affect the ability of prosecutors to do their
job by quelling their discretionary powers (Sedita, 2015). Specifically, they feared that
prosecutors would slow or stop engaging in their assigned duties due to constant oversight and
fear of retribution. This would, in turn, inhibit the efficacy of the criminal justice system, thus
ironically making the system less, as opposed to more, effective and fair.

These external groups of supporters and detractors served as influencing factors in the
success of the passage of the CPC, but they were not the only factors at play. Four additional
factors—the institution of the legislative branch, individual actors in the legislature, the larger
context of the national and state-wide mood, and key events—also impacted the ability of the
CPC to successfully move through the legislative process. However, exactly when and how these
factors influenced the success of the bill is unclear. To answer these questions, I combine the
factors that have been identified in the extant literature as contributing to legislative success—
thus far incompletely defined as a dichotomous outcome of bill becoming law or not—with a
newer model of the legislative process theory, which recognizes the process as a series of steps,
using the CPC as a case study in a longitudinal and qualitative study. By studying the impact of each factor over time and the success of the bill at each stage of the legislative process, the resulting analysis builds towards a more complete picture of the legislative process, illuminating when and how each factor affected the success of the CPC from its introduction in 2013 to being successfully chaptered into law for the first time in 2019.¹

Being informed of and understanding these factors and their relation to the legislative process is imperative to having a complete picture of the process and outcomes. More broadly, doing so contributes to the development of full, systematic evaluations of the legislative process, allowing one to clarify the general tendencies and patterns of the process, specifically as related to criminal justice issues. This is useful for the production of future legislation as well, as it can be used as a detailed example of the legislative process that may be expected for similar legislation in New York and across the country.² As such, the current dissertation has implications not only for the CPC and New York State, but for the rest of the country as it looks toward New York as the pioneer of a novel criminal justice organization, as well as future criminal justice reform.

¹ After being chaptered into law in 2019, the CPC was challenged in the courts before it could be implemented. After multiple appeals in the court system and rewritten drafts in the legislature, a final version of the bill was passed into law in 2021 and began the process of implementation in 2022. Additional details on this process will be discussed later.

² Although New York State is the first to pass a law of this kind, several other states have shown similar concerns for law enforcement conduct based on bills recently introduced. For example, Connecticut (H.B. 6693, 2019) and Florida (S.B. 262, 2020) have proposed bills regarding concerns of prosecutorial immunity and misconduct. Both Hawaii (S.B. 1424, 2019) and New Jersey (S. 2521, 2018) are attempting to create commissions for oversight of the corrections system to protect inmates, whereas Maryland (S309, 2022) and West Virginia (H3211, 2022) are drafting similar oversight commissions for police.
CHAPTER 2:
BACKGROUND ON PROSECUTORIAL MISCONDUCT

Our criminal justice system must fairly convict the guilty and exonerate the innocent. When any prosecutor consciously disregards that fundamental duty, communities suffer and lose faith in the system, and they must have a forum to be heard and seek justice.
—Former New York State Governor Andrew M. Cuomo on the New York State Commission on Prosecutorial Conduct

In this chapter, I outline the background and history of criminal justice issues, such as prosecutorial misconduct and miscarriages of justice, that led to the creation of the Commission on Prosecutorial Conduct (CPC), as well as its prescribed purpose. First, I discuss the role of prosecutors and prosecutorial misconduct, followed by an explanation of the current rules and disciplinary practices for attorney conduct and why these practices are ineffective at combating misconduct across the country and in New York specifically. Next, I review previous attempts to address misconduct in New York State, providing a background for the creation of the CPC. Finally, I provide an outline of the structure and purpose of the CPC as originally established, as well as an explanation of its current standing.

Prosecutorial Misconduct

Prosecutorial misconduct has been defined in many different ways as its existence has persisted over the years. Nearly a century ago, Justice George Sutherland defined prosecutorial misconduct as "overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense" (Berger v.
United States, 1935, p. 84). The contemporary legal definition defines the act as “[a] prosecutor’s improper or illegal act (or failure to act), esp. [sic] involving an attempt to avoid required disclosure or to persuade the jury to wrongly convict a defendant or assess an unjustified punishment” (Prosecutorial Misconduct, 2019). Thus, prosecutorial misconduct can involve any of several different ethical and/or legal violations, such as suppressing exculpatory evidence, knowingly using false testimony, fabricating evidence, coercing witnesses, making false statements to the jury, and engaging in improper closing arguments (Ridolfi & Possley, 2010; West, 2010).

Prosecutors are the primary enforcers of criminal law, even more than other law enforcement officers. They are uniquely positioned to control the outcome of cases, as it is their role to make charging decisions and sentencing recommendations in plea bargains and create the narrative in trials. In this way, they wield the power of the criminal justice system (Medwed, 2014) and the ability to deprive a person of their constitutional rights (Imbler v. Pachtman, 1976). It is therefore unsurprising that much research has demonstrated prosecutorial misconduct to be a leading cause of miscarriages of justice.

An initial look at the first 62 persons exonerated by DNA evidence revealed some degree of prosecutorial misconduct across 42% (n = 26) of cases, with a subsequent examination of 70 persons exonerated by DNA evidence revealing some degree of prosecutorial misconduct in 49% (n = 34) of cases (Joy, 2006). In the most in-depth statewide review of prosecutorial misconduct, the Northern California Innocence Project found 707 court-determined cases of prosecutorial misconduct in California between 1997 and 2009. This number averages to approximately one case per week (Ridolfi & Possley, 2010).
Unfortunately, such findings may considerably underestimate how often prosecutors actually engage in misconduct. The 707 cases in California in which prosecutorial misconduct was determined to have occurred were only a portion of the over 4,000 cases that appellate courts reviewed for misconduct during those years. This says nothing about the number of cases that were not appealed, or the 97% of cases in which a plea was bargained and, thus, there was no trial outcome to appeal (Ridolfi & Possley, 2010). And so, much like Gross (2006, p. 69) argued about wrongful convictions, the true rate of prosecutorial misconduct is similarly “unknown and frustratingly unknowable.”

These cases of misconduct are not necessarily malicious. Prosecutors, like all people, are fallible, and thus susceptible to the same psychological fallacies as anyone, such as tunnel vision and confirmation bias, which can lead to unintentional mistakes or errors (Findley & Scott, 2006). Further, some have argued that misconduct is not the result of isolated instances of conscious decisions to be unethical, but rather the product of the criminal justice institution. Specifically, three conditions implicit in the prosecutorial occupation can create perverse incentives for prosecutors to engage in, rather than refrain from, prosecutorial misconduct: (1) vague ethics rules that provide ambiguous guidance to prosecutors; (2) vast discretionary authority with little or no transparency; and (3) inadequate remedies for prosecutorial misconduct (Joy, 2006).

These three conditions converge to create uncertain norms and a general lack of accountability for how prosecutors view and carry out their ethical and institutional obligations (Joy, 2006). This uncertainty persists despite the several rules and disciplinary mechanisms in place for attorneys in general, and prosecutors specifically. Regardless of its driving force—be it malicious intent, psychological fallacies, or organizational pressure—prosecutorial misconduct,
and attorney misconduct generally, is a concern in the criminal justice system that has been confronted by several different mechanisms for oversight and discipline.

**Current Rules & Disciplinary Mechanisms**

There are many routes currently available for disciplinary actions against attorneys who violate the rules and regulations, including civil, criminal, legal, and procedural systems. However, these mechanisms have been shown to be ineffective and/or insufficient, especially in regard to disciplining prosecutors specifically. Of the complaints filed regarding prosecutors’ conduct, only a minority of cases are judged to constitute misconduct (e.g., Ridolfi & Possley, 2010). Even when misconduct is found, prosecutors are very rarely disciplined (Davis, 2007; Sullivan & Possley, 2015; Zacharias & Green, 2009). These conditions serve as little deterrent for misconduct.

In the following subsections, I describe the different disciplinary procedures currently in place for attorneys, as well as why they are ineffective at deterring prosecutors from or punishing prosecutors for engaging in misconduct.

**Professional Rules and Disciplinary Procedures**

A vast majority of federal and state jurisdictions, including New York State, have adopted the guidelines for attorney conduct set forth in the American Bar Association (ABA) model rulebook. These model rules of professional conduct describe standards of professional competence and ethical conduct for all attorneys, including topics ranging from administration of justice, to client-lawyer relationships, to malpractice (American Bar Association, 2016). In New York State, attorneys are required to abide by the New York Rules of Professional Conduct (Rules), which define the scope of the attorney’s role in New York State. In addition, the Rules
define misconduct, describing actions that a lawyer and/or law firm is prohibited from taking (New York State Bar Association, 2018).

Those who do not abide by the Rules and/or engage in misconduct are subject to discipline by the Appellate Division. One may bring a grievance to one of four Judicial Departments based on location. The four Judicial Departments all serve a similar purpose in handling attorney discipline; however each has its own individual organizational practices. For example, the Second and Fourth Judicial Departments require that if a complaint is not dismissed or referred elsewhere, the lawyer against whom the complaint is filed must issue a response; no such requirement is listed by the First or Third Judicial Departments. Likewise, the disciplinary actions that can be taken by these Departments vary, from minor consequences, such as referring a complaint to a mediation program, to punitive extremes, such as recommendations for disbarment (New York State Unified Court System, 2013).

However, the professional proceedings for handling and disciplining cases of misconduct offer little transparency, function poorly, and, most importantly, fail to actually hold prosecutors accountable (Sarma, 2017). Reports on prosecutorial oversight indicate that punitive outcomes against prosecutors who engage in misconduct are rare, occurring in less than 1% of cases. The Innocence Project (2016) identified 660 instances of prosecutorial error or misconduct from 2004

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3 The First Judicial Department serves the counties of New York and the Bronx. The Second Judicial Department has three sub-divisions serving Kings, Queens, and Richmond; Duchess, Orange, Putnam, Rockland, and Westchester; and Nassau and Suffolk counties. The Third Judicial Department serves the most counties, including Albany, Broome, Chemung, Chenango, Clinton, Columbia, Cortland, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Madison, Montgomery, Otsego, Rensselaer, St. Lawrence, Saratoga, Schenectady, Schoharie, Schuyler, Sullivan, Tioga, Tompkins, Ulster, Warren, and Washington. Finally, the Fourth Judicial Department also has three sub-divisions, serving the counties of the Fifth Judicial District—Herkimer, Jefferson, Lewis, Oneida, Onondaga, and Oswego—the Seventh Judicial District—Cayuga, Livingston, Monroe, Ontario, Seneca, Steuben, Wayne, and Yates—and the Eighth Judicial District—Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, and Wyoming (New York State Unified Court System, 2013).
to 2008, for which only one prosecutor (0.2%) was disciplined. Ridolfi and Possley (2010) similarly found that of 707 determined cases of misconduct, only six attorneys (0.8%) were disciplined.

Furthermore, even when discipline is administered, it is often minor. One journalistic investigation uncovered 381 national homicide cases in which the convictions were reversed due to false evidence or concealment of exculpatory evidence, both of which are considered explicit prosecutorial misconduct (Armstrong & Possley, 1999). Of these cases, one prosecutor was fired but later reinstated with back pay, and a second received only a 30-day suspension. No other disciplinary actions were taken against the rest of the prosecutors, despite the clear evidence of misconduct.

**Judicial Rules and Disciplinary Procedures**

Decisions by the Supreme Court of the United States (SCOTUS) have affirmed the importance of ethical and constitutional conduct by attorneys in a variety of forums, ranging from jury selection (*Batson v. Kentucky*, 1986) to press conferences (*Gentile v. State Bar of Nevada*, 1991). *Brady* violations—so named for *Brady v. Maryland* (1963), in which SCOTUS held that a prosecutor’s suppression of and/or failure to submit to the defense material evidence\(^4\) that points to the innocence of the defendant violates the defendant’s Fourteenth Amendment right to due process—are one of the most pervasive forms of prosecutorial misconduct (Ridolfi & Possley, 2010).

Violations of these judicially and constitutionally declared protections for defendants by prosecutors can be processed through the appellate system to determine if there was harmful or

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\(^4\) In the context of *Brady* violations, the evidence is material if it has some logical connection with the facts of the case or the legal issues presented and its exclusion creates a reasonable probability that the outcome would be different (*Brady v. Maryland*, 1963)
reversible error, defined as “error that affects a party's substantive rights” and would have a significant impact on “the case's outcome, and thus is grounds for reversal...” (Error, 2019). However, such findings are rare. A majority of cases in which error is debated are either ruled harmless error or not addressed at all (Johns, 2005). In the Innocence Project (2016) prosecutorial oversight report, 527 (80%) of the 660 cases of misconduct or error were deemed harmless. Even when examining one of the most common (and potentially devastating) forms of prosecutorial misconduct, alleged *Brady* violations, there are dramatically low levels of reversal (Medwed, 2010). In examining states’ disciplinary sanctions against prosecutors for *Brady*, Rosen found that “Thirty-five [states] claimed that no formal complaints for *Brady* violations had ever been filed” (Rosen, 1986, p. 731). In fact, only nine instances were identified in which there was a potential for disciplinary actions. In three of these cases, no discipline occurred, and four individuals received only minor sanctions—one reprimand, one caution, and two censures. Only one individual faced more serious discipline in the form of a suspension (Rosen, 1986).

Even if harmful error is found and the case is reversed, a reversal does not necessarily lead to any disciplinary proceedings against the prosecutor. Appellate courts examine cases for a prejudicial effect on the outcome for the defendant, not for the attorneys’ conduct itself (Medwed, 2010). Furthermore, appellate courts rarely name the prosecutors who have committed misconduct in their published opinions, thus saving prosecutors from a public trial as well as a legal one (Gershowitz, 2008).

To skirt the issue altogether, prosecutors can drop or plead out their cases against defendants before they go to trial, avoiding the possibility of potential judicial review entirely.
When agreeing to a guilty plea, as most defendants do, a defendant waives several constitutional rights, which can include the right to appeal (*McCarthy v. United States*, 1969). As such, in arranging a plea deal a prosecutor can make their case immune from judicial review and thus can render such misconduct on their part invisible.

**Criminal Charges**

Prosecutors can be criminally charged for misconduct if their conduct violates not just their respective professional rules or constitutional duties but the legal code. However, bringing criminal charges against a prosecutor for conduct that occurs in the course of a prosecution is all but unheard of (Brink, 2009; Liebman, 2000) given the fact that, by definition, criminal charges against prosecutors must be brought by prosecutors and prosecutors are reluctant to police their own colleagues (Innocence Project, 2016). In the rare cases in which such action does occur, it is often unsuccessful. In a study of cases spanning 25 years, Gershman (2010) found only two criminal prosecutions brought for deliberate *Brady* violations. In both cases, the prosecutor was acquitted. The rarity of a prosecution against misconduct is so great that the Huffington Post released an article exalting the novelty of the event, aptly titled, “For the First Time Ever, a Prosecutor Will Go to Jail for Wrongfully Convicting an Innocent Man,” referring to the case of Michael Morton who was wrongfully convicted and incarcerated in state prison for 25 years. And yet, the prosecutor in Morton’s case, who deliberately failed to turn over exculpatory evidence, was sentenced to only ten days in jail (Godsey, 2013).

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5 Most criminal cases are entered as guilty pleas, with only 2% of federal criminal defendants going to trial and 3% of criminal dispositions continuing to trial in New York State (Gramlich, 2019).
Civil System

Historically, the last channel of recourse against prosecutors who commit misconduct was through the civil system (42 U.S.C.A. § 1983, 2019). However, concerns began to arise that the constant threat of civil action would chill a prosecutor's ability and willingness to effectively do their job and keep the community safe. Thus, certain immunities were granted to government officials, allowing for protection from civil repercussions (e.g., lawsuits) for those working within the scope of their official duties (Imbler v. Pachtman, 1976; Buckley v. Fitzsimmons, 1993). Today, prosecutors enjoy absolute immunity, meaning that they cannot face civil lawsuits for misconduct in their official duties, regardless of the cause or severity of their misconduct (e.g., Connick v. Thompson, 2011).

The argument made in Imbler v. Pachtman (1976) and reiterated in Connick v. Thompson (2011) stated that implementing civil immunity is tolerable because prosecutors are still deterred from and punished for misconduct by their peers and professional disciplinary actions such as sanctions, suspensions, and/or disbarment, rendering civil repercussions unnecessary. However, as previously discussed, these other disciplinary actions are ineffective at either deterring or handling misconduct. Thus, the issue of prosecutorial misconduct and how best to handle it remains an active question for the criminal justice system.

Instead of legal mechanisms acting as a deterrent to misconduct, the lack of oversight provides little incentive for prosecutors to comply with rules (Jones, 2010) and may instead inadvertently incline them, consciously or unconsciously, to engage in misconduct (Davis, 2007). This inclination also may be due to institutionalized pressure to win cases, especially for high-profile cases (Medwed, 2014). Even more concerning, prosecutors may be rewarded for unethical work, receiving promotions and raises (Sapien & Hernandez, 2013). Before the
prosecutor in the Michael Morton case was charged, he received several promotions, eventually landing a judgeship. In an equally disturbing case, Glenn Kurtzrock, a homicide prosecutor, committed many deliberate *Brady* violations in several cases by altering records to remove exculpatory evidence, directly causing at least one wrongful conviction. Kurtzrock faced no career-ending sanctions, and now runs his own criminal defense firm, citing his seventeen years of experience as an ADA as a compelling reason for which he should be hired (Morrison, 2018).

**Misconduct in New York State**

New York State is not immune to these same troubles of prosecutorial misconduct and ineffective disciplinary mechanisms and safeguards for justice. In fact, the previously mentioned homicide prosecutor who deliberately altered records to expunge exculpatory evidence, Glenn Kurtzrock, was a New York State ADA; his successful defense office is currently located on Long Island (Morrison, 2018). More broadly, in a study of court rulings over the span of a decade in New York State, explicit prosecutorial misconduct was found by a judge to have occurred in more than 25 cases. However, prosecutors were rarely referred for investigation by the state disciplinary committee. Although 30 cases were overturned for several reasons, including explicit misconduct, most judges maintained that the errors had occurred not as a result of abuse, but rather as simple mistakes not warranting further action or discipline. With the exception of one prosecutor, none were disbarred, suspended, censured, or subject to any punishment. Instead, personnel records of these prosecutors showed that many received promotions and/or raises afterwards (Sapien & Hernandez, 2013).

A review of DA offices in the Bronx, Queens, and Brooklyn all showed similar patterns of overlooked and unpunished cases of misconduct (Rudin, 2011). In the Bronx, of the 72 cases of improper behavior that were discovered between the years of 1975 and 1996, only one
prosecutor was disciplined. In Queens, 73 cases of appellate reversals for misconduct were found between 1985 and 1998. As of 2000, no disciplinary actions had been taken, including dismissals, demotions reductions in/withholding of compensation, or, of importance, referrals to the court’s grievance committee. The Brooklyn DA’s office was found to have “no employee manual or other published rules or procedures concerning standards of behavior, potential sanctions for violating them, or procedures for investigating and imposing discipline…” (Rudin, 2011, p. 569).

Given that New York State has faced many of the same challenges that have been seen nationwide in regard to prosecutorial misconduct, it is no surprise that calls for reform in the state have been active. Such calls were answered with the creation of the Commission on Prosecutorial Conduct; however, the CPC was not the first step taken to examine and combat misconduct in New York State.

**New York State’s Response to Prosecutorial Misconduct**

The lack of consequences for prosecutorial misconduct in New York State instigated efforts to understand and combat this misconduct. In 2015, Chief Judge Jonathan Lippman created the Commission on Statewide Attorney Discipline (“Lippman Commission”) to comprehensively review the attorney disciplinary system in the state. The goal of the Lippman Commission was to determine what was working versus what needed improvement in the attorney disciplinary system, and offer recommendations to enhance the efficiency and effectiveness of the attorney discipline process in the state. One question they sought to answer was if the current system housed in different Judicial Departments caused regional disparities in the discipline process and outcomes, and thus if a statewide system was instead efficacious (NYS Commission on Statewide Attorney Discipline, 2015).
The Lippman Commission documented a number of concerns and recommended several reforms related to the issue of uniformity. Specifically discussed in the final report was the concern that with no statewide advisory guidelines, the four Judicial Departments varied in their rules and procedures and, consequently, sanctioning outcomes. Furthermore, the Judicial Departments made no effort toward uniformity, as they did not even reference similar cases between Departments in deciding appropriate outcomes. Thus, many reforms suggested by the Lippman Commission arose from a concern for the lack of uniformity in attorney discipline across the state (NYS Commission on Statewide Attorney Discipline, 2015).

Two years after the creation of the Lippman Commission, the New York State Justice Task Force (“Task Force”) released a Report on Attorney Responsibility in Criminal Cases. Similar to the Lippman Commission, the Task Force also noted concerns about misconduct and explored the potential use of a specialized organization to address the problem. Specifically, the Task Force reported concerns about the dearth of research and statistics on prosecutorial misconduct and its relation to wrongful convictions, as well as recommendations for improving the reporting of attorney misconduct and the grievance process (New York State Justice Task Force, 2017).

The reports and suggestions from the Lippman Commission and the Task Force made it clear that more work needed to be done to address the issue of prosecutorial misconduct in New York State. The CPC was created for this purpose.

**New York State Commission on Prosecutorial Conduct**

The CPC was not a quick fix to these perceived issues, but a product of years of investigation, deliberation, edits, and debate. The legislature introduced the first bill creating a commission on prosecutorial conduct and oversight in 2013 (N.Y. Legis. Assemb. 8179, 2013).

Prominent media outlets contended that passage of the bill “would move New York in the right direction, as well as set an important example for the rest of the nation” (Bennet et al., 2018, para. 13). By 2017, a diverse collection of individuals and organizations had expressed support for the legislation, including the Catholic Archdiocese, United Teachers Association, Legal Aid Society, and the New York Association of Criminal Defense Lawyers (Gershman, 2015).

