

The Perils of Partisanship in Judicial Ethics: Analyzing Legislative Changes to the Membership of the North Carolina Judicial Standards Commission*

In House Bill 259, the General Assembly increased its number of legislative appointments to the Judicial Standards Commission. In doing so, the North Carolina General Assembly expanded its influence over the disciplinary body, which has already been accused of partisanship. This Recent Development considers how this change impedes judicial independence and may even violate the Separation of Powers Clause of the North Carolina Constitution.

INTRODUCTION

In a self-regulated profession, who should regulate those at the top of the judiciary? In North Carolina, the Judicial Standards Commission (“JSC”) is the main body that is responsible for investigating allegations of judicial misconduct.¹ Through its ability to issue letters of caution and recommendations for disciplinary action to the Supreme Court of North Carolina, the JSC can exert considerable influence over the in-court and out-of-court behavior of state judges. In September of 2023, the North Carolina General Assembly passed a provision, nestled within a 625-page appropriations act, that increased its own influence on the JSC and, by extension, the judicial branch as a whole.² The provision gave the General Assembly the power to appoint six of the fourteen members of the JSC, a considerable increase from the two appointments it had prior to the passing of House Bill 259.³

This Recent Development discusses how the increase of legislative appointments to the JSC may affect judicial independence. Additionally, using existing case law on the constitutionality of legislative appointments to

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1. See *About the Judicial Standards Commission*, N.C. JUD. BRANCH, <https://www.nccourts.gov/commissions/judicial-standards-commission/about-the-judicial-standards-commission> [<https://perma.cc/EJ7S-BDA6>].

2. Current Operations Appropriations Act of 2023, ch. 134, § 16.20(a), 2023 N.C. Sess. Laws 421, 421–22 (codified at N.C. GEN. STAT. § 7A-375(a) (2024)). The decision to include the structural changes to the Judicial Standards Commission in the appropriations bill “has been criticized by lawmakers because no senator came forward to take ownership of the provision or to explain why it was necessary.” Mehr Sher, *Proposed Changes to N.C. Judicial Standards Commission Raise Concerns About Judicial Integrity and Oversight, Part Two*, CAROLINA PUB. PRESS (July 21, 2023), <https://carolinapublicpress.org/60805/proposed-changes-to-n-c-judicial-standards-commission-raise-concerns-about-judicial-integrity-and-oversight-part-two/> [<https://perma.cc/J4DC-9QUC> (staff-uploaded archive)].

3. See *id.*

executive commissions as a guide, this Recent Development explores how the change may violate the North Carolina Constitution. The analysis proceeds in three parts. Part I provides background on the purpose and procedures of the JSC. Part II explains the impact of House Bill 259 on judicial independence. Finally, Part III analyzes how existing case law on the application of the separation of powers doctrine to legislative appointments can be extended to the JSC, which is unique in its influence over the judiciary.

I. PURPOSE AND PROCEDURES OF THE JSC

The JSC was established by the General Assembly in 1973⁴ as part of a national trend of states establishing commissions to investigate and adjudicate judicial misconduct.⁵ The trend was motivated by a desire to “restore public confidence in the integrity, independence, and impartiality of the[] judiciary.”⁶ In addition to creating the JSC, the General Assembly authorized the Supreme Court of North Carolina to create the North Carolina Code of Judicial Conduct (“the Code”), which “prescribes standards of judicial conduct” and guides the JSC’s efforts.⁷ Broadly speaking, the JSC reviews complaints alleging that judges have violated the Code and, if appropriate, issues warnings or recommends disciplinary action subject to approval by the Supreme Court of North Carolina.⁸ Anyone can submit a complaint to the JSC, and complaints

4. *About the Judicial Standards Commission*, *supra* note 1; Shea Denning, *The Judicial Standards Commission and Judicial Discipline*, N.C. CRIM. L.: UNC SCH. GOV’T BLOG (July 19, 2021), <https://nccriminallaw.sog.unc.edu/the-judicial-standards-commission-and-judicial-discipline> [<https://perma.cc/5VYW-VE4S>] [hereinafter Denning, *Judicial Standards Commission and Judicial Discipline*]. The General Assembly established the JSC following a constitutional amendment calling for the General Assembly to “prescribe a procedure . . . for the removal of a Justice or Judge of the General Court of Justice[.]” Denning, *Judicial Standards Commission and Judicial Discipline*, *supra*; see N.C. CONST. art. IV, § 17(2).

5. See Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405, 405 (2007).

6. See *id.*; N.C. JUD. STANDARDS COMM’N, JUDICIAL STANDARDS COMMISSION FACT SHEET 1 (2019) [hereinafter N.C. JUD. STANDARDS COMM’N, FACT SHEET] (stating that the JSC works to “ensure the impartiality, independence, and integrity of the Judicial Branch”).

7. N.C. GEN. STAT. § 7A-10.1 (2024) (“The Supreme Court is authorized, by rule, to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice.”). See generally N.C. CODE OF JUD. CONDUCT (Off. of Admin. Couns., Sup. Ct. of N.C. 2022) (setting out standards for judges to follow). The Code’s canons include general requirements to avoid impropriety and uphold the integrity and independence of the judiciary as well as specific guidelines on adjudicative and administrative responsibilities, engagement in political activity, and receiving compensation for extrajudicial activities. *Id.* at Canons 1–2, 6–7. For example, judges have been found to have violated the Code for holding probable-cause hearings without a defendant’s counsel present, *In re Clontz*, 376 N.C. 128, 140–42, 852 S.E.2d 614, 622–24 (2020), sending inappropriate and flirtatious messages to women required to appear before the judge in court, *In re Pool*, 377 N.C. 442, 444, 858 S.E.2d 771, 773 (2021), and serving as a fiduciary to a nonfamily member, *In re Brooks*, 377 N.C. 146, 147, 856 S.E.2d 777, 777–78 (2021).

