# THE RIGHT TO AN IMPARTIAL JUDGE AND "INVOLUNTARY RECUSAL"*

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## INTRODUCTION

*"Shall not the Judge of all the earth do right?"*

Genesis 18:25[1]

In the appeal of *North Carolina State Conference of the NAACP v. Moore*,[2] a preliminary motion called for the disqualification of two associate justices of the Supreme Court of North Carolina because of claimed conflicts of interest.[3] This Article examines the source of the right to an impartial judge and considers the motion for disqualification in *Moore* as a matter of state constitutional law. This Article proceeds in two parts. The first part explores the history of the right to an impartial judge both as a common law right and as a constitutional right. It concludes that there is a common law right to an impartial judge and that the

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1. *Genesis* 18:25 (King James).

2. 382 N.C. 129, 2022-NCSC-99, ¶ 73 (holding that acts proposing amendments to the North Carolina Constitution that were passed by the General Assembly composed of a substantial number of legislators elected from unconstitutionally racially gerrymandered districts are not automatically shielded by the de facto officer doctrine and remanding for further findings).

3. Motion to Disqualify Justice Barringer and Justice Berger, *Moore*, 2022-NCSC-99 (No. 261A18-3) (alleging Justice Barringer's lack of impartiality because of her involvement as a member of the General Assembly in the proposal to adopt the amendments at issue and alleging Justice Berger's lack of impartiality because his father is one of the named defendants in the case).

right to an impartial judge, although not expressly enumerated in either the federal or state constitution, is an included right in the constitutional right to due process.[4] The second part examines the constitutionality of disqualifying justices without their consent ("involuntary recusal"), as well as the order of the Supreme Court of North Carolina in *Moore*, which allowed each justice the choice of making the decision to recuse or referring the decision to the entire court.[5] It concludes that the court lacks the constitutional authority, whether on the motion of a party or on the referral of an individual justice, to disqualify a sitting justice from participating in the hearing and decision of an individual case.

## I. RIGHT TO AN IMPARTIAL JUDGE

That there is a right to an impartial judge seems to require no explanation: a leading authority on appellate procedure describes it as "self-evident."[6] Scholars agree that an impartial judge is an essential requirement of the rule of law.[7] Over 1,500 years ago, the Corpus Juris Civilis, the great compilation of Roman law, declared *Nemo debet esse judex in propria sua causa*—"no man can be judge in his own cause."[8] Impartiality was simply assumed as an essential attribute of a judge. The common law, case based rather than codified, recognized the right in individual cases as a requirement of reason or natural law.[9] In the fifteenth century, Sir Thomas Littleton described a manor in which

4. Although the North Carolina Constitution does not include the phrase "due process of law," it guarantees due process by the Law of the Land Clause. N.C. CONST. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land."); *see* JOHN V. ORTH & PAUL MARTIN NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 71 (2d ed. 2013) ("As federal court decisions made famous the phrase 'due process of law,' North Carolina courts increasingly associated the law of the land with federal due process.").

5. Order Regarding Recusal Motions, 379 N.C. 693 (2022) [hereinafter Order Regarding Recusal Motions], https://www.nccourts.gov/assets/news-uploads/Order%20re%20Recusal%20Motions%20Clocked%20In_0.pdf?tF6Vi.8fLKF_2Cd7vX74DItZ0woUshB3 [https://perma.cc/5PBX-CJTD].

6. PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, JUSTICE ON APPEAL 9 (1976) (describing the link between the "process imperative" of impartial appellate judges and the functions of appellate judging as "self-evident" and requiring "no discussion here").

7. *See, e.g.*, Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 145 (1958) (listing the essential elements of the rule of law as open courts, an independent judiciary, and a reasoned justification for decisions); John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT'L L. & COM. REGUL. 71, 79 (1998) (listing the institutional arrangements essential for the rule of law as "(1) regular availability of tribunals for resolving disputes; (2) impartial decision-makers; and (3) prompt and effective implementation of decisions").

8. HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 116 (1882); *see also* DIG. 5.1.17 (Charles Henry Monroe & William Warwick Buckland, The Digest of Justinian 5) (*iniquum est aliquem suae rei iudicem fieri*) ("[I]t is unfair to make someone judge in his own affairs.").

9. English lawyers preferred to talk about the "law of reason" rather than the "law of nature," or natural law, although the terms are synonymous. *See* J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 188–89, 222 (1992).

it was the custom for the lord to distrain (that is, to seize) cattle that strayed onto his land and hold them until their owner paid the lord a fine of whatever amount he assessed for damages.[10] As Littleton recognized, this custom made the lord a judge in his own case and opened the door for abuse: "[I]f he had damages but to the value of a halfpenny, he might assess and have therefore an hundred pound, which should be against reason."[11] To be enforced as common law, a custom had to be reasonable.[12] It would be against reason for a litigant's case to be decided by a judge with an interest in the outcome.

Because there is a right to an impartial judge, it follows that there has to be a remedy if the right is denied. *Ubi jus, ibi remedium* ("where there is a right, there is a remedy") is a venerable legal maxim.[13] The House of Lords, then the highest common law court in Britain explained in 1852: "[W]e have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took part in the decision."[14] The rule, the court explained, is "not to be confined to a cause in which [the judge] is a party"; it also applies to "a cause in which he has an interest," or even the appearance of an interest.[15] Where there is more than one judge participating in the decision, the Court of Queen's Bench held in 1845 that all the judges had to be impartial.[16] The presence of even one interested judge would render the court improperly constituted and its decision void, even if a majority of disinterested judges supported the decision.[17] However, like all common law rules—indeed all legal rules—the right to an impartial judge is subject to a key exception: it will be overridden in "a case of necessity." Where no impartial judge is available—for example, if "an action was brought against all the Judges of the [Court of]

10. THOMAS LITTLETON, § 212 (1481), *reprinted and translated in* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWES OF ENGLAND; OR, A COMMENTARIE UPON LITTLETON § 212, 141a (1628). For the earlier history of the right to an impartial judge in England, see D.E.C. Yale, Iudex in Propria Causa*: An Historical Excursus*, 33 CAMBRIDGE L.J. 80 (1974).

11. LITTLETON, *supra* note 10, § 212.

12. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *77 ("Customs must be *reasonable*; or rather, taken negatively, they must not be unreasonable."); *see also* State *ex rel.* Thornton v. Hay, 462 P.2d 671, 677 (Or. 1969) (citing Blackstone and applying the requirement of reasonableness in recognizing an easement acquired by custom).

13. *Ubi jus, ibi remedium*, BLACK'S LAW DICTIONARY (10th ed. 2014). Oliver Wendell Holmes stated the reciprocal relationship between right and remedy in philosophical terms: "[F]or legal purposes, a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it." O.W. Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

14. Dimes v. Proprietors of Grand Junction Canal (1852) 10 Eng. Rep. 301, 315; 3 H.L.C. 759, 793.

15. *Id.*

16. R v. Justices of Hertfordshire (1845) 115 Eng. Rep. 284, 285–86; 6 Q.B. 753, 756–58.

17. *Id.*

Common Pleas, in a case . . . which could only be brought in that court"—the judges would have no alternative but to decide the case.[18]

Parliament's victory over the king in the English Civil Wars of the seventeenth century led to the recognition of parliamentary supremacy and with it the possibility of another exception to the right to an impartial judge. Parliament can adopt any law, even one that is against reason and natural law, and no court in England can refuse to enforce it.[19] As Sir William Blackstone explained shortly before the American Revolution,

> If we could conceive it possible for the parliament to enact, that [a man] should try as well his own causes as those of other persons, there is no court that has power to defeat the intention of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.[20]

Parliament could do by statute what could not be done by common law; it could deny the right to an impartial judge—even make a man a judge in his own case. This is where the matter stood at the time of American Independence: there is a common law right to an impartial judge, except in case of necessity or an overriding statute.