Support for the bill grew further following a widely publicized scandal in mid-2018 involving New York State DA Mary Rain, who was found to have violated 24 distinct rules regarding professional misconduct, including blatant, deliberate Brady violations. The Third Department of the Appellate Division determined that Rain would have her license suspended for two years (Matter of Rain, 2018). Although, as has been discussed, any discipline at all is surprising, public opinion determined the punishment did not match the severity of the crime. Media noted “the futility of New York’s disciplinary system in punishing and deterring errant prosecutors” (Gershman, 2016, para. 19), explaining that an investigation occurred only when DAASNY itself went to the extraordinary measure of requesting one (Gershman, 2016). Other news sources cited this incident as showing the “lack of urgency and transparency” (Rosenthal, 2018, para. 4) in addressing prosecutorial misconduct and named failures in existing checks on prosecutorial ethics as an impetus for “legislation to create a new prosecutorial oversight board that would investigate misconduct independently of the courts” (Rosenthal, 2018, para. 4).
Despite the growing support for such legislation, the bill also faced backlash and threats of civil action (e.g., Sedita, 2015). However, it continued to move forward through the New York State legislature toward codification. After several additional rounds of revisions, a new bill (N.Y. Legis. S. 2412-D, 2018) was introduced to the New York State Senate by Senator John A. DeFrancisco, and its Assembly counterpart (N.Y. Legis. Assemb. 5285-C, 2018) into the New York State Assembly by Assemblyman N. Nick Perry. In June 2018, the bill passed the Senate (45-12) and the Assembly (98-46) with bipartisan support in both chambers. Throughout this process, still more individuals and organizations added their support, urging the Governor to take the final codification step of signing the bill.6 A coalition of more than 100 groups and individuals—including 16 individuals who were wrongfully convicted—came together under the organization It Could Happen To YOU to demonstrate in Albany. The Jeffrey Deskovic Foundation for Justice, whose namesake was wrongfully convicted in part due to prosecutorial misconduct, organized a similar demonstration in New York City (Innocence Project, 2018).

Then Governor Cuomo approved of the law but had some concerns, stating that the bill “suffer[ed] from several flaws that have been identified by the State's judiciary, as well as the State's Office of the Attorney General, that would cause its undoing and would undermine the laudable goal sought to be achieved by its passage into law” (N.Y. Exec. Approval Memo No. 2, 2018, para 2). Therefore, the Governor, Senate, and Assembly entered into chapter amendment negotiations, wherein the three houses collectively reach an agreement to amend and re-pass the

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6 Many organizations wrote letters of support of the bill to Governor Cuomo, urging him to sign the CPC into law, including: the Office of the Brooklyn Borough President, the Bronx Defenders, the New York State Defenders Association, the New York State Catholic Conference, Latino Justice PRLDEF, New York State Trial Lawyers Association, the Innocence Project, New York State United Teachers, United Chaplains of New York State, New York State Association of Criminal Defense Lawyers, Social Justice Action Center, Prison Families of New York, and the Jeffrey Deskovic Foundation for Justice.
Current Status of the CPC

The current work follows the CPC from its first draft in 2013 until it was first successfully chaptered into law in 2019, to illustrate how a bill moves through the legislative process from initial introduction to being signed into law by the Governor. However, this is not where the process ended for the CPC. Although it is beyond the scope of the current work, the CPC was not implemented in April of 2019 as it was slated to be. Its implementation was paused when then-president of DAASNY, David Soares, argued that the bill was unconstitutional, contending that, among other things, implementing the CPC would cause a chilling effect thus deterring prosecutors from effectively doing their jobs (Soares et al. v. State of New York et al., 2018). According to an article in the New York Law Journal, lawmakers agreed not to exercise their authority to appoint commission members until the constitutionality of the CPC could be decided by the courts (Clark, 2019).

In January 2020, Plaintiffs David Soares, Robert J. Masters, and the DAASNY—representing himself, ADAs, and DAs, respectively—filed against Defendants then-Governor Andrew M. Cuomo, Speaker of the Assembly Carl E. Heastie, and then-Assembly Minority Leader Brian M. Kolb (Soares et al. v. State of New York et al., 2018). The Supreme Court for

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7 Legislative sessions in New York State last two years, starting with the odd year after an election, and run from January through December.
the Third Judicial District sided with the Plaintiffs, declaring the law unconstitutional as written and rendering it void. Following that decision, a new bill (N.Y. Legis. Assemb. 1634, 2021; N.Y. Legis. S. 3934, 2021) was introduced in the Legislature to remedy the constitutionality concerns raised by the Supreme Court and was signed into law by then-Governor Cuomo in June of 2021 (State Commission on Prosecutorial Conduct N.Y. JUD Art. 15-A § 499, 2021). As of the current writing, the judicially appointed members of the CPC have been determined, and the Executive Budget for FY23 included a proposal for funding for the CPC in the amount of $1.75 million. The complete texts of both the 2019 chapter and the 2021 chapter, with changes from the earlier chapter marked, are included in Appendix A.

Composition and Goals of the CPC

The New York State Commission on Prosecutorial Conduct (CPC) is slated to consist of eleven members, with an approximately equal number of defense attorneys, active, former, or retired prosecutors, and retired judges. Four of these members are to be appointed by the governor, four by the Senate and Assembly, and three by the Chief Judge (State Commission on Prosecutorial Conduct, N.Y. JUD Art. 15-A § 499-d, 2019). The main goal of the CPC is to investigate and hear complaints on the conduct, qualifications, fitness to perform, or performance of the official duties of any District Attorney or Assistant District Attorney. These concerns may be demonstrated by a departure from the prosecutor’s obligations as defined by statute, case law, or the New York Rules of Professional Conduct, persistent failure to perform in his or her duties, conduct prejudicial to the administration of justice, or mental or physical disability that prevents a prosecutor from proper performance of his or her duties. The CPC may hear complaints from

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8 All court documentation is available under Albany County Supreme Court case number 906409-18.
outside parties, or initiate proceedings themselves (State Commission on Prosecutorial Conduct, N.Y. JUD Art. 15-A § 499-d, 2019).

After receiving or initiating a complaint, the Commission can hold a hearing during which it can take testimony and receive evidence relevant to the complaint. The prosecutor against whom the complaint is filed has the right to counsel, and to call and cross-examine witnesses and present evidence. If inappropriate conduct is found to have occurred, the Commission then determines whether and how the prosecutor should be disciplined. The Commission also may recommend to the Governor that the prosecutor be removed from office for cause (State Commission on Prosecutorial Conduct, N.Y. JUD Art. 15-A § 499-f, 2019). At the conclusion of the hearing, all Commission proceedings shall remain confidential; however, the findings and conclusions of the Commission are to be made available to the public.
CHAPTER 3:
THEORY ON LEGISLATIVE CREATION

Theorists have endeavored to explain the causal mechanisms of the legislative process for several decades. Like in many other disciplines, the first theories used to explain the legislative process were taken from other fields, such as economics and behavioral psychology (see Shaviro, 1990), and applied to the new context of law and legislating. As more research was conducted on the topic, new theories emerged that were created solely from and for the legislative process itself. As the amount of research done on the topic has grown, so too has the number of theories attempting to explain the process. Despite their significant contributions to the area of study, these theories all have the same fatal flaw: they fail to explain the actual process. Instead, these theories take a macro look at the legislative process, mostly examining only the final stage and defining success or failure as the dichotomous outcome of the passage of a bill. But for a bill to even be determined as a success or failure in the final stage, it must first have succeeded at every previous stage. As was the case for the CPC, doing so may take years and many iterations of a bill as it cycles through the legislative process.

To date, only a couple of studies have examined the legislative process as a set of stages as opposed to a single event (King et al., 2005; Soule & King, 2006). Despite efforts to do so, these studies still fall short of effectively explaining the legislative process due to both failing to include variables that have previously been shown to be related to the process, as well as making incorrect temporal assumptions by not ensuring that these variables occurred temporally before the examined outcome variables. As such, I will take a more comprehensive approach to building towards an understanding the legislative process, particularly as it relates to criminal justice.
legislation and the CPC specifically, by examining how the existing identified and agreed upon factors that affect the legislative process may impact each stage of that process, using a longitudinal analysis to better understand the temporal relations between these variables.

In this section, I first provide a brief overview of the stages of the legislative process. Next, I identify key concepts discussed in the extant literature on the legislative process that most theories agree significantly impact this process, as well as how these latent concepts can be operationalized based on other empirical works. Then, I examine the more recent and dynamic legislative process theory that recognizes some of the different stages within the process and how some of these concepts affect them. Finally, I discuss how I merge these two schools of thought to build a more complete, iterative theory on the legislative process, using the NYS Commission on Prosecutorial Conduct as a case study.

**Stages of the Legislative Process in New York State**

Before being signed into law, the Commission on Prosecutorial Conduct (CPC) had to follow the same legislative process as any other law in New York State (see Figure 1):

1. **Introduction:** An idea formed by a legislator, staff member, activist/lobbyist or constituent is drafted and introduced as a bill.

2. **Committee:** Introduced bills are referred to the appropriate committee based on the content of the bill and related sections of law to be voted on by committee members.

3. **Floor Calendar:** The bill is added to the floor calendar once it is passed by the committee with a majority of votes while there is a quorum. Bills must remain on the floor calendar for three days before they can be added to a floor agenda.
4. **House Vote:** Bills added to the floor agenda are voted on by the entire house (Senate or Assembly), and pass with a simple majority.

5. **Delivered to Governor:** If both houses pass an identical bill, the bill is then delivered to the Governor to be signed.

6. **Decision by the Governor:** Once delivered, a bill can be vetoed, signed into law, or referred back to the legislature pending amendments agreed upon between the two branches with a chapter amendment.

If a bill does not successfully complete all of these stages within one legislative year, it usually must begin the entire process again at the start of the next session, barring some rare exceptions.
Figure 1

Stages of the Legislative Process
Theoretical Mechanisms of the Legislative Process

The current top theories of the legislative process (i.e., Baumgartner et al., 2014; Berry & Berry, 2014; Jenkins-Smith et al., 2014; McBeth et al., 2014; Mettler & SoRelle, 2014; Ostrom et al., 2014; Schneider et al., 2014; Zahariadis, 2014), defined as those that appear to be the most established and utilized in recent history, each explain the legislative process in their own unique ways from their unique perspectives (for review, see Sabatier & Weible, 2014). However, they have two themes in common. First, each defines the legislative process as the success or failure of a bill to be signed into law. Second, together these theories agree that this process is affected by five key factors. Specifically, they agree the ability of a bill to pass successfully into law is influenced by the following elements, which I review next: 1) institutions as the venues of decision-making; 2) legislators’ decision-making; 3) external groups; 4) larger context; and 5) key events.

Institutions as the Venues of Decision-Making

Modern theories state the passage of a bill into law is dependent on the institution as the venue of the decision-making. In general, the institutions that house where actors make decisions have their own history of policy as well as rules and norms that shape the behavior of the decision-makers (e.g., Baumgartner et al., 2014; Mettler & SoRelle, 2014; Ostrom et al., 2014). In other words, a particular sequence of past decisions sets the broad context for current policy (Mettler & SoRelle, 2014), and so policy commitments made in the past produce increasing returns and make it costly to choose a different path (Cairney, 2012; Pierson, 2000). This institutional history results in so-called institutional friction (Baumgartner et al., 2014), which requires a major or cumulative effort to overcome and successfully result in policy change (Mettler & SoRelle, 2014; Schneider et al., 2014). What these theories fail to address is how the
level of institutional friction may change depending on which stage of the legislative process a bill is in. Still, the efforts to overcome institutional friction can be a result of the individual or combined impact of legislators’ decision-making, external groups, larger context, and key events, as discussed next.

Legislators’ Decision-Making

All the modern theories of the legislative process include the concept of actors making decisions. Some theories include any individuals, groups, or organizations interested in policies and politics (e.g., see Baumgartner et al., 2014; McBeth et al., 2014; Mettler & SoRelle, 2014; Ostrom et al., 2014), while others consider only policymakers (e.g., Berry & Berry, 2014; Schneider et al., 2014; Zahariadis, 2014). Given greater theoretical and research consensus on the importance of legislators as opposed to other political actors, I will limit my definition of actors’ decision-making to that of the legislators, individually and collectively.

Thus far, prior empirical research on legislators’ decision-making has focused only on the thinking of individual policymakers or the legislature as a whole, indicating how their demographics shape their opinions of and decisions on policy. Importantly, past works have examined only the overall effect of legislator and legislature demographic variables, not when during the legislative process the impact of these variables is likely to be most pronounced. Even so, findings related to the effects of policymakers’ political orientation, gender, and race on policy adoption are informative, as reviewed next.

Political Orientation

Perhaps the most prominent demographic factor affecting the passage of legislation is political orientation. On the individual level, the party that an individual belongs to can predict how they will vote on certain measures, with Democratic legislators often aligned with more
liberal policies and Republican legislators typically aligned with more conservative policies. In the context of criminal justice, liberal policies are those that follow the Due Process Model—which focuses on defendants’ rights and the tenet that defendants are innocent until proven guilty—whereas conservative policies tend to follow the Crime Control Model—which focuses on protecting society by emphasizing swift and strict punishments (Packer, 1964). Thus, the Democratic Party has been associated historically with less punitive criminal justice policies and a greater willingness to use law to address social problems. As related to prosecutorial misconduct, one would expect individual Democrat legislators to be more supportive of a reform like the CPC, as such misconduct often directly violates the Due Process rights of defendants. Individual Republican legislators, however, may be more concerned with allowing prosecutors leeway to do what is needed for the sake of public safety.

Research also has indicated the importance of party at the higher level of the legislature as a whole. Specifically, studies have typically found that a Democratic majority and/or the percentage of liberal voters in the legislature relate to less punitive corrections policies or increased punishment for bias-motivated offenses (Allen et al., 2004; Jenness and Grattet, 1996; Sliva, 2016). There is also evidence of a correlation between the percentage of Democrats in the legislature and the passage and implementation of more liberal criminal justice reform (Brown, 2013; Soule & Earl, 2001). Therefore, the CPC successfully being signed into law was likely partially dependent on the fact that Democrats held the majority in both the Senate and Assembly that year. However, currently theory does not directly address the role of party identification or leadership in helping to overcome institutional friction at earlier stages of the legislative process, or gain the momentum necessary to get it to the final stage to be signed into law.
Gender

A second demographic factor empirically indicated to affect the legislative process is the number of women in the legislature and their relative position(s) of power. Some of this influence may be confounded with political orientation, given that there are more women legislators in the Democrat than Republican party (Pew Research Center, 2015). Additionally, any research on the topic is stymied by the fact that, historically, there just have not been many women legislators. As more women join the legislature, more valid and reliable data can be collected and analyzed to better examine the effect of gender on policy. Still, even the limited existing research has found that there are substantive psychological differences in women and men lawmakers that affect their decision-making regarding policy (Frederick & Jenkins, 2016; Swers, 2013).

For instance, research indicates that, on average, women demonstrate more legislative effectiveness than men. Anzia and Berry (2011) found that women legislators secured more federal discretionary spending than their men colleagues, and sponsored and cosponsored bills at a higher rate. Some posit that the cause is a gender role bias that manifests as men legislators pressure their women colleagues to take on “feminine” issues such as education, reproductive rights, and gender equity, while women simultaneously try to counter this bias by demonstrating their abilities through work on “masculine” issues such as national security and budget (Frederick & Jenkins, 2016). Others argue that this is due to the election process, which requires women to be more experienced, higher quality, and more competitive than their competitors to even win their seats (see Swers, 2013). Such traits might carry over into the job where women continue to compete against their coworkers to prove they can be effective legislators.
Regardless of the cause, the research is firm that women are more effective legislators across all topics of legislation.

In the context of the CPC, which, as discussed above, was a bill more likely to be supported by Democrats, it is likely that individual women legislators and the overall number of women in the legislature were each associated with the CPC successfully passing and being chaptered into law, due to the individual interest in the topic and the resulting collective push to get it passed. The contemporary impact of women legislators on legislation and the legislative process is yet unstudied, but is likely important and relevant as well. If the CPC faced different levels of friction at different stages of the legislative process, then examining these stages is necessary to determine if women legislators played a role in successfully overcoming this friction to shepherd the CPC through the intermediate stages of the legislative process—such as in the beginning stages when individual lawmaker support is more impactful and friction is the highest—rather than just over the finish line at the end of the process.

**Race**

The challenge of having sufficient representation to support reliable research is even harder when examining the impact of legislator race on legislation. Like women, legislators who are Black, Indigenous, and/or People of Color (BIPOC) are more often Democrats (Pew Research Center, 2015), and thus more likely to support more liberal policies. And so there is again a confounding and interacting relation between these demographic factors. Still, both women and BIPOC share interests beyond those often discussed by White men who usually run the legislature (Bratton & Haynie, 1999). Additionally, race, like gender, may similarly impact the success of a bill. One study that disaggregated these demographics found that progressive bills were more likely to be introduced specifically when a Black woman was the primary
sponsor (Orey et al., 2007), showing that even though legislators’ gender and race may interact to influence policymaking, these variables do have effects independent of political party.

One model of policymaking suggests that, at an individual level, elected officials from racial and ethnic minority groups may be more responsive to the interests of their racial and ethnic group members than White legislators (Preuhs, 2006). Because BIPOC are disproportionately represented in the criminal justice system (Porter & Ghandnoosh, 2018), any legislation affecting the criminal justice process, such as the CPC, is likely of special interest to legislators who are racial or ethnic minority members. At the aggregate level, a greater number of legislators from racial and ethnic minority groups may reduce overall racial bias in the representative body, resulting in policy decisions that are qualitatively different from decisions that are made in a racially or ethnically homogeneous body (Mansbridge, 1999; Preuhs, 2006). Therefore, the effect of race and ethnicity may be similar to the potential impact of gender. That is, the CPC may have successfully been signed into law due to the number of BIPOC members in the legislature at the time. But, as with women, their impact on the rest of the legislative process has not been examined.

External Groups

The third factor that theories have reached consensus as being key to legislative success relates to external groups, or special interest groups, which can be conceived of as communities that share a common goal and have power to move towards that goal. Special interest groups have had a hold in U.S. politics since the American Revolution. James Madison discussed such “factions” in Federalist Paper No. 10, defining them as “a number of citizens…who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens or to the permanent and aggregate interests of the community.” Actors with similar
beliefs become part of the same advocacy coalition, and coalitions compete against each other for the key resource of relationships with policymakers (Jenkins-Smith et al., 2014). Today, special interest groups often take the form of lobbyists, advocates, and professional organizations.

External groups have long been recognized in the policy adoption literature as playing an important role in advocating for or against the passage of particular policies or raising awareness of prior policy adoptions in other jurisdictions (Karch, 2007; Skocpol et al., 1993). These groups can help create and shape legislation both directly through lobbying, rallying, and providing official memos of support or opposition to the legislature (Baumgartner et al., 2014; Mettler & SoRelle, 2014; Zahariadis, 2014) and indirectly by shifting the public opinion and national mood surrounding an issue (Berry & Berry, 2014; Jenkins-Smith et al., 2014; McBeth et al., 2014; Ostrom et al., 2014), a point to which I return later. If enough legislators can be convinced to vote in a certain direction, these groups help push the passage of a bill into law.

An important point to note is that although research often focuses on the interest groups fighting for a bill, the opposition plays a key role as well (McCammon, 2001; Soule & Olzak 2004). As previously discussed, the CPC had support from a number of criminal justice advocacy groups, but also significant opposition from powerful professional groups such as the District Attorneys Association for the State of New York (DAASNY). Just because the CPC was successfully signed into law does not mean that the advocacy groups were fully impactful and DAASNY had no influence, which one might conclude by looking at only the ultimate outcome of the bill, as most past research has done. Instead, it is likely that both groups influenced lawmakers throughout the process and that the several iterations of the bills were new
compromises based on the excitement and concerns from these groups. Testing this assumption requires examining the stages and iterations of a bill through the legislative process.

**Larger Context**

All modern theories note the impact of larger cultural ideas or beliefs on the legislative process. The general rule is that policy is adopted over time as it is acceptable to the community; as the belief systems—or shared preferences and norms—that are embedded in the culture at the time affect policymakers’ decisions and behaviors (Berry & Berry, 2014; Ostrom et al., 2014), and thus the resulting policy. Possibly the best way to discern the larger context surrounding legislation and the legislative process is through public awareness or opinion, which maps on to cultural norms, including norms and opinions related to policy (Banaszak & Ondercin, 2016). As specifically related to criminal justice, public opinion has been shown to impact court decision-making, capital punishment policy and use, correctional expenditures, and incarceration rates (see Pickett, 2019).

Public opinion impacts legislators’ decisions even more during election years, when the public opinion is realized at the polls. All electeds are concerned with keeping in touch with issues that matter to their constituency to remain in office, whether it be for pure economic stability, a wish to stay in power, or a genuine desire to continue to do the work that they believe is best for their constituents (see Sabatier & Weible, 2014). Several studies have found that the electoral security of officials—defined as public rivalry variables such as party competition, divided government, and election timing—affect the adoption of criminal justice-specific legislation by, for example, increasing the need to appear tough on crime or decreasing the willingness to enact more controversial reforms (Sliva, 2016).
In other words, legislators may be less likely to promote more controversial criminal justice policies during an election year. For example, Williams (2003) and Allen et al. (2004) both found that measures of party competition were positively related to adoption of Truth-in-Sentencing laws, which reduce offenders’ likelihood of being released before completing their full prison sentences. Conversely, legislators may be more willing to push for criminal justice policy that is viewed favorably by the public near an election. In addition to concern from individual legislators about pleasing their constituency enough to get reelected, elections are of concern for the entire legislature as well. The party that holds the majority has the power to decide which bills are placed on committee and floor agendas because members of the majority party hold leadership positions. Additionally, by pure numbers alone, the majority party has the ability to pass bills through certain stages of the legislative process simply by voting along party lines.

As related to the CPC, the increased awareness of public opinion and political concern of gaining or maintaining majority party status may have been enough to overcome any institutional friction being faced at that point of the process, especially before an election. In support of this conjecture, the first time the CPC successfully made it through the entire legislative process, it was signed into law just three months before an election. However, between its original introduction in 2013 and being chaptered into law, in 2019, the CPC had made its way through the legislative process during three separate elections. How these other elections affected the success of the bill at the earlier stages of the legislative process is unknown.

Key Events

Finally, key or discrete events can draw attention to specific policy issues, which then, in turn, impact the policy process. These events—sometimes termed “critical junctures”—can act
as a catalyst for drawing attention to and shifting the political agenda around specific issues (Baumgartner et al., 2014; Jenkins-Smith et al., 2014; Schneider et al., 2014; Zahariadis, 2014). Some go as far as to state that due to institutional friction, change may take decades to occur in the absence of a major external event to change the way policymakers and the public view particular issues (Schneider & Ingram, 2005; Pierce et al., 2014).

The clearest example of how key events can act directly as an impetus for policy change in the realm of criminal justice issues is when they result in so-called “apostrophe laws,” a type of legislation named after victims of crime. In these cases, key events directly and rapidly cause the creation of specific laws that boast strong support from the public, despite lacking empirical success. There are a number of laws in the criminal justice field based on this phenomenon, including Megan’s Law, AMBER Alerts, and Breonna’s Law.