8. See N.C. JUD. STANDARDS COMM’N, FACT SHEET, *supra* note 6, at 2. The JSC also serves an educational role through issuing advisory opinions and holding programs for judges and other interested parties. *Id.*

are initially reviewed by Commission staff.⁹ Most complaints are dismissed following their initial review.¹⁰ Complaints are dismissed for several reasons, including the complaint being too vague, lacking credibility, or alleging legal error—which the JSC cannot review.¹¹ However, if the complaint alleges facts that indicate that a judge has violated the Code, the complaint is sent to an investigative panel.¹²

The investigative panel consists of seven of the appointed Commission members.¹³ Upon five affirmative votes, the investigative panel can launch either a preliminary investigation to verify the facts alleged in the complaint or a formal investigation to determine whether the judge engaged in actual misconduct.¹⁴ If the investigative panel completes a formal investigation and determines the judge did engage in misconduct, it has two possible courses of action. First, it can issue a private letter of caution to the judge.¹⁵ Second, the investigative panel can instead vote to initiate a disciplinary hearing,¹⁶ which is heard by a separate hearing panel.¹⁷ At the conclusion of the disciplinary hearing, upon five affirmative votes, the hearing panel can file a recommendation to the Supreme Court of North Carolina that the judge be “publicly reprimanded, censured, suspended, or removed from office for misconduct or suspended or removed for disability.”¹⁸ It is rare for a complaint to reach this final stage; in 2023, only five of the 755 complaints considered resulted in a recommendation of some disciplinary action to the Supreme Court of North Carolina.¹⁹ Up until the Supreme Court of North Carolina actually

9. N.C. GEN. STAT. § 7A-377(a) (2024); RULES OF THE JUD. STANDARDS COMM’N r. 9(a) (Off. Admin. Couns., Sup. Ct. N.C. 2024); *About the Judicial Standards Commission*, *supra* note 1. Most complaints are filed by litigants. *See* N.C. JUD. STANDARDS COMM’N, ANNUAL REPORT 9 (2023) [hereinafter N.C. JUD. STANDARDS COMM’N, ANNUAL REPORT].

10. *See* N.C. JUD. STANDARDS COMM’N, ANNUAL REPORT, *supra* note 9, at 7 (“[A]pproximately 77% [of complaints] were dismissed without investigation . . .”).

11. *Id.*

12. RULES OF THE JUD. STANDARDS COMM’N, *supra* note 9, r. 9(a)–9(b). Alternatively, an investigative panel can also consider complaints “brought on the Commission’s own motion that is based on credible information received by the Commission.” *Id.* r. 9(b).

13. *See id.* r. 2(b)(2). This figure includes the Chairperson or Vice-Chairperson, who preside over and are voting members of their respective panels. *Id.* r. 2(b)(1), 2(c)(2). Some panel members may be disqualified from considering certain matters. *Id.* r. 7a. For example, a judge serving on the JSC is disqualified from “acting in a matter in which the judge is the subject of a complaint, investigation, or disciplinary or disability proceeding, except in his or her own defense.” *Id.*

14. *Id.* r. 9(b), 10(a)–(c).

15. *Id.* r. 11(a).

16. *Id.* r. 12(a).

17. *See id.* r. 2(b)(2)–(4).

18. *Id.* r. 21(a).

19. N.C. JUD. STANDARDS COMM’N, ANNUAL REPORT, *supra* note 9, at 7–8. Of those 755 matters, fifteen were pending investigation or proceedings by the JSC and carried into 2024. *Id.* Some of those pending matters may also result in recommendations to the Supreme Court of North Carolina. *See id.*

pursues disciplinary actions,²⁰ all aspects of the JSC's investigations and hearings are confidential²¹ unless confidentiality is waived by the judge being investigated.²²

Through these procedures, the JSC can influence the actions of judges with little oversight of the Commission itself. Although the JSC cannot unilaterally publicly reprimand, censure, suspend, or remove judges from office,²³ the process of going through hearings can be cumbersome for a judge,²⁴ and the threat of being recommended for disciplinary action may be enough for them to amend their behavior to appease the JSC.²⁵ Ideally, this influence would only extend as far as encouraging judges to act ethically under the Code and maintain the integrity of the judiciary.²⁶ However, through partisan enforcement of the Code, the JSC's influence has the potential to hinder the independent decision-making of a judge who fears retribution. Determining the pervasiveness of this influence is inherently difficult, however, because the JSC's proceedings are confidential.²⁷ Unless confidentiality is waived, there is no way for the public to monitor specifically who the JSC investigates or why,²⁸ making the regulations of the JSC and the appointment of its members all the more important.

20. RULES OF THE JUD. STANDARDS COMM'N, *supra* note 9, r. 6(b)(1).

21. *Id.* r. 6(a).

22. *Id.* r. 6(b)(2). Where a complaint is otherwise made public, the Rules also allow the JSC to “issue statements of clarification and correction as it deems appropriate in maintaining confidence in the administration of justice.” *Id.* r. 6(b)(3).

23. *See id.* r. 21(a).

24. *See generally* Complaint, Earls v. N.C. Jud. Standards Comm'n, 703 F. Supp. 3d 701 (M.D.N.C. Nov. 22, 2023) (No. 23-cv-734), 2023 WL 8190395 (detailing Justice Anita Earls's experience being investigated by the JSC and the chilling effect it had on her expression).

25. *See id.* at 713; *infra* notes 50–53 and accompanying text.

26. The stated mission of the JSC is to “ensure the impartiality, independence, and integrity of the Judicial Branch” through the investigation and adjudication of complaints and “[a]dvice and training for judges regarding their obligations under the Code of Judicial Conduct.” N.C. JUD. STANDARDS COMM'N, FACT SHEET, *supra* note 6, at 1.