In *Calder v. Bull*,[21] one of the first cases to reach the U.S. Supreme Court, the right to an impartial judge was the subject of a famous exchange between two justices. Justice Chase suggested a "supraconstitutional" origin for certain rights, including the right to an impartial judge. "An ACT of the Legislature (for I cannot call it a law) contrary to the first great principles of the social compact," Justice Chase said, "cannot be considered a rightful exercise of legislative authority."[22] For instance, "a law that makes a man a Judge in his own cause . . . is against all reason and justice."[23] In reply, Justice Iredell did not disagree, but argued that the right to an impartial judge, like all rights in the

18. *Dimes*, 10 Eng. Rep. at 313; 3 H.L.C. at 787–88.

19. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 37–38 (1908) ("The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament . . . has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."); *see* R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5, [43] (quoting Dicey and describing his *Introduction to the Law of the Constitution* as "still the leading account" of parliamentary supremacy).

20. 2 WILLIAM BLACKSTONE, COMMENTARIES *91. Blackstone was here expressly rejecting the holding by Sir Edward Coke in Dr. Bonham's Case (1610) 77 Eng. Rep. 638, 652, which stated that acts of parliament are void if "against common right and reason." *See* John V. Orth, *Did Sir Edward Coke Mean What He Said?*, 16 CONSTIT. COMMENT. 33, 35–36 (1999).

21. 3 U.S. (3 Dall.) 386 (1798).

22. *Id.* at 388.

23. *Id.* For a discussion of the "supraconstitutional" jurisprudence of early Federalist judges, particularly Justice Chase, see STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 44–46 (1991).

newly independent nation, had to be grounded in the Constitution, not simply in reason and natural law: "The ideas of natural justice," Justice Iredell explained, "are regulated by no fixed standard: the ablest and purest men have differed upon the subject."[24] Only the Constitution, Iredell insisted, provided the necessary "fixed standard."[25]

The difficulty is that the right to an impartial judge is not an expressly enumerated right.[26] The Court did not have to confront this issue in *Calder*, a case that concerned the interpretation of the Ex Post Facto Clause of the federal Constitution.[27] The Constitution as originally ratified provides that the "Trial of all Crimes, except in Cases of Impeachment, shall be tried by jury,"[28] and the Sixth Amendment adds an express guarantee of an "impartial jury" in all criminal prosecutions.[29] The Seventh Amendment guarantees the "right of trial by jury" in civil cases and prohibits the reexamination by judges of facts found by a jury, except "according to the rules of the common law."[30] But none of these provisions expressly mentions an impartial judge.

In 1927, the U.S. Supreme Court finally confronted a claimed violation of the right to an impartial judge. *Tumey v. Ohio*[31] involved a challenge to a conviction in a mayor's court[32] for violation of the state's prohibition law, which resulted in a fine, a fraction of which was allocated to the mayor "in addition to his regular salary."[33] Presumably intended to encourage enforcement of the law while keeping the cost of enforcement low, the arrangement gave the mayor a

24. *Calder*, 3 U.S. (3 Dall.) at 399.

25. *See id.* A modern biographer attributes Justice Iredell's rejection of "natural-law theory" to his "passion for certainty." WILLIS P. WHICHARD, JUSTICE JAMES IREDELL 133 (2000). Modern legal scholars have declared Justice Iredell the winner in the debate, but only in form; "some of the [Supreme] Court's more recent decisions under such rubrics as 'substantive due process' raise the question whether it is paying lip service to Iredell for the sake of appearances while effectively following Chase." DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888, at 48 (1985) (alteration in original).

26. *See* John V. Orth, *The Enumeration of Rights: "Let Me Count the Ways*,*"* 9 U. PA. J. CONST. L. 281, 285–86 (2006).