Although there were a number of discrete key events that occurred around the creation of the CPC, the CPC was not tied to a single discrete event. Instead, as noted previously, it was the culmination of many years of work around issues of misconduct in the country and New York State specifically. Therefore, using the current top theories to explain the success of the CPC would exclude any mention of key events. However, just because key events did not immediately precede and singularly cause the adoption of the policy does not mean that they had no impact on the success of the CPC through the legislative process. The exact nature of this impact, however, is unknown given the lack of examination of the effect of key events on other stages of the legislative process.

**Legislative Process Theories**

The theories discussed in the prior section take a macro look at the legislative process, identifying these key elements that affect the legislative process as a whole and defining success...
or failure as whether or not a bill passes the legislature. However, as previously discussed, the legislative process is just that—a process composed of many steps. Each step is distinct, and, as such, a bill can succeed or fail at any one of these stages. More critically, the factors discussed above are likely to affect each stage differently, as each stage of the legislative process has unique rules and goals. Prior theories (e.g., Baumgartner et al., 2014; Berry & Berry, 2014; Mettler & SoRelle, 2014; McBeth et al., 2014; Ostrom et al., 2014; Schneider et al., 2014; Zahariadis, 2014) failed to acknowledge this possibility by only examining the legislative process as a whole instead of as a composite of many stages, each of which may interact differently with the key elements.

King, Cornwall, and Dahlin (2005) were the first who sought to address this limitation by developing a theory of legislative logic, in which they posited that each concurrent stage of the process is characterized by more stringent rules than the preceding stage, and each progressive stage becomes more consequential. As such, each stage has a different level of policy responsiveness (Schumaker, 1975), and so is impacted differently by these mechanisms depending on how effective they are at influencing that stage’s particular rules and consequences. King et al. (2005) tested their theory by examining the impact of social movements on the state-level legislative process for national amendments at four distinct steps: bill introduction, roll-call vote, passage in first house, and passage in second house. As they predicted, social movements—defined as insider tactics such as lobbying as well as outsider tactics including public education—were more effective in earlier stages of the legislative process than later stages. They explain this finding with the argument that earlier stages of the legislative process have less stringent rules and are less consequential to legislators, whereas
later stages become more consequential and legislators must weigh their actions more seriously and therefore are less likely to respond to outsider groups than other political and cultural factors.

Soule and King (2006) then expanded upon this work by replicating the examination of social movements and adding political opportunity structure and public opinion as variables, this time examining the success of the Equal Rights Amendment (ERA). Because they were studying a constitutional amendment, they broke the legislative process down into three stages: bill introduction, passage in the first house, and ratification in the second house. They successfully replicated the findings of King et al. (2005) regarding social movements, finding that both supportive and oppositional social movements were most effective at the earliest stages of the legislative process. Additionally, they found that, conversely, public opinion has the greatest impact on later stages of the legislative process. This, they argued, is because later legislative action is more visible and consequential, causing legislators to pay more attention to the wishes of their constituency. The results of both studies supported the authors’ hypothesis that different factors impact the success of a policy differently at different stages of the legislative process, thus showing the importance of examining the legislative process as a dynamic practice.

**Flaws with Legislative Process Theories**

Despite the more nuanced and theoretically sound arguments made by King and colleagues in their legislative process theory (King et al., 2005; Soule & King, 2006), they still fail to fully explain the legislative process. First, although these studies included social movements (external groups) and public opinion (larger context) in their analysis, they excluded many of the previously discussed factors that have been theorized and empirically shown to affect the success of the legislative process, including institutions as venues of decision-making,
legislators’ decision-making, and key events. The true impact of the included variables cannot be determined without including all the relevant elements in one study.

In addition, these studies also excluded many stages of the legislative process and the steps that take place within those stages. This may partially be due to the fact that both studies examined national constitutional amendments as opposed to state-level legislation. Although the steps to ratification are slightly different for this type of legislation, the basic legislative process is the same, and, as previously discussed, there are six stages to the legislative process—not three (Soule & King, 2006) or four (King et al., 2005).

Potentially even more importantly, these studies ignore the inherently iterative process of legislating. Both King, Cornwall, and Dahlin (2005) and Soule and King (2006) studied a single legislative year as their unit of analysis. This is problematic for two reasons. First, not all bills make it through the entire legislative process in one year. If a bill gets amended, it may be required to cycle back through the process again, as would a bill that successfully makes it through most of the process but fails to be signed by the Governor by the end of the calendar year. But the inability of a bill to pass through every stage of the legislative process and be signed into law by the Governor in one attempt is not necessarily a failure if it leads to the eventual passage of a piece of legislation. Amendments suggested by individual legislators or external groups may produce a more successful piece of legislation. Even without any changes to a bill, its movement through the legislative process may depend on changes in the legislature, larger context, or key events. The legislative process is not a series of up/down votes. There are arguments, debates, rewrites, amendments, and compromises within each stage; the bill that is introduced is not always the bill that is placed on the executive desk to be signed into law. Furthermore, a “win” may not be the concrete step of passing one stage of the legislative process
and moving to the next, but editing the bill to bring it one step closer to the final draft that ultimately may become law.

The second issue with using one year as a unit of analysis is that it precludes the ability to examine temporal relations of these factors within the legislative process. All of the variables used in these studies, both the variables of interest and the control variables, were aggregated over the year to a single data point. And so, despite studying a process that occurs over time, the variables used to examine this process were treated as static over the entire year. In addition, both King et al. (2005) and Soule and King (2006) relied on regression equations to determine the likelihood of a bill successfully passing through their defined steps in the process in any given year given a certain set of predictor and control variables. Although useful as a starting point, this approach fails to fully acknowledge exactly where and how each factor affects the legislative process. Thus, those researchers failed to discover how the changes in their variables within years affected their outcomes.

Understanding the legislative process is not just about determining which factors allow a bill to move through each stage of the process, but why and how they do so. The incompleteness of the one existing process theory proposed by King et al. precludes this full understanding by excluding identified predictor variables, incompletely defining the stages of the legislative process, ignoring the iterative nature of the legislative process, and unnecessarily aggregating key data, thus losing time as a variable in the process.

**An Expanded Iterative Theory on the Legislative Process**

For all these reasons, I extend the current legislative process theory by (a) including all five of the key factors identified by most modern theories, (b) applying these key factors to all six stages of the legislative process, (c) acknowledging that it can take many iterations of a bill to
pass, (d) using qualitative analyses to explore where, how, and why each factor affects the process, and (e) examining outcomes not only as a bill passing through a stage of the legislative process but also as when a change to the language of the bill allowed it to overcome institutional friction and continue through the process. My hypotheses about these relations are described next.

**Institutions as the Venues of Decision-Making**

The idea of institutional friction is intrinsically tied to the legislative process as a system that occurs over time. Institutions as the venues of decision-making are the starting point of each piece of legislation. Due to institutional friction, every new bill that is introduced is unlikely to move unless there is enough force to overcome this friction (Baumgartner et al., 2014). In this way, institutional friction can be conceptualized as an inverse force pushing against a bill successfully moving through the legislative process as other factors push for it.

It is important to examine multiple iterations of the legislative process to fully understand the role of institutions as venues of decision-making because the role of the institution may not be completely clear in a single cycle; because institutional friction is a culmination of years of history, it will likely take years to change. As such, the best way to investigate the impact of institutional friction is to examine the iterative process.

Although the impact of institutional friction has been theorized about, it has been empirically measured only rarely. In testing their legislative process theory, Soule and King (2006) used the previous success of the bill as a control variable and found that it was a significant predictor of its current success. This is likely because the institutional friction was already overcome by other factors at earlier stages, reducing friction in later iterations as the bill moved off its own momentum. Overcoming initial institutional friction, then, requires substantial
and continued efforts to change the institution, efforts which can lessen as a bill gains momentum and friction decreases. Additionally, levels of friction likely vary depending on the stage of the legislative process. Specifically, an individual legislator may not face much, if any, friction by just introducing a bill because an introduction requires only one individual legislator who may or may not feel the weight of the institutional pressure, especially considering that visibility and consequences are at the lowest level at this stage.

However, getting a bill to move through the committee stage requires immediately facing a significantly higher number of individuals, including the Chair of the assigned committee, central staff members who are experts in the specific subject area, and the leaders of the legislature, all of whom must agree to put a specific bill—out of hundreds or thousands—on to a committee agenda. A bill faces similar obstacles to be added to a floor agenda to be voted on by the membership, but at this point it has already faced some scrutiny and so has been partially vetted. By the time it makes it on the floor for a vote, there is likely little friction to be faced to pass it in the respective house. In summary, institutional friction is likely of little consequence at the very first stage of the process, most evident at the second stage, and then slowly dissipates through to the end of the process (see Figure 2).

Because the CPC is the first body of its kind in the country, let alone in New York State, the base level of institutional friction it faced was likely very high. Thus, to get it signed into law, additional factors would have been required to overcome that friction, including legislators’ decision-making, external groups, larger context, and key events, as described next. However, once the initial friction was overcome, it is likely that later iterations of the bill fed off this momentum, combatting institutional friction with simple inertia and thus requiring less and less time to move through the legislative process with each iteration.
Figure 2

*Impact of Institutions as Venues of Decision-Making on the Legislative Process*

**INSTITUTIONS AS THE VENUES OF DECISION-MAKING**
- Institutional friction
- Prior legislation

**LEGISLATORS’ DECISION-MAKING**
- Political orientation
- Gender
- Race

**EXTERNAL GROUPS**
- Special interest groups

**LARGER CONTEXT**
- Public opinion
- Election cycle

**KEY EVENTS**
- Media
Legislators’ Decision-Making

As argued by King et al. (2005), a single actor’s decision-making is likely most important at the beginning stages of the legislative process, where the rules are the least stringent and decisions are least visible, and therefore less consequential to the individual. What each legislator deems important, relevant, interesting, or otherwise worthy of their time and effort to introduce will depend greatly on the lens of personal experience through which they view the issue. Additionally, only one legislator is needed to introduce a bill and so the decision of one individual has a significant impact. By the end of the process, on the other hand, an individual legislator’s vote has significantly less power to singlehandedly pass a bill through the final stage of the legislative process. Therefore, the impact of the individual legislators’ decision-making on the success of the CPC likely decreases as it moves through the policy process, having the largest impact at the earliest stage and the least impact at the final stage (see Figure 3).

As reviewed previously, legislators’ decision-making may be affected by a number of factors, including that individual’s political orientation, gender, and race. The role each of these individual factors play may similarly differ depending on the stage of the policy process. For example, at the beginning stages, where decisions are less visible and less consequential, the political orientation of both the individual legislators as well as the legislative body will likely have less of an impact than gender and race, as legislators are making decisions based more on their own preferences and beliefs than concern for public image. However, later in the process where decisions are more consequential, whereas the effects of legislators’ gender and race may wane, political orientation may drive decision-making. For example, some individuals may change their position by switching their vote based on the preferences of their constituency and party.
Indeed, the party in control of the legislature is also likely to be more important at earlier stages because members of the majority party have the power over which bills are added to committee agendas and determine the number of members likely to vote on a partisan issue. Political party plays a large role in politics in New York State. Despite being considered a “safe blue” state at the national level, the state legislature is not overwhelmingly Democratic. In fact, Democrats have held the majority in the State Senate for only six of the last 30 years, four of which were during the most recent legislative sessions from 2019 to 2022. Perhaps not surprisingly, this change in leadership occurred the same year the CPC was chaptered into law. Because the changing of the majority in the Senate overlapped with the passage of the CPC, I can examine how party leadership in any given year impacted the success of the CPC in that year, and explore whether majority party was a significant factor in its inability to pass into law prior to 2019.

Like party, gender and race similarly are likely to have an impact at the aggregate level as well. As discussed, women have been found to be more effective legislators, so the number of women in the legislature likely helped move the bill through the process, especially at stages where institutional friction was high. The number of BIPOC legislators similarly may have helped push the bill forward because a number of individuals taking a special interest in a piece of legislation may make it more likely to be chosen out of the thousands of bills introduced each year to move through the process, especially when fewer individuals are necessary to move a bill at the earlier stages of the process.
Figure 3

Impact of Legislators’ Decision-Making on the Legislative Process

INSTITUTIONS AS THE VENUES OF DECISION-MAKING
- Institutional friction
- Prior legislation

LEGISLATORS’ DECISION-MAKING
- Political orientation
- Gender
- Race

EXTERNAL GROUPS
- Special interest groups

LARGER CONTEXT
- Public opinion
- Election cycle

KEY EVENTS
- Media
External Groups

As shown in both King et al. (2005) and Soule and King’s (2006) studies, external or special interest groups are most effective at impacting legislation when a single individual can be encouraged to act in a specific way during earlier stages of the process where their decisions are more hidden and thus less subject to public scrutiny. Therefore, these groups are likely highly effective at the beginning stages of the legislative process, where institutional friction is highest. Targeted lobbying by special interest groups is still possible during the committee process given the presence of a committee chair and the limited number of committee members. However, their job becomes harder as the bill continues to move through the legislative process and more individuals are required to continue to move the bill (see Figure 4). To be equally effective, they would have to put the same amount of pressure on an increasing number of legislators in a more public stage of the process. Support or opposition to the CPC by external groups may have pressured legislators to act or make edits to bill language in the early stages of the process, but likely had less impact as the bill moved further through the legislative process.
Figure 4

Impact of External Groups on the Legislative Process

INSTITUTIONS AS THE VENUES OF DECISION-MAKING
- Institutional friction
- Prior legislation

LEGISLATORS’ DECISION-MAKING
- Political orientation
- Gender
- Race

EXTERNAL GROUPS
- Special interest groups

LARGER CONTEXT
- Public opinion
- Election cycle

KEY EVENTS
- Media
Larger Context

Conversely, as theorized by King et al. (2005) and tested by Soule and King (2006), the later (versus earlier) stages of the legislative process are more likely to be influenced by larger contextual factors such as public opinion and the current election cycle because they occur at a more publicly visible, and therefore consequential, level. As each stage becomes more visible and consequential, legislators are seeking an increasing number of votes compared to the praise of a few individuals or special interest groups, especially during an election year when legislators track public opinion to ensure their vote falls in line with the public’s wishes and help guarantee their reelection to the legislature. As such, larger context will likely have increasing importance with each stage of the legislative process (see Figure 5).

During the time the CPC was in the legislature, there were many national and state-level conversations surrounding the issues of prosecutorial misconduct and wrongful convictions. Some of these conversations may have been instigated by key events, discussed next, but they sparked conversations that shifted the larger context surrounding the issue of miscarriages of justice in time to help successfully pass the CPC into law. Additionally, because these shifts in larger context took place over time, these changing norms likely impacted the success of the CPC through the stages of the process depending on if interest shifted towards or away from an issue.
Figure 5

Impact of Larger Context on the Legislative Process

INSTITUTIONS AS THE VENUES OF DECISION-MAKING
- Institutional friction
- Prior legislation

LEGISLATORS’ DECISION-MAKING
- Political orientation
- Gender
- Race

EXTERNAL GROUPS
- Special interest groups

LARGER CONTEXT
- Public opinion
- Election cycle

KEY EVENTS
- Media
Key Events

Unlike other factors discussed above, the impact of key events on helping to overcome institutional friction likely depends on when they occur in relation to where the bill is in the legislative process. As previously discussed, key events can directly cause the creation and chaptering into law of a specific bill based on a single discrete event. However, if a key event occurs during the legislative process, it may serve as a catalyst needed to overcome institutional friction and push a piece of legislation through the stages by highlighting the importance of a specific piece of legislation as related to a specific issue. Therefore, any events that occur after a bill is first introduced have the ability to impact any stage of the process equally (see Figure 6).

As discussed, the CPC was not created in direct response to a single key event. However, there were several key events that occurred during the time the CPC was going through the legislative process, both locally—e.g., the discovery of gross misconduct by DA Mary Rain, which occurred in mid-2017—and nationally—e.g., the broad popularity of documentaries such as Making a Murderer (Ricciardi et al., 2015-2018) and podcasts such as Serial (Koenig, 2014), each of which was downloaded several million times. The occurrence of these key events and others during this time likely further highlighted the necessity of a reform such as the CPC. Such events likely helped push the bill to the next stage of the process, at whichever stage the bill was at when the event occurred, acting as necessary catalysts for its smaller successes throughout the multiple iterative stages of the process.
**Figure 6**

*Impact Key Events on the Legislative Process*

**INSTITUTIONS AS THE VENUES OF DECISION-MAKING**
- Institutional friction
- Prior legislation

**LEGISLATORS’ DECISION-MAKING**
- Political orientation
- Gender
- Race

**EXTERNAL GROUPS**
- Special interest groups

**LARGER CONTEXT**
- Public opinion
- Election cycle

**KEY EVENTS**
- Media

Diagram showing the legislative process from introduction, referred to committee, majority vote, placed on floor agenda, house vote, majority vote in both houses, delivered to governor, sent to governor's desk, and decision by governor.
Current Study

Gaining a more thorough understanding of the legislative process is crucial to understanding how current laws came to be and how new bills can successfully become laws. Many studies have examined the theoretical underpinnings of this process (Baumgartner et al., 2014; Berry & Berry, 2014; Mettler & SoRelle, 2014; McBeth et al., 2014; Ostrom et al., 2014; Schneider et al., 2014; Zahariadis, 2014) but only a few have examined the differing effects on different stages of the process (King et al., 2005; Soule & King, 2006). As reviewed, the work on the topic of the legislative process thus far has been inadequate for several reasons. First, the earlier work has ignored the dynamic features of the legislative process, looking at it as a whole as opposed to a series of discrete steps. Even those who acknowledged the stages of the legislative process still failed to examine when during that process their predictor variables occurred, and thus failed to fully examine the temporal relations between these variables. Second, both studies testing the legislative process theory used national-level bills and laws, which follow a slightly different process than state laws do. Third, these studies failed to incorporate additional variables that have been shown to affect the legislative process. Lastly, by using quantitative analyses, the previously reviewed studies could define success only as whether a bill passed a certain stage of the legislative process, and so failed to consider other, equally important outcome measures such as consequential changes in the bill text.

The present work aims to fill these holes in the literature by completing a qualitative, longitudinal case study of the state-level bill creating the Commission on Prosecutorial Conduct from initial inception to first passage into law. In doing so, I examine the following hypotheses:
1. Institutional friction in the state-level legislative process will be highest during the second stage of the process, immediately following introduction, and dissipate through the remaining stages.

2. The impact of key factors on reducing institutional friction and the success of a bill passing a particular stage of the state-level legislative process will differ based on the stage of the process.
   
   a. Legislators’ decision-making, both at the individual and group level, will have the most impact on bill success in the earliest stages, and become less impactful through later stages of the process.
   
   b. External groups will have the most impact on bill success at the earliest stages of the legislative process, and become less impactful through later stages.
   
   c. Larger context will have the least impact on bill success at the earlier stages of the legislative process, and grow in impact through the later stages.
   
   d. Key events will have an equal impact on overcoming institutional friction and bill success at every stage of the legislative process at which they occur.

To examine these hypotheses, I analyze the evolution of the CPC over six years, from its first introduction in 2013 to its first passage into law in 2019. The results will help build on current theory on the legislative process to begin to more fully explain which factors may impact the success of a bill and how. Practically, this work will be a first step to furthering our understanding of the legislative process, which can be useful not only to other jurisdictions that
seek to create similar programs based on the nation’s first Commission on Prosecutorial Conduct, but also to policy creators and advocates who are searching for more effective ways of influencing the successful passage of legislation.
CHAPTER 4: METHODS

This study is a longitudinal, qualitative examination of the legislative process using the New York State Commission on Prosecutorial Conduct as a case study. In this section, I first explain in detail the stages of the legislative process in New York State, next describe the specific data collected, and then explain how these data were coded to operationalize the key factors that impact this process.

The Legislative Process in New York State

The first step to studying the legislative process is to operationalize the individual stages of the process, described next.

Stage 1: Introduction

Ideas for legislation come from many sources. A legislator may have an idea, or one of their constituents may point out a need. A state official may propose a change, or an organization may espouse a cause that pushes for a change in the law. Concurrent with or after an idea often comes sample language serving as a rough draft for the bill. These rough drafts can be brought by the aforementioned sources, or be drafted in house by the legislator or a staffer, by a different state official or agency, or by an interest group that may have its own attorneys. To become an official bill draft recognized by the legislature, these rough drafts must be sent to the Legislative Bill Drafting Commission (LBDC) by a legislator or other legislative staffer. The LBDC is staffed by professionals who have acquired a specialized type of legal training to write official bill drafts. They take the ideas and rough drafts provided and write them in accordance with state law, such as determining which sections of existing law the bill amends, retracts, or adds to.
Once the language of the bill draft is finalized by the LBDC, the legislative bill draft can be submitted to the house for introduction. Bills can be introduced by only legislators or standing committees of the Senate and Assembly. Upon introduction, the bill is given an official bill number, with bills in the Senate starting with “S” and bills in the Assembly starting with “A,” and then referred to the appropriate committee. If a bill is amended, it is reintroduced with a letter following the bill number to indicate a new print of the bill (e.g., S. 1000-A).

Stage 2: Committee Meeting

Each bill is sent to a relevant Standing Committee, based on topic, whose members debate and evaluate bills and decide whether to "report" them (send them) out of committee to either a secondary committee or the session floor for a final decision by the full membership. As such, the committee system acts as a funnel through which the large number of bills introduced each session must pass before they can be considered. The system also acts as a filter to sift out undesirable or unworkable ideas. Each bill is open to discussion or questions, after which a member must make a motion to move the bill. The motion must be seconded by another member before it is voted on by the committee. Legislators can vote to support with “Aye,” oppose with “Nay,” or vote “Aye without Recommendation” (AWR), which indicates the member will move the bill forward but has some reservations or concerns. With a quorum present and a majority of aye votes, the committee will report the bill out of committee.

Stage 3: Floor Calendar and Reading Days

The Daily Calendar is the agenda for sessions—days in which the entire Senate and Assembly come together to vote—and contains those measures which have come through the

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9 There is one exception, where the Executive Budget is submitted directly by the Governor.
committee process. Bills are assigned a Calendar Number in order as they are reported from their respective committees. This is the first point at which the bill is available to the entire membership for comments, questions, suggestions, and critiques. Each bill must sit three days before it can be voted on, providing legislators time to read and consider the bill. This also provides an opportunity for amendments to be made. Once a bill is on the so-called Third Reading Calendar, it can be added to the floor agenda for a vote by the full house.

**Stage 4: Passing a Bill with a Floor Vote**

Bills that are added to the floor agenda are open on the floor for explanation, discussion or debate, after which a vote is taken. If a majority of the legislators approve, the bill is passed and sent to the opposite house, where it concurrently or consecutively goes through the above process. If the exact bill—known as a “same-as”—is approved in the second house without amendment, it can be sent to the Governor to consider. However, if the bill is changed at any point, it is returned to the first house for concurrence in the amendments, and must begin the process anew.¹⁰ Both houses must pass the bill with the exact same language before it can be sent to the Governor to sign into law.