27. *See* Sher, *supra* note 2. Former judge and chair of the JSC Wanda Bryant consulted on four matters before the JSC. *Id.* She reported that three of those matters “seemed to be racially biased and gender biased,” but she could not speak about the specific cases due to the confidentiality of the JSC's investigations. *Id.* More broadly, Judge Bryant expressed concern that the changes to the JSC in House Bill 259 “could lead to the targeting of judges and justices.” *Id.*

28. The JSC does release general data about which type of judges (district court, superior court, etc.) receive complaints and what category of misconduct is alleged. *See* N.C. JUD. STANDARDS COMM'N, ANNUAL REPORT, *supra* note 9, at 10, 12. However, this data does not show the specific judge or basis of the complaint, which is necessary to determine where there may be bias in the complaints or investigation. *See id.*

II. THE IMPACT OF HOUSE BILL 259 ON JUDICIAL INDEPENDENCE

House Bill 259 increased the General Assembly's control of the JSC,²⁹ thereby increasing the General Assembly's influence on North Carolina's judiciary as a whole and threatening judicial independence.³⁰ The JSC has a total of fourteen members, with most serving six-year terms.³¹ Prior to House Bill 259, those fourteen members included six judges appointed by the chief justice of the Supreme Court of North Carolina, four attorneys appointed by the North Carolina State Bar Council, two citizens appointed by the governor, and two citizens appointed by the General Assembly.³² Of the two General Assembly appointments, one was made upon recommendation of the speaker of the house of representatives and the other was recommended by the president pro tempore of the senate.³³ House Bill 259 removed the four attorney appointments by the state bar and replaced them with four judges appointed by the General Assembly—two recommended by the president pro tempore of the senate and two recommended by the speaker of the house.³⁴ This brings the membership composition to six appointments made by the chief justice, six appointments made by the General Assembly, and two appointments made by the governor.³⁵

These appointment reallocations enacted by House Bill 259 risk increasing the partisanship of the JSC. In removing the appointments by the state bar, the General Assembly cut out the only nonpartisan organization that had a say in who served on the JSC.³⁶ Furthermore, although the General Assembly appointments are split between the president pro tempore of the senate and the speaker of the house of representatives, both assembly leaders may be members

29. See Current Operations Appropriations Act of 2023, ch. 134, § 16.20(a), 2023 N.C. Sess. Laws 421, 421–22 (codified at N.C. GEN. STAT. 7A-375(a) (2024)).

30. The JSC controls the removal of judges, an important factor in judicial independence. See generally James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J.L. & CTS. 187 (2014) (finding that the de jure protections most impactful on de facto judicial independence are the selection and removal of judges, though these protections have less effect in established democracies such as the United States).

31. *About the Judicial Standards Commission*, supra note 1. The chair and vice-chair of the JSC do not serve a six-year term. *Id.* Rather, they “serve at the pleasure of the Chief Justice.” *Id.*

32. Current Operations Appropriations Act of 2023 § 16.20(a)(4)–(5).

33. *Id.* § 16.20(a)(5).

34. *Id.* § 16.20(a)(4)–(5).

35. *Id.* § 16.20(a)(1)–(5); see *About the Judicial Standards Commission*, supra note 1.

36. Current Operations Appropriations Act of 2023 § 16.20(a)(4)–(5). In North Carolina, justices on the Supreme Court of North Carolina are elected through partisan election, MICHAEL CROWELL, HISTORY OF NORTH CAROLINA JUDICIAL ELECTIONS 6 (2020), as are, of course, the governor and General Assembly, making the North Carolina State Bar the only nonpartisan organization involved in the JSC.

of the same political party, as presently is the case.³⁷ Therefore, splitting the appointments between the house and senate does little to decrease the partisan shift of the JSC's membership. In fact, immediately following the enactment of House Bill 259, both the president pro tempore of the senate and the speaker of the house of representatives used their new appointments to stack the JSC with conservative judges, thereby increasing the partisan appearance of the JSC.³⁸

Even before the enactment of House Bill 259, the JSC was accused of partisanship. Bob Orr, a former justice of the Supreme Court of North Carolina, said that the JSC has become “a vehicle for both political parties to try and use for political advantage.”³⁹ Recently, the JSC has faced accusations of partisan application of the Code for launching investigations into statements made by Justice Anita Earls, then one of two Democrats, and the only Black

37. When House Bill 259 was passed, the house was led by Republican Speaker Tim Moore, see *North Carolina House of Representatives*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/House> [<https://perma.cc/9KC8-HN2N> (staff-uploaded archive)], and the senate was led by Republican Senator Phil Berger, see *North Carolina Senate Leadership*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/Members/Leadership/S> [<https://perma.cc/QNC3-BKXM> (staff-uploaded archive)].

38. The president pro tempore of the senate appointed Judge Rashad Hauter and Judge Ashley Gore, while the speaker of the house appointed Judge Justin Brackett and Judge Andrew Womble. Shea Denning, *General Assembly Appoints Seven New Special Superior Court Judges*, N.C. CRIM. L.: UNC SCH. GOV'T BLOG (Oct. 30, 2023), <https://nccriminallaw.sog.unc.edu/general-assembly-appoints-seven-new-special-superior-court-judges/> [<https://perma.cc/JH9Z-QDSM> (staff-uploaded archive)]. All four of these appointees ran as Republicans in their respective elections. *11/03/2020 Official Local Election Results - Statewide*, N.C. STATE BD. ELECTIONS, https://er.ncsbe.gov/?election_dt=11/03/2020&county_id=0&office=JUD&contest=0 [<https://perma.cc/7EKJ-H3UG> (staff-uploaded archive)] (listing Judge Gore and Judge Brackett under the Republican Party); *11/08/2022 Official General Election Results - Statewide*, N.C. STATE BD. OF ELECTIONS, https://er.ncsbe.gov/?election_dt=11/08/2022&county_id=0&office=JUD&contest=0 [<https://perma.cc/F3FP-8UTS> (staff-uploaded archive)] (listing Judge Hauter and Judge Womble under the Republican Party).