27. *See generally Calder*, 3 U.S. (3 Dall.) 386 (holding that the Ex Post Facto Clause applies only to criminal, not civil, laws). The Ex Post Facto Clause says that "[n]o State shall . . . pass any . . . *ex post facto* Law." U.S. CONST. art. I, § 10 (emphasis added).

28. U.S. CONST. art. III, § 2.

29. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .").

30. U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

31. 273 U.S. 510 (1927).

32. A mayor's court is a municipal court in some jurisdictions "in which the mayor presides as the judge, with jurisdiction over minor criminal (and sometimes civil) matters." *Mayor's Court*, BLACK'S LAW DICTIONARY (10th ed. 2014).

33. *See Tumey*, 273 U.S. at 518–19.

"direct, personal, substantial, pecuniary interest" in convicting the defendant.[34] The Court held that this violated the defendant's right to an impartial judge, but—true to Justice Iredell's insistence on a textual basis for the right—located it not in "common right and reason" alone, but rather within the constitutional right to due process, interpreted in light of relevant common law.[35]

> [I]n determining what due process of law is, under the Fifth or Fourteenth Amendment, the court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, which were shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[36]

This preserved the common law right to an impartial judge, and by recognizing it as a constitutional right, eliminated the possible exception created by parliamentary supremacy. In America, the Constitution is "the supreme Law of the Land."[37] Thus, neither the state nor the federal government can make a man a judge in his own case.[38] As in England, the remedy for the violation of the right to an impartial judge is reversal; in *Tumey* the judgment was reversed and the case remanded for "further proceedings not inconsistent with [the] opinion."[39]

Like the U.S. Constitution, the North Carolina Constitution lacks an express guarantee of the right to an impartial judge, although it expressly forbids the arrangement condemned in *Tumey*: "In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs."[40] While there is no general guarantee of an impartial judge in the state constitution, the Supreme Court of North Carolina, like the U.S. Supreme Court, has recognized that parts of the common law "are incorporated in our Constitution."[41] The right to proceedings according to the

34. *Id.* at 523.

35. *See id.* at 532–33.

36. *Id.* at 523–24 (citing Dr. Bonham's Case (1610) 77 Eng. Rep. 638, 652; Day v. Savage (1614) 80 Eng. Rep. 235, 237; City of London v. Wood (1702) 88 Eng. Rep. 1592, 1603).

37. U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

38. THE FEDERALIST NO. 10, at 68 (James Madison) (The Floating Press 2011).

39. *Tumey*, 273 U.S. at 535.

40. N.C. CONST. art. IV, § 21.

41. Gwathmey v. State *ex rel.* Dep't of Env't, Health & Nat. Res., 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995) (citing State v. Mitchell, 202 N.C. 439, 163 S.E. 581 (1932)) (stating that the common law must yield to statutory law, "except that any parts of the common law which are incorporated in our Constitution may be modified only by proper constitutional amendment").

"law of the land,"[42] which is guaranteed, constitutionalizes common law rights, including the common law right to an impartial judge.[43]

Moreover, unlike the United States, the state of North Carolina declares by statute that all relevant parts of the common law are "in full force within this State."[44] Therefore, North Carolina cases follow the common law concerning the right to an impartial judge with the Supreme Court of North Carolina adopting the "sound public policy that no judge should sit in his own case, or participate in a matter in which he has a personal interest, or has taken sides therein."[45] The right to an impartial judge is not limited to cases in which a judge has a "personal bias, prejudice or interest" in the outcome but includes the "right to be tried before a judge whose impartiality cannot reasonably be questioned."[46] And in the case of a multimember court, "[l]itigants are entitled to an impartial tribunal whether it consists of one [person] or twenty."[47] As in England, however, where an action is brought against all the members of the final appellate court, the rule of necessity allows them to proceed.[48]

42. N.C. CONST. art. I, § 19 ("No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.").

43. *See* State v. ----, 2 N.C. (1 Hayw.) 28, 50 (1794) (holding that the law of the land means "according to the course of the common law"); *see also* John V. Orth, *The Past Is Never Dead: Magna Carta in North Carolina*, 94 N.C. L. REV. 1635, 1637–38 (2016) (explaining that North Carolina's Law of the Land Clause "is now often thought of as North Carolina's version of the Federal Due Process Clause").