**Stage 5: Delivery to the Governor**

After the bill is passed by both houses with identical language, it is sent back to the first house that passed it to deliver to the Governor. Once a bill is called up by the Governor to their desk, they have a statutorily designated number of days to sign or veto. While the legislature is in

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¹⁰ In some instances, bills can be amended while on the Third Reading Calendar and retain their place on the Calendar without needing to go through the Committee process again.
session, the Governor has ten days (excluding Sundays) to act on a bill. When the legislature is out of session, the Governor has 30 days to act on a bill.\(^\text{11}\)

**Stage 6: Decision by the Governor**

Bills signed by the Governor become chaptered in law, effective on the date stated in the bill. Vetoed bills are returned to the house that first passed them, together with a statement of the reason for their disapproval. A vetoed bill can still become law if two-thirds of the members of each house vote to override the Governor's veto. The Governor's failure to sign or veto a bill within the ten-day period during session means that it becomes law automatically. A failure to sign or veto during the 30-day period while the legislature is not in session results in a “pocket veto,” which has the same effect as a veto.

In some instances, the Governor agrees to sign the bill pending agreed-upon edits between both houses of the legislature and the executive. In these “chapter amendments,” a new bill is introduced with the consensus language with the understanding that it will pass both houses and be signed by the Governor with no additional changes or obstacles.

The legislative calendar cycles through two-year periods, with the legislative session generally running from January to June. At the start of each session, the cycle resets and any bill that did not get signed by the governor by the start of the new session in January must start from the beginning of the process again.\(^\text{12}\) Every two years, a new election takes place and a new

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\(^\text{11}\) Although the NYS legislative session runs from January to June, the Senate and Assembly are almost always standing by to reconvene at the call of the Temporary President of the Senate or the Speaker of the Assembly, respectively. Thus, the legislature is legally almost always in active session, and as such the Governor almost follows the 10-day rule.

\(^\text{12}\) In some rare instances, a bill that is not signed by the Governor may be reported to the floor calendar the following session without needing to go through the entire process again.
legislative session period begins. All bills that did not become law must be reintroduced as new legislation and begin the process anew.

Data

Archival research was conducted to collect publicly available data relevant to the Commission on Prosecutorial Conduct (CPC) and the six stages of the legislative process. I describe these data next, consisting of both textual data—the bills themselves, transcripts of discussions on the bills, memos of support and opposition, and relevant news articles—and non-textual data—votes by legislators, legislator and legislature demographics, and election cycle.

Bill and Amendment Text

Bills introduced in New York State are publicly available through the official NYS Senate and NYS Assembly websites as well as the public version of the NYS Legislative Retrieval System (LRS). Tracking the evolution of identical legislation can be done on LRS through its “Old Bill” function. In addition, non-identical bills can be identified in the Legislative History section of a bill’s sponsor’s memo in LRS. Because the present study focuses on the evolution of the law that established the CPC, the first bill collected was the one that was successfully chaptered when it was signed into law by then-Governor Cuomo on March 27, 2019. This final bill was tracked backwards in both the Senate and Assembly on LRS to collect every iteration of that bill that was introduced and amended in the legislature until the original iteration was found.

Next, an additional search was conducted using the “Search Bills” function on the New York State Senate website to capture any similar bills introduced related to the creation of a prosecutorial conduct oversight organization, starting five years prior to the earliest bill found in the first search up through 2019, the year the final bill was signed into law.
In total, twelve bills and amendments were collected from the years 2013 to 2019. The text and sponsor’s memo for each bill and amendment identified were collected. Also collected were the status updates of each bill, or the dates on and ways in which the status of the bill changed due to, for example, an introduced amendment or referral to a committee.

**Transcripts of Discussions on the Bills**

I collected transcripts of sessions and committee meetings in which relevant bills and amendments were discussed and debated. Transcripts for Senate sessions and some Assembly sessions and committee meetings are available on the respective chamber’s official websites. These transcripts were reviewed to identify discussions on the appropriate bill(s) and amendments and only those relevant discussions were included in the data.

For committee meetings and sessions for which a transcript was not available, videos were collected from archives on the official NYS Senate YouTube page and the official NYS Assembly website. As legislators can speak on a bill only when it is on an official agenda, appropriate videos of session and committee meetings were found by comparing the dates on which the bill’s status indicated it was in a committee or on the floor to the corresponding session or committee meeting. These videos were watched to find the relevant segments pertaining to the bill, clipped using the QuickTime video tool, and transcribed using Otter.ai automatic transcribing software. Transcripts were then uploaded to the Inqscribe transcription software and checked by two research assistants to ensure they were correct. Any necessary corrections were made.

This resulted in a total of 26 transcripts from committee meetings and floor discussions and debates.
Memos of Support and Opposition

Official memos or statements of external groups in support of or opposed to the collected bills were supplied by the legislature, which archives memos on bills sent to either the Senate or Assembly. Twenty statements of support or opposition were collected from the legislature in total.

News Articles

I collected news articles related to the issues of prosecutorial misconduct, the CPC, and the legislative process. Articles were limited to official news sources including both national (e.g., CNN, MSNBC and Fox News) and local (e.g., Times Union and Democrat and Chronicle) sources. In addition, the search was set to include articles released only between 2012 and 2019 (i.e., the first year of the two-year session when the first bill was introduced, as revealed in the previously described LRS search, to when the final bill was passed). These articles were located using the search engines Google News and LexusNexus. The goal was to capture articles not only directly relevant to the CPC itself but also relevant to the goals of the bill that may have affected the creation of the CPC. As such, search words and phrases were used to locate all potentially relevant news articles, including general phrases such as “prosecutorial misconduct” and “official misconduct” as well as specific phrases such as “New York State Commission on Prosecutorial Conduct,” as well as all combinations of these terms (a complete list of search terms and sources is available upon request). Altogether, 28 news articles were collected.

Votes on Bills

Each time a bill was put up for a committee or floor vote, the archived voting records from the respective chambers were recorded for each voting member. Legislator votes were recorded for every time a bill or amendment was voted on in committee or on the session floor.
In committee, a member can vote in the affirmative (aye), negative (nay), or affirmative but without recommendation (aye without recommendation, or AWR). An AWR vote counts as an “aye” vote for purposes of ensuring the bill has enough votes to pass out of committee, but signals that the member does not have full confidence that the bill should continue to move forward. On the session floor, members can only vote aye or nay.

**Legislator Demographic Information**

Archived records of the legislators on the official NYS Senate and Assembly websites were used to determine who was a member in each legislative session from which a relevant bill was collected. For all legislators who were active during the years the collective bills were introduced, their political party, gender, and race were coded (see Table 1). When possible, these data were gleaned from their official Senate or Assembly biographies. Specifically, demographic variables were determined, when possible, by explicit proclamations of gender, race, and party. If the data were not available there, other official sources, such as campaign websites, elections information, and official social media pages, were relied upon. For example, NYS Senator Jamaal T. Bailey’s gender and race were derived from a tweet from his official Twitter account stating, “I’m the youngest member of the NYS Senate. I’m a young black male. I cannot, in good conscience vote for any budget without #RaiseTheAge” (emphasis added; Bailey, 2017). If there were no such explicit proclamations, secondary cues were used to code these variables, such as the use of pronouns or discussion of being part of the majority or minority conference. For example, Senator Andrea Stewart-Cousins was coded as a woman and a Democrat based on her official Senate biography which reads, “In just her first year as Senate Majority Leader, Andrea Stewart-Cousins led the most productive legislative session in state history” (emphasis added; The New York State Senate, n.d.).
Coding

Changes to Bill Status and/or Text

One of the main tenets of an expanded iterative theory of the legislative process should be that success is not defined just as a bill becoming law, but that changes to a bill—either passing through a stage of the legislative process such as a committee, or changes made to an edited, or amended, version of the bill being introduced—are changes worth analyzing because they allow the bill to be one step closer to the final goal of becoming legislation. As such, I coded every iteration of each bill and amendment for such changes.
Passing through a Stage of the Legislative Process

One way I measured success was as a bill passing through a stage of the legislative process. This was assessed by comparing the status of a bill to which stage of the legislative process the iteration immediately preceding it had successfully reached.

Changes to Bill Text

I also measured success as changes in the text of a bill. Changes were identified by comparing the language in each bill and amendment to the version that immediately and chronologically preceded it. I then used open coding to identify patterns that emerged in the types of edits made to the bills as they moved through amendments and years. Three types of changes were identified: substantive, clarification, and technical.

Substantive changes signaled something substantive about the formation of the Commission, its function, or its role had changed between bill drafts. For example, the first bill introduced in 2013 stated that “After a hearing, the commission may determine that a prosecutor be admonished, censured, removed or retired” (emphasis added; N.Y. Legis. Assemb. 8179, 2013). When the next iteration of the bill was introduced in the following session in 2014, this was changed to state, “After a hearing, the commission may determine that a prosecutor be admonished or censured, or may recommend to the governor that a prosecutor be removed from office for cause” (emphasis added; N.Y. Legis. S. 6286, 2014). Because this signaled a change in the role and power of the commission, it was coded as a substantive change. Coding revealed 32 substantive changes.

Clarifications were changes that did not change something about the functioning of the Commission, but provide more clarification or detail. For example, N.Y. Legis. S. 24-A (2015) specifies that:
The commission shall have the authority to review the conduct of prosecutors upon the filing of a complaint with the commission to determine whether said conduct as alleged departs from the applicable statutes, case law, New York Rules of Professional Responsibility and Rule 3.8 (Special Responsibilities of Prosecutors) of the Model Rules of Professional Conduct of the American Bar Associations.

This bill was amended to, among other things, provide more detail regarding the applicable laws prosecutors must abide by, clarifying that:

The commission shall have the authority to review the conduct of prosecutors upon the filing of a complaint with the commission to determine whether said conduct as alleged departs from the applicable statutes, case law, New York Rules of Professional Conduct, 22 NYCRR 1200, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers) (emphasis added; N.Y. Legis. S. 24-B, 2015).

Because this change simply clarified which sections of law it was referring to, it was coded as a clarification. Coding indicated five clarifications were made as the bill evolved into law.

Lastly, technical changes are changes that were necessary but not related to the substance of the bill. For example, changes to the date the law would take effect due to the start of a new session, or updates to a cited law if the reference changed, constituted technical changes. Coding showed that the original bill had 11 technical changes throughout the legislative process.

For the rest of the coding and analyses, I focused solely on substantive changes because these are changes that were made with the express intent to help push a bill through the legislative process, whereas clarification and technical changes are required changes. Therefore clarification and technical changes will not be discussed further.
Key Factors Related to a Change in a Bill

Institutions as Venues of Decision-Making

Institutions as venues of decision-making, or more specifically institutional friction, was operationalized as continuation of the status quo, measured as the failure of a bill to pass through a certain stage of the legislative process. Excluding stages where institutional friction was definitively not a contributing factor—i.e., introduction to committee referral and delivery to the Governor to action by the Governor, both of which happen automatically—institutional friction was observed at 18 points during the legislative process. Specifically, of the 22 bills and amendments introduced, only nine (41%) successfully made it through the committee stage to the Floor Calendar. Of those nine, four (44%) were then added to the floor agenda and voted on by their respective house. All four individual bills (two unique bills, 100%) that made it on to a floor agenda for a vote successfully moved on to be delivered to and signed by the Governor.

Legislators’ Decision-Making

Legislators’ decision-making was operationalized using both textual—i.e., transcripts and news articles—and non-textual—i.e., member votes—data. Specifically, transcripts and news articles were examined for quotes by legislators. Votes by each legislator at each junction were coded as Aye, AWR, or Nay.

Legislator and Legislature Demographics. Data on individual legislators’ demographic information, described earlier, were collected for each individual legislator and were used to compute the demographics of each house.\textsuperscript{13} Specifically, for each year and each house, the

\textsuperscript{13} Demographics for each house were coded separately because bills must pass through both the Senate and Assembly to be signed into law, and therefore the success of an identical bill may be dependent on the demographic makeup of the house it is in.
percentages of the body who were registered Democrats, women, and BIPOC were calculated, as was which party was in the majority and had control of the body (see Table 2).

**Table 2**

Demographics of NYS Legislature by Year¹⁴

<table>
<thead>
<tr>
<th>Year</th>
<th>% Democrats</th>
<th>% Women</th>
<th>% BIPOC</th>
<th>Majority Party</th>
<th>Election Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>ASSEMBLY</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>70%</td>
<td>26%</td>
<td>21%</td>
<td>Democrat</td>
<td>No</td>
</tr>
<tr>
<td>2014</td>
<td>70%</td>
<td>25%</td>
<td>21%</td>
<td>Democrat</td>
<td>Yes</td>
</tr>
<tr>
<td>2015</td>
<td>71%</td>
<td>29%</td>
<td>24%</td>
<td>Democrat</td>
<td>No</td>
</tr>
<tr>
<td>2016</td>
<td>72%</td>
<td>31%</td>
<td>26%</td>
<td>Democrat</td>
<td>Yes</td>
</tr>
<tr>
<td>2017</td>
<td>70%</td>
<td>31%</td>
<td>27%</td>
<td>Democrat</td>
<td>No</td>
</tr>
<tr>
<td>2018</td>
<td>70%</td>
<td>32%</td>
<td>27%</td>
<td>Democrat</td>
<td>Yes</td>
</tr>
<tr>
<td>2019</td>
<td>70%</td>
<td>34%</td>
<td>28%</td>
<td>Democrat</td>
<td>No</td>
</tr>
<tr>
<td>SENATE</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2014</td>
<td>52%</td>
<td>18%</td>
<td>23%</td>
<td>Republican</td>
<td>Yes</td>
</tr>
<tr>
<td>2015</td>
<td>52%</td>
<td>17%</td>
<td>24%</td>
<td>Republican</td>
<td>No</td>
</tr>
<tr>
<td>2016</td>
<td>52%</td>
<td>18%</td>
<td>23%</td>
<td>Republican</td>
<td>Yes</td>
</tr>
<tr>
<td>2017</td>
<td>51%</td>
<td>22%</td>
<td>24%</td>
<td>Republican</td>
<td>No</td>
</tr>
<tr>
<td>2018</td>
<td>51%</td>
<td>24%</td>
<td>24%</td>
<td>Republican</td>
<td>Yes</td>
</tr>
<tr>
<td>2019</td>
<td>64%</td>
<td>31%</td>
<td>29%</td>
<td>Democrat</td>
<td>No</td>
</tr>
</tbody>
</table>

¹⁴ In the years 2014 to 2018, more than 50% of the members of the Senate were Democrats, but the Republicans held the majority. This is due to the fact that between 2011 and 2018 a group of Democrats created the Independent Democratic Conference (IDC) and formed a coalition with the Republican conference to give them the majority in the chamber. Although they conferenced with the Republicans, members of the IDC were still coded as Democrats for two reasons: first, they ran as registered Democrats, and second, the decision to conference with the Republicans was not due to a shared ideology but with the goal of running a bipartisan chamber. In fact, part of the reason the IDC members defected from the Democratic conference was because they were unhappy that those members voted down liberal reforms such as marriage equality and reforming Stop & Frisk.
**External Groups**

The existence of external groups was operationalized through official memos of support and opposition, as well as quotes or other references to these groups and their positions related to the CPC in news articles.

**Larger Context**

**Public Opinion.** Following previous work (e.g., Iyengar, 1990; McCombs et al., 2017; McCombs et al., 2011), larger context was operationalized through news articles written on issues around the CPC to determine how much and in what way these issues were being discussed, as well as quotes from the sponsor’s memos of bills and legislator’s themselves that reflected broader conversations of issues of prosecutorial misconduct, wrongful convictions, and miscarriages of justice more broadly. For example, the justification section of sponsor’s memo for N.Y. Legis. Assemb. 8179 (2013) quotes the “increased discussion and analysis of prosecutorial misconduct and related wrongful convictions” as a reason why the legislation creating the CPC is a necessary bill. Therefore, larger context was coded as an influencing key factor for Assemb. 8179 at the introduction stage of the legislative process.

**Election Cycle.** Each year a collected bill was in the legislature, from 2013 to 2019, was coded as to whether or not it was an election year. The state legislature runs on a two-year election cycle with all odd years being non-election years and all even years being election years.

**Key Events**

Last, key events were operationalized as discrete events related to prosecutorial misconduct, wrongful convictions, and/or miscarriages of justice, outside of actions related to the CPC itself, occurring during the sessions the CPC was in the legislature, from 2012 to 2019. Key events were identified by examining news articles, sponsor’s memos, and transcripts for
mentions of relevant discrete events that occurred during the time the bill was moving through the legislature.

Analysis

Changes to Bill Language

After all language changes to the bills were coded, I conducted qualitative analysis to examine the relation between the key factors assessed herein and if they may have triggered substantive language change in the bill or amendment to occur or a bill to move forward in the process. To do so, I organized all the previously described textual data (i.e., memos of support or opposition, news articles, transcripts of committee and floor proceedings, and sponsor’s memos) chronologically along with the bills and amendments to discern the factors that may have impacted substantive changes in the bills. All the changes to the bills and amendments then were compared to the content of any intervening materials to determine whether they included any language that could be identified as a trigger for a change in a following bill. Both manifest content—communications that are objective, systematic, and quantitative (Berelson, 1952), often easily observable and countable—and latent content—the underlying meaning of the text—were analyzed to pinpoint potential triggers for changes to the bill. Appendix B presents the original text alongside subsequent changes and probable triggers for those changes.

Identified triggers were then coded based on which key element was the influencing factor. Specifically, triggers were coded as legislators’ decision-making if they came from quotes from specific legislators from transcripts and new articles that mirror subsequent changes to bill language. Changes that reflected recommendations from memos of support or opposition were coded as external groups. Similarly to legislators’ decision-making, transcripts and news articles discussing larger context were analyzed for language that resulted in similar changes to bill text.
Last, discussions of key events in news articles, memos of support or opposition, and transcripts were analyzed for details that were then reflected in changed bill language. If no trigger type was identified for a change, it was coded as occurring for an unknown reason.

**Bill Movement Through the Legislative Process**

In contrast to the process just described, potential triggers for a bill moving through the legislative process were examined in reverse, that is, by noting when a bill moved through a stage of the legislative process and then looking backward to identify potential triggers. These triggers could be directly related to the changes to bill text described above, as well as member votes and changes to legislature demographics such as a shift in the majority party. This facilitated measurement of the impact of legislator and legislature demographics on votes, which are inherently tied to a bill successfully passing through certain stages of the legislative process.
CHAPTER 5:
RESULTS

Altogether, 22 bills and amendments—12 of which were unique due to there being identical same-as bills in the Senate and Assembly—were introduced to the New York State legislature related to the creation of a commission on prosecutorial conduct. Throughout the legislative process, all 22 bills were referred to a committee upon introduction, as is custom. Only six of these bills successfully passed all of the required committees to make it on to the Floor Calendar, and only two unique bills identical between the Senate and Assembly—the penultimate version of the CPC (N.Y. Legis. Assemb. 5285-C, 2018; N.Y. Legis. S. 2412-D, 2018) and the following year’s chapter amendment (N.Y. Legis. Assemb. 781, 2019; N.Y. Legis. S. 1190, 2019)—successfully made it on to the Floor Agenda to be voted on by the entire legislature, passed both houses, and were delivered to and signed into law by the Governor. Thirty-two substantive changes were made across these bills. Analyzing these changes and their triggers revealed when and why these changes occurred, as well as the role of the five identified key theoretical elements in the legislative process.

Institutions as Venues of Decision-Making

As discussed, one of the biggest indicators of the role of the institution is institutional friction, whereby change to the status quo is met with resistance.

Bill Progress through the Legislative Process

When examining the bill statuses, it became clear that institutional friction decreased with each iteration, as each bill introduced or amended made it further in the legislative process than the previous iteration (see Figure 7).
*Note* Bills marked with an asterisk were amended on the Third Reading Calendar and maintained their place on the Calendar.
The very first bill introduced, N.Y. Legis. Assemb. 8179 (2013), was introduced in only one house and did not move any further than the initial committee to which it was referred. In fact, it was stuck in committee for 16 months without ever getting on a committee agenda, before finally dying in committee at the end of the legislative session and not being reintroduced the next session. The next set of bills, introduced the following year, successfully had a same-as version picked up in the opposite house (N.Y. Legis. Assemb. 8634, 2014; N.Y. Legis S. 6286, 2014). The first version of these bills made it through the first referred committee in only four months. Both bills were then amended and referred back to committee. The next iteration of the bill, N.Y. Legis. Assemb. 8634-A (2014), made it through the first referred committee in less than a month, but both the Assembly bill and its Senate same-as (N.Y. Legis. S. 6286-A, 2014) died in their respective final committees before the end of Session in mid-June.

Similarly, the re-introduced bills the following session in 2015 (N.Y. Legis. Assemb. 1131, 2015; N.Y. Legis. S. 24, 2015) made it through their first referred committee within five or six months, respectively, but did not make it through the final referred committee(s) on to the floor calendar before the end of that year’s session in June. However, the following year, in 2016, the first amendment of these bills (N.Y. Legis. Assemb. 1131-A, 2015; N.Y. Legis. S. 24-A, 2015) successfully passed through the first referred committee within three months and the second referred committee in less than a month, before being amended for a second time (N.Y. Legis. Assemb. 1131-B, 2016; N.Y. Legis. S. 24-B, 2016) and making it through all of the referred committees and on to the Floor Calendar in about one month, before failing to pass before the end of the legislative session in 2016.
The final set of reintroduced bills (N.Y. Legis. Assemb. 5285, 2017; N.Y. Legis. S. 2412, 2017) were amended several times, and successfully passed through multiple committees and made it to the Floor Calendar many times over between January of 2017 and May 2018. The final iterations of these bills (N.Y. Legis. Assemb. 5285-C, 2018; N.Y. Legis. S. 2412-D, 2018) passed both the Senate and Assembly in June of 2018, and were signed by the Governor two months later in August, pending chapter amendments. The following year, the newly agreed upon chapter amendments (N.Y. Legis. Assemb. 781, 2019; N.Y. Legis. S. 1190, 2019) were introduced, passed multiple committees, passed both houses, and were signed into law by the Governor all within three months.

As illustrated above, each iteration of a bill that was introduced was able to go further through the legislative process than the last, indicating how institutional friction let up as the bills picked up momentum each succeeding year.