39. Michael Hewlett, *The Majority v. Anita Earls*, ASSEMBLY (Jan. 29, 2024), <https://www.theassemblync.com/politics/courts/anita-earls-supreme-court/> [<https://perma.cc/77E5-GRS4>]. In October 2024, North Carolina Supreme Court Justice Allison Riggs accused Republican lawmakers of weaponizing the JSC after the lawmakers filed a complaint with the JSC accusing Justice Riggs of violating the Code in her campaign ads. See Kyle Ingram, *Tensions Escalate in NC Supreme Court Election over Abortion Attack Ad, Ethics Complaint*, RALEIGH NEWS & OBSERVER (Oct. 22, 2024), <https://www.newsobserver.com/news/politics-government/election/article294308224.html> [<https://perma.cc/59KG-S2W2> (staff-uploaded, dark archive)]. The complaint alleges that Justice Riggs impermissibly made public comments indicating how she would rule on cases that could come before the court concerning abortion bans. See Ahmed Jallow, *Republican Senators Attack Justice Allison Riggs over Her Public Support for Abortion Rights*, NC NEWSLINE (Oct. 22, 2024), <https://ncnewsline.com/2024/10/22/republican-senators-attack-justice-allison-riggs-over-her-public-support-for-abortion-rights/> [<https://perma.cc/MRQ6-GRRV>]. Justice Riggs responded to the complaint, saying “[t]his is a troubling moment for judicial independence in our state. Members of the legislature should never be able to weaponize the nonpartisan Judicial Standards Commission to assist a political ally in winning a judicial election.” Ingram, *supra* (quoting @AllisonJRiggs, X (Oct. 21, 2024, 1:22 PM), <https://x.com/AllisonJRiggs/status/1848414662544470270> [<https://perma.cc/9BHS-UL7Y>]).

female justice, sitting on the Supreme Court of North Carolina.⁴⁰ The JSC investigated Justice Earls following comments she made to the press about the lack of diversity in the state’s judicial system.⁴¹ Specifically, Justice Earls discussed the lack of racial diversity among the court’s clerks, the implicit bias underlying interruptions of female advocates before the court, and the disbanding of the Commission on Fairness and Equity.⁴² The JSC alleged that these comments implied “that her colleagues on the Supreme Court [we]re acting out of racial, gender, and/or political bias in some of their decision-making” and that, by making such implications, Justice Earls was not conducting herself “in a manner which promotes public confidence in the integrity and impartiality of the judiciary,”⁴³ as is required by the Code.⁴⁴

The allegations that partisanship played a role in the investigation are based in part on a perceived disparate enforcement of the Code against Republican and Democratic judges. For example, during a campaign speech in 2019, Chief Justice Paul Newby, then the lone Republican on the Supreme Court of North Carolina, disparagingly called the other six justices “AOCs,” in reference to Democratic U.S. Representative Alexandria Ocasio-Cortez.⁴⁵ He then expressed worry about what would happen if no one held “those that want to cause social change through our judicial branch” accountable.⁴⁶ At the time, former North Carolina Supreme Court Justice Patricia Timmons-Goodson said Justice Newby’s remarks “undermine[d] the court.”⁴⁷ More recently, other

40. Gene Nichol, *The Forces of Darkness in NC Are Trying to Erase a Great NC Supreme Court Justice*, CHARLOTTE OBSERVER (Sept. 9, 2023, 6:00 AM), <https://www.charlotteobserver.com/opinion/article279051429.html> [<https://perma.cc/8CAV-FVLJ> (staff-uploaded, dark archive)]; Hewlett, *supra* note 39.

41. Justin Gamble, *North Carolina Supreme Court Justice Files Lawsuit over State Investigation into Her Comments About Diversity*, CNN (Sept. 4, 2023, 5:52 PM), <https://www.cnn.com/2023/09/04/us/anita-earls-lawsuit-diversity-statements-reaj/index.html> [<https://perma.cc/648P-56SJJ>].

42. Complaint, *supra* note 24, ¶ 4; Hewlett, *supra* note 39.

43. Kelan Lyons, *NC Supreme Court Justice Anita Earls Sues State’s Judicial Standards Commission*, NC NEWSLINE (Aug. 29, 2023, 12:39 PM), <https://ncnewsline.com/2023/08/29/nc-supreme-court-justice-anita-earls-sues-states-judicial-standards-commission/> [<https://perma.cc/9SBC-WDP3>] (quoting Complaint, *supra* note 24, Exhibit A).

44. N.C. CODE OF JUD. CONDUCT, *supra* note 7, at Canon 2(A) (“A judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”).

45. Travis Fain, *Republican Supreme Court Judge Disses All Six Other NC Justices*, WRAL (July 16, 2019, 7:24 PM), <https://www.wral.com/story/republican-supreme-court-judge-disses-all-six-other-nc-justices/18514145/> [<https://perma.cc/FZ3T-8VGS>]. Justice Newby seemingly singled out Justice Earls as an “AOC” before applying the term to all six of his colleagues. *Id.*; Patricia Timmons-Goodson, *Newby’s Comments About Other Justices Undermine the Court*, RALEIGH NEWS & OBSERVER, <https://www.newsobserver.com/article233163801.html> [<https://perma.cc/UV33-N4DE> (staff-uploaded, dark archive)] (last updated Aug. 2, 2019, 6:24 AM).

46. Fain, *supra* note 45; Timmons-Goodson, *supra* note 45.

47. Timmons-Goodson, *supra* note 45. Former North Carolina Supreme Court Justice Bob Orr also commented on Justice Newby’s remarks, saying “[t]here’s something uncomfortable about it” but expressing doubt that Justice Newby intended the remarks to be mean-spirited. Fain, *supra* note 45.

critics have compared Justice Newby's remarks to those made by Justice Earls and pointed out that Justice Newby was seemingly not investigated for misconduct.⁴⁸ Additionally, though not referencing any specific remarks, Justice Earls's complaint stated that "[p]art of the capriciousness of the [JSC] is based on the fact that other judges appear able to comment publicly on similar issues without challenge."⁴⁹ It is difficult to determine whether liberal judges in North Carolina are more likely to be investigated by the JSC than conservative judges, but Justice Earls's case certainly raises questions about the JSC's partisan capabilities. The General Assembly's increasing of its own legislative appointments further suggests partisan motives may be at play in the JSC.