44. N.C. GEN. STAT. § 4-1 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.) ("All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."). *Contra* United States v. Hudson, 11 U.S. (7 Cranch) 32, 32 (1812) (denying the existence of a federal common law of crimes); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that "[t]here is no federal general common law").

45. Ponder v. Davis, 233 N.C. 699, 703, 65 S.E.2d 356, 359 (1951) (citing Moses v. Julian, 45 N.H. 52 (1863)).

46. State v. Fie, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987); *see also* N.C. CODE OF JUD. CONDUCT, at Canon 3(C)(1) (Off. of Admin. Couns., Sup. Ct. of N.C. 1997) ("On motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned . . . .").

47. Crump v. Bd. of Educ. of Hickory Admin. Sch. Unit, 326 N.C. 603, 618, 392 S.E.2d 579, 587 (1990) (alterations in original) (explaining "there is no way which we know of whereby the influence of one upon the others can be quantitatively measured" (quoting Berkshire Emps. Ass'n of Berkshire Knitting Mills v. NLRB, 121 F.2d 235, 239 (3d. Cir. 1941))).

48. *See* Lake v. State Health Plan for Tchrs. & State Emps., 379 N.C. 162, 162, 861 S.E.2d 335, 336 (2021) (mem.) (invoking the rule of necessity because "a majority of the members of the Court are potentially disqualified"). A quorum of four justices is required by statute for the transaction of judicial business. N.C. GEN. STAT. § 7A-10(a) (LEXIS). It is unclear whether the General Assembly has the constitutional authority to impose this requirement.

## II. "INVOLUNTARY RECUSAL"

In North Carolina, there is a common law and a constitutional right to an impartial judge.[49] Where a judge's impartiality "may reasonably be questioned," the judge is required by the Code of Judicial Conduct, either on the motion of a party or on the judge's own motion, to recuse, that is, voluntarily to withdraw from participation in the decision of the particular case.[50] Where there is a claimed violation of the right to an impartial judge at trial, the judgment will be reviewed by the court of appeals. Where the claimed violation concerns a decision by judges of the court of appeals, the judgment is reviewable by the supreme court. If a violation of the right to an impartial judge is found by either appellate court, the remedy is reversal and, in appropriate cases, a new trial.

The difficulty arises when the claimed violation of the right to an impartial judge involves a justice of the Supreme Court of North Carolina. In *North Carolina State Conference of the NAACP v. Moore*, the plaintiff moved for two justices to "be disqualified" before hearing because of the appearance of conflicts of interest; that is, the party moved for the court to remove the justices without their consent from participating in the decision of that case in order to protect its right to decision by a court composed of impartial judges.[51] A motion to disqualify justices without their consent ("involuntary recusal"[52]) is in effect a motion for the court to reduce the constitutional number of justices deciding a particular case. When a justice of the Supreme Court of North Carolina is temporarily absent for whatever reason, the constitution permits the General Assembly to provide by general law for the temporary recall of a retired

49. *See supra* text accompanying notes 38–48.

50. N.C. CODE OF JUD. CONDUCT, *supra* note 46, at Canon 3(C)(1).

51. *See* Motion to Disqualify Justice Barringer and Justice Berger, *supra* note 3, at 3–7.