**Legislature Demographics**

One factor I did not anticipate having an impact on institutional friction was changes to the makeup of the legislature. However, this is logical given that a change to the legislative body is, in and of itself, a change to the institution and the status quo. Compared to when the first bill was introduced in 2013, the number of Democrats in the Senate and the number of women and BIPOC legislators in the Assembly and the Senate increased substantially. Between 2013 and 2019, the percentage of both women and BIPOC in the legislature trended upwards. In the Assembly, the 2013 legislature was made up of 26% women and 21% BIPOC legislators. By 2019, these numbers had increased to 34% and 28%, respectively. A similar pattern was found in the Senate, where numbers for women and BIPOC legislators rose from 18% to 31% and 23% to 29%, respectively, between 2013 and 2019. These changes in the demographic makeup of the
legislature may have helped the success of the CPC, which successfully made it through further
and further stages of the legislative process as the number of women and non-White members
increased.

On the other hand, the Assembly remained steady with 70-72% of the house consisting of
Democrat members for all six years, whereas the Senate grew from 52% to 64% Democrats in
that time. Considering the original Assembly version of the bill, N.Y. Legis. Assemb. 8179
(2013), did not have a same-as in the Senate, but following iterations of the bills moved through
the legislative process at similar times through 2019, it is possible that increasing Democrat
members in the Senate allowed that bill to move forward in line with the Assembly bill.

The larger jumps in these numbers corresponded to the success of bills moving through
different stages of the legislative process. For example, in 2016, the number of women and
BIPOC in the Assembly increased by 2% each. That was also the first year an Assembly bill
made it through all the required committees and on to the Floor Calendar. Similarly, the largest
change in number of Democrats, women, and BIPOC in the Senate and women and BIPOC in
the Assembly occurred in 2019, the year that the CPC was successfully signed into law without
any further caveats or chapter amendments required.

Legislators’ Decision-Making

Beyond bill introductions, which are, by nature, a result of a final decision by an
individual legislator, very few substantive changes were triggered by a single actor making a
decision. This is not surprising given how collaborative of a process bill drafting is. In addition
to the prime sponsor of the bill, cosponsors, member staffers, and attorneys for the Senate and
Assembly at large are all part of the bill drafting process. In addition, often language is provided
or recommended by outside advocates or other experts in the field. Any one individual having complete say over the language of the bill is very rare, even at the very beginning stages.

In one example, then-Chair of the Judiciary Committee Republican Senator Bonacic said the following after a lively debate on the CPC in the Judiciary Committee:

What I am going to do with this legislation is I’m going to refer it to Finance--although I’m not required to do it--where there will be another forum where you can weigh in on the merits of this legislation. Okay? The bill passed, and now I am going to refer it to Finance.

In this particular case, it was the Senator’s call as the Chair to refer the bill to a secondary committee. Due to the debate that had occurred previous to voting on the bill, he decided to send the bill to an additional committee for another conversation to occur.

In a second example, the major substantive difference between N.Y. Legis. Assemb. 5285-A (2017)/N.Y. Legis. S. 2412-B (2017) and the following amended bills N.Y. Legis. Assemb. 5285-B (2017)/N.Y. Legis. S. 2412-C (2017) could similarly be attributed to a single legislator’s decision. Between these bills, all discussion of the CPC role in investigating the Attorney General was removed. The inclusion or exclusion of the Attorney General being subject to investigation by the CPC was not indicated in any of the memos of opposition or support. However, when the bill sponsor was debating the bill on the floor of the Senate before the bill was voted on, he said, “…this bill does not apply to the Attorney General. And the reason it doesn't, the Assembly wanted it out for me to get a same-as bill. So I took it out.” In this case, a quote by the legislator himself was used to identify his decision as the cause of a change to the bill text.
Beyond quotes such as these, individual legislators’ decision-making was also operationalized as votes on a bill. However, the data do not support the hypothesis that an individual legislator’s vote significantly impacted the success of the CPC at any stage of the legislative process, as the CPC never failed a vote either in committee or on the floor. It is likely that this was not by accident. For a bill to be added to a committee agenda or the floor agenda, it must be approved by members of central staff and the majority party leadership. These checks are there partially to ensure that the bills are drafted in the best possible way to achieve their purported goal, but also to check in with the membership and ensure it has enough votes to pass if it is brought to a vote.

Because of this fact, the votes that occur may be purely performative in some cases. For example, at one point in the Senate, both the Minority Leader, Democrat Andrea Stewart-Cousins, and the Deputy Minority Leader, Democrat Michael Gianaris, voted no on the bill in committee before voting yes on the session floor. As Senator Stewart-Cousins is a Black woman and Senator Gianaris is a White man, their negative votes could not be attributed to either race or gender. However, they did share political party. The idea that political party influenced their votes is supported by the fact that the following year, when the Democrats took the majority and Senators Stewart-Cousins and Gianaris become the Majority Leader and Deputy Majority Leader, respectively, they both voted yes at every stage. Being veteran legislators at the time, given their positions in leadership, both Senators were fully aware that their votes would not impact the actual outcome of the bill and thus were purely performative.

The impact of both party politics and legislator demographics on individual members’ votes—and therefore changes to a bill at specific stages of the legislative process—is illustrated
by this quote by Senator James Sanders, Jr., a Black Democrat, who said the following during a vote on the floor while the Republican party had the majority:

    How can I look in the face of a mother and tell her I was more worried about how I would look politically, that the bill didn't come from my party so I couldn't really do anything about it? How am I going to look in the face of a child wondering about their father or daughter, mother, and say that politically it wasn't the right season, that I personally should have set that down and we couldn't do anything?

Although it appears legislator demographics impacted their vote, the hypothesis that votes, as an operationalization of legislators’ decision-making, had a significant impact on the legislative process was not supported.

**External groups**

External groups, on the other hand, played a major, explicit role in the movement of the CPC bills through the legislative process. When the first bill was introduced in 2013, not a single memo of support or opposition was filed. By the end, however, over 20 memos had been submitted to the legislature, seven of which were written for the final iteration of the bill alone. That says nothing of the many meetings that likely occurred in addition to these official memos. Additionally, as previously discussed, many of the concerns raised by these groups in their memos were taken into consideration by the bill drafters and directly impacted the language of the bill at all stages of the legislative process through substantive changes in the bill language. Altogether, six changes were identified to be caused by input from external groups.

For example, the DA’s offices of both Westchester and the Bronx cited concerns in their respective memos of opposition regarding the issue of separation of powers. Specifically, a representative of the Bronx DA’s Office argued in their memo that, “the Executive, Legislature,
and Judiciary all must operate independently, with no one branch subservient to the other” and that the CPC “[f]ar from respecting the independence of the Executive and the Judiciary…runs roughshod over both of them. Because the legislation would allow commission members appointed by the legislative leaders… to investigate, prosecute and potentially punish” members of the Executive branch. In response, a later version of the bill included the following language, “…appointment of an administrator shall [not] be valid unless approved by an executive appointee, the appointee of the temporary president of the senate, and the appointee of the speaker of the assembly.” In doing so, the legislature sought to combat arguments about separation of power by ensuring that the legislature did not have exclusive power over decisions of punishment over the DAs and ADAs.

As a second example, in response to N.Y. Legis. S. 24 (2015), the District Attorney’s Association for the State of New York issued a memo of opposition with a number of complaints, including the following:

CPC complaints can be filed and CPC hearings can be held contemporaneous to an ongoing criminal case because there is no exemption for pending criminal investigations or prosecutions. The CPC legislation fails to account for how important and sensitive investigative issues—like privileged medical records, immunity, confidential informant identity, confidentiality as a result of a grand jury subpoena or grand jury testimony, wiretaps, the location of domestic violence victims, child protective service records etc. —will be addressed in the context of a CPC proceeding.

As a result, the next substantive change made to the bill (N.Y. Legis. S. 24-A, 2015) added the following provision:
The prosecuting agency may inform the commission of its position that the commission's investigations will substantially interfere with the agency's own or prosecution. If the prosecuting agency, by affirmation with specificity and particularity, informs the commission of its basis for that position, the commission shall only exercise its powers in a way that will not interfere with an agency’s active investigation or prosecution.

As was hypothesized, many of the changes that were triggered by external groups were towards the beginning of the legislative process, as bills were being referred to and passed through committees. What was not anticipated, however, was the extent to which these groups seemed to impact later stages of the legislative process. In both 2018 and 2019, then-Governor Andrew Cuomo cited both concerns and support from external groups in his approval memo. In 2018, he stated many concerns about the bill that were first cited by DAASNY, including expanding the powers of the Court of Appeals, inappropriate separation of powers between the Legislative and Executive branches, and potential damage to active cases. These were all points that were later discussed in the chapter amendment process, and led to language changes in the re-introduced bill the following year.

The case in 2019 was slightly different. The Governor again signed an approval memo, but this time without the promise of a chapter amendment. In his memo, he states:

Despite my desire for a bill strong-suited for the legal challenges that it will surely confront, my commitment to the creation of this Commission and the promise that it brings for a more transparent and just criminal justice system remains unshaken.

It appears that in this case, the concerns of the external groups were recognized, but did not actually impact the bill. It is unclear, based on the data, whether this failure to impact the bill was
due to the late stage of the legislative process, individual and collective decisions by policymakers, or a different, unstudied variable.

**Larger Context**

**Public Opinion**

The larger context surrounding the CPC in New York State, and nationally, regarding prosecutorial misconduct and wrongful convictions also was a major factor at the end of the legislative process. Before the introduction of the CPC, I did not find any news articles related to prosecutorial misconduct, wrongful convictions, or miscarriages of justice more broadly that were not specifically reporting on a key event (discussed later). By 2015, five articles had been written about these issues more broadly, including two articles that explicitly called for the passing of a bill like the CPC.

In discussing the issue broadly, one journalist (Gershman, 2015) stated,

Such misconduct exacts a tremendous toll. Scarce taxpayer resources need to be spent to litigate and re-litigate cases involving misconduct. Public confidence in the criminal justice system is eroded and the public’s faith in the integrity of criminal trials is undermined. And most tragically, misconduct by some prosecutors has destroyed the lives of innocent people and their families.

He later goes on to say,

“Despite the high costs of misconduct, existing review mechanisms are woefully inadequate… A more robust review mechanism is needed. Of course, a state commission [on prosecutorial conduct] will not be a silver bullet that eliminates all misconduct. But it would be a crucial first step.
This article was published over the summer, after the legislative session had adjourned for the year. But the following year, both the Senate and Assembly bills (N.Y. Legis. Assemb. 1131-B, 2016; N.Y. Legis. S. 24-B, 2016) successfully passed through all the necessary committees to make it to the floor calendar. Between this iteration of the bill and the penultimate version, an additional 16 articles had been written about the issue of miscarriages of justice, including prosecutorial misconduct, wrongful convictions, immunity, and other similar topics, as well as on the CPC itself, urging legislators to take action, which they then did.

**Election Cycle**

At first glance it appears that the election cycle had an impact on the legislative process, as bills moved further along in the process at the end of a session year before an election than in a non-election year. Together with the above findings regarding the larger context and conversations around miscarriages of justice broadly and the CPC specifically, this appears to support my hypothesis that the success of a bill to move through the legislative process is partially based on electeds paying attention to the larger context during an election year.

**Key Events**

Finally, key events also appeared to have played a role in the success of the CPC. Less than a year before the first bill was introduced in 2013, the National Registry of Exonerations (NRE) was first published by the University of Michigan Law School. Although not directly cited, in the sponsor’s memo for this first bill, the memo did note the recent “increased discussion and analysis of prosecutorial misconduct and related wrongful convictions.” It may be that the creation of the NRE was partially responsible for the introduction of the first iteration of a CPC bill.
These events similarly impacted the intermediate stages of the legislative process, helping push the bill through committees and onto the Floor Calendar. The New York State Association of Criminal Defense Lawyers noted in their memo of support that New York was the fourth leading state in wrongful convictions in the country, citing data from the NRE. Many news articles started discussing specific cases of wrongful convictions and the impact of prosecutorial misconduct. In addition, a “diverse coalition of stakeholders [had] joined together – thewrongfully prosecuted and convicted, the Innocence Project” and many others to fight for the cause. With each swell of attention to these events during a legislative session, bills were amended and re-amended, and successfully passed through several stages of the legislative process many times over.

By the time the bill finally made it to a vote on the floor of the Senate and Assembly in 2018, multiple members stood to speak about exonerations that had occurred in their districts. For example, on the day the bill passed in the Assembly, Speaker Carl Heastie said the following:

…I stand here today on behalf of the wrongfully convicted, so many in New York State and throughout the United States, some of who are here in the Chamber today. I would just like to recognize as I close, for 16 years, Jeff Deskovic stayed in jail for a crime he did not commit. He's in the Gallery here and I hope—and he's watching—and I hope that he'll walk out today very happy to see that we, the people elected to speak on behalf of folks in that situation, are doing the right thing. Selwyn Days, who spent 17 years in jail convicted for a crime he did not commit due to prosecutorial misconduct. And there's a list that goes on and on. And we vote today, Mr. Speaker, to say to all of those who are
victims of this system that we're not going to let this go on and we are going to do something to make New York a better place than it has been.

Immediately following Speaker Heastie, Assemblywoman Latrice Walker rose to say the following:

In many instances, my district was Ground Zero to a number of incidences where people had to be exonerated; a number of them occurred in the Ocean Hill-Brownsville section of my neighborhood. And it's not uncommon for me to have people who come into my office who said that they've done 27 years and they were wrongfully convicted, and what life is like in order to try to put back the pieces after having lost 27 years of your life.

Many others followed suit.

On the Senate side, the Sponsor of the CPC at the time, Senator John DeFrancisco, said the following regarding the importance of the bill:

…there's many cases where individuals are convicted of crimes as heinous as murder and spent 10, 20 years in jail and are found later—and they were found later because of DNA evidence—that they weren't the guilty party. So then they go to the State of New York and the Court of Claims, bring a lawsuit, and the state and our taxpayers have to pay millions of dollars for that misconduct. Usually it's withholding exculpatory information, information that would help the defense. And by law, they're supposed to provide that. Now, 99 percent of the prosecutors are good prosecutors and would not do these types of things…but it's the outliers that there ought to be an ability to at least make a complaint, have it reviewed…

Senator James Sanders, Jr. went further, citing the National Registry of Exonerations:
Nineteen thousand six hundred and ten years. In my hand, I hold the National Registry of Exonerations. The amount of years that people spent in jail and were exonerated—that we know about—19,610 years. In New York State, 249 people.

Senator Phil Boyle discussed events that occurred specifically within his district:

I talk about Suffolk County, where I'm from. Recently an assistant district attorney was fired in the middle of a murder trial. They found out he was withholding evidence. Come to find out he had five other murder trials which the cases were dismissed. I'm not talking about speeding tickets. Murder trials. Five murder cases dismissed because of the misconduct of this assistant district attorney.

As hypothesized, regardless of when key events occurred during the legislative process, they were successful in helping to either amend the CPC and/or push it through additional stages of the legislative process.

Overall, the data reflect many of the hypothesized relations between the five key factors of legislative process and the success of the CPC, defined both as a change in language and as completing a stage of the legislative process.
CHAPTER 6:
DISCUSSION

Scholars agree that examining the legislative process is a difficult but necessary issue to understand. Theories explaining this process number in the dozens, with hundreds empirically testing them. However, in their examination of the legislative process, nearly all these theories and studies have missed the important fact that it is, in fact, a process. Success should not be measured at just the very end stage of this process, or in cross-sectional, aggregated snapshots of a single year. The legislative process is an iterative process that can take years, and a failure of a bill to become a law in one year is not necessarily a failure if it leads to changes that help that bill move towards its eventual final form. In this research, I studied one law—the New York State Commission on Prosecutorial Conduct—from its inception through to its passage into law and examined how it changed over time, and how key factors may have influenced that change across six years. By examining change in the bill text and status as it passed through the stages of the legislative process instead of simply defining success of a piece of legislation as whether or not it is signed into law, one can see that bills are successful far more frequently than what is currently argued in the extant literature. Further, consistent with prior work, I found the hypothesized relations between the process and institutions as venues of decision-making, legislators’ decision-making, external groups, larger context, and key events. Moreover, building on prior work, for the first time I examined the relations between each of these factors at each stage of the legislative process over time. These findings are discussed and contextualized in more detail next.
Key Factors

Institutions as Venues of Decision-Making

In this work, I operationalized institutions as venues of decision-making as institutional friction. As hypothesized, the hardest step of the legislative process for a bill to overcome is getting through a committee. Once that occurred, it was significantly easier for a bill to move on to the next step of process, and it became easier from there to continue through to the end. This is in line with many theories of the legislative process, but especially Punctuated Equilibrium Theory (True et al., 1999), where friction is described as building up against the status quo until enough variables work together to overcome that friction, resulting in large and quick change. Although the findings herein are not as explosive as the Punctuated Equilibrium Theory would posit, the general pattern was consistent; a bill would not move unless acted upon by enough outside forces to overcome institutional friction, at which point inertia allowed for subsequent stages of the process to happen more and more easily.

Legislators’ Decision-Making

As predicted, the demographics of the individual legislators and legislature was correlated with how they voted on the CPC, and together these individual and collective demographics and decisions were similarly correlated with the success of the CPC through the legislative process. In studying the process as a dynamic operation, I was able to integrate broader theories on legislator decision-making and legislature makeup with the findings from studies on specific individual legislator demographics. As found by these studies, all of these variables did impact the legislative process, and they did so more effectively at the beginning stages, as was found in the studies on the legislative process theory (King et al., 2005; Soule & King, 2006).
External Groups

As expected, I found several cases of advocates directly influencing policy through changes in bill language. One unanticipated, but retrospectively logical, finding was the difference in impact from support versus opposition groups. Specifically, due to the nature of memos of opposition compared to memos of support, all of the changes to bill language came from memos of opposition. This is because memos of opposition are often asking for change, whereas memos of support, on the other hand, declare support and why, but do not request changes because they are, by definition, supportive of the bill. Due to this fact, I did not have any data to support the query that any of the memos of support had a direct impact on the success of a bill, defined as a change to bill language, in the same way as memos of opposition.

However, as with all null findings, this does not mean that they had no impact. As previously discussed, in addition to writing memos, external groups also advocate for legislation by shifting the attention of the legislators and the public to these issues. At times, this includes rallies which may have acted as key events, such as the previously discussed rally organized by the Deskovic Foundation in conjunction with other advocacy groups in support of the CPC. Other work may have been similarly successful, but without public record to reflect the exact impact.

Larger Context

Wrongful convictions, which make up a very small proportion of the criminal justice system and historically made up a very small proportion of the conversation surrounding criminal justice issues, suddenly became part of the cultural zeitgeist during the time the CPC was working its way through the legislative process. This shift in larger context was likely initiated by and persisted due to key events including the release of pop culture hits like Making
a Murderer and Serial as well as advocacy and educational work by the Innocence Project and the National Registry of Exonerations, discussed more later. However, conversations surrounding issues of miscarriages of justice, wrongful conviction, and prosecutorial misconduct, specifically, continued even after they were no longer being discussed explicitly in the context of these key events.

The role of the election cycle, on the other hand, is less straightforward. My results indicate that election cycle was related to the success of the CPC moving further through the legislative process, but that may not be the only factor. For example, the election cycle may have a different impact on individual legislators depending on their seniority in the legislature, or their confidence in reelection. Regardless, the election cycle is tied up with legislative process in that an election triggers the beginning of a new two-year legislative session where any bills that were not successfully signed into law must be re-introduced as a new bill and begin the entire process anew. As such, the push at the end of a session year could be attributed to either, or both, of these pressures. Unfortunately, none of the data collected were able to support one point or the other.

One way to disaggregate these factors is to collect and analyze data specifically related to elections, separate from the session cycle. This was not possible in the current work because, legally, legislators cannot talk about anything election or campaign related during work hours or using work resources due to various ethics laws. Future research aimed at determining the full impact of the election cycle might collect additional data from campaign speeches and the personal, versus political, social media posts by members.

**Key Events**

The occurrence of key events was found to impact the success of a bill when defined as its movement through the legislative process. However, no key events identified in the data that
were implicated in directly impacting a change in bill language. This does not mean that they did not have an impact, but discerning the impact may be difficult due to the fact that key events occur at a single moment in time, but the determination of which bills will be put on a committee or floor agenda for a vote can be made several weeks in advance. As discussed, a number of individuals must approve a bill before it is put on a committee agenda. This includes the sponsor of the bill, who is usually asked if they are opposed to their bill being added to the agenda. In some cases, central staffers flag bills that are selected that must be amended, either for intended substantive changes or just to update the effective date to the current year. Depending on the time of year, these amendments can take some time to be introduced. All this must occur before the draft agenda is sent to the Majority Leader for approval before being finalized a week before the actual committee meeting occurs.

Additionally, as previously discussed the CPC was not written as a piece of crime control theater in direct response to a single event, but as a culmination of years of work and attention to the issue by government officials and policymakers. Therefore, the bill and subsequent amendments were an amalgamation of a number of key events that occurred prior to and during its time in the legislature. The impact of any one specific event may get lost in the cumulative impact of many.

**Unknown Factors**

Despite the many substantive changes to bill language that could be attributed to the five theoretically identified key factors in the legislative process discussed here, many more did not fit neatly into these categories. In fact, there were eighteen substantive changes across seven bill iterations for which no specific factor could be identified as the impetus for the change. These changes ranged from specifying how to handle potential conflicts of interest between
Commission members and prosecutors on cases, to changing how many Commission members are appointed by each branch, to specifics on how proceedings handled by the Commission are run. There was little overlap in content across these changes, and the number of these changes with unknown causes ranged from one to six within a single bill.

Interestingly, the bill with the most of these unidentified triggers for substantive changes was the chapter amendment in 2019. This stage of the legislative process is likely the most hidden despite being at the end of the process, as the negotiations are held between the Executive branch and central staff members of the Legislative branch in private, not in a public forum like committee meetings and floor debates. As such, there are no public records from which to discern what the impetuses for these changes were. The lack of private records is one of the limitations of this dissertation, as described next.

**Limitations and Future Directions**

This work builds significantly on current theories of the legislative process, but there are still a number of ways to further empirically examine this process. All of the data collected for this dissertation were publicly available. This was done for a number of reasons, including the fact that data collection started during the COVID-19 pandemic, which precluded my ability to obtain other types of data. Additionally, much of this private data, such as notes from meetings with advocates or emails back and forth with central staffers, may no longer exist as people join and leave their jobs at the legislature, and therefore are impossible to collect. As such, the only way to key into some of this information would be to hold interviews with those who were involved in the legislative process of the CPC. Future research involving these individuals and collecting this additional data may help shed light on some of the unidentified causes of changes to the bill language.
Some of these actors may include advocates from the organizations that wrote memos of support and opposition. These individuals clearly have a vested interest in the issue at hand, and so likely advocated beyond just submitting letters by holding meetings with members of the legislature and their staff. Like I previously discussed, bill ideas and edits come from many places, including from external groups such as advocates. These private conversations may have directly caused changes to the bill language without any public record to indicate so. In fact, given that so many of the coded changes to the bill language came directly from external groups, it is not a stretch to imagine that many of the changes coded that had no discernable cause may also have been due to external groups, just from these private conversations as opposed to public memos. This is especially true for supporters, who likely worked with the bill drafters to improve the language of the bill in private but did not want to show anything other than full support in public.