Justice Earls's complaint also sheds light on how the JSC is able to exercise power over judges. In her complaint, Justice Earls alleged that the JSC subjected her to "a series of month-long intrusive investigations" following two separate complaints filed against her.⁵⁰ She called the JSC's investigation "part of a continuing effort to stifle" her.⁵¹ Furthermore, she described ways that the series of investigations changed her behavior: she turned down opportunities to write law review articles and "refrained from speaking publicly" at Equal Access to Justice Commission meetings "for fear that she could not speak without running the risk of discipline from the [JSC]."⁵² Justice Earls went on to make specific allegations as to how the emotional toll of being investigated by the JSC "interrupted her ability to do her work as a Justice of the North Carolina Supreme Court."⁵³

Given the difficulties these investigations imposed on Justice Earls, despite none having resulted in formal disciplinary action, it is easy to imagine how a judge could be bullied out of the judiciary or compelled to approach their role differently for fear of retribution. This strikes at the heart of judicial independence. If the JSC operates as a partisan body, it can exert influence by disproportionately investigating and litigating claims of misconduct against judges based on their political affiliations. By removing the state bar's appointments to the JSC and adding more legislative appointments, the General Assembly has increased the risk of partisanship infecting the JSC, threatening judicial independence in the process.

48. Hewlett, *supra* note 39; Nichol, *supra* note 40 (arguing in defense of Justice Earls and stating that both Justices Earls's and Newby's remarks deserve protection by the First Amendment). Of course, due to the confidential nature of the JSC's investigations, it is difficult to tell whether any single judge was investigated due to a particular incident. See RULES OF THE JUD. STANDARDS COMM'N, *supra* note 9, r. 6(b)(1).

49. Complaint, *supra* note 24, ¶ 81.

50. *Id.* ¶¶ 2, 4.

51. *Id.* ¶ 65.

52. *Id.* ¶ 80.

53. *Id.* ¶ 81.

III. HOUSE BILL 259 AS A VIOLATION OF THE SEPARATION OF POWERS

In addition to carrying serious consequences for judicial independence, the usurpation of appointments to the JSC by the General Assembly poses a potential threat to the separation of powers. The Separation of Powers Clause of the North Carolina Constitution states that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”⁵⁴ The JSC likely falls under the judicial branch. In *In re Nowell*,⁵⁵ the Supreme Court of North Carolina described the JSC as “an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable.”⁵⁶ To that end, the JSC’s primary duty is to investigate misconduct according to the Code, which is created by the Supreme Court of North Carolina.⁵⁷ Notably, the JSC only refers any recommended disciplinary action to the Supreme Court of North Carolina, which ultimately decides if such action is appropriate.⁵⁸ Additionally, it must seek approval from the Supreme Court of North Carolina for any changes in its procedure.⁵⁹ Thus, despite the administrative nature of the JSC’s duties, it still falls under the judicial branch as a body of the Supreme Court of North Carolina.⁶⁰ Because the JSC is a judicial body, interference in its administration by the legislative branch could implicate the Separation of Powers Clause.⁶¹

54. N.C. CONST. art. I, § 6.

55. 293 N.C. 235, 237 S.E.2d 246 (1977).

56. *Id.* at 244, 237 S.E.2d at 252.

57. *See* N.C. JUD. STANDARDS COMM’N, FACT SHEET, *supra* note 6, at 1.

58. *Id.* at 2.

59. N.C. GEN. STAT. § 7A-375(g) (2024). Additionally, the JSC staff are considered personnel of the North Carolina Judicial Branch. *See* N.C. ADMIN. OFF. OF THE CTS., 2022-2023 NORTH CAROLINA JUDICIAL BRANCH ANNUAL REPORT 7-8 (2023) (listing the JSC under the “other” category of North Carolina Judicial Branch personnel).

60. On the federal level, the Administrative Office of the Courts (“AO”), which also performs administrative duties to aid the judiciary, has been recognized by the Fourth Circuit as an exclusively judicial body. *See* *Strickland v. United States*, 32 F.4th 311, 368 (4th Cir. 2022) (“[F]ederal courts do not take what could reasonably be described as ‘executive agency actions[s],’ The same holds true for entities that are related to the federal courts, including the AO” (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009))); *Judicial Administration*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/judicial-administration> [<https://perma.cc/V23E-6N2J>].

61. It could be argued that because the North Carolina Constitution calls for the General Assembly to “prescribe a procedure” for the removal of judges, the General Assembly’s act of increasing its legislative appointments to the JSC, which is a modification of that prescribed procedure, cannot be unconstitutional. *See* N.C. CONST. art. IV, § 17(2). After all, the North Carolina Constitution “cannot violate itself.” *Leandro v. State (Leandro I)*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997). However, constitutional authority can be *limited* by other constitutional provisions. *Cooper v. Berger*, 370 N.C. 392, 410–11, 809 S.E.2d 98, 109 (2018). For example, “the Governor’s authority to appoint constitutional officers . . . is subject to . . . separation of powers.” *Id.* at 411, 809 S.E.2d at 109 (citing *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982)). Thus, it is still possible that the legislative changes to the membership of the JSC violate the Separation of Powers Clause.

One form of unconstitutional interference by the legislative branch involves legislative appointments to nonlegislative commissions. In *State ex rel. McCrory v. Berger*,⁶² the Supreme Court of North Carolina recognized that legislative appointments to executive commissions violate the Separation of Powers Clause where those appointments prevent the governor from carrying out their constitutional duties.⁶³ This finding has not been applied to judicial commissions. However, when looked at broadly, *McCrory* can provide guidance on the constitutionality of legislative appointments to judicial commissions, including the JSC. Section III.A explains the Supreme Court of North Carolina's analysis in *McCrory v. Berger*, and Section III.B adapts the *McCrory* analysis to propose a framework for determining whether legislative appointments to judicial commissions violate the Separation of Powers Clause of the North Carolina Constitution. Section III.B will also apply that proposed framework to the JSC.