52. "Involuntary recusal" involves a contradiction in terms, comparable to "involuntary gift." Voluntariness of the action, whether recusal or gift, is of the essence. *Compare Recusal*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining recusal as the "removal of oneself as a judge or policy-maker in a particular matter, esp. because of a conflict of interest"), *with Gift*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining gift as the "voluntary transfer of property to another without compensation").

justice.[53] Permanent vacancies in the appellate courts are "filled by appointment of the Governor."[54]

Although involuntary recusal seems to address the problem of participation in the decision by a justice who is alleged to have a conflict of interest, it creates another: the possibility that the removal of a justice by the Supreme Court of North Carolina could determine the outcome of the case. The problem can arise in any final appellate court. According to Chief Justice Roberts of the U.S. Supreme Court, one reason that "the Supreme Court [of the United States] does not sit in judgment of one of its own Members' decision whether to recuse" is that it would "create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate."[55]

In its order responding to the motion for involuntary recusal in *Moore*, the Supreme Court of North Carolina affirmed traditional practice and allowed each justice to make the final determination whether to recuse or not. "As an alternative," the Supreme Court of North Carolina permitted each justice "to refer the motion to the full court for disposition without their participation."[56] In that case, a majority of the participating justices "must concur to disqualify a Justice."[57] Presumably if the participating justices are equally divided—not a remote possibility given an even number of participating justices—the justice would not be disqualified. In *Moore*, the challenged justices subsequently made

53. Although statutes authorize the chief justice to recall a retired justice to fill a temporary vacancy, N.C. GEN. STAT. §§ 7A-39.13 to 7A–39.14 (LEXIS), the supreme court's attempt to implement the practice by rule proved difficult. Rule 29.1 of the North Carolina Rules of Appellate Procedure, promulgated by the Supreme Court of North Carolina on November 8, 2016, allowed the Chief Justice to appoint a "substitute justice" from a list of retired justices "when necessary to avoid the possibility of an evenly divided disposition." N.C. R. APP. P. 29.1 (2016) (repealed); *see also* John V. Orth, *NC Supreme Court's New Rule Could End Equally Split Rulings*, NEWS & OBSERVER (Nov. 17, 2016), https://www.newsobserver.com/article115261653.html [https://perma.cc/RB8Z-S84A (staff-uploaded, dark archive)] (raising concerns about the operation of the rule and questioning whether the Constitution permits the chief justice to appoint a "substitute justice"). After criticism, the Supreme Court of North Carolina repealed Rule 29.1 one month later on December 8, 2016, without ever having invoked it.

54. N.C. CONST. art. IV, § 19.

55. Roberts wrote,

> [T]he Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.

JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2011). Voluntary recusal does not pose the problem of intentionally affecting the outcome of the case, but it does pose the problem of reducing the size of the Court. *See id.* ("[I]f a Justice withdraws from a case, the Court must sit without its full membership . . . . [E]ach Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.").

56. Order Regarding Recusal Motions, *supra* note 5.

57. *Id.*

their own determination and denied the motion calling for their disqualification.[58]

Had either justice referred the decision to the entire Supreme Court of North Carolina, it would have raised the question of whether the court has the authority to disqualify a justice from participating in the decision of a particular case.[59] The court's order was described as issued "[p]ursuant to the powers conferred by the North Carolina Constitution and General Statutes" without citation either to a constitutional provision or to a specific statute.[60] By contrast, the number of justices[61] and their selection and term of office[62] are expressly established by the North Carolina Constitution. Reducing the number of justices, altering their terms of service, or removing them from the consideration of a particular case by the Supreme Court of North Carolina acting on its own motion would contradict the express provisions of the constitution.

Pursuant to the North Carolina Constitution, the General Assembly may remove justices from the Supreme Court of North Carolina, either by impeachment[63] or, in case of "mental or physical incapacity," by address.[64] In addition to impeachment and address, the General Assembly, acting pursuant

58. Order, 380 N.C. 266 (2022) (Barringer, J.) (denying motion to disqualify); Order, 380 N.C. 263 (2022) (Berger, J.) (same).

59. The issue would be starkly presented if a justice who referred the motion to the full court then refused to accept as final a determination of disqualification.

60. Order Regarding Recusal Motions, *supra* note 5.

61. N.C. CONST. art. IV, § 6 ("The Supreme Court shall consist of a Chief Justice and six Associate Justices, but the General Assembly may increase the number of Associate Justices to not more than eight."). The North Carolina General Assembly has never exercised its power to increase the size of the Supreme Court of North Carolina.