Some of this impact may have been possible to examine with the non-publicly available legislative bill drafts (LBDs). These LBDs are written as official drafts of a bill, but are not necessarily introduced. This means that in most cases, there are more LBDs than bill amendments as specific bill language is being finalized. Every LBD that is drafted gets an identification number that includes which number draft number it is. Although the LBDs themselves are not, this number is public record, and is identified on LRS with the bill number. For example, N.Y. Legis. S. 2412-D (2018), the fifth iteration of the bill introduced, was LBD number 08062-09-8, the “09” indicating that it was the ninth LBD written. This means that there were four additional drafts of the bill that were not introduced but could contain changes that were caused by any of the variables tested herein, or hints as to the sources of some of the unidentified changes. LBDs were not included in the analysis partially because they were not
publicly available, but also because it was determined that if they were not introduced they were not deemed ready for public consumption, including consumption and votes by members. This assumption can be confirmed only by talking to the bill drafters—legislators, staffers, advocates, attorneys, etc.—and asking for the reasons behind language changes.

Additionally, only so much information can be gleaned from discussions among legislators during committee meetings and on the floor. Although they are meant to be a place for open discussion, much of what happens during these meetings and debates is likely performative. First, the members know that they are being recorded during these meetings. This means that not only are they likely filtering themselves, but in the age of digital technology and social media, they are also likely garnering for clips that can be used to bolster their platform or image for their constituents and other politicians, especially during an election year. Also, as previously discussed, the members know a bill is going to pass as soon as it is on a committee or the floor agenda. As such, the conversations or debates held rarely, if ever, have any real impact on the outcome. In examining these conversations, any time a member spoke up to support or oppose a bill, their vote reflected that stance. In none of these conversations did the information discussed actually change either legislator’s position on the bill. Although this may be due to other reasons such as confirmation bias—which has been shown to impact decisions regarding issues related to wrongful convictions (see Rossmo & Pollock, 2019)—it is more likely that these conversations are more about politics and optics than the democratic process.

Another important piece of the context surrounding the CPC was the fact that it was moving through the legislature during a strange time in New York’s legislative history with the creation and later dissipation of the Independent Democratic Conference (IDC) in the Senate. This group of Democrats who chose to conference with the Republican party despite opposing
political views likely muddied the relation between individual legislators’ decision-making and the legislative process, especially given the apparently partisan nature of the CPC.

The CPC also was surrounded by the issues of bail and discovery reform, as it was packaged with these two bills as a three-bill criminal justice reform package touted by the legislature. The process for these other two bills was slightly different than that of the CPC, because they were included in the budget as opposed to passed through the legislature as individual bills. As such, the timeline for these bills was linked not to the end of session but to the April 1st deadline for the state budget. In examining when during the legislative session the CPC moved, it is clear that most of the movement occurred after March, between the completion of the state budget and the conclusion of the session for that year. But the bills on bail and discovery reform likely followed a different timeline, moving between January at the beginning of the legislative session and March, when the budget is due. Future research examining the legislative process should keep this difference in mind, noting not only the legislative and election cycles but the budget timeline as well.

Last, it is important to note that each of the five factors discussed in this dissertation do not exist in a bubble. Although I examined their impact on the legislative process, all of these factors have an impact on one another as well. Each of the hypothesized processes laid out in Figures 2 to 6 are happening simultaneously. For example, external groups not only lobby legislators directly, but advocate and educate the public as well to help shift public opinion. Similarly to how key events can cause the creation of specific pieces of legislation, they also can spark the creation of specific advocacy groups. Institutional history and friction can dictate the legislators’ decisions, but the individual legislators themselves also dictate the institutional history as the old guard leaves and new members are elected into office. These factors may have
additive, moderating, or mediating effects on one another that better explain their individual and collective impact on the legislative process. Future research is needed to determine exactly how these factors interplay with one another.

**Conclusion**

This dissertation shed light on the long, arduous, and often unseen, legislative process. By examining a bill from its inception to passage into law and qualitatively examining each step of that process, this study fills a gap in the literature that was heretofore unstudied. However, this is just the first step in building a new iterative theory of the legislative process. Future studies should examine those private data sources, including LBDs, meetings with advocates and lobbyists, and conversations among legislators, and have discussions with the bill drafters themselves. These data can speak more to the five theoretical elements than what was uncovered herein, and may even shed light on additional factors that have yet to be identified in the literature.

Bills currently in state legislatures across the country are now facing a change that the CPC never had to confront: changing district lines as a result of a new census and a subsequent redistricting process. All of these variables and more are likely just as influential to the legislative process as those examined in the current study. This dissertation is an important start but is just the beginning of a new way of understanding the legislative process. The laws of the land are the blueprint for and foundation of our criminal justice system, and so understanding how they come to be is necessary for understanding the entire system.
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Appendix A

2019 and 2021 NYS Commission on Prosecutorial Conduct Chapters

2019 Chapter Text

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article 15-A of the judiciary law, as added by chapter 202 of the laws of 2018, is amended to read as follows:

ARTICLE 15-A

STATE COMMISSION ON PROSECUTORIAL CONDUCT

Section 499-a. Establishment of commission.

499-b. Definitions.

499-c. State commission on prosecutorial conduct; organization.

499-d. Functions; powers and duties.

499-e. Panels; referees.

499-f. Complaint; investigation; hearing and disposition.

499-g. Confidentiality of records.
499-h. Breach of confidentiality of commission information.

499-i. Resignation not to divest commission or presiding Justices of the Appellate Division of
jurisdiction.

499-j. Effect.

§ 499-a. Establishment of commission. There is hereby created within the executive department
a state commission of prosecutorial conduct. The commission shall have the authority to
review the conduct of prosecutors upon the filing of a complaint with the commission to
determine whether said conduct as alleged departs from the applicable statutes, case law,
New York Rules of Professional Conduct, 22 NYCRR 1200, including but not limited to
Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers).

§ 499-b. Definitions. For the purposes of this article the following terms have the following
meanings:

1. "Commission" means the state commission on prosecutorial conduct.

2. "Prosecutor" means a district attorney or any assistant district attorney of any county of the
state in an action to exact any criminal penalty, fine, sanction or forfeiture.

3. "Hearing" means a proceeding under subdivision four of section four hundred ninety-nine-f of
this article.

4. "Member of the bar" means a person admitted to the practice of law in this state for at least
five years.
5. "Presiding justices of the appellate division" shall mean, collectively, the presiding justices of the appellate division of the supreme court of each judicial department. The chief administrative judge shall, by rule, establish an appropriate mechanism, not inconsistent with law, for persons and entities interacting with the presiding justices of the appellate division pursuant to this article to file papers and communicate with such body.

6. "Retired judge" shall mean a former judge or justice of the unified court system who was qualified as an attorney during such service and served as such a judge or justice for at least five years.

§ 499-c. State commission on prosecutorial conduct; organization.

1. The commission shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals.

(a) Of the members appointed by the governor, two shall be attorneys providing public defense services who have provided such services for at least five years, and two shall be active, former or retired prosecutors with at least five years of prosecutorial experience.

(b) Of the members appointed by the chief judge, two shall be retired judges, one of whom shall possess significant work experience providing public defense services and one of whom shall have significant prosecutorial experience; one shall be a full time law professor or dean at an accredited law school with significant criminal law experience.
(c) Of the members appointed by the legislative leaders, two shall be attorneys providing defense services and two shall be active, former, or retired prosecutors. Each candidate for appointment as an attorney providing defense services shall have provided such services for at least five years and each candidate for appointment as an active, former or retired prosecutor shall have had at least five years of prosecutorial experience. After the speaker of the assembly and temporary president of the senate shall have made their initial appointments, the minority leaders of each house shall make their appointments to the commission in a manner to ensure an equal number of attorneys providing defense services and active, former or retired prosecutors. After such initial appointments, successive appointments must be made in a manner to ensure an equal number of attorneys providing defense services and active, former or retired prosecutors. A temporary imbalance in the number of prosecutors and defense attorneys pending new appointments shall not prevent the commission from conducting business.

2. Membership on the commission by a prosecutor shall not constitute the holding of a public office and no prosecutor shall be required to take and file an oath of office before serving on the commission. The members of the commission shall elect one of their number to serve as chairperson during his or her term of office or for a period of two years, whichever is shorter. Members of the commission who fail to participate for ninety days may be replaced by the original appointing authority for the remainder of the term.

3. The persons first appointed by the governor shall have respectively three and four year terms as he or she shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three and four year terms as he or she shall designate. The person first appointed by the temporary president of the senate shall have
a three year term. The person first appointed by the minority leader of the senate shall have a two year term. The person first appointed by the speaker of the assembly shall have a three year term. The person first appointed by the minority leader of the assembly shall have a two year term. Each member of the commission shall be appointed thereafter for a term of four years. Membership shall terminate if a member attains a position which would have rendered him or her ineligible for appointment at the time of his or her appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

4. If a member of the commission who is a prosecutor is the subject of a complaint or investigation with respect to his or her qualifications, conduct, fitness to perform or performance of his or her official duties, he or she shall be disqualified from participating in any and all proceedings with respect thereto. If a member of the commission is employed in the same organization as the subject of a complaint or investigation with respect to his or her qualifications, conduct, fitness to perform, or performance of his or her official duties, he or she shall be disqualified from participating in any and all proceedings with respect thereto.

5. Each member of the commission shall serve without salary or other compensation, but shall be entitled to receive actual and necessary expenses incurred in the discharge of his or her duties.

6. For any action taken pursuant to subdivisions four through nine of section four hundred ninety-nine-f or subdivision two of section four hundred ninety-nine-e of this article, eight members of the commission shall constitute a quorum of the commission and the concurrence of six members of the commission shall be necessary. Two members of a
three member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.

7. The commission shall appoint and at pleasure may remove an administrator who shall be a member of the bar who is not an active, former or retired prosecutor. The administrator of the commission may appoint such deputies, assistants, counsel, investigators and other officers and employees as he or she may deem necessary, prescribe their powers and duties, fix their compensation and provide for reimbursement of their expenses within the amounts appropriated therefor. No appointment of an administrator shall be valid unless approved by an executive appointee, the appointee of the temporary president of the senate, and the appointee of the speaker of the assembly.

§ 499-d. Functions; powers and duties. The commission shall have the following functions, powers and duties:

1. To conduct hearings and investigations, administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation and require the production of any books, records, documents or other evidence that it may deem relevant or material to an investigation; and the commission may designate any of its members or any member of its staff to exercise any such powers, provided, however, that except as is otherwise provided in section four hundred ninety-nine of this article, only a member of the commission or the administrator shall exercise the power to subpoena witnesses or require the production of books, records, documents or other evidence. In accordance with section twenty-three hundred four of the civil practice law and rules, a request to
withdraw or modify a subpoena issued pursuant to this article may be made to the person who issued it and/or to the commission. The prosecuting agency may inform the commission, by affirmation with specificity and particularity, in a form and manner in which shall be prescribed by the commission, of its position that the commission's investigations will substantially interfere with the agency's own criminal investigation. If the prosecuting agency informs the commission of its basis for that position, the commission shall only exercise its powers in a way that will not interfere with an agency's active investigation or prosecution and in no event shall the commission exercise its powers prior to the earlier of: (a) the filing of an accusatory instrument with respect to the crime or crimes that led to such prosecuting agency's investigation and underlie the complaint; or (b) one year from the commencement of the occurrence of the crime or crimes that led to such prosecuting agency's investigation and underlie the complaint.

2. To confer immunity when the commission deems it necessary and proper in accordance with section 50.20 of the criminal procedure law; provided, however, that at least forty-eight hours prior written notice of the commission's intention to confer such immunity is given the attorney general and the appropriate district attorney.

3. To request and receive from any court, department, division, board, bureau, commission, or other agency of the state or political subdivision thereof or any public authority such assistance, information and data as will enable it properly to carry out its functions, powers and duties.

4. To report annually, on or before the first day of March in each year and at such other times as the commission shall deem necessary, to the governor, the legislature and the chief judge
of the court of appeals, with respect to proceedings which have been finally determined by the commission. Such reports may include legislative and administrative recommendations. The contents of the annual report and any other report shall conform to the provisions of this article relating to confidentiality.

5. To adopt, promulgate, amend and rescind rules and procedures, not otherwise inconsistent with law, necessary to carry out the provisions and purposes of this article. All such rules and procedures shall be filed in the offices of the chief administrator of the courts and the secretary of state.

6. To do all other things necessary and convenient to carry out its functions, powers and duties expressly set forth in this article.

§ 499-e. Panels; referees. 1. The commission may delegate any of its functions, powers and duties to a panel of three of its members, one of whom shall be a member of the bar, except that no panel shall confer immunity in accordance with section 50.20 of the criminal procedure law. No panel shall be authorized to take any action pursuant to subdivisions four through nine of section four hundred ninety-nine-f of this article or subdivision two of this section.

1. The commission may designate a member of the bar who is not a prosecutor or a member of the commission or its staff as a referee to hear and report to the commission in accordance with the provisions of section four hundred ninety-nine-f of this article. Such referee shall be empowered to conduct hearings, administer oaths or affirmations, subpoena witnesses, compel their attendance,
examine them under oath or affirmation and require the production of any books, records, documents or other evidence that the referee may deem relevant or material to the subject of the hearing.

§ 499-f. Complaint; investigation; hearing and disposition. 1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any prosecutor, and may determine that a prosecutor be admonished, or censured; and make a recommendation to the governor that a prosecutor be removed from office for cause, for, including, but not limited to, misconduct in office, as evidenced by his or her departure from his or her obligations under appropriate statute, case law, and/or New York Rules of Professional Conduct, 22 NYCRR 1200, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers), persistent failure to perform his or her duties, conduct prejudicial to the administration of justice, or that a prosecutor be retired for mental or physical disability preventing the proper performance of his or her prosecutorial duties. A complaint shall be in writing and signed by the complainant and, if directed by the commission, shall be verified. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have notified the prosecutor of the complaint, the commission shall also notify the prosecutor of such dismissal. Pursuant to paragraph a of subdivision four of section ninety of this chapter, any person being an attorney and counselor-at-law who
shall be convicted of a felony as defined in paragraph e of subdivision four of section ninety of this chapter, shall upon such conviction, cease to be any attorney and counselor-at-law, or to be competent to practice law as such.

2. The commission may, on its own motion, initiate an investigation of a prosecutor with respect to his or her qualifications, conduct, fitness to perform or the performance of his or her official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the prosecutor involved before it, in which event the prosecutor shall be notified in writing of his or her required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In either case a copy of the complaint shall be served upon the prosecutor at the time of such notification. The prosecutor shall have the right to be represented by counsel during any and all stages of the investigation in which his or her appearance is required and to present evidentiary data and material relevant to the complaint. A transcript shall be made and kept with respect to all proceedings at which testimony or statements under oath of any party or witness shall be taken, and the transcript of the prosecutor's testimony shall be made available to the prosecutor without cost. Such transcript shall be confidential except as otherwise permitted by section four hundred ninety-nine-g of this article.

4. If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be
drawn and served upon the prosecutor involved, either personally or by certified mail, return receipt requested. The prosecutor shall file a written answer to the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the prosecutor involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto. Upon the written request of the prosecutor, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the prosecutor without cost copies of all documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the prosecutor at least five days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint. The failure of the commission to timely furnish any documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the prosecutor. The complainant may be notified of the hearing and unless he or she shall be subpoenaed as a witness by the prosecutor, his or her presence thereat shall be within the discretion of the commission. The hearing shall not be public unless the prosecutor involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The prosecutor shall have the right to be represented by counsel during any and all stages of the hearing and shall have
the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint. A transcript of the proceedings and of the testimony of witnesses at the hearing shall be taken and kept with the records of the commission.

5. Subject to the approval of the commission, the administrator and the prosecutor may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall make its determination upon the pleadings and the agreed statement of facts.

6. If, after a formal written complaint has been served pursuant to subdivision four of this section, or during the course of or after a hearing, the commission determines that no further action is necessary, the complaint shall be dismissed and the complainant and the prosecutor shall be so notified in writing.

7. After a hearing, the commission may determine that a prosecutor be admonished or censured, or may recommend to the governor that a prosecutor be removed from office for cause. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the presiding justices of the appellate division who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the prosecutor involved. Upon completion of service, the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the appellate division in the department in which the alleged misconduct occurred. Records of a prosecuting agency provided by the agency to the commission pursuant to this article shall not be subject to disclosure by the
commission under article six of the public officers law. The prosecutor involved may either accept the determination of the commission or make written request to the presiding justices of the appellate division, within thirty days after receipt of such determination, for a review thereof by the presiding justices of the appellate division. If the commission has determined that a prosecutor be admonished or censured, and if the prosecutor accepts such determination or fails to request a review thereof by the presiding justices of the appellate division, the commission shall thereupon admonish or censure him or her in accordance with its findings. If the commission has recommended that a prosecutor be removed or retired and the prosecutor accepts such determination or fails to request a review thereof by the presiding justices of the appellate division, the presiding justices of the appellate division shall thereupon transmit the commission's findings to the governor who will independently determine whether the prosecutor should be removed or retired.

8. If the prosecutor requests a review of the determination of the commission, in its review of a determination of the commission, the presiding justices of the appellate division shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the presiding justices of the appellate division may accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction. However, if the presiding justices of the appellate division recommend removal or retirement, they shall, together with the commission, transmit the
entire record to the governor who will independently determine whether a prosecutor
should be removed or retired.

9. (a) The presiding justices of the appellate division may suspend a prosecutor from exercising
the powers of his or her office while there is pending a determination by the commission
for his or her removal or retirement, or while he or she is charged in this state with a
felony by an indictment or an information filed pursuant to section six of article one of
the constitution. The suspension shall terminate upon conviction of a felony resulting in
such prosecutor's disbarment pursuant to paragraph a of subdivision four of section
ninety of this chapter. If such conviction becomes final, he or she shall be removed from
office. The suspension shall be terminated upon reversal of the conviction and dismissal
of the accusatory instrument.

(b) Upon the recommendation of the commission or on its own motion, the presiding justices of
the appellate division may suspend a prosecutor from office when he or she is charged
with a crime punishable as a felony under the laws of this state, or any other crime which
involves moral turpitude. The suspension shall terminate upon conviction of a felony
resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of
section ninety of this chapter. The suspension shall continue upon conviction of any other
crime which involves moral turpitude and, if such conviction becomes final, he or she
shall be removed from office. The suspension shall be terminated upon reversal of the
conviction and dismissal of the accusatory instrument.

(c) A prosecutor who is suspended from office by the presiding justices of the appellate division
shall receive his or her salary during such period of suspension, unless the court directs
otherwise. If the court has so directed and such suspension is thereafter terminated, the
presiding justices of the appellate division may direct that he or she shall be paid his or her salary for such period of suspension.

(d) Nothing in this subdivision shall prevent the commission from determining that a prosecutor be admonished or censured or prevent the commission from recommending removal or retirement pursuant to subdivision seven of this section.

10. If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with the provisions of subdivisions seven through nine of this section, within the powers of: (a) a person having administrative jurisdiction over the prosecutor involved in the complaint; or (b) an appellate division of the supreme court; or (c) a presiding justice of an appellate division of the supreme court; or (d) the chief judge of the court of appeals; or (e) the governor pursuant to subdivision (b) of section thirteen of article thirteen of the constitution; or (f) an applicable district attorney's office or other prosecuting agency, the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary.

11. The commission shall notify the complainant of its disposition of the complaint.

12. In the event of removal from office of any prosecutor, pursuant to subdivision seven or eight or paragraph (a) or (b) of subdivision nine of this section, a vacancy shall exist pursuant to article three of the public officers law.
§ 499-g. Confidentiality of records. Except as hereinafter provided, all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the commission shall be confidential and shall not be made available to any person except pursuant to section four hundred ninety-nine-f of this article. The commission and its designated staff personnel shall have access to confidential material in the performance of their powers and duties. If the prosecutor who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject prosecutor or complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such prosecutor.

§ 499-h. Breach of confidentiality of commission information. 1. Any staff member, employee or agent of the state commission on prosecutorial conduct who violates any of the provisions of section four hundred ninety-nine-g of this article shall be subject to a reprimand, a fine, suspension or removal by the commission.

2. Within ten days after the commission has acquired knowledge that a staff member, employee or agent of the commission has or may have breached the provisions of section four hundred ninety-nine-g of this article, written charges against such staff member, employee or agent shall be prepared and signed by the chairman of the commission and filed with the commission. Within five days after receipt of charges, the commission shall determine, by a vote of the majority of all the members of the commission, whether
probable cause for such charges exists. If such determination is affirmative, within five
days thereafter a written statement specifying the charges in detail and outlining his or
her rights under this section shall be forwarded to the accused staff member, employee or
agent by certified mail. The commission may suspend the staff member, employee or
agent, with or without pay, pending the final determination of the charges. Within ten
days after receipt of the statement of charges, the staff member, employee or agent shall
notify the commission in writing whether he or she desires a hearing on the charges. The
failure of the staff member, employee or agent to notify the commission of his or her
desire to have a hearing within such period of time shall be deemed a waiver of the right
to a hearing. If the hearing has been waived, the commission shall proceed, within ten
days after such waiver, by a vote of a majority of all the members of such commission, to
determine the charges and fix the penalty or punishment, if any, to be imposed as
hereinafter provided.

3. Upon receipt of a request for a hearing, the commission shall schedule a hearing, to be held at
the commission offices, within twenty days after receipt of the request therefor, and shall
immediately notify in writing the staff member, employee or agent of the time and place
thereof.

4. The commission shall have the power to establish necessary rules and procedures for the
conduct of hearings under this section. Such rules shall not require compliance with
technical rules of evidence. All such hearings shall be held before a hearing panel
composed of three members of the commission selected by the commission. Each hearing
shall be conducted by the chairperson of the panel who shall be selected by the panel.
The staff member, employee or agent shall have a reasonable opportunity to defend
himself and to testify on his or her own behalf. He or she shall also have the right to be represented by counsel, to subpoena witnesses and to cross-examine witnesses. All testimony taken shall be under oath which the chairperson of the panel is hereby authorized to administer. A record of the proceedings shall be made and a copy of the transcript of the hearing shall, upon written request, be furnished without charge to the staff member, employee or agent involved.