A. *Understanding McCrory v. Berger*

In *McCrory v. Berger*, Pat McCrory, then governor of North Carolina, challenged legislation that authorized the General Assembly to appoint a majority of the voting members of three administrative commissions: (1) the Oil and Gas Commission, (2) the Mining Commission, and (3) the Coal Ash Management Commission.⁶⁴ The legislation also outlined that for each commission, the members would serve for a specified term and could be removed by the governor “for misfeasance, malfeasance or nonfeasance.”⁶⁵ Additionally, a quorum for each of the commissions was a majority of its members.⁶⁶ The Oil and Gas Commission had the power to select its own chair, while the governor picked the chair of the Coal Ash Management Commission.⁶⁷

McCrory argued that the legislation “violate[d] the separation of powers clause . . . by preventing the governor from performing his constitutional duty under Article III, Section 5(4),”⁶⁸ which states that “[t]he Governor shall take care that the laws be faithfully executed.”⁶⁹ The Supreme Court of North Carolina agreed, establishing that legislative appointments to executive commissions may, but will not always, violate the Separation of Powers Clause

62. 368 N.C. 633, 781 S.E.2d 248 (2016).

63. *See id.* at 636, 781 S.E.2d at 250.

64. *Id.*

65. *Id.* at 637–38, 781 S.E.2d at 251.

66. *Id.* at 637, 781 S.E.2d at 251.

67. *Id.* The opinion in *McCrory* made no mention of whether the Mining Commission had a chair and, if so, how that chair was selected. *Id.*

68. *Id.* at 644, 781 S.E.2d at 255.

69. N.C. CONST. art. III, § 5(4).

of the North Carolina Constitution.⁷⁰ The court did not develop a categorical rule for whether legislative appointments violate the Separation of Powers clause.⁷¹ Rather, it outlined relevant inquiries and points to consider, declaring that each challenge must be resolved by “carefully examining its specific factual and legal context.”⁷²

The court explained that one type of separation of powers violation occurs where “the actions of one branch prevent another branch from performing its constitutional duties.”⁷³ Where the governor’s constitutional power is implicated, the court must assess “whether the actions of a coordinate branch ‘unreasonably disrupt a core power of the executive.’”⁷⁴ The court found that the governor’s constitutional power to take care that the laws be faithfully executed was implicated in *McCrory* because the commissions at issue “[we]re primarily administrative or executive in character,’ and . . . ha[d] final authority over executive branch decisions.”⁷⁵ Therefore, the court held, “the Governor must have enough control over [the commissions] to perform his constitutional duty.”⁷⁶

In doing so, the court introduced two main considerations in separation of powers analyses for legislative appointments to executive commissions: the authority of the commission and the control of the commission. For the first consideration, authority of the commission, where the commission has enough executive authority that it implicates the governor’s ability to execute the state’s laws, the governor must retain sufficient control. The court was clear that final executive authority is sufficient for a commission to implicate the governor’s duties, but the court was not explicit about whether such authority is *necessary*. The bounds of how much authority is necessary was not discussed in depth because all three commissions clearly possessed “final executive authority”—each commission was able to unilaterally execute laws, implicating the governor’s constitutional duties.⁷⁷

70. *McCrory*, 368 N.C. at 646–47, 781 S.E.2d at 257.

71. *Id.* at 646, 781 S.E.2d at 257.

72. *Id.* at 646–47, 781 S.E.2d at 257; *see also* Christopher G. Browning, Jr., Moderator, Troutman Sanders LLP, Seminar Presentation at the North Carolina Bar Association: *McCrory v. Berger* and Separation of Powers in an Administrative State (May 20, 2016), *in* THE IMPACT OF *MCCRORY V. BERGER* ON STATE BOARDS AND COMMISSIONS 1–4 (on file with the North Carolina Law Review).

73. *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256 (citing *Bacon v. Lee*, 353 N.C. 696, 715, 549 S.E.2d 840, 853 (2001), *cert. denied*, 533 U.S. 975 (2001)).

74. *Id.* (quoting *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854).

75. *Id.* (quoting *McCrory v. Berger*, No. 14-CVS-015201, 2015 WL 1324855, at *8 (N.C. Super. Ct. Mar. 16, 2015) (unpublished decision), *modified and aff’d in part, vacated in part sub nom.*, *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016)).

76. *Id.* at 646, 781 S.E.2d at 256.

77. *Id.* The Coal Ash Management Commission had the power to overrule “classifications and closure plans for coal ash surface impoundments” made by the Department of Environmental and

The second consideration, control of the commission, presents its own balancing test. Courts must consider both the level of control held by the governor and the level of control retained by the General Assembly.⁷⁸ The Supreme Court of North Carolina outlined three factors of the governor's control: (1) appointment power, (2) removal power, and (3) ability to supervise the day-to-day activities of the commissioners.⁷⁹ The court found that the legislation in *McCroly* limited the governor's control under all three factors and transferred that control to the General Assembly.⁸⁰ Under the legislation, the General Assembly had the power to appoint a majority of voting members, and the governor could remove commission members only for cause.⁸¹ The legislation insulated the commissions from the governor's supervision by allowing them to have final authority over decisions typically made by an executive department.⁸² It even contained a specific provision requiring the Coal Ash Management Commission to act independently from other executive departments.⁸³

The court reviewed all of these factors and found that the legislation violated the Separation of Powers Clause. In discussing the effect of the General Assembly's control of the commissions, the court stated

When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this

Natural Resources ("DENR"). *Id.* (citing N.C. GEN. STAT. § 130A-309.202(f), *repealed by* Act of July 1, 2016, ch. 130A, sec. 1, § 309.202(f) 2016 N.C. Sess. Laws 532, 535). Similarly, the Mining Commission had the power "to overrule certain permit decisions that DENR makes." *Id.* (citing N.C. GEN. STAT. § 143B-290). Lastly, the Oil and Gas Commission could "remit civil environmental penalties that DENR imposes." *Id.* (citing N.C. GEN. STAT. § 143B-293.6).