62. N.C. CONST. art. IV, § 16 ("Justices of the Supreme Court . . . shall be elected by the qualified voters and shall hold office for terms of eight years."); *see* Faires v. State Bd. of Elections, 2016 WL 865472 (N.C. Super. Mar. 4, 2016) (holding that legislation permitting a retention election for incumbent justices seeking reelection violates N.C. Const. art. IV, § 16), *aff'd without precedential value by an equally divided court*, 368 N.C. 825, 784 S.E.2d 463 (2016) (per curiam); *see also* John V. Orth, *Our Hobson's Choice on Judicial Elections*, NEWS & OBSERVER (June 25, 2015, 6:31 PM), https://www.newsobserver.com/opinion/op-ed/article25441552.html [https://perma.cc/VD4N-2WTA (staff-uploaded, dark archive)] (raising concerns about the practicality and constitutionality of the legislation). *See generally* John V. Orth, *"Without Precedential Value": When the Justices of the Supreme Court of North Carolina Are Equally Divided*, 93 N.C. L. REV. 1718 (2015) (tracking the history of cases "without precedential value" and concluding that courts of appeals' decisions should have precedential value when affirmed by an equally divided Supreme Court of North Carolina).

63. N.C. CONST. art. IV, § 4 ("The House of Representatives solely shall have the power of impeaching. The Court for the Trial of Impeachments shall be the Senate . . . . A majority of the members shall be necessary to a quorum, and no person shall be convicted without the concurrence of two-thirds of the Senators present. Judgment upon conviction shall not extend beyond removal from and disqualification to hold office in this State, but the party shall be liable to indictment and punishment according to law.").

64. N.C. CONST. art. IV, § 17 cl. 1 ("Any Justice or Judge of the General Court of Justice may be removed from office for mental or physical incapacity by joint resolution of two-thirds of all members of each house of the General Assembly.").

to authority granted by the constitution,[65] created the Judicial Standards Commission "to provide for the investigation and resolution of inquiries concerning the qualification or conduct of any judge or justice."[66] The commission may make a recommendation to the supreme court that it remove a justice or judge in case of "willful misconduct in office . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[67]

The court's order concerning recusal described the decision, whether made by the individual justice or by the court, as "final."[68] A final order of the Supreme Court of North Carolina is not subject to review and reversal, meaning that there is no remedy if a decision by a justice not to recuse or by the court not to disqualify a justice denied a party's right to an impartial judge.[69] Although this is inevitably true of all final decisions of the Supreme Court of North Carolina, it raises the disquieting possibility of a right without a remedy.

## III. RIGHT AND REMEDY

Since the ex post remedy of review and reversal is not available in case of a claimed violation of the right to impartial justices of the Supreme Court of North Carolina,[70] greater attention could be given to ex ante prevention of a violation. The process of judicial selection is intended to provide qualified

65. N.C. CONST. art. IV, § 17 cl. 2 ("The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this Section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.").

66. N.C. GEN. STAT. § 7A-374.1 (LEXIS through Sess. Laws 2022-75 (end) of the 2022 Reg. Sess. of the Gen. Assemb.). Although the commission may make an investigation on its own motion, "any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice." § 7A-377 (LEXIS). No proceedings by the Judicial Standards Commission were initiated in *Moore*.

67. § 7A-376 (b) (LEXIS) ("Upon recommendation of the Commission, the Supreme Court may issue a public reprimand, censure, suspend, or remove any judge for willful misconduct in office, willful and persistent failure to perform the judge's duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."); *see* § 7A-374.2(5) (LEXIS) (defining "judge" to include a justice as well as a judge). Without more guidance, it is difficult to see how the Supreme Court of North Carolina could handle a recommendation concerning a sitting justice.

68. Order Regarding Recusal Motions, *supra* note 5.

69. It is unclear whether the court's order concerning recusal is a final decision on a matter of state law. Under the U.S. Constitution, there remains the possibility of review by the U.S. Supreme Court for violation of the federal right to due process.