5. Within five days after the conclusion of a hearing, the panel shall forward a report of the hearing, including its findings and recommendations, including its recommendations as to penalty or punishment, if one is warranted, to the commission and to the accused staff member, employee or agent. Within ten days after receipt of such report the commission shall determine whether it shall implement the recommendations of the panel. If the commission shall determine to implement such recommendations, which shall include the penalty or punishment, if any, of reprimand, a fine, suspension for a fixed time without pay or dismissal, it shall do so within five days after such determination. If the charges against the staff member, employee or agent are dismissed, he or she shall be restored to his or her position with full pay for any period of suspension without pay and the charges shall be expunged from his or her record.

6. The accused staff member, employee or agent may seek review of the recommendation by the commission by way of a special proceeding pursuant to article seventy-eight of the civil practice law and rules.
§ 499-i. Resignation not to divest commission or presiding justices of the appellate division of jurisdiction. The jurisdiction of the presiding justices of the appellate division and the commission pursuant to this article shall continue notwithstanding that a prosecutor resigns from office after a recommendation by the commission that the prosecutor be removed from office has been transmitted to the presiding justices of the appellate division, or in any case in which the commission's recommendation that a prosecutor should be removed from office shall be transmitted to the presiding justices of the appellate division within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such prosecutor. Any determination by the governor that a prosecutor who has resigned should be removed from office shall render such prosecutor ineligible to hold any other prosecutorial office.

§ 499-j. Effect. 1. The powers, duties, and functions of the state commission on prosecutorial conduct shall not supersede the powers and duties of the governor as outlined in section thirteen of article thirteen of the New York state constitution.

2. Removal or retirement of a prosecutor pursuant to this article shall be considered a removal from office pursuant to section thirty of the public officers law.

§ 2. Section 3 of chapter 202 of the laws of 2018 amending the judiciary law relating to establishing the commission on prosecutorial conduct, is amended to read as follows:

§ 3. This act shall take effect on the first of April next succeeding the date upon which it shall have become a law.
§ 3. If any part or provision of this act is adjudged by a court of competent jurisdiction to be unconstitutional or otherwise invalid, such judgment shall not affect or impair any other part or provision of this act, but shall be confined in its operation to such part or provision.

§ 4. This act shall take effect immediately.
THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND
ASSEMBLY, DO ENACT AS FOLLOWS:

EXPLANATION--Matter in UPPER CASE is new; matter in brackets [ ] is old law to be omitted.

Section 1. Section 499-a of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-a. Establishment of commission. There is hereby created within the executive department a state commission of prosecutorial conduct. The commission shall have the authority to review AND INVESTIGATE the conduct of prosecutors upon the filing of a complaint with the commission to [determine] EXAMINE whether [said] A PROSECUTOR OR PROSECUTORS HAS COMMITTED conduct [as alleged departs from the applicable] IN THE COURSE OF HIS OR HER OFFICIAL DUTIES OR UNDER COLOR OF STATE LAW POTENTIALLY VIOLATIVE OF statutes, THE LEGAL RIGHTS OF PRIVATE PERSONS, WHETHER STATUTORY, CONSTITUTIONAL OR OTHERWISE; case law[.]; OR COURT RULES, INCLUDING, BUT NOT LIMITED TO THE New York Rules of Professional Conduct, 22 NYCRR 1200, OR ANY SUBSET THEREOF OR SUCCESSOR THERETO, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers).
§ 2. Section 499-b of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-b. Definitions. For the purposes of this article the following terms have the following meanings:

1. "Commission" means the state commission on prosecutorial conduct.

2. "Prosecutor" means a district attorney or any assistant district attorney of any county of the state in an action to exact any criminal penalty, fine, sanction or forfeiture.

3. "Hearing" means a proceeding under subdivision four of section four hundred ninety-nine-f of this article.

4. "Member of the bar" means a person admitted to the practice of law in this state for at least five years.

5. ["Presiding justices of the appellate division" shall mean, collectively, the presiding justices of the appellate division of the supreme court of each judicial department. The chief administrative judge shall, by rule, establish an appropriate mechanism, not inconsistent with law, for persons and entities interacting with the presiding justices of the appellate division pursuant to this article to file papers and communicate with such body.

6.] "Retired judge" shall mean a former judge or justice of the unified court system who was qualified as an attorney during such service and served as such a judge or justice for at least five years.
§ 3. Subdivision 6 of section 499-c of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

6. For any action taken pursuant to subdivisions four through [nine] SEVEN of section four hundred ninety-nine-f or subdivision two of section four hundred ninety-nine-e of this article, eight members of the commission shall constitute a quorum of the commission and the concurrence of six members of the commission shall be necessary. Two members of a three member panel of the commission shall constitute a quorum of the panel and the concurrence of two members of the panel shall be necessary for any action taken.

§ 4. Section 499-f of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-f. Complaint; investigation; hearing and disposition. 1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct[, qualifications, fitness to perform,] or performance of official duties of any prosecutor[, and may determine that a prosecutor be admonished, or censured]; and MAY make a recommendation to the governor that a prosecutor be removed from office for cause, for, including, but not limited to, misconduct in office, as evidenced by his or her departure from his or her obligations under appropriate statute, case law, and/or New York Rules of Professional Conduct, 22 NYCRR 1200, OR ANY SUBSET THEREOF OR SUCCESSOR THERETO, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers), persistent failure to perform his or her duties, conduct prejudicial to the administration of justice, or that a prosecutor be retired.
for mental or physical disability preventing the proper performance of his or her 
prosecutorial duties. A complaint shall be in writing and signed by the complainant and, 
if directed by the commission, shall be verified. Upon receipt of a complaint (a) the 
commission shall conduct an investigation of the complaint; or (b) the commission may 
dismiss the complaint if it determines that the complaint on its face lacks merit. If the 
complaint is dismissed, the commission shall so notify the complainant. If the 
commission shall have notified the prosecutor of the complaint, the commission shall 
also notify the prosecutor of such dismissal. Pursuant to paragraph a of subdivision four 
of section ninety of this chapter, any person being an attorney and counselor-at-law who 
shall be convicted of a felony as defined in paragraph e of subdivision four of section 
ninety of this chapter, shall upon such conviction, cease to be any attorney and counselor-at-law, or to be competent to practice law as such.

2. The commission may, on its own motion, initiate an investigation of a prosecutor with respect 
to his or her [qualifications,] conduct[,] fitness to perform] or the performance of his or 
her official duties. Prior to initiating any such investigation, the commission shall file as 
part of its record a written complaint, signed by the administrator of the commission, 
which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the 
prosecutor involved before it, in which event the prosecutor shall be notified in writing of 
his or her required appearance, either personally, at least three days prior to such 
appearance, or by certified mail, return receipt requested, at least five days prior to such 
appearance. In either case a copy of the complaint shall be served upon the prosecutor at 
the time of such notification. The prosecutor shall have the right to be represented by
counsel during any and all stages of the investigation in which his or her appearance is required and to present evidentiary data and material relevant to the complaint. A transcript shall be made and kept with respect to all proceedings at which testimony or statements under oath of any party or witness shall be taken, and the transcript of the prosecutor's testimony shall be made available to the prosecutor without cost. Such transcript shall be confidential except as otherwise permitted by section four hundred ninety-nine-g of this article.

4. If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the prosecutor involved, either personally or by certified mail, return receipt requested. The prosecutor shall file a written answer to the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon expiration of the time to answer, the commission shall direct that a hearing be held with respect to the complaint, the prosecutor involved shall be notified in writing of the date of the hearing either personally, at least twenty days prior thereto, or by certified mail, return receipt requested, at least twenty-two days prior thereto. Upon the written request of the prosecutor, the commission shall, at least five days prior to the hearing or any adjourned date thereof, make available to the prosecutor without cost copies of all documents which the commission intends to present at such hearing and any written statements made by witnesses who will be called to give testimony by the commission. The commission shall, in any case, make available to the prosecutor at least five days prior to the hearing or any adjourned date thereof any exculpatory evidentiary data and material relevant to the complaint. The failure of the commission to timely furnish any
documents, statements and/or exculpatory evidentiary data and material provided for herein shall not affect the validity of any proceedings before the commission provided that such failure is not substantially prejudicial to the prosecutor. The complainant may be notified of the hearing and unless he or she shall be subpoenaed as a witness by the prosecutor, his or her presence thereat shall be within the discretion of the commission. The hearing shall not be public unless the prosecutor involved shall so demand in writing. At the hearing the commission may take the testimony of witnesses and receive evidentiary data and material relevant to the complaint. The prosecutor shall have the right to be represented by counsel during any and all stages of the hearing and shall have the right to call and cross-examine witnesses and present evidentiary data and material relevant to the complaint. A transcript of the proceedings and of the testimony of witnesses at the hearing shall be taken and kept with the records of the commission.

5. Subject to the approval of the commission, the administrator and the prosecutor may agree on a statement of facts and may stipulate in writing that the hearing shall be waived. In such a case, the commission shall [make its determination upon the pleadings and] RELY UPON the agreed statement of facts IN FORMING THE COMMISSION'S FINDINGS OF FACT.

6. If, after a formal written complaint has been served pursuant to subdivision four of this section, or during the course of or after a hearing, the commission determines that no further action is necessary, the complaint shall be dismissed and the complainant and the prosecutor shall be so notified in writing.

7. [After a hearing, the commission may determine that a prosecutor be admonished or censured, or may recommend to the governor that a prosecutor be removed from office for cause.]
The commission shall transmit its [written determination, together with its] findings of fact and [conclusions of law] RECOMMENDATIONS and the record of the proceedings upon which [its determination is] SUCH FINDINGS AND RECOMMENDATIONS ARE based, to the [presiding justices of the] ATTORNEY GRIEVANCE COMMITTEE OF THE appellate division [who] IN THE DEPARTMENT WHERE THE PROSECUTOR WAS ADMITTED TO PRACTICE, WHICH shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the prosecutor involved. Upon completion of service, the [determination of the commission, its] COMMISSION'S findings and [conclusions] RECOMMENDATIONS and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the appellate division in the department in which the [alleged misconduct occurred] RECORD WAS FILED. IF THE COMMISSION'S FINDINGS AND RECOMMENDATIONS INCLUDE ANY RECOMMENDATION THAT ANY PROSECUTOR SHOULD BE REMOVED OR RETIRED, THE COMMISSION SHALL SIMULTANEOUSLY TRANSMIT ITS FINDINGS, RECOMMENDATIONS, AND RECORD OF ITS PROCEEDINGS TO THE GOVERNOR. Records of a prosecuting agency provided by the agency to the commission pursuant to this article shall not be subject to disclosure by the commission under article six of the public officers law. [The prosecutor involved may either accept the determination of the commission or make written request to the presiding justices of the appellate division, within thirty days after receipt of such determination, for a review thereof by the presiding justices of the appellate division. If the commission has determined that a prosecutor be admonished or censured, and if the
prosecutor accepts such determination or fails to request a review thereof by the presiding justices of the appellate division, the commission shall thereupon admonish or censure him or her in accordance with its findings. If the commission has recommended that a prosecutor be removed or retired and the prosecutor accepts such determination or fails to request a review thereof by the presiding justices of the appellate division, the presiding justices of the appellate division shall thereupon transmit the commission's findings to the governor who will independently determine whether the prosecutor should be removed or retired.]

8. [If the prosecutor requests a review of the determination of the commission, in its review of a determination of the commission, the presiding justices of the appellate division shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the presiding justices of the]

THE ATTORNEY GRIEVANCE COMMITTEE OF THE appellate division THAT RECEIVES THE COMMISSION'S REPORT may accept or reject the [determined] RECOMMENDED sanction; impose a different sanction [including admonition or censure, recommend removal or retirement for the reasons set forth in subdivision one of this section]; or impose no sanction. [However, if the presiding justices of the appellate division recommend removal or retirement, they shall, together with the commission, transmit the entire record to the governor who will independently determine whether a prosecutor should be removed or retired.]

9. [(a) The presiding justices of the appellate division may suspend a prosecutor from exercising the powers of his or her office while there is pending a determination by the commission for his or her removal or retirement, or while he or she is charged in this state with a
felony by an indictment or an information filed pursuant to section six of article one of the constitution. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. If such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.

(b) Upon the recommendation of the commission or on its own motion, the presiding justices of the appellate division may suspend a prosecutor from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. The suspension shall continue upon conviction of any other crime which involves moral turpitude and, if such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.

(c) A prosecutor who is suspended from office by the presiding justices of the appellate division shall receive his or her salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the presiding justices of the appellate division may direct that he or she shall be paid his or her salary for such period of suspension.

(d) Nothing in this subdivision shall prevent the commission from determining that a prosecutor be admonished or censured or prevent the commission from recommending removal or retirement pursuant to subdivision seven of this section.
10.] If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with the provisions of subdivisions seven [through nine] AND EIGHT of this section, within the powers of: (a) a person having administrative jurisdiction over the prosecutor involved in the complaint; or (b) [an] THE ATTORNEY GRIEVANCE COMMITTEE OF THE appellate division [of the supreme court] IN THE DEPARTMENT WHERE THE PROSECUTOR WAS ADMITTED TO PRACTICE; or (c) [a presiding justice of an appellate division of the supreme court; or (d) the chief judge of the court of appeals; or (e)] the governor pursuant to subdivision (b) of section thirteen of article thirteen of the constitution; or [(f)] (D) an applicable district attorney's office [or other prosecuting agency], the commission shall refer such complaint or the appropriate allegations thereof and any evidence or material related thereto to such person, agency or court for such action as may be deemed proper or necessary.

[11.] 10. The commission shall notify the complainant of its disposition of the complaint.

[12. In the event of removal from office of any prosecutor, pursuant to subdivision seven or eight or paragraph (a) or (b) of subdivision nine of this section, a vacancy shall exist pursuant to article three of the public officers law.]

§ 5. Section 499-i of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-i. Resignation not to divest commission [or presiding justices of] AND the appellate division of jurisdiction. The jurisdiction of the [presiding justices of the] appellate
division and the commission pursuant to this article shall continue notwithstanding that a prosecutor resigns from office after a recommendation by the commission that the prosecutor be removed from office has been transmitted to the [presiding justices of the appellate division] GOVERNOR, or in any case in which the commission's recommendation that a prosecutor should be removed from office shall be transmitted to the [presiding justices of the appellate division] GOVERNOR within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such prosecutor. Any determination by the governor that a prosecutor who has resigned should be removed from office shall render such prosecutor ineligible to hold any other prosecutorial office.

§ 6. Section 499-j of the judiciary law, as amended by chapter 23 of the laws of 2019, is amended to read as follows:

§ 499-j. Effect. [1.] The powers, duties, and functions of the state commission on prosecutorial conduct shall not supersede the powers and duties of the governor as outlined in section thirteen of article thirteen of the New York state constitution.

[2. Removal or retirement of a prosecutor pursuant to this article shall be considered a removal from office pursuant to section thirty of the public officers law.]

§ 7. Legislative intent. It is hereby declared to be the intent of the legislature that, if any clause, sentence, paragraph, subdivision, section or part of article 15-A of the judiciary law shall
be adjudged by any court of competent jurisdiction to be invalid, that such article would have been enacted even if such invalid provisions has not been included therein.

§ 8. Severability. If any clause, sentence, paragraph, subdivision, section or part of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, section or part thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included herein.

§ 9. This act shall take effect immediately.
## Appendix B

List of Substantive Changes to Bill Text from 2013 to 2019

EXPLANATION—Changes to language are **bolded**.

<table>
<thead>
<tr>
<th>Original Language</th>
<th>Trigger</th>
<th>New Language</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. 8179 (Introduced in 2013)</td>
<td><em>No trigger identified</em></td>
<td>S. 6286 / A. 8634 (Introduced in 2014)</td>
</tr>
</tbody>
</table>

§ 499-b. State commission on prosecutorial conduct; organization.
1. A state commission on prosecutorial conduct is hereby established. The commission shall consist of eleven members, of whom **four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals.** Of the members appointed by the governor one person shall be a **member of the bar of the state but not a prosecutor, one shall not be a member of the bar, one shall be a public defender and one shall be a prosecutor.**

…

3. The persons first appointed by the governor shall have respectively three and four year terms as he or she shall designate. The persons first appointed by the chief judge of the court of appeals shall…
shall have respectively one, two, three, and four year terms as he or she shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three and four year terms as he or she shall designate. The person first appointed by the temporary president of the senate shall have a one year term. The person first appointed by the minority leader of the senate shall have a two year term. The person first appointed by the speaker of the assembly shall have a four year term. The person first appointed by the minority leader of the assembly shall have a three year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a prosecutor appointed by the governor or the chief judge shall terminate if such member ceases to hold the position which qualified him for such appointment. Membership shall also terminate if a member attains a position which would have rendered him ineligible for appointment at the time of his or her appointment. A vacancy shall be filled by the appointing officer for the remainder of the term. have respectively two, three and four year terms as he or she shall designate. The persons first appointed by the temporary president of the senate shall have respectively three and four year terms as he or she shall designate. The person first appointed by the minority leader of the senate shall have a two year term. The persons first appointed by the speaker of the assembly shall have respectively three and four year terms as he or she shall designate. The person first appointed by the minority leader of the assembly shall have a three year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him or her for such appointment. Membership shall also terminate if a member attains a position which would have rendered him or her ineligible for appointment at the time of his or her appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.
| **A. 8179**  
( Introduced in 2013) | **Memo of Opposition from DAASNY** | **S. 6286 / A. 8634**  
( Introduced in 2014) |
|---|---|---|
| The powers, duties, and functions of the state commission on prosecutorial conduct shall not supersede the powers and duties of the governor as outlined in section three of article four of the New York state constitution. | Should the proposed bill become law, District Attorneys would be the only attorneys in New York State, as well as in the United States of America, to be subject to investigation and discipline by two separate entities: the Grievance Committees and the CPC. | Effect. a. The powers, duties, and functions of the state commission on prosecutorial conduct shall not supersede the powers and duties of the governor as outlined in section thirteen of article thirteen of the New York state constitution.  
**b. Removal or retirement of a prosecutor pursuant to this article shall be considered a removal from office pursuant to section thirty of the public officers law.** |
| **A. 8179**  
( Introduced in 2013) | **No trigger identified** | **S. 6286 / A. 8634**  
( Introduced in 2014) |
| Language not included | If during the course of or after an investigation or hearing, the commission determines that the complaint or any allegation thereof warrants action, other than in accordance with the provisions of subdivisions seven through nine of this section, within the powers of: … (e) the governor pursuant to subdivision (b) of section thirteen of article thirteen of the constitution; | |
| **A. 8179**  
( Introduced in 2013) | **No trigger identified** | **S. 6286 / A. 8634**  
( Introduced in 2014) |
<p>| Language not included | | In the event of removal from office by the commission of any district serving any county of the state a vacancy shall exist pursuant to article three of the public officers law. |</p>
<table>
<thead>
<tr>
<th>A. 8179 (Introduced in 2013)</th>
<th>No trigger identified</th>
<th>S. 6286 / A. 8634 (Introduced in 2014)</th>
</tr>
</thead>
<tbody>
<tr>
<td>9. (a) The court of appeals may suspend a prosecutor or justice from exercising the powers of his or her office while there is pending a determination by the commission for his or her removal or retirement, or while he or she is charged in this state with a felony by an indictment or an information … the court may suspend a prosecutor or justice from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. … (c) A prosecutor or justice who is suspended from office by the court shall receive his or her salary during such period of suspension, unless the court directs otherwise. … (d) Nothing in this subdivision shall prevent the commission from determining that a prosecutor or justice be admonished, censured, removed, or retired pursuant to subdivision seven of this section.</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No language on establishment of commission</td>
<td>§ 499-a. Establishment of commission. A state commission of prosecutorial conduct is hereby established.</td>
<td></td>
</tr>
</tbody>
</table>
The commission shall have the authority to review the conduct of prosecutors upon the filing of a complaint with the commission to determine whether said conduct as alleged departs from the applicable statutes, case law, New York Rules of Professional Responsibility and Rule 3.8 (Special Responsibilities of Prosecutors) of the Model Rules of Professional Conduct of the American Bar Associations.

<table>
<thead>
<tr>
<th>S. 6286 / A. 8634</th>
<th>No trigger identified</th>
<th>S. 6286-A / A. 8634-A</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Introduced in 2014)</td>
<td></td>
<td>(Introduced in 2014)</td>
</tr>
<tr>
<td>2. &quot;Prosecutor&quot; means any person who represents the state or a political subdivision of the state in an action to exact a penalty, fine, sanction or forfeiture.</td>
<td></td>
<td>2. &quot;Prosecutor&quot; means a district attorney or any assistant district attorney of any county of the state, and the attorney general or any assistant attorney general of the state, or any individual employed by or subject to the direction and supervision of a district attorney, assistant district attorney, attorney general or assistant attorney general, in an action to exact any criminal penalty, fine, sanction or forfeiture.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>S. 6286 / A. 8634</th>
<th>News Article Quoting then-Governor Cuomo</th>
<th>S. 6286-A / A. 8634-A</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Introduced in 2014)</td>
<td>…as a way to remove the “perceived conflict” when district attorneys investigate the police officers with whom they work closely.</td>
<td>(Introduced in 2014)</td>
</tr>
</tbody>
</table>

| S. 6286-A / A. 8634-A  |  |
|------------------------| |
|--------------------------------------|--------------------------------------------|--------------------------------------------|
| …prosecutor be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office… | … this bill cannot withstand scrutiny under time-honored separation of powers principles… | …prosecutor be admonished, or censured; and make a recommendation to the governor that a prosecutor be removed from office for cause, for, including, but not limited to, misconduct in office, as evidenced by his or her departure from his or her obligations under appropriate statute, caselaw, and/or rule 3.8 special responsibilities of prosecutors which is part of the model rules of professional conduct of the American bar association… |
| The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any prosecutor, and may determine that a prosecutor be admonished, censured or removed from office for cause… | … violates the separation of powers that are specified in the New York State Constitution and would undermine the existing mechanisms for the discipline of attorneys in New York. | The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any prosecutor, and may determine that a prosecutor be admonished, or censured; and make a recommendation to the governor that a prosecutor be removed from office for cause… |
| …including, but not limited to, misconduct in office, | No trigger identified | …including, but not limited to, misconduct in office, as |
persistent failure to perform his or her duties…

evidenced by his or her departure from his or her obligations under appropriate statute, caselaw, and/or rule 3.8 special responsibilities of prosecutors which is part of the model rules of professional conduct of the American bar association, persistent failure to perform his or her duties…

S. 6286 / A. 8634 (Introduced in 2014)
After a hearing, the commission may determine that a prosecutor be admonished, censured, removed or retired

…

If the commission has determined that a prosecutor be removed or retired, and if the prosecutor accepts such determination or fails to request a review thereof by the court of appeals, the court of appeals shall thereupon order his or her removal or retirement in accordance with the findings of the commission.