78. *See id.* at 645, 781 S.E.2d at 256 (citing *Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982)).

79. *See id.*

80. *See id.* at 646, 781 S.E.2d at 256–57.

81. *Id.*

82. *Id.* at 646, 781 S.E.2d at 257.

83. *Id.*

much control over the execution of the laws from the Governor and lodge it with itself.⁸⁴

Thus, though there is no categorical test that can be applied in future cases, the Supreme Court of North Carolina provided a guide for future cases by carefully laying out its reasoning step-by-step. Applying the court’s reasoning in *McCrory*, the recent legislative changes to the JSC may pose similar separation of powers issues.

B. *Applying McCrory to the JSC*

The *McCrory* factors were developed with executive commissions in mind, so they do not map seamlessly onto the legislation granting the General Assembly greater control over the JSC, a judicial commission. However, the general themes and concerns outlined by the Supreme Court of North Carolina can be translated across branches, and extrapolated to apply to judicial commissions as well. This section explores what an application of the *McCrory* factors to the legislative appointments to the JSC may look like and incorporates considerations specific to the judicial branch.

1. Authority of the Commission

On its face, a narrow application of the first *McCrory* consideration—authority of the commission—may weigh against a separation of powers violation. However, applying the broader underlying principles of *McCrory* to the JSC suggests that the Separation of Powers Clause is still implicated by House Bill 259. The duties of the judicial branch are less clearly outlined in the North Carolina Constitution than the duties of the governor, but the judicial branch is generally charged with interpreting laws.⁸⁵ The JSC does not take on the traditional judicial role of interpreting and applying the law; rather, it plays a more administrative role in enforcing the Code.⁸⁶ Thus, the JSC likely does not carry out a “core” judicial function. That does not, however, completely exclude the possibility that House Bill 259 implicates the Separation of Powers Clause.

The inquiry into whether a commission carries out a core function of its coordinate branch is derived from the principle that separation of powers violations can be nuanced, such as “when the actions of one branch prevent

84. *Id.* at 647, 781 S.E.2d at 257.

85. *State v. Hill*, 276 N.C. 1, 16, 170 S.E.2d 885, 895 (1969), *rev’d on other grounds*, *Hill v. North Carolina*, 403 U.S. 948 (1971)). Compare N.C. CONST. art. III, § 5 (listing duties of the governor), with N.C. CONST. art. IV (describing administration of judicial powers but not defining judicial power).

86. As to the JSC’s overall authority, though only the Supreme Court of North Carolina can issue official disciplinary orders, the JSC has final authority to *not* investigate complaints or recommend disciplinary actions. See RULES OF THE JUD. STANDARDS COMM’N, *supra* note 9, r. 10. Additionally, the JSC does not need permission to issue private letters of caution. *Id.* r. 11(a).

another branch from performing its constitutional duties.”⁸⁷ Looking to that principle more generally, the General Assembly’s usurpation of the JSC may still implicate the Separation of Powers Clause, even if the General Assembly is not directly interpreting laws through its appointees. For example, the increasing partisanship of the JSC threatens the independence of the judiciary.⁸⁸ Independence is essential to the court faithfully interpreting laws. The North Carolina Constitution recognizes that the judiciary must be independent, as is demonstrated by clauses like Article IV, Section 21, which requires that a judge’s salary not be diminished or otherwise dependent upon his decisions.⁸⁹ Accordingly, interference with the ability of individual judges and the judiciary as a whole to engage in independent decision-making could be considered a form of preventing the judicial branch from performing its constitutional duty. Therefore, House Bill 259 may still implicate the Separation of Powers Clause such that the General Assembly cannot lawfully usurp control of the JSC from the judiciary.

2. Control of the Commission

Turning to the second *McCrory* consideration—control of the commission—the increased number of legislative appointments combined with the lack of removal power for the chief justice weighs in favor of a separation of powers violation. As for the first factor of appointment power, House Bill 259 allows the General Assembly to appoint just under half of the JSC members.⁹⁰ Though that is a smaller proportion of legislative appointments than in *McCrory*,⁹¹ the impact is still significant because action by the JSC requires approval from more than a simple majority. The seven-member panels, which determine whether to initiate investigative and disciplinary hearings, are split equally such that each panel has three judicial appointees, three legislative appointees, and one executive appointee.⁹² It requires a vote of five to initiate hearings or recommend disciplinary action against a judge to the Supreme Court of North Carolina.⁹³ Thus, though the three legislative appointees cannot unilaterally initiate hearings or disciplinary recommendations, they can unilaterally *prevent* hearings or disciplinary recommendations. This, too, is

87. *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256.

88. *See supra* Part II.

89. N.C. CONST. art. IV, § 21 (“The General Assembly shall prescribe and regulate the fees, salaries, and emoluments of all officers provided for in this Article, but the salaries of Judges shall not be diminished during their continuance in office. In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs.”).

90. Current Operations Appropriations Act of 2023, ch. 134, § 16.20(a), 2023 N.C. Sess. Laws 421 (codified at N.C. GEN. STAT. § 7A-375(a) (2024)).

91. *See McCrory*, 368 N.C. at 646, 781 S.E.2d at 256–57.

92. RULES OF THE JUD. STANDARDS COMM’N, *supra* note 9, r. 2(b).

93. *See id.*

impactful as the perceived disparate treatment of conservative versus liberal justices has significantly contributed to the accusations that the JSC attempts to silence judges.⁹⁴ Further, while not a majority, three members on a seven-member panel is much more influential than the one member the General Assembly had on each panel prior to House Bill 259.