70. Impeachment and removal of a justice who denied a party the right to an impartial judge by failing to recuse when appropriate would punish the jurist but not remediate the wrong.

jurists sensitive to real or apparent conflicts of interest.[71] Greater scrutiny of judicial candidates would make violation of the right to an impartial judge less likely. Difficult as this is in case of executive nomination and legislative confirmation, it is even more difficult in the case of partisan judicial election as in North Carolina.

A more rigorous standard of judicial conduct might also reduce the risk of violation of the right to an impartial judge. The Supreme Court of North Carolina is authorized by statute "to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice."[72] The Code of Judicial Conduct, which was promulgated by the court, requires a judge, either on the motion of a party or on the judge's own motion, to recuse where the judge's impartiality "may reasonably be questioned."[73] It may be possible to draft a stricter standard, but the problem of enforcement if the standard is not voluntarily complied with would remain.

It is also conceivable that a commission could be authorized to identify justices whose participation in the decision of a particular case raises the possibility of a real or apparent conflict of interest. The North Carolina Constitution does allow the General Assembly to

> prescribe a procedure, in addition to impeachment and address . . . for the censure and removal of a Justice or Judge of the General Court of Justice for willful misconduct in office . . . , or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.[74]

Legislation establishing the current Judicial Standards Commission does not establish a procedure for the removal of a justice. But if it did, it would create the undesirable situation in which the commission could affect the outcome of

71. ROBERTS, *supra* note 55, at 10 (explaining the U.S. Supreme Court's practice of not reviewing a justice's decision concerning recusal, Chief Justice Roberts emphasized the "rigorous appointment and confirmation process" of Supreme Court justices).

72. N.C. GEN. STAT. § 7A-10.1 (LEXIS). The General Court of Justice consists of "an Appellate Division, a Superior Court Division, and a District Court Division." N.C. CONST. art. IV, § 2. The Appellate Division of the General Court of Justice consists of "the Supreme Court and the Court of Appeals." *Id.* § 5.

73. *See* N.C. CODE OF JUD. CONDUCT, *supra* note 46, at Canon 3(C)(1), (D). The Code refers throughout to judges rather than justices, although it does mention "emergency justices." *Id.* at Canon 5(E).

74. N.C. CONST. art. IV, § 17 cl. 2 ("The General Assembly shall prescribe a procedure, in addition to impeachment and address set forth in this Section, for the removal of a Justice or Judge of the General Court of Justice for mental or physical incapacity interfering with the performance of his duties which is, or is likely to become, permanent, and for the censure and removal of a Justice or Judge of the General Court of Justice for willful misconduct in office, willful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."). It is unclear whether the "removal" referred to in this section could include suspension, applying only to participation in a particular case, or would necessarily be permanent.

a case by selecting which justices may participate in the decision. It would be naïve to believe that the commission in that case would escape questions about the selection of the commissioners, their tenure, and their impartiality and would create the potential of an infinite regression of commissions. *Quis custodiet ipsos custodes?* "Who watches the watchers?"[75]

## CONCLUSION

There is both a common law and a constitutional right to an impartial judge. The remedy for a claimed violation of the right to an impartial judge is review by an appellate court and, in appropriate cases, reversal and a new trial. Where a claimed violation involves the justices of the final appellate court, there is no possibility of review. In such a case, the remedy is subject to the rule of necessity, which permits the Supreme Court of North Carolina to proceed. The denial of a remedy for a claimed violation of the right to an impartial judge in that case, an essential element in the rule of law, is the price of finality.[76]

75. JUVENAL, SATIRES VI, at 347–48 (Lindsay Watson & Patricia Watson eds., A.S. Kline trans., 2014).

76. *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring) ("There is no doubt that if there were a super-Supreme Court, a substantial proportion of our reversals of state courts would also be reversed. We are not final because we are infallible, but we are infallible only because we are final.").