…

impose a different sanction including admonition, censure, removal or retirement

…

Memo of Opposition from the Bronx DA’s Office
… this bill cannot withstand scrutiny under time-honored separation of powers principles…

…any legislative enactment conflicting or otherwise interfering with that prerogative of the Judicial Branch violates separation of powers principles.

Memo of Opposition from the DA of Westchester
… violates the separation of powers that are specified in the New York State Constitution and would undermine the existing mechanisms for the discipline of attorneys in New York.

S. 6286-A / A. 8634-A (Introduced in 2014)
After a hearing, the commission may determine that a prosecutor be admonished or censured, or may recommend to the governor that a prosecutor be removed from office for cause.

…

If the commission has and the court of appeals recommends that a prosecutor be removed it shall transmit the commission and court of appeals findings to the governor who will independently determine whether the prosecutor should be removed or retired.

…

such review, the court may accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or
(d) Nothing in this subdivision shall prevent the commission from determining that a prosecutor be admonished, censured, removed, or retired

…

12. In the event of removal from office by the commission of any district serving any county of the state a vacancy shall exist pursuant to article three of the public officers law.

…

The jurisdiction of the court of appeals and the commission pursuant to this article shall continue notwithstanding that a prosecutor resigns from office after a determination of the commission that the prosecutor be removed from office has been transmitted to the chief judge of the court of appeals, or in any case in which the commission's determination that a prosecutor should be removed from office shall be transmitted to the chief judge of the court of appeals within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such prosecutor. Any determination by the court of appeals that a prosecutor who has resigned should be removed from office shall be transmitted to the chief judge of the court of appeals.

retirement for the reasons set forth in subdivision one of this section; or impose no sanction. However, if the court of appeals determines removal or retirement, it shall, together with the commission, transmit the entire record to the governor who will independently determine whether a prosecutor should be removed or retired.

…

(d) Nothing in this subdivision shall prevent the commission from determining that a prosecutor be admonished or censured or prevent the commission from recommending removal or retirement

…

12. In the event of removal from office by the governor of any prosecutor, a vacancy shall exist pursuant to article three of the public officers law.

…

The jurisdiction of the court of appeals and the commission pursuant to this article shall continue notwithstanding that a prosecutor resigns from office after a recommendation by the commission that the prosecutor be removed from office has been transmitted to
render such prosecutor ineligible to hold any other prosecutorial office.

the chief judge of the court of appeals, or in any case in which the commission's recommendation that a prosecutor should be removed from office shall be transmitted to the chief judge of the court of appeals within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of such prosecutor. Any determination by the governor that a prosecutor who has resigned should be removed from office shall render such prosecutor ineligible to hold any other prosecutorial office.

<table>
<thead>
<tr>
<th>S. 24-A / A. 1131-A</th>
<th>No trigger identified</th>
<th>S. 24-B / A. 1131-B</th>
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<tbody>
<tr>
<td>(Introduced in 2016)</td>
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<td>(Introduced in 2016)</td>
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…Rules of Professional Responsibility and Rule 3.8 (Special Responsibilities of Prosecutors) of the Model Rules of Professional Conduct of the American Bar Associations.

…

caselaw, and/or rule 3.8 special responsibilities of prosecutors which is part of the model rules of professional conduct of the American bar association, persistent failure to perform his or her duties…

…

caselaw, and/or New York Rules of Professional Conduct, 22 NYCRR 1200, including but not limited to Rule 3.8 (Special Responsibilities of Prosecutors and Other Government Lawyers), persistent failure to perform his or her duties…
<table>
<thead>
<tr>
<th>S. 24-B / A. 1131-B</th>
<th>Memo of Opposition from Bronx DA’s Office</th>
<th>S. 2412 / no same-as</th>
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</thead>
<tbody>
<tr>
<td>(Introduced in 2016)</td>
<td>Because the bill would give the proposed Commission on Prosecutorial Conduct absolute license to investigate the legitimacy, propriety, and justification for prosecutorial decisions, the Attorney General and their Assistants would constantly be subject to being second-guessed and threatened with investigation by a legislatively-created commission. The voters elect these prosecutors to file criminal charges without fear or favor, and a legislatively-created commission would cause a chilling effect on that mission.</td>
<td>(Introduced in 2017)</td>
</tr>
<tr>
<td>No trigger identified</td>
<td></td>
<td></td>
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<tr>
<td>No such language</td>
<td>Language removed</td>
<td></td>
</tr>
<tr>
<td>S. 24-B / A. 1131-B</td>
<td>If the commission has and the court of appeals recommends that a prosecutor be removed it shall transmit the commission and court of</td>
<td>S. 2412 / no same-as</td>
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<tr>
<td>(Introduced in 2016)</td>
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<tr>
<td>No trigger identified</td>
<td>(Introduced in 2017)</td>
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<tr>
<td>If the commission has recommended that a prosecutor be removed or retired and the prosecutor accepts such determination or fails to request a review thereof by the court of</td>
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</table>
appeals findings to the governor. | appeals, the court of appeals shall thereupon transmit the commission's findings to the governor.

| S. 24-B / A. 1131-B (Introduced in 2016) | No trigger identified | S. 2412 / no same-as (Introduced in 2017) |
| No such language | ...if the commission has and the court of appeals recommends that the attorney general be removed, the court of appeals shall transmit the commission's findings and, if any, court of appeals findings to the governor who may recommend the removal of the attorney general pursuant to section thirty-two of the public officers law. |

| S. 24-B / A. 1131-B (Introduced in 2016) | No trigger identified | S. 2412 / no same-as (Introduced in 2017) |
| No such language | ...if the court of appeals recommends the removal or retirement of the attorney general, it shall, together with the commission, transmit the entire record to the governor who may recommend the removal of the attorney general pursuant to section thirty-two of the public officers law. |

| S. 24-B / A. 1131-B (Introduced in 2016) | Memo of Opposition from the DA of New York County | S. 2412 / no same-as (Introduced in 2017) |
| The suspension shall continue upon conviction and, if the conviction becomes final, he or she shall be removed from office by the governor. | ...the bill would allow the Governor to remove any Assistant District Attorney in the State – yet, the State Constitution allows the Governor to remove only | The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section |
| elected District Attorneys, not Assistant District Attorneys. | ninety of this chapter. If such conviction becomes final, he or she shall be removed from office provided, however, that if such conviction is of the attorney general, he or she shall be removed from office pursuant to paragraph e of subdivision one of section thirty of the public officers law, if applicable, or may be removed from office pursuant to section thirty-two of such law. |

| S. 24-B / A. 1131-B (Introduced in 2016) | No trigger identified | S. 2412 / no same-as (Introduced in 2017) |

…upon conviction and, if the conviction becomes final, he or she shall be removed from office.

…upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. The suspension shall continue upon conviction of any other crime which involves moral turpitude and, if such conviction becomes final, he or she shall be removed from office provided, however, that if such conviction is of the attorney general, he or she shall be removed from office pursuant to paragraph e of subdivision one of section thirty of the public officers law, if applicable, or may be removed from office pursuant to section thirty-two of such law.
| **S2412-A / A. 5285**  
(Introduced in 2017) | **Memo of Opposition from the Bronx DA’s Office** | **S. 2412-B / A. 5285-A**  
(Introduced in 2017) |
<table>
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<tbody>
<tr>
<td><em>No such language</em></td>
<td>On the other hand, you currently have before you a legislative proposal of doubtful constitutionality that will interfere with the daily decision-making of a coordinate branch of government that is charged with keeping the population safe.</td>
<td>The prosecuting agency may inform the commission of its position that the commission's investigations will substantially interfere with the agency's own investigation or prosecution. If the prosecuting agency, by affirmation with specificity and particularity, informs the commission of its basis for that position, the commission shall only exercise its powers in a way that will not interfere with an agency's active investigation or prosecution.</td>
</tr>
<tr>
<td><strong>News Quote from Unidentified NYS DA’s</strong></td>
<td>They express concern that their independence will be threatened and that they will be hindered from carrying out their duties. Also, they predict that the interference in their work will breed more public corruption and distrust of public officials.</td>
<td></td>
</tr>
</tbody>
</table>
| **S. 2412-B / A. 5285-A**  
(Introduced in 2017) | **No trigger identified** | **S. 2412-C / A. 5285-B**  
(Introduced in 2017) |
| 2. "Prosecutor” means a district attorney or any assistant district attorney of any county of the state, and the attorney general or any assistant attorney general of the state, in an action to exact any criminal penalty, fine, sanction or forfeiture. | | 2. "Prosecutor" means a district attorney or any assistant district attorney of any county of the state in an action to exact any criminal penalty, fine, sanction or forfeiture. |
| **S. 2412-B / A. 5285-A**  
(Introduced in 2017) | **Quote from Bill Sponsor Senator DeFrancisco** | **S. 2412-C / A. 5285-B**  
(Introduced in 2017) |
| …and the **attorney general** or any **assistant attorney general** of the state… | “But this bill does not apply to the Attorney General. And the reason it doesn't, the Assembly wanted it out for | All text referencing the Attorney General removed |
| … | | |
…if the commission has and
the court of appeals
recommends that the
attorney general be
removed, the court of appeals
shall transmit the
commission's findings and, if
any, court of appeals findings
to the governor who may
recommend the removal of
the attorney general
pursuant to section thirty-two
of the public officers law.

…

…the court of appeals
recommends the removal or
retirement of the attorney
general, it shall, together
with the commission,
transmit the entire record to
the governor who may
recommend the removal of
the attorney general
pursuant to section thirty-two
of the public officers law.

…

…it if such conviction is of the
attorney general, he or she
shall be removed from office
pursuant to paragraph e of
subdivision one of section
thirty of the public officers
law, if applicable, or may be
removed from office
pursuant to section thirty-two
of such law.

…

…it if such conviction is of the
attorney general, he or she
me to get a same-as bill. So I
took it out.”
shall be removed from office pursuant to paragraph e of subdivision one of section thirty of the public officers law, if applicable, or may be removed from office pursuant to section thirty-two of such law.

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<tbody>
<tr>
<td>Resignation not to divest commission or <strong>court of appeals</strong> of jurisdiction.</td>
<td>…four judicial departments of the Appellate Division of the Supreme Court within our State have the authority to regulate the behavior of attorneys, institute disciplinary proceedings and impose appropriate punishment, if necessary, without the need for a complaint. …for any instances of misconduct that they commit, and are wholly subject to punishment by the appropriate Disciplinary Committee of the Appellate Division of the Supreme Court. <strong>News Quote from Unidentified NYS DA’s</strong> …error can already be pursued by existing methods, such as the Appellate Division Grievance Committee.</td>
<td>Resignation not to divest commission or <strong>presiding justices of the appellate division</strong> of jurisdiction.</td>
</tr>
<tr>
<td><strong>S. 2412-D / A. 5285-C</strong>  (Introduced in 2018)</td>
<td><strong>Memo of Opposition from the NYC Bar</strong></td>
<td><strong>S. 1190 / A. 781</strong>  (Introduced in 2019)</td>
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<tr>
<td>A state commission of prosecutorial conduct is hereby established.</td>
<td>…the Legislature's delegation of powers and duties to two other branches of government would raise legitimate separation-of-powers concerns.</td>
<td>There is hereby created <strong>within the executive department</strong> a state commission of prosecutorial conduct.</td>
</tr>
</tbody>
</table>
| **Memo of Opposition from the Bronx DA’s Office** | Far from respecting the independence of the Executive and the Judiciary, I submit to you that this bill runs roughshod over both of them…. these are independent Executive Grant Officials under our Constitution and should not be subject to direct oversight by other branches of government  
… any legislative enactment conflicting or otherwise interfering with that prerogative of the Judicial Branch violates separation of powers principles | |
| **Quote from a Transcript of Senator Kaminsky** | …in court this will have all types of separation of powers issues about a governor appointing people to tell a prosecutor whether he or she can stay in office | 5. "*Presiding justices of the appellate division*" shall |

**S. 2412-D / A. 5285-C**  (Introduced in 2018) | **No trigger identified** | **S. 1190 / A. 781**  (Introduced in 2019) |
| **S. 1190 / A. 781**  (Introduced in 2019) | 5. "Presiding justices of the appellate division" shall |
No language regarding presiding justices or retired judges

<table>
<thead>
<tr>
<th>S. 2412-D / A. 5285-C</th>
<th>No trigger identified</th>
<th>S. 1190 / A. 781</th>
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<tr>
<td>(Introduced in 2018)</td>
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The commission shall consist of eleven members, of whom two shall be appointed by the governor, two by the temporary president of the senate, one by the minority leader of the senate, two by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one shall be a public defender and one shall be a prosecutor. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two

mean, collectively, the presiding justices of the appellate division of the supreme court of each judicial department. The chief administrative judge shall, by rule, establish an appropriate mechanism, not inconsistent with law, for persons and entities interacting with the presiding justices of the appellate division pursuant to this article to file papers and communicate with such body.

6. "Retired judge" shall mean a former judge or justice of the unified court system who was qualified as an attorney during such service and served as such a judge or justice for at least five years.

(a) Of the members appointed by the governor, two shall be attorneys providing public defense services who have provided such services for at least five years, and two shall be active, former or retired prosecutors.
shall be judges of courts other than the court of appeals or appellate division. Of the members appointed by the legislative leaders, there shall be an equal number of prosecutors and attorneys providing defense services; provided, however, that a temporary imbalance in the number of prosecutors and defense attorneys pending new appointments shall not prevent the commission from conducting business.

with at least five years of prosecutorial experience. (b) Of the members appointed by the chief judge, two shall be retired judges, one of whom shall possess significant work experience providing public defense services and one of whom shall have significant prosecutorial experience; one shall be a full time law professor or dean at an accredited law school with significant criminal law experience. (c) Of the members appointed by the legislative leaders, two shall be attorneys providing defense services and two shall be active, former, or retired prosecutors. Each candidate for appointment as an attorney providing defense services shall have provided such services for at least five years and each candidate for appointment as an active, former or retired prosecutor shall have had at least five years of prosecutorial experience. After the speaker of the assembly and temporary president of the senate shall have made their initial appointments, the minority leaders of each house shall make their appointments to the commission in a manner to ensure an equal number of attorneys providing defense services and active, former or retired prosecutors. After such initial appointments, successive appointments must
be made in a manner to ensure an equal number of attorneys providing defense services and active, former or retired prosecutors. A temporary imbalance in the number of prosecutors and defense attorneys pending new appointments shall not prevent the commission from conducting business.

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<tr>
<th>S. 2412-D / A. 5285-C</th>
<th>No trigger identified</th>
<th>S. 1190 / A. 781</th>
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<tbody>
<tr>
<td>(Introduced in 2018)</td>
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<td>(Introduced in 2019)</td>
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<tr>
<td>No such language regarding Commission members who fail to participate</td>
<td></td>
<td>Members of the commission who fail to participate for ninety days may be replaced by the original appointing authority for the remainder of the term.</td>
</tr>
</tbody>
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<thead>
<tr>
<th>S. 2412-D / A. 5285-C</th>
<th>Memo of Opposition from Bronx DA’s Office</th>
<th>S. 1190 / A. 781</th>
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</thead>
<tbody>
<tr>
<td>(Introduced in 2018)</td>
<td></td>
<td>(Introduced in 2019)</td>
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<tr>
<td>No language regarding approval of appointments</td>
<td>“the Executive, Legislature, and Judiciary all must operate independently, with no one branch subservient to the other”</td>
<td>No appointment of an administrator shall be valid unless approved by an executive appointee, the appointee of the temporary president of the senate, and the appointee of the speaker of the assembly.</td>
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<td>“[f]ar from respecting the independence of the Executive and the Judiciary…[the CPC] runs roughshod over both of them. Because the legislation would</td>
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allow commission members appointed by the legislative leaders… to investigate, prosecute and potentially punish”

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<thead>
<tr>
<th>S. 2412-D / A. 5285-C</th>
<th>Memo of Opposition from the District Attorney’s Association for the State of New York</th>
<th>S. 1190 / A. 781</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Introduced in 2018)</td>
<td>The prosecuting agency may inform the commission of its position that the commission's investigations will substantially interfere with the agency's own investigation or prosecution. If the prosecuting agency, by affirmation with specificity and particularity, informs the commission of its basis for that position, the commission shall only exercise its powers in a way that will not interfere with an agency's active investigation or prosecution.</td>
<td>… a request to withdraw or modify a subpoena issued pursuant to this article may be made to the person who issued it and/or to the commission. The prosecuting agency may inform the commission, by affirmation with specificity and particularity, in a form and manner in which shall be prescribed by the commission, of its position that the commission's investigations will substantially interfere with the agency's own criminal investigation. If the prosecuting agency informs the commission of its basis for that position, the commission shall only exercise its powers in a way that will not interfere with an agency's active investigation or prosecution and in no event shall the commission exercise</td>
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</table>

CPC complaints can be filed and CPC hearings can be held contemporaneous to an ongoing criminal case because there is no exemption for pending criminal investigations or prosecutions. The CPC legislation fails to account for how important and sensitive investigative issues – like privileged medical records, immunity, confidential informant identity, confidentiality as a result of a grand jury subpoena or grand jury testimony, wiretaps, the location of domestic violence victims, child protective service records etc. -- will be addressed in the context of a CPC proceeding.
its powers prior to the earlier of:
(a) the filing of an accusatory instrument with respect to the crime or crimes that led to such prosecuting agency's investigation and underlie the complaint; or
(b) one year from the commencement of the occurrence of the crime or crimes that led to such prosecuting agency's investigation and underlie the complaint.

| S. 2412-D / A. 5285-C  
(Introduced in 2018) | Quote from bill sponsor 
Senator Bailey | S. 1190 / A. 781  
(Introduced in 2019) |
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<td>The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the <strong>chief judge of the court of appeals</strong> who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the prosecutor involved. Upon completion of service, the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the <strong>court of appeals</strong>. The prosecutor involved may either accept the determination of the</td>
<td>Now, the commission will serve as a fact-finding entity. It will review complaints of prosecutorial misconduct throughout New York State, and produce a factual record, along with recommendations, that are then transmitted to the relevant Appellate Division attorney grievance committee in charge of overseeing the prosecutor charged with misconduct. This new law makes clear that the relevant attorney grievance committee may then accept or reject the recommended sanction.</td>
<td>The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the <strong>presiding justices of the appellate division</strong> who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the prosecutor involved. Upon completion of service, the determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the <strong>appellate division in the department in which the alleged misconduct occurred</strong>. Records of a</td>
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commission or make written request to the chief judge, within thirty days after receipt of such determination, for a review thereof by the court of appeals. If the commission has determined that a prosecutor be admonished or censured, and if the prosecutor accepts such determination or fails to request a review thereof by the court of appeals, the court of appeals shall thereupon admonish or censure him or her in accordance with its findings. If the commission has recommended that a prosecutor be removed or retired and the prosecutor accepts such determination or fails to request a review thereof by the court of appeals, the court of appeals shall thereupon transmit the commission's findings to the governor who will independently determine whether the prosecutor should be removed or retired.

8. If the prosecutor requests a review of the determination of the commission, in its review of a determination of the commission pursuant to the second undesignated paragraph of subdivision b of section three of article six of the state constitution, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's

prosecuting agency provided by the agency to the commission pursuant to this article shall not be subject to disclosure by the commission under article six of the public officers law. The prosecutor involved may either accept the determination of the commission or make written request to the presiding justices of the appellate division, within thirty days after receipt of such determination, for a review thereof by the presiding justices of the appellate division. If the commission has determined that a prosecutor be admonished or censured, and if the prosecutor accepts such determination or fails to request a review thereof by the presiding justices of the appellate division, the presiding justices of the appellate division shall thereupon transmit the commission's findings to the governor who will independently determine whether the prosecutor should be removed or retired.
determination was based. After such review, the **court** may accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction. However, if the **court of appeals recommends** removal or retirement, it shall, together with the commission, transmit the entire record to the governor who will independently determine whether a prosecutor should be removed or retired.

9. (a) The **court of appeals** may suspend a prosecutor from exercising the powers of his or her office while there is pending a determination by the commission for his or her removal or retirement, or while he or she is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one of the constitution. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. If such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of

8. If the prosecutor requests a review of the determination of the commission, in its review of a determination of the commission the **presiding justices of the appellate division** shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the **presiding justices of the appellate division** may accept or reject the determined sanction; impose a different sanction including admonition or censure, recommend removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction. However, if the **presiding justices of the appellate division recommend** removal or retirement, they shall, together with the commission, transmit the entire record to the governor who will independently determine whether a prosecutor should be removed or retired.

9. (a) The **presiding justices of the appellate division** may suspend a prosecutor from exercising the powers of his or her office while there is pending a determination by the commission for his or her removal or retirement, or while he or she is charged in this state with a felony by an indictment or an information filed pursuant to section six of
the conviction and dismissal of the accusatory instrument. (b) Upon the recommendation of the commission or on its own motion, the court may suspend a prosecutor from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. The suspension shall continue upon conviction of any other crime which involves moral turpitude and, if such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. (c) A prosecutor who is suspended from office by the court shall receive his or her salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that he or she shall be paid his or her salary for such period of suspension. article one of the constitution. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. If such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. (b) Upon the recommendation of the commission or on its own motion, the presiding justices of the appellate division may suspend a prosecutor from office when he or she is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall terminate upon conviction of a felony resulting in such prosecutor's disbarment pursuant to paragraph a of subdivision four of section ninety of this chapter. The suspension shall continue upon conviction of any other crime which involves moral turpitude and, if such conviction becomes final, he or she shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument.
(c) A prosecutor who is suspended from office by the **presiding justices of the appellate division** shall receive his or her salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the **presiding justices of the appellate division** may direct that he or she shall be paid his or her salary for such period of suspension.

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<td>§ 499-i. Resignation not to divest commission or <strong>court of appeals</strong> of jurisdiction. The jurisdiction of the <strong>court of appeals</strong> and the commission pursuant to this article shall continue notwithstanding that a prosecutor resigns from office after a recommendation by the commission that the prosecutor be removed from office has been transmitted to the <strong>chief judge of the court of appeals</strong>, or in any case in which the commission's recommendation that a prosecutor should be removed from office shall be transmitted to the <strong>chief judge of the court of appeals</strong> within one hundred twenty days after receipt by the chief administrator of the courts of the resignation of</td>
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such prosecutor. Any determination by the governor that a prosecutor who has resigned should be removed from office shall render such prosecutor ineligible to hold any other prosecutorial office.

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