Ohio Prosecuting Attorneys Association

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Senate Bill 4
Opponent Testimony
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Chair Ray, Vice-Chair LaRe, Ranking Member Brent and members of the House General Government Committee, thank you for the opportunity to provide opponent testimony on Senate Bill 4. Significantly, Senate Bill 4 was amended into House Bill 96 earlier this year and almost all of it is now law. One small portion of Senate Bill 4 was vetoed by the Governor. That veto reflects concerns that our Association has repeatedly expressed with the evidentiary standard in this bill and with ability of the Attorney General to review and overturn county prosecutor charging decisions.

To be clear, our Association agrees with the bill sponsor and our Secretary of State that no amount of voter or election fraud is acceptable. Voting and election fraud is an attack on democracy that cannot be tolerated. It should be investigated and prosecuted whenever possible. The portions of this bill that were vetoed, however, require prosecutors to choose between indicting cases based on minimal evidence in violation of ethical responsibilities or choosing not to indict and being stripped of the authority that our communities elected us to exercise.

The bill conflicts with prosecutors' ethical responsibilities.

The portion of Senate Bill 4 that was vetoed requires prosecutors to prosecute referrals from the election integrity unit based on evidence that satisfies R.C. 3599.42. This statute provides that any violation of any provision of Title 35 constitutes a prima-facie case of fraud. Prima-facie evidence is a low evidentiary standard that prosecutors cannot ethically rely on to seek an indictment let alone to prove a case beyond a reasonable doubt.

The ABA Standards for the Prosecution Function, which are intended to provide ethical guidance to prosecutors in the performance of their duties, include the following standards:

> Standard 3-4.3 Minimum Requirements for Filing and Maintaining Criminal Charges
> (a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.
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> (b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor continues to reasonably believe that probable cause exists and that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.

Standard 3-4.6 Quality and Scope of Evidence Before a Grand Jury
(a) A prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charges beyond reasonable doubt at trial. A prosecutor should advise a grand jury of the prosecutor's opinion that it should not indict if the prosecutor believes the evidence presented does not warrant an indictment.

This bill requires prosecutors to pursue cases based only on prima facie evidence in violation of our ethical responsibility to seek indictments and pursue cases only when we reasonably believe there will be evidence sufficient to support conviction beyond a reasonable doubt. Many of the referrals prosecutors receive from the Secretary of State simply do not include enough evidence to obtain a conviction. All we have asked is that the Election Integrity Unit be required to provide us with enough evidence to establish proof beyond a reasonable doubt, the same thing we ask of every other investigating entity we work with.

The bill promotes forum shopping.
Senate Bill 4 permits the decisions of locally elected prosecutors to be overturned by lawyers for the attorney general who were not elected to perform the functions of a prosecutor. Under Senate Bill 4 a county prosecutor cannot decide that something cannot or should not be prosecuted. The only option is to prosecute based on minimal evidence and in violation of our ethical responsibilities or be stripped of our authority. This turns the attorney general into a reviewing body for prosecutor charging decisions. This promotes forum shopping.

Sometimes prosecutors have to make the difficult decision not to prosecute even when they believe a crime has been committed. In some cases there simply isn't enough evidence to support the charges beyond a reasonable doubt. In others there is no justice in prosecuting an offense. Some of these elections law violations involve elderly individuals who mistakenly voted two times or people who misunderstood how a provisional ballot works. If a local prosecutor declines to pursue one of these cases, the matter should end. Under Senate Bill 4 prosecutors are stripped of their authority to decline prosecution. If a prosecutor decides that a case should not or cannot be prosecuted for whatever reason, the secretary of state can make the referral to the attorney general and hope for a different outcome. This is forum shopping and it undermines the integrity and legitimacy of our justice system.

The bill could turn county prosecutors into witnesses for the defense.
Revised Code section 3501.055 as enacted by House Bill 96 requires prosecutors to "provide a written statement to the election integrity unit explaining a reason for declining to prosecute" a referral from the election integrity unit. If a county prosecutor declines to prosecute and the election integrity unit then refers the allegation to the attorney general who overturns the county prosecutor and decides to prosecute, the county prosecutor's statement declining to prosecute will most likely have to be turned over to the defense as possible exculpatory evidence and the defense may then use the county prosecutor as a defense witness in a criminal case in the prosecutor's own county.

For these reasons, we felt that the Governor's veto of the prima facie evidentiary standard and the language allowing the attorney general to overturn a prosecutor's decision struck a reasonable middle ground between the need to investigate and prosecute election fraud cases and the bipartisan concerns of prosecutors across the state about their ethical responsibilities and the integrity of the justice system. We continue to oppose these changes.