It could be argued that although the General Assembly appoints just under half of the voting members of the JSC, four of the General Assembly's six appointments are judges, and thus, the judiciary retains adequate control over the Commission. However, this does not account for the partisan effect that legislative appointments have, no matter who is filling the seat. The power to choose *which* judges are appointed to the Commission is still an exercise of control by the General Assembly. A similar principle was illustrated in another separation of powers case, *Cooper I*.⁹⁵ In that case, the General Assembly restricted Governor Cooper's appointment power over the North Carolina State Board of Elections by making him select his appointees from lists provided by the state chairs of the two political parties with the highest number of registered affiliates.⁹⁶ The Supreme Court of North Carolina declared that the requirement was a violation of the Separation of Powers Clause as it prevented the governor from having "control over the views and priorities" of the board members.⁹⁷ There, Governor Cooper's ability to make the final decision as to who was appointed did not overcome the fact that the General Assembly took away the meaningfulness of that choice by having the governor choose from a list. Similarly, in choosing which judges are on the JSC, the General Assembly has not granted the judiciary meaningful control of the Commission. Rather, the General Assembly has expanded its own control of the Commission by increasing the number of legislative appointees to the JSC, nearing a violation of the Separation of Power Clause in the process.

Additionally, the second factor of removal power from *McCrory* weighs in favor of a separation of powers violation. Only the chair and vice-chair, who are court of appeals judges, appear to be removable, as they "serve at the pleasure of the Chief Justice."⁹⁸ For the other twelve Commission members, there is no provision allowing for removal.⁹⁹ Rather, it appears that their membership is

94. See Nichol, *supra* note 40; Complaint, *supra* note 24, ¶ 81.

95. *Cooper v. Berger (Cooper I)*, 370 N.C. 392, 809 S.E.2d 98 (2018).

96. *Id.* at 406–10, 809 S.E. 2d at 106–08.

97. *Id.* at 416, 809 S.E.2d at 112.

98. *About the Judicial Standards Commission*, *supra* note 1.

99. See N.C. GEN. STAT. §§ 7A-374.1 to -377 (2024) (providing for the creation of the JSC and its members but not including a procedure for removal of commission members). Removal powers are typically designated by statute, but there are no procedures for removal of members of the JSC in Chapter 7A of the General Statutes of North Carolina. See *id.* § 143B-293.2 (providing for the removal of any member of the Oil and Gas Commission by the governor). In 2022, it was speculated that a staff

only regulated by their six-year term limit. Therefore, the judicial branch seemingly has no power to remove the legislative appointees. This limits the overall power that the judicial branch has over the JSC, creating a threat to the separation of powers. Under this factor, the legislative appointments in House Bill 259 pose an even higher risk to the separation of powers than the legislative appointments found to be unconstitutional in *McCrorry*, where the governor could remove appointees for cause.¹⁰⁰

Balancing all the considerations laid out in *McCrorry*, including the judiciary's ability to supervise the day-to-day activities of the Commissioners, the legislative appointments to the JSC are probably not as egregious as the unconstitutional appointments in *McCrorry*.¹⁰¹ Therefore, under a strict application of *McCrorry v. Berger*, and without further developments in the case law on the separation of powers as applied to commissions affecting the judicial branch, the legislative appointments to the JSC are likely not a Separation of Powers Clause violation. However, under two of the existing *McCrorry* factors, there are ways that House Bill 259 still arguably presents a potential separation of powers violation. First, under House Bill 259, the General Assembly appoints almost half the members of the JSC, which is enough to keep some claims of misconduct from reaching the hearings stage. Second, these appointed members are not subject to removal by the chief justice, nor any other removal process. Additionally, although the JSC does not take on the traditional judicial role of interpreting laws, the JSC's power as a gatekeeper to disciplinary action gives it considerable influence over the behavior of judges statewide. Thus, given the importance of impartiality in the judicial branch and the JSC's unique ability to exert partisan influence over judges, the legislative appointments in House Bill 259 could possibly be considered a violation of separation of powers.

CONCLUSION

As the main body investigating and adjudicating claims of judicial misconduct, the JSC is in a unique position of influence over North Carolina's judges. Thus, changes to the Commission can affect the judiciary as a whole. The General Assembly's act of awarding itself four extra appointments to the JSC threatens the independence of North Carolina's courts. Allegations of

member of the JSC was ousted by top Republican officials in the judiciary. If true, however, it was likely through informal pressure on a staff member, not an appointee of the JSC, to resign. See Ned Barnett, *Under Chief Justice Newby, NC Courts Grow More Partisan*, RALEIGH NEWS & OBSERVER, <https://www.newsobserver.com/opinion/article259769990.html> [<https://perma.cc/7RDT-4CY3> (staff-uploaded, dark archive)] (last updated Mar. 28, 2022, 10:47 AM); Dallas Woodhouse, *Justified Change at Judicial Standards Commission*, CAROLINA J. (Mar. 31, 2022), <https://www.carolinajournal.com/opinion/justified-change-at-judicial-standards-commission/> [<https://perma.cc/YQ8L-CSY9>].

100. See *State ex rel. McCrorry v. Berger*, 368 N.C. 633, 646, 781 S.E.2d 248, 257 (2016).

101. See generally *id.* (explaining how legislation that prevents one branch of government from fulfilling its constitutional duties is unconstitutional).

partisanship and constitutional violations already plague the JSC. Increasing legislative appointments and removing input from the nonpartisan North Carolina State Bar Association will only add to those concerns. Moreover, increasing the legislative appointments to the JSC transfers control of the Commission to the General Assembly and may pose a separation of powers violation. Under House Bill 259, the General Assembly now appoints a near majority of the members of the JSC, enough to have control over whether complaints move through the disciplinary process. Combined with the judiciary's lack of removal power and the JSC's ability to regulate the behavior of judges, the increased legislative appointments to the Commission may pose a risk to the separation of powers.

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